Applying Basic Structure Review

The Limits of State Action and the Standard of Review

In Kesavananda Bharati’s case… this Court had not worked out the implications of the basic structure doctrine in all its applications. It could, therefore, be said, with utmost respect, that it was perhaps left there in an amorphous state which could give rise to possible misunderstandings as to whether it is not too vaguely stated or too loosely and variously formulated without attempting a basic uniformity of its meanings or implications.¹

Beg in the quotation above observes the need for the doctrine of basic structure to be rigorously developed in the cases following Kesavananda. This task of formulating the doctrine cannot proceed unless the tendency, in the court and academic literature, to criticize and deal with the doctrine in an undifferentiated fashion is abandoned. By utilizing the analytical distinction between different aspects of a doctrine of judicial review I find that the judicial output on the doctrine may be reorganized along discrete themes. These thematic enquiries allow us to analyse the judicial output critically and to assess strengths and weaknesses of parts of the doctrine as it presently stands and to respond to criticisms of excessive and careless use.

In this work I argue that basic structure review has evolved into a fully developed independent doctrine of judicial review. In Chapters 1 and 2 I investigated the constitutional basis of the basic structure doctrine

¹ State of Karnataka v. Union of India, AIR 1978 4 SC 68 (Beg, CJ) 119.
for the judicial review of constitutional amendments, the proclamation of emergency power, as well as ordinary legislative, and executive power. In this chapter I investigate the application of the doctrine—the type of review and standard of scrutiny—to varied forms of state action. After the conception of the basic structure doctrine in Kesavananda, a clear type of basic structure review of constitutional amendments emerges in Indira Gandhi v. Raj Narain. In this case, the court identifies different types of basic structure review of constitutional amendments: namely, an extension of Article 13-type judicial review for compliance with fundamental rights to constitutional amendments, or an independent new form of judicial review. I argue that basic structure review as developed by the courts in Indira Gandhi and subsequent cases is best understood as an independent type of judicial review of constitutional amendments.

Where basic structure review is applied to proclamations of emergency as well as ordinary executive action, the court has to consider whether the doctrine applies as an independent competence criterion against which the vires of the executive action may be assessed or whether basic structure review is to be accommodated with the existing administrative law model of judicial review of executive action. In Bommai the court characterized the emergency proclamation power as a prerogative power which was not subject to ordinary jurisdictional limits of executive action. Instead, the court ruled that such an action may be reviewed only on the Wednesbury unreasonableness standard into which it combined basic structure review in order to conclude that the proclamation of emergency was unconstitutional. I will argue that the court’s approach to basic structure review of executive action fails to articulate the relationship between basic structure review and administrative law review of executive action. Irrespective of the executive action being reviewed—higher executive action or ordinary executive action—basic structure review must operate as a substantive limit on the action which circumscribes the sphere of valid authority of the executive branch of government.

I conclude the first part of this chapter by evaluating basic structure review of ordinary legislation which has been applied by the courts in an unsophisticated manner. Even if ordinary legislative action

2 AIR 1975 SC 2299.
complies with judicial review for competence and fundamental rights, the court has recognized that basic structure review may still be applied to find such legislation unconstitutional. Hence with ordinary legislation, basic structure review is supplementary to other models of constitutional judicial review\(^3\) and operates as a substantive limit on the boundaries of permissible legislation.

In the second part of this chapter I critically examine the standard of scrutiny which the court applies to state action under basic structure review. Unlike the type of basic structure review considered in the previous part of the chapter, the arguments relating to the standard of scrutiny remain the same irrespective of the type of state action being challenged. Notably the standard of scrutiny is unevenly developed in the cases dealing with different types of state action. So in some sections though I may only consider one type of state action the conclusions apply to all types of state action. The phrase which best captures the standard of review applied is whether the state action ‘destroys or damages the basic features or basic structure of the Constitution’.\(^4\) The phrase ‘destroys or damages’ indicates the high threshold of constitutional injury, or conversely the low standard of judicial scrutiny, employed by the courts in reviewing constitutional amendments. In other words, basic structure review does not employ the intense scrutiny, associated with Article 13 judicial review for compliance with fundamental rights or Articles 245 and 246 judicial review for competence where any minor violation of the provisions may lead to the court striking down the state action as unconstitutional. Instead, a constitutional amendment may be struck down only where there is substantial evidence that there is change in the ‘form, character, and content’\(^5\) of the constitution so that it may be said that the ‘identity’ of the constitution is irrevocably altered.

