The basic structure doctrine evolved in the context of challenges to the constitutionality of land reform legislation. In the early 1950s the constitutional validity of land reform legislation was challenged before the courts and some of this legislation was declared unconstitutional. Hence, the constitution was amended to undo the constitutional basis for these challenges to the validity of this legislation. The court was petitioned to judicially review these constitutional amendments and declare them to be unconstitutional. Land reform related constitutional amendments were challenged before the Supreme Court in a series of cases beginning with *Sankari Prasad v. Union of India*¹ in 1951 and culminating in *Kesavananda Bharati v. State of Kerala*² in 1973. Between 1951 and 1973 the Supreme Court accepted two separate arguments for judicial review of constitutional amendments: first, constitutional amendments are subject to judicial review under Article 13 (express limits) and second, that constitutional amendments are subject to basic structure review (implied limits).

This chapter critically evaluates these two arguments in support of judicial review of constitutional amendments. The first argument rests on the claim that the express limits on all forms of ‘state action’

¹ *Sankari Prasad v. Union of India*, AIR 1951 SC 458.
in Article 13, to comply with fundamental rights\(^3\) in the constitution, should be extended to include constitutional amendments. This argument is considered at length in the part on ‘express limits’ on amending power and is rejected as constitutional judicial review constitutional amendments under Article 13 would require the court to contort the meaning of constitutional text and apply constitutional principles inconsistently.

The second argument offers an alternative constitutional basis for judicial review of constitutional amendments other than the express limits under Article 13. It is argued that constitutional amendments may be subject to implied limits whereby the courts may review a particular constitutional amendment to assess whether it destroys or abrogates the basic features of the constitution.\(^4\) This chapter assesses the relative merits of these two forms of review paying particular attention to the constitutional basis for such a review. I conclude that basic structure review, at least the version of the doctrine defended in this chapter, is by the second argument accounted for a coherent reading of the constitutional text and the application of sound constitutional principles.

Rights review under Article 13 and basic structure review do not exhaust the scope of judicial review of constitutional amendments. The court may also review whether constitutional amendments have been made in compliance with the procedure outlined in Article 368. Judicial review to ensure compliance with the procedural limits to constitutional amendments has been carried out in several cases considered below. As I am concerned primarily with substantive limits on amending power in this work I do not pay any more attention to challenges based on procedural limits to amending power.

In *Kesavananda* the Supreme Court used the basic structure doctrine for the first time to subject constitutional amendments to judicial review. Since that ruling, the doctrine has been used by the Supreme Court in several significant constitutional law cases not all of which relate to constitutional amendments. In Chapter 1,

\(^3\) This was first proposed in *Sankari Prasad* and finally accepted in *Golaknath v. State of Punjab*, AIR 1967 SC 1643.

\(^4\) The doctrine was announced in *Kesavananda* and has been continuously developed since.
I suggested that the constitutional basis of basic structure review is best addressed by focusing our enquiry on the particular forms of state action being reviewed. In this chapter, the constitutional basis of basic structure review as it applies to constitutional amendments is examined. In Chapter 3, I go on to analyse basic structure review as it applies to other forms of state action.

In this Chapter, I will show why basic structure review, when understood as an implied limit on the power of amendment under Article 368 which arises from several provisions of the constitution taken together, provides a sounder constitutional basis for the judicial review of constitutional amendments for two reasons: first, it does not rely on the particular phrasing of a single provision of the constitution thereby avoiding the possibility that the Parliament may amend such provision of the constitution to oust judicial review. Second, implied limits review requires a type of review which distinguishes between constitutional limits on ordinary state action and constitutional amendments. Moreover, it avoids focusing on the detailed fundamental rights provisions in the constitution and proposes a set of general constitutional principles as the limit on the amendment power in the constitution. By distinguishing between fundamental rights review and basic structure review, the court gives the amendment process an opportunity to express democratic conceptions of basic constitutional values without derogating from the fundamental constitutional principles protected by basic structure review. Before I get too far ahead of the story let us turn to the arguments around Article 13 in detail.

**Express Limits on Amending Power: Judicial Review under Article 13**

The operative part of Article 13(2) provides that: “The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.” For constitutional amendments to be subject to judicial review under Article 13, the courts need to find that constitutional amendments are ‘law’ under Article 13(2). The inclusive definition in Article 13(3)(a) makes no

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5 Constitution of India, 1950, Article 13(2).
mention of constitutional amendments. Hence in order to include constitutional amendments, petitioners advance arguments about the nature and purpose of judicial review for rights compliance in the constitution and about whether parliamentary amending power is a species of residuary legislative power. I will examine each of these in turn.

First, let me briefly examine the role that Article 13 judicial review plays in the constitution. Article 13 is often characterized as the guarantor of fundamental rights in the constitution. It provides that ‘the state’ shall not make any ‘law’ that abridges any of the fundamental rights guaranteed in Part III of the constitution. Article 12 defines ‘the state’ widely to include ‘Government and the Parliament of India’ as well as other authorities ‘all local and within the territory of India or under the control of the Government of India’ to be subject to judicial review under Article 13. The fundamental rights protected in Part III include the rights to life and personal liberty and rights guaranteeing equality of all persons before law. Read with Articles 32 and 226, Article 13 authorizes the Supreme Court and the High Courts in the States to declare invalid any ‘law’ which abridges these rights. The arguments in the constitutional amendment cases focus on whether the scope of the term ‘law’ is wide enough to include constitutional amendments. ‘Law’ is defined in Article 13(3)(a) to include ‘any Ordinance, order, by-law, rule, regulation, notification, custom or usage having in the territory of India the force of law.’

A lean version of the argument that constitutional amendments are ‘law’ under Article 13 was first raised in Sankari Prasad v. Union of India. Although Patanjali Sastri considered this to be a more ‘plausible argument’ than the others advanced in the case, he eventually rejected it by ‘harmonizing’ the wide scope of the amending power in Article 368 with the scope of judicial review under Article 13. Mudholkar and Hidayatullah expressed doubts on the soundness

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6 Constitution of India, 1950, Article 13(2).
7 Ibid., Article 21.
8 Ibid., Article 14.
9 Ibid., Article 13(3) (a).
10 Sankari Prasad, supra n. 1, p. 458 (Patanjali Sastri, CJ).
11 Ibid., p. 463.
12 AIR 1965 SC 845.
of Sastri’s ruling a few years later in their concurring opinions in *Sajjan Singh v. State of Rajasthan*. A revised, stronger version of this argument was endorsed by the majority in *Golaknath v. State of Punjab* and it is this version of the argument that I will focus on.

If the argument that constitutional amendments can be reviewed under Article 13 is to succeed either one of the following two independent claims need to be accepted. First, that constitutional amendments in the Indian Constitution are the product of the exercise of legislative power through an essentially legislative process and are therefore correctly described as ‘law’ under Article 13(3)(a). Second, it is proposed that all state action including constitutional amendments are subject to judicial review under Article 13 as a necessary condition of a written constitution protecting immutable fundamental rights guaranteed under the constitution. These arguments are assessed separately below.

**The Legislative Character of Constitutional Amendments**

The legislative character of constitutional amendments is supported by the interpretation of two distinct sets of constitutional provisions first, provisions on the source of amending power and second, provisions relating to the process of amendment of the constitution. These arguments bring varied resources and interpretive strategies to advance their claims. Some judges relied exclusively on a close reading of the constitutional text while others drew on broader constitutional principles gleaned from historical data, a comparative approach, and theoretical literature.

The argument about the source of amending power in the constitution rests on a close reading of the constitutional text. The marginal note to an unamended Article 368, which provides for the general amending power of Parliament, read ‘The Procedure for the amendment of the Constitution’. The word ‘power’ was conspicuously missing in the marginal title and the several clauses of Article 368. Hence, it is argued that the power to amend the

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13 *Golaknath*, supra n. 3, p. 1643.

14 The marginal note to Article 368 was amended by section 3 of the Constitution (24th Amendment) Act, 1971 to read ‘Power of Parliament to amend the Constitution and procedure thereof’.
constitution is not provided for in Article 368 and instead is to be found in the residuary legislative power of Parliament. A corollary to this argument is that Article 368 merely provides for a special process to be followed when exercising the amending power. By declaring that amending power draws from the plenary legislative power of Parliament the Golaknath majority alludes to the doctrine of parliamentary sovereignty in the United Kingdom; a constitutional principle which is not easily accommodated by the text of the constitution. While it is true that Article 368, as it then stood, did not contain the word ‘power’ and its marginal title employed the word ‘procedure’, the conclusion that amendments were an exercise of legislative power leads to absurd consequences.

Article 245 which confers legislative power on the Union and the States begins with the phrase ‘Subject to the provisions of this Constitution, Parliament may make laws …’. The effect of this phrase is to establish a hierarchy between ordinary laws and constitutional law by disabling Parliament from using its ordinary legislative power to alter the constitution. Hence, no law enacted under Article 245 may amend any provisions of the constitution. In the absence of this hierarchy, the Indian Constitution would more closely resemble the British constitutional arrangement in which Parliament may enact ordinary legislation on any subject matter including constitutional matters. The doctrine of implied repeal resolves any problems arising out of conflicting laws. The doctrine of implied repeal is an adequate device to settle conflicts among laws provided all the laws are considered to be of equal status. The majority opinion in the Golaknath case does not appear to have grasped the essence of this limitation on Parliamentary legislative power.