I then briefly consider three issues related to the level at which courts scrutinize state action under the basic structure doctrine: first, it has been suggested that basic structure review ensures compliance with principles and not rules and I show that this distinction is not useful or sustainable. Second, I examine whether basic structure

\(^3\) Ismail Faruqui v. Union of India, (1994) 6 SCC 360.

\(^4\) Indira Gandhi, supra n. 2, p. 2314 (Ray, CJ).

\(^5\) Ganpathrao v. Union of India, AIR 1993 SC 1267, 1291 (Pandian, J).
review may be characterized as a soft incompatibility review and not a hard unconstitutionality review. The evidence on this is mixed as it seems that the court uses basic structure review in both these ways. I argue that this accommodates the dual normative force of basic features as implied limits on state action and as aids to constitutional interpretation. Third, I conclude this section, and the chapter, by assessing whether judicial deference has any role to play in basic structure review and conclude that the identification of the type and standard of basic structure review with precision renders the language of judicial deference to be of no further assistance and should be abandoned.

**Type of Basic Structure Review**

In the ‘Introduction’ I outlined the types of judicial review jurisdictions enjoyed by the Supreme Court and High Courts in India. These are review for jurisdictional competence of legislative and executive actions and review for compliance with fundamental rights. Besides jurisdictional competence and rights compliance review the courts have continued to develop administrative law review by building on, and at times going beyond, their common law inheritance. The introduction of basic structure review in *Kesavananda* requires the court to articulate whether such review will adopt and mould pre-existing types of review employed by the courts or develop a novel and distinctive model of review. The application of basic structure review has developed independently for each type of state action and I will consider them separately in this part of the chapter.

Where the challenged state action is constitutional amendments or executive action by high constitutional authorities, basic structure review may be the only available model of review. Nevertheless, there has been considerable confusion about whether basic structure review would be integrated with fundamental rights review or administrative law review for these respective state actions. However, where ordinary legislative and executive power is challenged, the presence of other types of judicial review for such actions may result in basic structure review being suitably modified to supplement rather than supplant other types of judicial review. With this general introduction I now examine the application of basic structure review to different forms of state action. The discussion in the rest
of this part of the chapter will consider basic structure review of constitutional amendments, ordinary legislation, and executive action in that order.

**Constitutional Amendments**

In *Kesavananda*, the court developed the constitutional basis of the basic structure doctrine extensively but did not pay much attention to the type and standard of review. While a majority of judges found that the Constitution (25th Amendment) Act, 1971 which inserted Article 31-C into the constitution damaged the basic structure of the constitution, they expressed the basic structure review test in different terms. Sikri concluded that Parliament’s amending power could not ‘completely change the fundamental features of the constitution so as to destroy its identity’.\(^6\) Khanna proposed that the basic structure doctrine limited amending power insofar as it did not ‘include the power to abrogate the Constitution nor does it include the power to alter the basic structure or framework of the Constitution’.\(^7\) Likewise, Hegde and Mukherjea found that the amending power does not include ‘the power to destroy or emasculate the basic elements or the fundamental features of the Constitution’.\(^8\) All three opinions phrase the basic structure test in negative terms as a form of judicial review where the court will determine the outward boundaries of amending power. The opinions describe these boundaries in three ways: first, when a constitutional amendment abrogates the entire constitution; second, when a constitutional amendment damages or destroys a basic feature of the constitution; and third, where the challenged amendment, in Sikri’s words, threatens the very ‘identity’ of the Constitution.\(^9\) As the application of these various tests to the challenged constitutional amendment in *Kesavananda* was not very illuminating it fell to subsequent judgments to clarify the normative force of the doctrine and distinguish it from the other forms of constitutional judicial review.


\(^7\) Ibid., p. 824 (Khanna, J).

\(^8\) Ibid., p. 512 (Hegde and Mukherjea, JJ).