Rao's response to this problem is that the ‘limitations in Article 245 are in respect of the power to make a law and not of the content of the law made’. He suggests that limit on the power of Parliament to make a law amending the Constitution under Article 245 depends on whether the constitutional provision

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15 Constitution of India, 1950. Articles 245 and 246 read with entry 97 of List I of the 7th Schedule confers on Parliament the power to legislate on any item not included in any other list of the 7th Schedule.

16 Ibid., Article 245.

17 Golaknath, supra n. 3, p. 1658 (Subba Rao, CJ).
to be amended expressly provides or impliedly suggests that it cannot be amended. In other words, he seems to suggest that in order to determine whether a provision in the constitution can be amended using Article 368 one must read the provision for verbal cues which suggest whether it is immutable or open to change. Therefore, he concludes that Article 245 does not prevent all laws that amend the constitution from being enacted. However, the distinction between the limits on amending power and the limits on the content of the amending law which Rao seeks to identify in Article 245 is not clear. Further it is difficult to imagine how such a distinction allows us to overcome the limitations on legislative power in Article 245. At any rate, Rao’s proposal presents us with a tortured reading of the constitutional text with insufficient reasons to support it.

The majority opinions in *Golaknath* eliminate the hierarchy between ordinary and constitutional law in Article 245, drawing inspiration from a British constitutional model of parliamentary sovereignty. However, they do not embrace the implications of this model of illimitable sovereignty and assert that both law making and constitutional amendment are equally subject to judicial review under Article 13. Their equivocating use of the text and comparative constitutional analogies to support their interpretive conclusions about different parts of the constitution leads to a constitutional collage that is incoherent and inconsistent. This becomes clearer with the analysis of the arguments related to the scope of judicial review later in this chapter.

The second argument advanced to support the conclusion that constitutional amendments are ‘law’ under Article 13 relies on the strong resemblance between the legislative process and the amending process set out in the constitution. The essentially ‘legislative character’ of the amending process is sought to be demonstrated by comparing: first, the rules followed to enact ordinary legislation as well as the process of amendment adopted under the special amending articles in the constitution and second, the rules adopted by the

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18 Hidayatullah’s eloquent concurring judgment in the case does not even visit this controversy.

19 *Golaknath*, supra n. 3, p. 1695 (Hidayatullah, J).
Lok Sabha to administer the amendment process under the general Article 368 power.

The Indian constitution may be amended in two ways: first, a general amending power under Article 368 which applies to all subject matter and second, a ‘special’ amending power that applies to specified subjects. The special amending powers allow Parliament to amend the constitution for the purposes identified under the Article by enacting an ordinary law using the ordinary legislative process. For example, Articles 2 and 3 of the Constitution allow the Parliament to admit new states into the Union and alter the boundaries of existing states in the Union by making law. Though these laws alter some provisions of the constitution, they are deemed as not being amendments to the constitution under Article 368.

As the constitution expressly allows for amendment in particular cases by the exercise of ordinary legislative power, it is argued that the constitution adopts a legislative model of constitutional amendment. This conclusion strains the constitutional text and is difficult to accept without further reasons. The constitution distinguishes between two types of amending power and sets out the different processes by which they may be exercised. A plain reading of the constitutional text suggests that Article 368 is the general power of amendment, while other articles which provide for an easier mode of amendment of specific subject matter are exceptions to this general power. As the constitutional text clearly sets out further process requirements—two-thirds majority in Parliament and the consent of half the states in some cases—for the exercise of the general amending power under Article 368 which are unnecessary for the exercise of special amending power, it is difficult to understand why the majority concludes that both types of constitutional amending powers are exercised in an identical fashion. Further, this comparison between general and special amending power does not itself provide us with any principled reasons to decide the scope of judicial review under Article 13.

The Rules of Procedure adopted by the Lok Sabha under Article 18 for the passage of a bill amending the Constitution bear a close proximity to the procedure prescribed in the Constitution for the passage of ordinary laws.

20 Other articles which confer special amending powers include Article 169, Para 7 of the 5th Schedule and Para 21 of the 6th Schedule.

21 Constitution of India, 1950, Article 4(2).
resemblance to those adopted for ordinary legislation.\textsuperscript{22} Rao concludes from the above evidence that amendments in the Indian constitution are essentially ‘legislative’\textsuperscript{23} in character. He considers the requirements of an enhanced majority of two-thirds of the members present and voting\textsuperscript{24} to pass any amendment and of ratification by half the states in certain circumstances\textsuperscript{25} as safeguards against hasty action and the protection to the states respectively which did not alter the ‘legislative character’ of amendments. Hence, he concluded that these safeguards did not alter the ‘legislative character’ of constitutional amendment.

The majority opinions in the \textit{Golaknath} case offer any further arguments to extend the analogy between legislative process and amending process to control the scope of judicial review under Article 13. The analogy may be extended if one considers that the Indian constitution does not submit constitutional amendments to a unique process—like referendums, or to a specially convened constitutional convention—as prescribed by other constitutions. This may be because Rao decries the use of the comparative method in constitutional interpretation as he considers that differences between constitutions can be traced to the ‘spirit and genius of the nation in which a particular constitution has its birth’.\textsuperscript{26} Keeping aside the merits of his constitutional particularism, it is nevertheless difficult to conclude from the evidence and arguments of the majority in \textit{Golaknath} that the constitution makes no distinction between the process of legislation and constitutional amendment.

Moreover, even if the process of amendment is legislative in character it is not necessary for us to conclude that the outcome of the amending process is ‘law’ for the purpose of Article 13. To extend this analogy between the amending process and the legislative process to the nature and quality of the outcomes which result from these respective processes one needs more substantive reasons. These arguments could be about the definition of ‘law’ in Article 139(3)(a) or about the constitutional principles which guide the scope of

\textsuperscript{22} Lok Sabha Rules of Procedure, 1951, Rules 155, 156, 157, and 158.
\textsuperscript{23} \textit{Golaknath}, supra n. 1, p. 1659 (Subba Rao, CJ).
\textsuperscript{24} Constitution of India, 1950, Article 368(2).
\textsuperscript{25} Ibid., Proviso to Article 368(2).
\textsuperscript{26} \textit{Golaknath}, supra n. 3, p. 1661 (Subba Rao, CJ).
judicial review under Article 13. However, none of these arguments are offered in Golaknath.

In this section I have considered the arguments, advanced in support of the conclusion that constitutional amendments are ‘law’ under Article 13: first, the source of the amending power and second, the analogy between the amending process and the legislative process. The arguments offered by the Golaknath majority about the source of amending power are motivated by the British constitutional model and ignores the text of the Indian constitution. Further, this constitutional model erases the relationship between ordinary laws and constitutional laws which is among the basic facets of any written constitution. As a result, amending power is located in a constitutional provision that does not lend support to the constitutional practices of amendment. The analogy proposed between the legislative and amending process does not, without further support from constitutional text and principle, provide us with any guidance on the nature of amending power in the constitution. In the next part of this chapter, I consider whether the arguments about the nature and scope of judicial review under Article 13 offers us compelling reasons as to why constitutional amendments are law.

The Golaknath judgment provoked a strong reaction from Parliament which amended the marginal title of Article 368 to read ‘Power of Parliament to amend the Constitution and the procedure therefor’ and inserted a new clause (1) which expressly provides for Parliament’s ‘constituent power’ to amend any of the articles in the Constitution. When the 24th Constitution Amendment Act, which made these changes, was challenged in Kesavananda, counsel for the appellant conceded the arguments about the source and nature of amending power in the constitution. Both majority and minority judgments agreed that this amendment was valid insofar as it clarified the source of amending power. Khanna, who wrote the controlling opinion in the case, emphatically concluded that once the procedure prescribed in Article 368 was followed the ‘end-product is the amendment of the constitution.’ The issue has remained settled by

28 Ibid.
29 Kesavananda Bharati, supra n. 2, p. 225.
30 Ibid., p. 739 (Khanna, J).
these constitutional amendments and has not been raised thereafter in any case before the Supreme Court.

Scope of Judicial Review

Four major arguments were advanced in support of the conclusion that constitutional amendments are subject to judicial review under Article 13. First, it is argued that ‘law’ under Article 13 is wide enough to include constitutional amendments. Second, it is suggested that the nature of judicial review provided for in written constitutions requires the review of amendments. This is closely related to the third argument about the nature of fundamental rights guaranteed by the constitution. Finally, it is argued that a common law doctrine of implied limitation on the sovereignty of Parliament was applicable in India. I will consider each of these arguments in turn.

The scope of Article 13 is controlled by clause 2 which provides that no ‘law’ shall contravene the fundamental rights in the constitution. Article 13(3)(a) defines ‘law’, for the purpose of judicial review under Article 13 to include ‘any ordinance, order, bye-law, rule, regulation, notification, custom, or usage having in the territory of India the force of law’.31 This open-ended inclusive definition of ‘law’ used in the Article does not provide sufficient linguistic resources to decisively settle the question of whether constitutional amendments should be regarded as ‘law’. This definition allows for the argument that constitutional amendments, although not expressly included, may be accommodated within the definition of law in this Article. It is argued that the ordinary meaning of the word ‘law’ would include constitutional law and hence constitutional amendments should be considered law for the purposes of Article 13. Further, it is argued that the term ‘law’ should be read consistently in Article 13(1) on pre-constitutional laws, and Article 13(2) on post-constitutional laws.

Article 13(1) allows for the continuity of all laws existing in the territory of India before the adoption of the 1950 constitution provided that such laws are not inconsistent with the fundamental rights. As the 1950 constitution is the first constitution of independent India it is difficult to imagine what ‘constitutional laws’ are saved under clause 1. It seems likely that petitioners had important

colonial enactments like the Government of India Act, 1935 and the Indian Independence Act, 1947 as examples of laws of ‘constitutional character’ prior to 1950. However, these enactments are expressly repealed by Article 395 of the Constitution of India, 1950 leaving no laws of constitutional significance to be covered under Article 13(1).

The attempt by some judges to arrive at a definitive conclusion about the scope of the term law by semantic stipulation or an interpretation of Article 13 standing alone is unsatisfactory. Such an approach to interpretation is devoid of any consideration of constitutional principles that illuminate the role and function that Article 13 judicial review plays in the constitution. Moreover, it is far from convincing to arrive at a conclusion about the proper scope of the term ‘law’ in Article 13 without paying attention to other provisions of the constitution and its overall structure which allows us to develop a view about the purpose of judicial review in the constitution. I now consider two arguments about the scope of the term ‘law’ which go beyond the language of Article 13.

One argument defines the scope of the term ‘law’ by examining the relationship between Articles 13 and 368 with the aid of doctrines of statutory and constitutional interpretation. However, this attempt to resolve the conflict between the two widely phrased articles using standard techniques of statutory interpretation—‘the technique of harmonious construction’—is deeply flawed. In *Sankari Prasad*, Sastri sought to harmoniously reconcile the amending power of Parliament and the judicial review power of the courts by reading down the scope and application of the judicial review power to not include constitutional amendments.32 Rao utilized the same principle of construction to read down the amending power of Parliament under Article 368 to be subject to the judicial review power under Article 13 in *Golaknath*.33 Both these judgments correctly apply the rule of harmonious construction as this interpretive strategy provides equal support to opposite outcomes. It is unlikely that judges may convincingly resolve complex questions about the judicial review of amending power by resorting to semantic stipulation or applying doctrines of statutory construction like the doctrine of harmonious

32 *Sankari Prasad*, supra n. 1, p. 463 (Patanjali Sastri J, Kania CJ).
33 *Golaknath*, supra n. 3, p. 1664 (Subba Rao, CJ).
construction without further substantive argument. Both these text-based strategies of interpretation need arguments of principle to support the conclusions they advance. The second argument about the nature of judicial review in written constitutions promises to offer more substantive reasons.

A second, more promising, argument about the nature of judicial review in written constitutions emerged from Kania’s observation in A.K. Gopalan v. Union of India. He took the view that fundamental rights guaranteed in the constitution are paramount and inviolable even in the absence of Article 13. Hence, he concluded that the judiciary has the power to review the constitutional validity of any legislative enactment to the extent that it violated fundamental rights irrespective of the particular phrasing of Article 13. He was echoing Marshall in Marbury v. Madison when he proposed that the Indian Constitution, by virtue of being a written constitution, conferred an inherent power on the Supreme Court to review state action. Patanjali Sastri, concurring in the case, added that the people of India, as sovereigns, delegated to government the right to govern but reserved to themselves certain fundamental rights.

Gajendragadkar rejected these arguments in Sajjan Singh v. State of Rajasthan on the grounds that both opinions pre-supposed a ‘theoretical concept’ of sovereignty which was not necessary to interpret the provisions of the Constitution. Arguably, any concept of judicial review pre-supposes some principled justification in political theory assigning to different institutions their respective powers and functions. By refusing to engage in a full-fledged discussion about the proper role of judicial review, Gajendragadkar foreclosed the opportunity of providing a substantive justification for an interpretation of Article 13 to include constitutional amendments. This eschewal of justifications from political theory resulted in a premature abandonment of this line of argument. The unwillingness of the court to revisit it in later constitutional amendment cases including Golaknath has deprived the court of a significant argument in support of Article 13 judicial review to constitutional amendments.

34 AIR 1950 SC 27 at p. 34 (Kania, CJ).
35 5 US 137 (1803).
36 A.K. Gopalan, supra n. 34, p. 72 (Kania, CJ).
37 Sajjan Singh, supra n. 12, p. 858 (Gajendragadkar, CJ).
In spite of the court’s reluctance, I will explore whether the view taken by the court in *Gopalan* provides an adequate justification for judicial review of constitutional amendment as this advances the argument in this thesis.

Three distinct lines of argument emerge out of the dicta in *A.K. Gopalan*. First, the court proposes that judicial review is inherent in a written constitution. This conclusion about the nature of judicial review was important in *Marbury* as the United States Constitution does not expressly provide for judicial review, its relevance of the argument to the Indian constitution which expressly provides for such review is unclear. Perhaps, one could argue that the inherent character of judicial review in a written constitution allows for judicial review of a wider scope than that suggested by the text of Article 13. However, to extend the scope of *Marbury* principle beyond ordinary legislation to cover constitutional amendments, principled arguments must be offered to justify such an extension. Further, it is not necessary that the constitutional judicial review justified by the *Marbury* principle needs to be rights based review under Article 13. It is plausible to suggest that judicial review of constitutional amendments may be an extension of legislative competence review which the courts conventionally exercise under Article 245. Moreover, besides developing a justification for such a review, we will also need to find textual support from the constitution to accommodate this expanded model of judicial review.

Secondly, Sastri proposes a model of delegated sovereignty in which the people as popular sovereigns delegate limited powers under the constitution to the government. Though this model was rejected as an inaccurate description of the political arrangements in the Indian constitution, Hidayatullah’s concurring judgment in *Golaknath* implicitly adopts it. He suggests that a Parliament which sought to amend fundamental rights in the Constitution should reconstitute a Constituent body of the people which would be authorized to make such changes.38 I will consider both these arguments in greater detail in Chapter 6.

The third line of argument in *A.K. Gopalan* about the nature of judicial review rests on an understanding of the nature and status of constitutional amendment.

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38 *Golaknath*, supra n. 3, p. 1705 (Hidayatullah, J).
fundamental rights in the constitution. The immutable character of fundamental rights guaranteed in Part III of the constitution was a critical ingredient of the argument for judicial review of constitutional amendments under Article 13 in the majority opinions in Golaknath. Rao took the view that ‘fundamental rights are given a transcendental position under our constitution and are kept beyond the reach of Parliament.’ 39 He surveyed various provisions of the constitution, a wide range of historical sources from declarations adopted by the Congress party during the freedom movement, and speeches made by leaders in the Constituent Assembly to arrive at the conclusion that fundamental rights are only a modern name for ‘natural rights’. 40 Hidayatullah, in his concurring opinion in Golaknath, agreed for different reasons that fundamental rights were immutable in character though he did not go so far as to endorse the view that they were natural rights. He reiterated the position which he first adopted in Sajjan Singh where he observed that ‘The Constitution gives so many assurances in Part III that it would be difficult to think that they were the playthings of a special majority’. 41 Moreover he took a different view from Rao about the immutable character of these rights where he was willing to admit that fundamental rights may be tinkered with in minor ways but that they could not be abridged or removed. Notably, Wanchoo’s dissenting opinion in Golaknath does not respond to any of the arguments about the immutable character of fundamental rights in the constitution.

So far, we have identified three of the arguments in support of the majority opinions in Golaknath that fundamental rights should not be modified by constitutional amendments: first, that because fundamental rights are natural rights and such rights are by definition beyond the reach of the state; second, that the elevated status of fundamental rights in the constitution may be discerned from the historical process by which these rights came to be included in the constitution; and third, that the constitutional provisions together as a whole, organic document the conclusion that constitutional amendments are subject to judicial review under Article 13. I will critically analyse each of these arguments below.

39 Golaknath, supra n. 3, p. 1656 (Subba Rao, CJ).
40 Ibid.
41 Ibid., p. 1693 (Hidayatullah, J).
The Indian Constitution does not spell out the rationale for the ‘fundamentalness’ of the rights guaranteed by Part III of the constitution. Unlike the United States Constitution, which confers rights using broad and general phrases, the Indian Constitution contains a detailed catalogue of rights providing for exceptions and allowing for restrictions under specific circumstances. Moreover, the constitution allows for rights to be abridged or suspended in times of national emergencies.42 Nothing in the text of the constitution supports the conclusion that these rights are ‘natural rights’. To the contrary, these modestly stated rights, weighed down by several exceptions, grate against the overarching monolithic vision of immutable natural rights which Rao proposes. While it is clear that the constitution guarantees a wide range of fundamental rights there is no reason a priori to assume that such rights have to be ‘natural rights’.43 The constitution may just as well have adopted an interest-based theory or will-based justification of fundamental rights.44

The crucial question posed in Golaknath is about the level of entrenchment that these rights enjoy—it is clear that they limit ordinary state legislative and executive action. The courts have to determine whether rights are immune to constitutional amendments as well. By positing that the rights in the Constitution are natural rights, without making any argument about how the constitutional text supports such a conclusion, Rao seeks to settle the question in an unconvincing way. To accept the conclusion that constitutional amendments are subject to judicial review under Article 13, we need further argument about the nature of rights or the manner of their entrenchment in the constitution.