It was in *Indira Gandhi*\(^\text{10}\) that the court applied basic structure review to constitutional amendments and ordinary legislation. As significant disagreements about the type of judicial review that the court should undertake under basic structure review arose in this case, it deserves careful attention. The High Court of Allahabad had found the (then) recently elected prime minister guilty of corrupt election practices under the Representation of People Act, 1951 and disqualified her from public office and from contesting elections for a period of six years. Parliament enacted the Constitution (39th Amendment) Act, 1975 to overcome the decision of the Allahabad High Court using three distinct devices. Article 71 was amended to allow Parliament to regulate the election of the president and vice-president by law, including the grounds on which such an election may be challenged before the courts. A new Article 329-A was introduced which allowed Parliament to enact laws to regulate the election of the prime minister and the speaker to either House of Parliament. Clauses 4 and 5 of Article 329-A provided that all previous laws, pending legal proceedings, including orders passed under such pre-existing laws were void. The third means of overcoming the decision of the Allahabad High Court was to insert the amended Representation of People Act, 1951, the Election Law (Amendment) Act, 1975, and the Representation of People (Amendment) Act, 1974 into the 9th Schedule thereby protecting them from judicial review for violation of fundamental rights.\(^\text{11}\)

Several legal and constitutional issues were raised before the court, but I will confine myself in this section to those arguments related to the application of the basic structure doctrine to review constitutional amendments. It was argued that the basic features affected by the 39th constitutional amendment included the separation of powers, democracy, equality, republicanism, rule of law, and the sanctity of judicial review itself. I am not concerned for the moment with this list of basic features as the problems related to the identification of basic features are dealt with in Chapter 4. In this section I examine why the plural opinions in the *Indira Gandhi* took differing views about the relationship between basic structure review and other

\(^{10}\) *Indira Gandhi*, supra n. 2.

\(^{11}\) Article 31-B read with the 9th Schedule, Constitution of India, 1950.
types of constitutional judicial review and then conclude the section by evaluating the development of these views in subsequent cases.

The majority opinions in Kesavananda had proposed a form of judicial review which had the potential to limit the amending power of Parliament. Two distinct approaches emerge in Indira Gandhi. The first was to construe basic structure review to be an extension of existing models of constitutional judicial review to constitutional amendments. The second approach to develop a novel form of judicial review distinct from existing models of judicial review hitherto applied by the court. I will consider each of these in turn.

**Extension of Article 13 Judicial Review**

In Indira Gandhi, the clearest illustration of the extension of Article 13 judicial review is Chandrachud’s opinion. He assesses whether Clauses (4) of (5) to Article 329-A satisfied the guarantee of equality which he had earlier identified to be a ‘basic postulate of our constitution’.\(^{12}\) He argued that since Anwar Ali Sarkar v. State of West Bengal\(^{13}\) the court has in Article 14 cases investigated whether the classification adopted by the law or executive action was founded on an intelligible differentia which has a rational relation to the object sought to be achieved by such law or action. Applying the same test to the 39th Amendment, he concluded that the differential treatment of the elections to high constitutional office, including that of the prime minister, from elections of other ordinary members of Parliament would fail this rationality standard.\(^{14}\) It is surprising that Chandrachud took the basic structure test to be an extension of the Article 14 doctrine, developed under Article 13 constitutional judicial review of ordinary legislative and executive action, to constitutional amendments. Notably, he did not apply the same model of analysis to determine whether the 39th Amendment destroys other basic features like democracy, judicial review, separation of powers, or the rule of law; as unlike equality, these basic features are not traceable to a single provision of the Constitution around which constitutional doctrine has been developed.

\(^{12}\) *Indira Gandhi*, supra n. 2, p. 2469.

\(^{13}\) AIR 1952 SC 75.

\(^{14}\) *Indira Gandhi*, supra n. 2, p. 2469.
Chandrachud’s inconsistency in *Indira Gandhi* is amplified by his approach to the constitutional validity of the Constitution (42nd Amendment) Act, 1976 in his majority opinion in *Minerva Mills v. Union of India*. The 42nd Amendment introduced Article 31-C which immunized legislation, which advanced directive principles set out in Part IV of the Constitution, from being challenged for violation of Articles 14 and 19 fundamental rights. Reviewing the constitutionality of this amendment, Chandrachud observes:

The answer to this question must necessarily depend on whether Arts 14 and 19, which must now give way to laws passed in order to effectuate the policy of the State towards securing all or any of the principles of Directive Policy, are essential features of the basic structure of the Constitution. It is only if the rights conferred by these two articles are not a part of the basic structure that they can be allowed to be abrogated by a constitutional amendment.

He then found that as Articles 14 and 19 were basic features of the Constitution they had been abrogated by Article 31-C. He concludes that the 42nd Amendment, by giving absolute primacy to the directive principles over fundamental rights, violated the ‘harmony and balance between fundamental rights and directive principles’ which is ‘an essential feature of the basic structure of the Constitution’.

Chandrachud’s opinion in these cases raises two connected issues: first, he identifies the basic structure of the Constitution by isolating important individual provisions which are made immune from amendment. This is an issue related to the identification of basic features considered in Chapter 4. Second, he understands basic structure review to be an assessment of whether the challenged constitutional amendment violates these important provisions of the constitution. This second issue is about the character of basic structure review as Chandrachud extends the court’s existing Article 13 judicial review analysis to constitutional amendments with two additional features. First, basic features may include other provisions of the constitution besides the rights included in Part III which are protected by Article 13 judicial review. Second, the challenged constitutional amendments must damage or destroy the

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16 Ibid., p. 1803 (Chandrachud, CJ).
17 *Minerva Mills*, supra n. 15, p. 1806 (Chandrachud, CJ).
constitutional provision and not merely ‘abridge’ fundamental rights to be declared unconstitutional.

In *R.C. Poudyal v. Union of India*,\(^{18}\) Sharma’s dissenting opinion adopts a similar approach to basic structure review. He enquires into whether the reservation of a legislative seat for the Buddhist Sangha violates ‘Article 15 as also several other provisions of the Constitution; and further whether these constitutional provisions are unalterable by amendment’.\(^{19}\) He then goes on to consider whether the reservation of the seat violates Article 15 which prohibits discrimination on the basis of religion. In both these enquiries, basic structure review enables the court to apply judicial review for human rights compliance under Article 13 to constitutional amendments.

In two recent decisions of the Supreme Court, the conflation of basic structure review and Article 13 fundamental rights review has intensified. In *M. Nagaraj v. Union of India*\(^{20}\) four constitutional amendments which introduced new provisions regarding reservations in public employment were challenged on two basic structure grounds: first, that Parliament had amended the constitution to overcome judicial decisions and hence damaged the basic feature of judicial review and second, that these constitutional amendments which enlarged the scope for reservation damaged the basic feature of equality. While responding to the second challenge, Kapadia, speaking unanimously for the 5-judge bench, suggests that he is conscious of the distinction between equality as a fundamental right and equality as a basic feature of the constitution,\(^{21}\) but he does not apply this distinction to the constitutional validity of these amendments. He proposes that basic structure review is made up of two tests which apply disjunctively: namely, the ‘width test’ and the ‘identity test’.\(^{22}\) The ‘width test’ extends Article 13 judicial review to constitutional amendments for compliance with fundamental rights but such amendments must cause greater damage to rights than other forms of state action under Article 13 judicial review. He concludes that the challenged constitutional amendments are valid as they do not

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\(^{18}\) AIR 1993 SC 1804.

\(^{19}\) *R.C. Poudyal v. Union of India*, AIR 1993 SC 1804.


\(^{21}\) Ibid., pp. 242–6 (Kapadia, J).

\(^{22}\) Ibid., p. 268 (Kapadia, J).
damage the basic structure of the constitution. These amendments do away with ‘the concept of the “catch-up” rule and “consequential seniority” [which] are not constitutional requirements. They are not constitutional limitations. They are concepts derived from service jurisprudence… Obliteration of these concepts or insertion of these concepts does not change the equality code indicated by Articles 14, 15, and 16 of the constitution.” One may infer that where a constitutional amendment obliterates a fundamental rights provision then the constitutional amendment would be unconstitutional under basic structure review.