The second argument supports the conclusion that rights are entrenched against amendment by relying on historical evidence. There are two kinds of histories that this argument relies on: first, a historical evolutionary perspective on how rights came to be included in the Indian constitution and secondly, the drafting

42 Constitution of India, 1950, Articles 352 and 356.
history of the relevant articles of the Constitution being interpreted. The reliance on historical evidence raises complex theoretical problems about the appropriate methods to be adopted in constitutional interpretation. Even assuming that both these kinds of histories aid constitutional interpretation, we must enquire into the scope and kinds of historical evidence which are relevant and the nature of inferences that one may draw from such evidence. Below, I consider the use of these techniques in the cases under judicial review of constitutional amendment cases and assess whether they support the conclusions reached.

The Supreme Court has developed a rule of construction which allows any court to examine the Constituent Assembly debates when there is ambiguity in the constitutional text. The court may use these debates to establish the broader historical background to any provision but prohibits the use of such materials to interpret the text of the constitution.\(^45\) It is not altogether clear whether courts are able to apply this distinction in the way that these materials are to be used in practice. In any event the evidence on the applicability of Article 13 judicial review to constitutional amendment is scanty and unhelpful. Both sides of the argument are able to mobilize evidence to support their conclusions.

The Constituent Assembly considered draft article 304-A,\(^46\) corresponding to Article 368, which cast express limits on the power of constitutional amendment. There is no clarity from the historical record as to why the Constituent Assembly rejected this proposal. Draft article 8,\(^47\) corresponding to Article 13, proposed to include a specific clause which prevented Parliament from amending any fundamental rights. This draft Article was subsequently dropped without specific reasons. While petitioners concluded that these draft articles were abandoned because the framers envisaged that the existing provisions of the constitution already provided for these contingencies, the respondents suggested that these draft articles were dropped in order to give Parliament a wider amending power.

\(^{45}\) *Golaknath*, supra n. 3, p. 1682 (Wanchoo, J).

\(^{46}\) Constituent Assembly Debates, 17 September 1949.

Both sides to the argument led further evidence of the importance that the eminent leaders speaking in the Constituent Assembly attached to fundamental rights or to the supremacy of Parliament in support of their respective claims. In the absence of further clinching historical evidence or agreement on a judicial technique of drawing suitable inferences from historical materials one must safely conclude that this approach to constitutional interpretation cannot settle the question before us decisively.

The second argument from history seeks to establish the immutable character of rights in the constitution by developing a broad historical evolutionary perspective on the exalted status of rights in the freedom movement which resulted in their ‘fundamental’ status in the 1950 Constitution. However, the evidence presented falls far short of establishing the proposition asserted—that fundamental rights are immune from amendment. Rao selectively excerpts from speeches made, and declarations adopted, by the freedom movement between 1850 and 1947. He relies heavily on a speech delivered by Motilal Nehru in 1928 in which it is asserted that fundamental rights guaranteed in the constitution should not be withdrawn “… under any circumstances.” The attempt to control the interpretation of concretely expressed articles of the constitution using scanty historical record of this sort is fraught with danger. This is particularly so when there is an attempt to reduce a wide array of often contradictory historical events and expressions to support or sustain narrow propositions in constitutional law. This does not rule out the use of historical evidence by courts to arrive at broader propositions about the central ideas animating a constitution such as whether the constitution should be understood to be of a transformative character as opposed to status-quoist character. For the moment it is sufficient to note that both arguments from history are inadequate to support the conclusion that fundamental rights are immutable and beyond the reach of the amending power in Article 368.

The third interpretive strategy advanced in support of immutable fundamental rights is an interpretation of the relationship between amending power and fundamental rights which situates it in the

48 Golaknath, supra n. 3, p. 1656 (Subba Rao, CJ).
context of wider provisions of the constitution. Rao was of the opinion that the proper place of fundamental rights in the constitution could not be appreciated unless we first undertake a survey of the objectives of the constitution and the particular provisions employed to achieve these objectives. 49 He first looked to the preamble and identified the other provisions of the Constitution which establish the principle of the rule of law and the supremacy of the constitution as central themes in the constitution. He concluded from his broad survey that the Constitution sought to achieve the overarching goal of social justice while ensuring that the country did not slide down an authoritarian path.

This is not the first time that the court has considered the role of the preamble in constitutional interpretation. In a previous case, the Supreme Court had ruled that the preamble could not be a source of substantive power 50 and Wanchoo’s dissenting opinion in Golaknath inferred from this ruling that the preamble could not be a source of prohibition or limitation on power either. 51 Rao’s use of the preamble does not offend this rule of construction. He does not take the view that the preamble directly imposes limitations on the amending power in Article 368 and uses it as an aid to interpret the relationship between Articles 13 and 368. The preamble in the constitution is a compact statement of the ideals and aspirations of the constitution and should not be read as a mere platitude. If the language of Article 13 and 368 allow for conclusions which take into account the preamble’s aspirations then such an interpretation is certainly more attractive than the strategy of harmonizing conflicting articles in an opaque and inarticulate manner adopted by the courts in some decisions we considered earlier in this section.

However, it is not clear which values in the preamble can provide us assistance in interpreting the relationship between Articles 13 and 368. The chief values that Rao employs to interpret the relationship is the supremacy of the constitution and the rule of law. Neither of these values is expressly stated in the preamble. Moreover, both the rule of law and supremacy of the constitution as general constitutional

49 Ibid., p. 1655 (Subba Rao, CJ).
50 In Re Berubari Union, AIR 1960 SC 845.
51 Golaknath, supra n. 3, p. 1683 (Wanchoo, J).
principles do not compel us to the conclusion that constitutional amendments should be subject to judicial review under Article 13. We can think of other constitutions, like that of the United States, which profess both these ideas but do not recognize the judicial review of constitutional amendments.

A structural interpretation of the Constitution which uses the preamble to assist in the interpretation of other constitutional provisions may well be a legitimate and useful interpretive approach. Rao needs to engage in further argument to establish why either supremacy of the constitution or the rule of law should require the conclusion that constitutional amendments are subject to judicial review. This may have something to do with the kinds of conclusions that such a structural interpretation of the constitution can support. Such interpretations support the identification of constitutional themes and institutional arrangements at a level of abstraction that supplements plausible readings of the constitutional text. In other words, these constitutional principles assist us in choosing between two possible interpretations of the text but do not support the use of constitutional principles to override the express provisions in the constitution. In Chapter 5, I will examine whether structural interpretation is a defensible model of interpretation and the kinds of conclusions that such an interpretation can support.

The fourth, and final, argument advanced to support the conclusion that amending power is subject to judicial review under Article 13 is the doctrine of implied limits. I must clarify that judicial opinions and commentaries have used the phrase ‘implied limitations’ differently. Some judges and commentators use the implied–express distinction to signal whether the limitations they seek to impose on parliamentary amending power are expressed in particular provisions of the constitution or are inferred from the constitution as a whole, respectively. In this sense, Article 13 is an express limit whereas any limitation which is inferred from the constitution as a whole is considered an implied limit. The express–implied limit distinction is used in a second sense to distinguish between limits that may be traced to the structure and origin of the constitution at its founding moment—historically implied limits—and express limits which may be traced to the constitutional text. It is the second sense of the distinction that we are concerned about here.
There are two strands of arguments advanced in the majority opinions in *Golaknath* about the doctrine of implied limits. First, regarding the status and power enjoyed by colonial legislatures as distinguished from Westminster Parliament\(^{52}\) and second, arising from the distinction between states and governments in European jurisprudence. In *Golaknath*, both strands of argument were raised in a rather confused and underdeveloped fashion.

Rao relied on two important judgments of the Privy Council\(^{53}\) which deal with arguments about limits on the power of amendment enjoyed by colonial legislatures as authority to conclude that the Indian Constitution may be amended legislatively. These cases address the important question in British constitutional law of how the sovereignty of colonial assemblies may be limited by statute in ways that Westminster Parliament is not. Rao does not enquire into whether the Indian Parliament is similarly situated. Instead he relies on these cases as authority for the proposition that constitutions may be amended legislatively, an issue settled by these cases in a legal system which was crucially different from the provisions of the Indian constitution. The argument for special limits on the power of colonial legislatures is one that autochthonous constitutional traditions such as India’s reject. An improved version of the doctrine of implied limits is raised more appropriately in a more fleshed-out fashion in the *Kesavananda* case which developed the doctrine of basic structure. I will carefully analyse the applicability of this modified version of the doctrine in India in the next part of this chapter where I consider the *Kesavananda* case.

The second strand of the argument for implied limits draws on the distinction in European constitutional jurisprudence between the state and the government. Hidayatullah suggests that this distinction may be mapped onto the Indian constitution to distinguish between the status of the constituent body which drew up the constitution and that of Parliament exercising its powers of amendment. He concludes that ‘kompetenz–kompetenz’ or the unlimited ability to


alter the constitution ‘does not flow from the amendatory process’\textsuperscript{54} in the constitution. Once rights have been declared to be fundamental by ‘the people’, Parliament may not abridge them in any way through the amending process. It must ‘convoke another Constituent Assembly’\textsuperscript{55} which may be empowered to look at the constitution afresh. Hidayatullah conducts a sketchy survey of constitutions where similar limits have been placed on the amending body to buttress this conclusion.

The entrenchment of fundamental rights against constitutional amendment is an outcome that may be justified differently by varied philosophical traditions. The German Basic Law sets out that certain portions of law are immune from amendment in order to overcome the defects of the Weimar Constitution exploited during the Hitler years.\textsuperscript{56} Some common law constitutional jurisdictions view limits on amending power as being anti-democratic in character, which would require us to provide a revised account of the relationship between constitutions and democracy.\textsuperscript{57} We will engage with these philosophical arguments in greater depth in Chapter 6.

Irrespective of the merits of these arguments we must recognize that the task of constitutional interpretation is not merely to conceive of the best theoretical reconciliation between popular sovereignty of the people and the amending power of Parliament, but to direct one’s attention to the interpretation of the text of the constitution. Hidayatullah’s opinion in Golaknath fails to address the limits which the constitutional text imposes on the kinds of insights from political philosophy which may legitimately be used to interpret the constitution. For the moment, it is sufficient for us to conclude that though a doctrine of implied limits which relies on the distinction in power between a constituent and constituted body may be a plausible philosophical argument, more reasons to conclude that

\textsuperscript{54} Golaknath, supra n. 3, p. 1697 (Hidayatullah, J).
\textsuperscript{55} Golaknath, supra n. 3, p. 1705 (Hidayatullah, J).
this distinction extends the scope of judicial review to constitutional amendments under Article 13.

**Conclusion**

In this part of the chapter, I have considered whether parliamentary amending power is subject to judicial review under Article 13. I have argued that the claim that the source and nature of amending power is legislative in character is unsustainable for two reasons: first, Article 245 cannot be a source for amending power as the powers under the article are to be exercised subject to the other provisions of the constitution, and second, the analogy between legislative and amending process is a weak one which cannot support the conclusion that the substantive output of both processes is legislation and therefore should be subject to judicial review. I then considered three types of arguments on why the term ‘law’ should be considered to include amendments. I have argued that the definition of ‘law’ should not be stipulated semantically or merely by reference to the structure of Article 13 as these arguments are inconclusive and avoid principled arguments about whether ‘law’ should be construed to include amendments or not.

The argument that all written constitutions allow for judicial review—irrespective of the phrasing of Article 13—thereby making constitutional amendments subject to judicial review, is that it moves from a principle which relates to the source of judicial review to unsupported conclusions about the nature and scope of such review. In order to apply the *Marbury* principle in these cases further arguments are necessary to justify its application to constitutional amendments and to clarify whether it requires rights based review as opposed to competence review.

I conclude this part of the chapter by considering the four arguments about why fundamental rights in the constitution are immutable in character. The claim that fundamental rights are natural rights is devoid of any support from the text of the constitution and one may argue that the constitution is motivated by other justifications for making some rights ‘fundamental’ but open to amendment. Both types of arguments from history are indecisive. Reliance on the Constituent Assembly debates is unreliable as there is evidence that supports alternative conclusions. The attempt to develop a historical
evolutionary perspective on the status of fundamental rights in the constitution is sketchy and utilizes inadequate historical data. Even if a comprehensive historical perspective is developed such a technique cannot support an interpretation of the constitution which is inconsistent with the constitutional text.

Structural interpretations of the constitution which use the preamble and other constitutional provisions to establish constitutional values and principles such as supremacy of the constitution or rule of law can be useful aids to judicial interpretations. However, none of these principles or values can be used to support the narrow legal proposition that amendments are subject to judicial review under Article 13. Moreover, such principles and values derived through a structural interpretation of the constitution cannot override the constitutional text and cannot be used in a general context or independent fashion to settle interpretive questions about whether constitutional amendments are ‘law’ under Article 13.

There are two versions of the doctrine of implied limitations advanced in support of the immutable character of rights. The argument which rests on the limited sovereignty of colonial legislatures misapplies precedent and is unable to withstand the claim of autochthonous constitutions, like the Indian Constitution, to enjoy full sovereignty. The second version which relies on the distinction in the powers of constituent and constituted bodies is a useful distinction which needs to be developed in two senses: to assess if it fits with the Indian Constitution and whether it offers a reasoned understanding of the interaction between the ideas of democracy and constitutionalism. The version put forward in the Golaknath case does neither. Hence, for the reasons addressed above, the Supreme Court was mistaken in ruling that constitutional amendments are subject to judicial review under Article 13.

**Implied Limits on Amending Power:**

**Basic Structure Review**

In this part of this chapter, I argue that the Supreme Court was right in concluding that the Constitution imposes implied limits on the power of constitutional amendment under Article 368. I must make clear at the outset that this is a modest argument about limits on this
mode of constitutional change—constitutional amendment—which may or may not apply with equal rigour to other modes of constitutional change beyond constitutional amendment. In the first part of this chapter I had suggested that the argument for express limits on the power of amendment under Article 13 was unsustainable on a reasonable interpretation of the constitutional text as it led to a complete breakdown of the relations between the legislative and amending powers of Parliament envisaged in the constitution. It may then seem odd that while I deny that the constitution imposes express limits I argue that it nevertheless imposes implied limits.

I will try to show by the end of this chapter that what, at first glance, seems to be a rather surprising conclusion turns out to be a reasonable and well supported one. Significantly, not much turns on the distinction between 'express' and 'implied' limits. The distinction between the two types of limits is prompted by the arguments advanced in court in these cases and in the academic literature commenting on these cases. The doctrine of implied limits which has previously been applied in diverse constitutional cases in several other jurisdictions came to be strenuously argued as the basis on which amending power was restricted. This use of the doctrine is both confusing and unhelpful. What is at stake here is whether an interpretation of the Constitution which limits Parliamentary amending power is valid and legitimate? The phrasing of these limits as implied or express is not indicative of the nature or source of the limit and is at best a placeholder for arguments about whether these limits were previously recognized or not. It is only to signal the temporal novelty of these new limits in the Indian constitutional context that I use the term ‘implied limit’ to characterize basic structure review.

In this work, I mark out arguments which extend previously recognized constitutional models of judicial review to cover constitutional amendments—express limits—from arguments that devise a novel form of judicial review that applies especially to constitutional amendments—implied limits. This distinction is useful to the extent as it identifies the different models of judicial review developed by the court. This work argues that the distinction between types of

58 See N. Palkhivala, Our Constitution Defaced and Defiled, Delhi: Macmillan Co. of India, 1974.
constitutional judicial review has not been amplified or well understood in the academic literature on the subject. However, it is a misleading distinction insofar as it suggests that while express limits are somehow based on the text of the constitution, implied limits are divined free from the constitutional text by some imaginary value-laden ether. Such a use of the distinction is a reminder that the constitutional basis for both models of judicial review is arguments about the interpretation of the constitutional text. What distinguishes the constitutional basis of implied and express limits on amending power is the reliance on different provisions in the constitution and different methods of constitutional interpretation.59

The Kesavananda Ratio

In *Kesavananda v. State of Kerala*,60 the majority among a 13-judge bench of the Supreme Court ruled that the 24th, 25th, and 29th Constitution (Amendment) Acts passed by Parliament exercising its powers under Article 368 were unconstitutional to the extent that they damage the ‘basic structure of the constitution’. In doing so the court overruled the majority opinion in *Golaknath v. State of Punjab*,61 that Article 13 provided a constitutional basis for the judicial review of constitutional amendments. The *Kesavananda* opinion is among the longest judicial opinions delivered by any superior court in any jurisdiction and it is almost impossible to deal with every argument raised in the case exhaustively. In this part of the chapter, I will consider in great detail the important arguments considered by the Supreme Court in *Kesavananda* on the constitutional basis for basic structure review. I will argue that though the court was right in concluding that the constitution included implied limits on the power of amendment it did not ground this conclusion on a satisfactory interpretation of the constitution.

In *Kesavananda* a special bench of 13 judges was constituted to hear a bunch of six writ petitions that raised several common

59 For a fuller account of the approach to constitutional interpretation in this thesis see Chapter 6.


61 *Golaknath*, supra n. 1.
questions of constitutional law. The judges took seriously Mathew’s suggestion that it ‘was desirable for the future development of the law that there should be a plurality of opinion even if the conclusion reached is the same’. 62 Eleven opinions were delivered making the task of identifying the majority holding on any question of law an arduous exercise. Nani Palkhivala, writing soon after the judgment was delivered, took the view that Khanna’s view ‘became the law of the land’ as it agreed with the majority six led by Sikri on the question of limitations on the amending power and with the minority six led by Ray on the validity of Article 31C. 63 Very many interesting things may be, and have been, said about the judgment of the court in this case and whether one may ascertain a clear majority holding in the case. 64 Rajeev Dhavan’s painstaking analysis accurately identifies the plurality opinion to comprise six majority, four minority, and three cross-bench opinions. He notes that even the nine judges who subscribed to some version of the doctrine of implied limits did not do so for the same reasons. 65 With the passage of time, the legal debate over the existence of a majority holding or ratio has ebbed away. I will not go any further into this question in this work. The analysis in this part of the chapter will focus on the two main questions before it: the scope of amending power under Article 368 and the power of the court to subject constitutional amendments to judicial review.