*I.R. Coelho v. State of Tamil Nadu* is the latest judgment which follows through on this line of reasoning about the type of basic structure review. Article 31-B was inserted into the Constitution by the Constitution (1st Amendment) Act, 1950 to protect Union and State laws from Article 13 fundamental rights review for violation of Articles 14, 19, and 21. To be protected under Article 31-B these laws had to be inserted into the 9th Schedule of the constitution by a constitutional amendment. Although Article 31-B was introduced to protect land reform legislation from judicial review, it eventually cast a protective umbrella over laws covering varied subject matter. As the constitutional amendments inserting laws inserted into the 9th Schedule were challenged on basic structure grounds, ‘the extent and nature of immunity that Article 31-B can validly provide’ was the central issue in the case. Sabharwal, speaking for a unanimous 5-judge bench, concluded that basic structure test would examine ‘the nature and extent of infraction of a Fundamental Right by a statute, sought to be constitutionally protected, and on the touchstone of the basic structure doctrine as reflected in Article 21 read with Article 14 and Article 19 by application of the “rights test” and the “essence of the right” test…’ It is not clear from this passage, or from the rest of the judgment, whether Sabharwal had one or two tests in mind. In any event it is abundantly clear that in either case he is concerned with ‘the actual effect and impact of the law on the rights guaranteed under Part III… for determining whether or

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23 *M. Nagaraj*, supra n. 20, p. 268 (Kapadia, J).
25 Ibid., p. 222 (Sabharwal, CJ).
26 Ibid., p. 240.
not it destroys the basic structure. The impact test would determine the validity of the challenge.\textsuperscript{27}

These recent cases develop Chandrachud’s opinion in \textit{Indira Gandhi} which views basic structure review as a text-based limit on amending power which prevents the abrogation or obliteration of important provisions of the constitution. As all these cases deal with threats to fundamental rights provisions, the court developed basic structure review as an extension of Article 13 fundamental rights review but with the additional requirement of having to show a more intense level of constitutional injury. Before I evaluate the merits of an approach to basic structure review modelled on judicial review for fundamental rights compliance, I will turn to alternative approaches to basic structure review developed in \textit{Indira Gandhi} and other subsequent cases.

\textbf{Independent Substantive Judicial Review}

The court’s application of basic structure review to evaluate the 39th Amendment for damage to the basic features of democracy and judicial review in \textit{Indira Gandhi} is a useful starting point for our investigation into an alternative approach to basic structure review. Chandrachud and Mathew assessed whether the 39th Amendment Act damaged the basic feature of democracy but reached opposite conclusions.\textsuperscript{28} The preliminary task while assessing whether a particular amendment damages the basic feature of democracy is to work out what the constitutional principle of democracy requires in the particular context which the constitutional amendment operates. To do this the court must ascertain how the constitution entrenches the principles of democracy and its political practice in India and distinguish it from the various versions adopted by different countries.\textsuperscript{29} Neither opinion sought to identify an abstract set of principles which constitute the core of the concept of democracy and instead confined themselves to the principles of democracy adopted by the Constitution. They equated democracy as set out in the Constitution with the ‘representation of the people in Parliament

\textsuperscript{27} I.R. Coelho, supra n. 24, pp. 239–40 (Sabharwal, CJ).

\textsuperscript{28} Ray took the view that democracy did not count as one of the basic features of the constitution: \textit{Indira Gandhi}, supra n. 2, p. 2320.

\textsuperscript{29} \textit{Indira Gandhi}, supra n. 2, p. 2467 (Chandrachud, J).
and State Legislature by the method of election’.

That such an election should be free and fair follows from the principles of democracy as adopted in the Constitution. The 39th Amendment Act was tested against this derived principle of free and fair election.