The eleven opinions in the case concentrated almost exclusively on the scope of amending power of the constitution. The arguments

62 Kesavananda Bharati (Mathew J), supra n. 2, p. 825.
advanced crystallized along two nodes: the scope of the term ‘amendment’ in Article 368 and the doctrine of implied limitations. None of the opinions developed any extensive argument about the role of the court in judicially reviewing these amendments. The opinions seem to assume that once it is clear that some implied limits on amending power are identified, it follows that the court is empowered to police these limits. This assumption about the role of the courts is central to the issues before the Court and in Chapter 5, I analyse the constitutional arguments that support, and counter-arguments which object, to the court’s power to judicially review amendments. In the rest of this chapter, I will consider the arguments relating to amending power in Article 368.

In *Kesavananda*, the court considered whether the power of constitutional amendment under Article 368 was subject to implied limits. All the opinions delivered by the court were agreed that where the language used by the constitution was capable of more than one plausible meaning, then the court was right to call into aid various rules of construction. The argument for implied limits took many forms: it was argued that the source of limits lie in the word ‘amend’ in Article 368 which allowed Parliament to modestly alter the constitution but not radically change it. I will argue that this ‘textualist’ interpretation adopts a semantic approach to the constitutional text, and standing alone, fails to offer any convincing reasons to conclude one way or the other.

Other opinions concluded that implied limits on amending power emerge when one reads Article 368 together with the other provisions of the constitution. It was argued that the amending power in Article 368 could not extend to alter the values espoused in the preamble to the constitution and all the rights guaranteed by the constitution. This was not an argument about the scope of Article 368 amending power considered in isolation but one that determines the scope of amending power by reading Article 368 in the context of the other relevant provisions of the constitution and the institutional structure envisaged by the constitution. This ‘structural interpretation’ of the constitutional document as a whole offers more compelling reasons for the court to uphold a particular interpretation of the scope of the amending power. This chapter will analyse the court’s use of structural interpretation and argue that the conclusions arrived at by
the court using this model of interpretation upholds the integrity of the constitutional document and can be the basis for imposing limits on the amending power.

A third type of argument that played a significant role in the court’s reasoning was one that investigated the historical origins and purpose of the constitutional document. This argument took many forms: there were ‘originalist’ arguments about the intent of the constitutional framers. The constitutional assembly debates on which these originalist arguments rely do not offer significant support to the conclusions arrived at by the court on the point at issue and hence do not settle the issue of whether there are limits on the amending power. In addition, the court considered the historical context and motivations of the nationalist freedom movement to identify the purposes and aspirations that they ascribed to the constitution. This ‘grand historical narrative’ provided the court with a teleological argument that a constitution which advanced such noble aims would necessarily impose limits on parliamentary amending power. It is often suggested that such grand narratives are unsophisticated in their historical technique and provide malleable frameworks that are amenable to the courts’ whims and fancies. In this chapter I will argue that such historical arguments provide the court with valuable information and orientation while interpreting historically self-conscious constitutions which are adopted in a particular historical context to achieve clearly identified transformative ends.

By adopting an approach to interpreting the constitution which was analogous to the tasks of statutory interpretation, the court avoided any engagement with the theoretical arguments that the issue of constitutional judicial review of constitutional amendments raises. I will take the lead of the court and avoid such enquiries for the moment. In Chapter 5, I return to these debates and consider some issues in constitutional interpretation which arise in the context of basic structure review. Before I engage with these normative problems that the court’s decision raises, we would do well to analyse carefully the precise grounds on which the court reached its conclusions.

**Textualism**

In *Kesavananda*, the court’s attention was riveted on the language used in Article 368. Khanna’s opinion laid down two key propositions
from his analysis of Article 368. First, that the article laid down no limitations on the power of amendment particularly with respect to fundamental rights and second, that this power did not include the power to ‘abrogate the constitution and replace it with an entirely new constitution.’\(^{66}\) He found support for both these propositions in the language of Article 368. In support of the first proposition, he observed that ‘no words are to be found in Article 368 as may indicate that a limitation was intended on the power of making amendment’.\(^{67}\) Similarly, he found that the ‘words “amendment of this Constitution” and “the Constitution shall stand amended” in Article 368 show that what is amended is the existing constitution and what emerges as a result of amendment is not a new and different constitution…’\(^{68}\)

By strongly denying the utility of relying on dictionary meanings,\(^{69}\) historical resources,\(^{70}\) and the support of the doctrine of implied limitations,\(^{71}\) Khanna rested his conclusions on the scope of the amending power in Article 368 on very narrow ground. Though generally short on constitutional theory arguments, he hints at his normative understanding of the basic structure by quoting Dietrich Conrad on structural limits on an amending body and Carl J. Friedrich on the constitution as a ‘living, organic system’.\(^{72}\) I will explore the use of these theoretical resources in greater detail in the next section of this chapter. But first I will turn to the arguments against such a view.

The lead dissenting judgment in Kesavananda was by Ray. He agreed with Khanna that the ‘crux of the matter is the meaning of the word “amendment”’.\(^{73}\) He was of the view that the Constitution used ‘the word “amendment”… in an unambiguous and clear manner’ to ‘mean any kind of change’.\(^{74}\) On considering the various provisions of the Constitution which uses the word, and paying attention

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\(^{66}\) Kesavananda Bharati, supra n. 2, p. 767 (Khanna, J).
\(^{67}\) Ibid., p. 739 (Khanna, J).
\(^{68}\) Ibid., p. 768 (Khanna, J).
\(^{69}\) Ibid., p. 770 (Khanna, J).
\(^{70}\) Ibid., p. 743 (Khanna, J).
\(^{71}\) Ibid., p. 776 (Khanna, J).
\(^{72}\) Ibid., pp. 768 and 769 (Khanna, J).
\(^{73}\) Kesavananda Bharati, supra n. 2, p. 537 (Ray, J).
\(^{74}\) Ibid., p. 539 (Ray, J).
to the constitutional practice of amendment up to that point, Ray concluded that the amending power was ‘unlimited so long as the result is an… organic instrument which provides for the making, interpretation, and implementation of law.’\(^75\) So he concludes that Article 368 conferred an amending power of the widest amplitude but even his dissent remarkably concedes that the scope of amending power does not extend to the abrogation of the Constitution itself.

Mathew’s approach to the question exposed the textualist assumptions that plagued a bulk of the opinions in the case. He eloquently observes that ‘although the word “amendment” has a variety of meanings, we have to ascribe to it in the article a meaning which is appropriate to the function to be played by it in an instrument apparently intended to endure for ages to come and to meet the various crises to which the body politic will be subject’.\(^76\) By confronting linguistic indeterminacy squarely, Mathew correctly points out that the scope of the term ‘amendment’ in Article 368 cannot be settled by resorting to linguistic resources alone. In other words, to identify the better interpretation of Article 368 on a linguistic basis, one must provide other means of resolving this interpretive dispute. Mathew adopts a functional approach by enquiring into the role played by the article in the constitutional document. This interpretive approach is promising regardless of the conclusions reached.

**Structural Interpretation**

In difficult cases, judges draw on a wide variety of interpretive aids to assist them in reaching a justifiable interpretation of the constitution. Sikri took the lead in setting out the motivations for this task: ‘I must interpret Article 368 in the setting of our constitution, in the background of our history and in the light of our aspirations and hopes … I am not interpreting an ordinary statute, but a Constitution which apart from setting up a machinery of government, has a noble and grand vision.’\(^77\) This purposive orientation to the interpretive activity meant that Sikri would ‘look to the whole scheme of the constitution’\(^78\) to construe the expression ‘amendment of this

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\(^{75}\) Ibid., p. 557 (Ray, J).

\(^{76}\) Ibid., p. 830 (Mathew, J).

\(^{77}\) Kesavananda Bharati, supra n. 2, p. 306 (Sikri, CJ).

\(^{78}\) Ibid., p. 316 (Sikri, CJ).
Constitution.’ He found support for such an interpretive approach in the precedents of the Federal Court\textsuperscript{79} and the House of Lords\textsuperscript{80} on statutory construction.

He then went on to consider the various parts of the Constitution in a haphazard fashion. He lays great stress on the preamble and part III which deals with fundamental rights and considers the relevance of part XVII which deals with Official languages with a cursory line.\textsuperscript{81} This long drawn, and often erratic, examination\textsuperscript{82} began with the provisions themselves but often included their respective drafting histories. Sikri ties together this varied and disparate analysis with the pithy conclusion that all these provisions of the Constitution lead to some necessary implications: that the expression ‘amendment of this constitution’ allows Parliament to amend or change any part of the Constitution as long as it does not ‘abrogate or take away fundamental rights or to completely change its fundamental features of the Constitution so as to destroy its identity.’\textsuperscript{83} The conclusion rests on an interpretive approach which may be put forth as a single proposition: ‘In a written constitution it is rarely that everything is said expressly. Powers and limitations are implied from necessity or the scheme of the Constitution.’\textsuperscript{84}

I have examined Sikri’s opinion very carefully not because it is the strand of reasoning for the majority views in Kesavananda which has come to be accepted in subsequent decisions as the constitutional basis for the basic structure doctrine. As Khanna expressly subjects fundamental rights\textsuperscript{85} to the amending power of Parliament, that part of Sikri’s conclusions relating to the unamendability of fundamental rights is a minority opinion. A structural interpretation of the constitution, as proposed by Sikri, overcomes some of the defects of a textualist reasoning adopted by Khanna in support of his version of the basic structure doctrine. By bringing various elements of

\textsuperscript{79} The Central Provinces and Berar Act, 1939, FCR 18, 42 (Gwyer, CJ).
\textsuperscript{80} Bidie v. General Accident, Fire and Life Assurance Corporation (1948) 2 AllER 995, 998 (Lord Greene).
\textsuperscript{81} Kesavananda Bharati, supra n. 2, p. 335 (Sikri, CJ).
\textsuperscript{82} Ibid., pp. 321–46 .
\textsuperscript{83} Kesavananda Bharati, supra n. 2, p. 405 (Sikri, CJ).
\textsuperscript{84} Ibid., p. 346.
\textsuperscript{85} Ibid., p. 824 (Khanna, J).
constitutional design and aspiration to bear on the interpretation of constitutional phrases like ‘amendment of the Constitution’ this approach offers a more persuasive bouquet of reasons for the conclusion reached in this case.

**The Use of History**

The opinions in *Kesavananda* considered different types of history and engaged in a debate on the relevance of these sources and the legitimate inferences that may be drawn for the interpretation of the constitution. Earlier in this chapter, the extensive use of history to determine the express limits on the scope of amendment was briefly discussed. This approach to constitutional interpretation continued in *Kesavananda* where the court considered a wide range of historical evidence on several issues before it. Both sides of the argument drew strong support from these sources, which forced the court to acknowledge the indecisiveness of such authority. When coupled with other restraints on the use of such sources in constitutional interpretation, no opinion rested any key proposition or reasoning supported by these historical sources. For the sake of analytical clarity I will divide up these histories by the sources on which they rely, namely, constituent assembly proceedings; social and political history of India; and world history. Though the court does not adopt a clear distinction with respect to historical sources, arguably the distinction above has significant insights to offer as to the nature of historical evidence and the arguments it can support. I will analyse the use of each type of history in turn.

The proceedings in the Constituent Assembly included a wide range of activity: some central and others peripheral, to the crafting of the constitutional text. Seervai breaks these proceedings into four classes: the presentation of the draft constitutions; the consideration of amendments proposed to draft Articles or sub-Articles; the reports of the various committees appointed by the Assembly; and the speeches made in the Assembly. He points out that the court addressed itself to the wrong question with respect to the use of such evidence. ‘The right question to ask was not whether speeches in the Constituent Assembly are admissible as extrinsic aids to construction, but whether, any, and if so what, part or parts of the proceedings in the Constituent Assembly are admissible as extrinsic
aids to construction.\footnote{86} By lumping together these diverse sources the court erred in indiscriminately relying on these sources without paying attention to their probative value. Even if we consider the court’s approach to speeches made in the Constituent Assembly one becomes immediately aware of the complex questions that arise from the use of these materials.

Sikri speaking for the majority articulated a Janus-faced approach to the use of speeches made by members in the Constituent Assembly. While he found it, on the strength of precedent and other reasons, ‘a sound rule of construction that speeches made by members of a legislature in the course of debates relating to the enactment of a statute cannot be used as aids for interpreting any provision of the statute’\footnote{87} he nevertheless saw ‘no harm in finding confirmation of one’s interpretation in debates…’\footnote{88}. Khanna was less equivocal in his reliance on speeches in the Constituent Assembly and took the view that they may ‘be referred to for finding the history of the Constitutional provision and the background against which the said provision was drafted…’ but cannot ‘form the basis for construing the provisions of the Constitution.’\footnote{89}

Mathew, dissenting in the case, sought to approach the question from first principles: ‘Logically, there is no reason why we should exclude altogether the speeches made in the Constituent Assembly by individual members if they throw any light which resolve latent ambiguity in a provision of the Constitution.’\footnote{90} Relying on the speeches made by Ambedkar on draft Article 304 (now Article 368), draft Article 25 (now Article 32) and on the nature of fundamental rights, he found ‘it difficult to understand why the constitution-makers did not specifically provide for an exception to Article 368 if they wanted that fundamental rights should not be amended in such a way as to take away or abridge them.’\footnote{91}

\footnote{87} \textit{Kesavananda Bharati}, supra n. 2, p. 339 (Sikri, CJ).
\footnote{88} Ibid., p. 340.
\footnote{89} Ibid., p. 743 (Khanna, J).
\footnote{90} Ibid., p. 841 (Mathew, J).
\footnote{91} \textit{Kesavananda Bharati}, supra n. 2, p. 843 (Mathew, J).
There is no dispute about the veracity of the speeches cited by Mathew, but other opinions in the case cite these very same speeches to infer the opposite conclusions. These inferences are only buttressed by conflicting speeches made by Ambedkar on various provisions of the Constitution which are not easily reconciled. Seervai, after a detailed analysis of the use of Constituent Assembly proceedings,\(^\text{92}\) comes to the conclusion that courts may rely usefully on the first three classes of Constituent Assembly proceedings but not on speeches in the Constituent Assembly.\(^\text{93}\) The analysis of the complexities which arise out of the use of speeches made in the Constituent Assembly in \textit{Kesavananda} confirm that caution needs to be exercised in using these materials in constitutional interpretation. Further, argument on the probative value of these speeches and other proceedings in the Constituent Assembly more generally, as well as the manner of drawing inference from historical evidence is necessary before such materials may be employed in constitutional interpretation. Under these circumstances it is best not to rest the constitutional basis of judicial review of constitutional amendments on these historical resources. As none of the majority opinions in \textit{Kesavananda} or subsequent decisions have relied exclusively on the speeches made in the Constituent Assembly, I need not engage in any further analysis of these arguments.

I will now briefly consider the use of social and political history of colonial India and snapshots of world history that were salient in the arguments raised in \textit{Kesavananda}. The various opinions in \textit{Kesavananda} summoned up very different sets of events under these categories, and used them with varying degrees of sophistication. Hegde and Mukherjea expressed their reliance on the former sources succinctly: ‘What was the purpose intended to be achieved by the Constitution? To answer this question it is necessary to make a brief survey of our Nationalist movement… since 1885 and the objectives sought to be achieved by that movement.’\(^\text{94}\) The survey that followed allowed them to identify the two primary objectives of the Constitution to be: ‘(1) to constitute India into a Sovereign

\(^{92}\) H.M. Seervai, supra n. 86, pp. 203–5.

\(^{93}\) Ibid., pp. 200–2.

\(^{94}\) \textit{Kesavananda Bharati}, supra n. 2, p. 477 (Hegde and Mukherjea, JJ).
Democratic Republic and (2) to secure to its citizens the rights mentioned therein’. Taking these objectives into account they were unwilling to ‘accept the contention that our Constitution-makers after making immense sacrifices for achieving certain ideals made provision in the Constitution itself for the destruction of these ideals. This grand historical narrative covering almost 100 years of pre-Independence history allows the judges to impute a teleological orientation to constitutional interpretation, thereby avoiding the need for other normative arguments about the validity of the propositions advanced in the case.

Khanna’s treatment of the ‘argument of fear’ offers us a more careful methodological approach to the use of history as well as a cautionary retort to the attempt by the majority to weave an elaborate historical justification for their conclusions. It was argued that that ‘unless there are restrictions on the power of amendment… the danger is that the Indian Constitution may also meet the same fate as did the Weimar Republic at the hands of Hitler.’ Khanna refuted this argument strongly and observed that it ‘is wholly misconceived and is not based upon correct appreciation of historical facts’. First he pointed out that Hitler made use of Article 48 of the Weimar Constitution which dealt with emergency powers and not amending power. He pointed out that the Weimar example illustrated that while ‘Hitler made a show of following the Constitution… the acts of his party in and out of the government in practice violated the basic law.’ The lesson he learnt from this historical reference was that ‘the best guarantee against the abuse of the power of amendment is good sense of the majority of members of Parliament and not the unamendability of Part III of the constitution…’

Khanna’s approach highlights some critical issues on the use of history. First, he insists on a close correlation between the factual history examined and the proposition sought to be supported. The factual inaccuracies in the historical analogy proposed between the Weimar Germany and 1970s India, he casts doubt on the inference...
to be drawn in the case. Second, even assuming that the analogy is factually correct, one must still work out the inferences which may be drawn by reference to history. Khanna relies on the analogy to the Weimar Republic to conclude that the judiciary should not intervene in this political context.

To these cautions on the use of history I may add one other. Pierre de Vos analyses the South African Constitutional Court’s efforts to interpret the 1996 Constitution using a ‘contextual approach’. He argues that the court, while mobilizing a grand narrative history in support of its conclusions, adopts an idea of history which pays inadequate attention to theoretical developments in historiography. In particular he is concerned with the lack of reflexivity of the judges’ use of history which, while denying the agency of the historian, seeks to portray history as somehow objectively true. Even if one were to insist, as Hobsbawm does, that ‘relativism will not do in history any more than in law courts’, there must rest a critical responsibility on the user of historical argument to pay careful attention to the plural historical accounts available and the normative lessons that may be inferred from these accounts.

From the discussion above I conclude that the use of historical arguments in *Kesavananda* did not evidence a sophisticated understanding of the historical method. Further, the opinions fail to develop normative reasons for the use of historical sources to support the legal propositions on limited amending power.

**The Use of Social, Political, and Philosophical Theory**

The use of social, political, and philosophical theories in constitutional interpretation was a topic on which there was a rare consensus across the majority and minority opinions in the case. Different opinions handled these materials with varied ability. Mathew displayed a strong felicity with this type of argument, Chandrachud signalled the approach of the court to these opinions: ‘We were taken through the writings of scores of scholars, some of whom express their beliefs

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with a dogmatism not open to a Judge. There was a faint controversy regarding the credentials of some of them … but brushing aside such considerations, the conflicting views of these writers, distinguished though they may be, cannot conclude the controversy before us, which must be decided on the terms of our Constitution and the genius of our nation.”

Though theoretical argument was not taken to be conclusive of the questions before the court, the extended investigation and attention paid to such materials beg explanation. The doctrine of implied limits was one proposition for which much theoretical support was invoked in the opinions, albeit in a most confused and disparate fashion. Nani Palkhivala, lead counsel for the petitioners, argued before the court, and in other secondary writing, that the doctrine of inherent and implied limits was in principle supported by a correct theoretical understanding of the relationship between amending power and the basic elements or fundamental principles of the written constitution in a democracy. At other points ‘implied limits’ was put forward as a principle of the common law pertaining to the interpretation of statutes in general and written constitutions in particular. Decisions of the Australian Federal Court on implied rights in the Australian Constitution, those of the Privy Council interpreting post-colonial constitutions, and the US Supreme Courts’ review of constitutional amendments were canvassed in support of such a doctrine. Often courts are confronted by arguments for a legal proposition which simultaneously rely on political theory, legal theory, and comparative law. However, it is rare that such an intricately threaded and tightly woven argument is likely to get a satisfactory response from the judges as they first need to untangle the varied strands of such arguments and then assess them.

Mathew, who approached such arguments with great sophistication, framed the argument in normative constitutional theory precisely when he observed that inherent and implied limitations ‘flow from the fact that the ultimate legal sovereignty resides in the people; that Parliament is a creature of the Constitution and not a constituent body and that the power to alter or to destroy the essential features

102 Kesavananda Bharati, supra n. 2, p. 961 (Chandrachud, J).
103 N. Palkhivala, Our Constitution: Defaced and Defiled, Delhi: Macmillan Co. of India, 1974.
of the Constitution belongs only to the people, the ultimate legal sovereign." He then went on to examine the argument in its abstract theoretical form, removed from the constitutional text, in great detail but reached the conclusion that this was an ‘impossible position’.105

Dhavan, after conducting an extensive analytical examination of Kesavananda insightfully observes, ‘We might ask the question: was the theory of implied limitations securely established? The answer must be that despite the attempt to give the theory credibility by reference to history, cosmopolitan jurisprudence, and word play, it was really advanced on a common sense basis. Never did a Court take so long a route to reach so simple a proposition, and never were so many fundamental propositions left unanswered.’106 This may well be an accurate assessment of the reasoning advanced in plurality opinion in Kesavananda. However, the question of judicial review of constitutional amendments requires a fuller account of the relevant normative constitutional theory and more crucially, the extent of reliance that a court should place on such argument while interpreting the Constitution. I return to these concerns in Chapter 5.

In Kesavananda the court was presented with novel arguments for the constitutional judicial review of constitutional amendments. The court heeded Seervai’s counsel, advanced in the first edition of his treatise, Constitutional Law of India, that the majority judgment in Golaknath was ‘clearly wrong, is productive of the greatest public mischief, and should be overruled at the earliest opportunity’.107 The court replaced explicit limits on amending power with implied limits whereby the plenary amending power of Parliament could be exercised so long as it did not ‘damage or destroy the basic features of the Constitution’. The detailed analysis above considers the various arguments advanced in support of this proposition and is not exhaustive of all the arguments considered in the opinion: the use of comparative law judgments and the discussion surrounding the relationship between the directive principles and fundamental rights are notable omissions.

104 Kesavananda Bharati, supra n. 2, pp. 844–5 (Mathew, J).
105 Ibid., p. 852. The entire discussion extends from pages 844–52.
106 R. Dhavan, supra n. 65, p. 191.
107 H.M. Seervai, supra n. 86, p. 1117.
Though both petitioners and respondents canvassed their opinions using comparative law materials, no opinion relies exclusively on these precedents in support of their conclusion. More significantly, no opinion develops a sophisticated approach to the relevance and utility of these materials in aid of a conclusion with the issues at hand. As comparative law sources are not critical to any arguments about the constitutional basis of the basic structure doctrine I say no more about such materials in the rest of the work. The relationship between the directive principles and fundamental rights has been the subject of extensive discussion in some secondary literature on Kesavananda. Dhavan suggests that the ‘Supreme Court missed a great opportunity of evaluating the relative priority of right based notions, and goal oriented principles entrenched in the Directive Principles.’ Whatever the merits of this view, this is not an argument in support of the proposition that the basic structure doctrine has a sound constitutional basis. The relative priority of fundamental rights and directive principles is important to assess the constitutional validity of land reform legislation under rights compliance review as well as the validity of constitutional amendments under basic structure review. The enquiry into whether constitutional amendments which protected land reform legislation satisfies judicial scrutiny under the basic structure standard is about the nature and standards of basic structure review—a topic fully considered in Chapter 4.

**Constitutional Basis for Basic Structure Review of Amending Power**

In the preceding sections I have considered the judicial reasoning in support of a constitutional basis for implied limits to the amending power in Kesavananda. I have argued that a structural interpretation of the Constitution may offer good reasons to interpret amendment under Article 368 to be subject to implied limits.

This chapter endorses Sikri’s interpretive approach in support of the basic structure doctrine, as the best constitutional interpretation

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109 R. Dhavan, supra n. 65, p. 228.
advanced by the Kesavnanda bench despite it not securing a majority support. He sought to imply necessary limitations on amending power by drawing on a broad survey of various constitutional provisions. This approach needs closer examination of the text and more careful reasoning to persuade one to a conclusion regarding the necessity of such implication. I will need to show the conditions under which the provisions of the constitution may be said to yield text-emergent, but otherwise unwritten, principles which constrain the exercise of powers and functions under the Constitution.

Unfortunately, subsequent decisions of the court in *Indira Gandhi v. Raj Narain*\(^\text{110}\) or *Minerva Mills v. Union of India*\(^\text{111}\) do not undertake these essential tasks. These cases affirm the holding in *Kesavananda* on the strength of the bench rather than the persuasiveness of its reasons. However, Seervai claims that:\(^\text{112}\)

A critical discussion of *Kesavananda’s* case, taken by itself, would be inaccurate and misleading without a discussion of the deeper analysis of the amending power in the *Election* case… It appears to me that the most satisfactory method of exposition would be to defer a critical examination of *Kesavananda’s* case till the full implications of the *Election* case have been brought out by a critical examination.

This astonishing claim about the constitutional basis of the basic structure doctrine merits a clarification. Seervai suggests the constitutional basis of the doctrine is more clearly set out in *Indira Gandhi* and not in *Kesavananda*. In *Indira Gandhi*, all the judges accepted the constitutional basis of the doctrine as set out in *Kesavananda* as binding precedent and ignored this issue in their opinions. Hence, Seervai’s comment is best understood as a convoluted attempt to locate the constitutional basis of the doctrine in *Indira Gandhi* as he had already denounced the *Kesavananda* holding as a bad law. It is certainly true that various other aspects of the basic structure doctrine—nature and standards of review and the identification of basic features of the constitution—was developed

\(^{110}\) AIR 1975 SC 2299 at 2242 (Ray, CJ).

\(^{111}\) AIR 1975 SC 1789 at 1818 (Bhagwati, J) relying on the *Indira Gandhi* opinion as binding on him.

significantly in *Indira Gandhi* and this is a matter we will turn to in Chapters 4 and 5 respectively. Most recently, in *I.R. Coelho v. State of Tamil Nadu*, a nine-judge bench had the opportunity to articulate a stronger constitutional basis for the basic structure doctrine but did not apply itself to this task.

Despite such refusal by the courts to engage with the foundational questions relating to basic structure review of constitutional amendments, in this chapter I have made significant progress in uncovering a constitutional basis for the basic structure doctrine by eliminating a range of plausible but nevertheless inappropriate arguments. I have not proposed a basic structure doctrine which rests on any version of natural rights or metaphysically derived fundamental values, or suggested that a semantic stipulation on the scope of the term ‘amend’ in Article 368 would provide a sufficient constitutional basis. I propose that implied limitations which may be inferred from other relevant provisions of the constitution can offer us a sound constitutional basis for the basic structure doctrine. Before I can assert that such a model of basic structure review has a sound constitutional basis, I will need to consider normative arguments on the appropriate model of constitutional interpretation and provide a coherent normative constitutional theory which supports basic structure review. These arguments are addressed in Chapter 5.

The evolution and constitutional practice of basic structure review in the 30 years since it was established in Kesavananda has gone beyond judicial review of amendments. In Chapter 3, I examine the judicial debates on the constitutional basis of basic structure review as it applies to legislation and executive action. Chapters 4 and 5 address aspects of basic structure review which apply equally to all forms of state action and in Chapter 6, I examine the theories of interpretation necessary to support the claim of the legitimate constitutional basis of basic structure review. In the next chapter I go on to investigate the constitutional basis of the basic structure doctrine to review two other species of state action: the exercise of executive emergency power and ordinary legislative and executive action.

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113 (2007) 1 Sup Ct Almanac 45.