Mathew found that a commitment to the principle of free and fair elections entailed that all election disputes were to be resolved in a judicial manner. As the 39th Amendment gave Parliament the power to resolve election disputes, he concluded that this damaged the principle of free and fair elections and in turn the basic feature of democracy. Chandrachud took a different view. He accepted that democracy was a basic feature and that free and fair elections are an essential requirement of democracy. However, he reasoned that the 39th Amendment did not ‘destroy the democratic structure of the government’ as even after the amendment the rule is ‘still the rule of the majority’ and the amendment has ‘not abrogated the electoral process’. Chandrachud explained that it was ‘hard to generalize from a single instance that such an isolated act of immunity has destroyed or threatens to destroy the democratic framework of our government. One swallow does not make a summer.’ Mathew and Chandrachud use a similar model of basic structure review of constitutional amendments for compliance with constitutional principles or basic features—as distinguished from constitutional provisions—but their application of different standards of review leads them to different conclusions.

Bhagwati’s opinion in *Minerva Mills v. Union of India* develops the distinctive character of basic structure review in a sharper fashion. He carefully analyses the opinions in *Kesavananda* and *Indira Gandhi* and points out that the majority holdings in these cases show that ‘fundamental rights are not part of the basic structure of the constitution and therefore…they could be abrogated or taken away by Parliament by an amendment under Article 368’.

30 Ibid., p. 2372 (Mathew, J).
31 Ibid., pp. 2373–4.
32 Ibid., p. 2468 (Chandrachud, J).
33 *Indira Gandhi*, supra n. 2.
34 Ibid.
35 AIR 1980 SC 1789 (Bhagwati, J) p. 1811.
36 *Minerva Mills*, supra n. 15, p. 1818 (Bhagwati, J).
I argue in Chapter 4 that fundamental rights should be considered while identifying basic features of the constitution, I am concerned in this section with Bhagwati’s clear articulation of a version of basic structure review which is distinct from Article 13 judicial review for violation of fundamental rights. This distinction is borne out in his analysis of the challenge to the constitutionality of Article 31-C.

Article 31-C provides that legislation giving effect to the equitable redistribution of the material resources of society, a principle set out in Article 39 (b) and (c), was not to be declared unconstitutional on the grounds that it violated Articles 14 and 19. As Article 31-C grants ‘primacy to Directive Principles over Fundamental Rights in case of conflict between them’ the question posed is whether the constitutional amendments which inserted Article 31-C into the constitution would damage or destroy the basic structure of the constitution. He proceeds to answer this question by tracing the drafting history of these two parts of the Constitution in great detail and concludes that ‘socio-economic rights embodied in the Directive Principles are as much a part of human rights as the Fundamental Rights’. Hence he argues that the ‘amendment in Article 31-C far from damaging the basic structure of the Constitution strengthens and reinforces it’. Interestingly, he distinguishes between ‘equality before the law in the narrow and formalistic sense’ in Article 14 and the egalitarian principle which is an ‘essential element of social and economic justice’ sought to be achieved by the Directive Principles. Basic structure review for Bhagwati required the courts to apply the equality principles and not the constitutional doctrine developed by the court interpreting Article 14.

Bhagwati’s analysis in Minerva Mills clearly distinguishes between Article 13 fundamental rights judicial review and basic structure review. When a court engages in basic structure review it is not interested in whether fundamental rights in the constitution are affected even where the basic feature which is the ground for the constitutional challenge is expressed in the constitution in fundamental rights terms. The court

37 Minerva Mills, supra n. 15, pp. 1842–3 (Bhagwati, J).
38 Ibid., pp. 1842–53 (Bhagwati, J).
39 Ibid., p. 1845 (Bhagwati, J).
40 Ibid., p. 1847 (Bhagwati, J).
41 Ibid.
must evaluate whether the challenged amendments damage the basic features to the extent that it can be claimed that the constitutional identity has been irrevocably altered. Put this way, basic structure review is a novel and independent model of judicial review where the courts engage in a substantive analysis of whether the challenged constitutional amendments damage or destroy the basic structure of the Constitution. In the rest of this section, I will carefully unpack the character of this substantive review of compliance with basic features as it has developed in subsequent cases.

The substantive character of basic structure review requires potentially wide-ranging types of analyses. Bhagwati’s approach in *Minerva Mills* opens up three lines of enquiry: first, whether the policy objectives sought to be achieved by the challenged constitutional amendment damages basic features of the constitution; second, the proposed constitutional amendments may be subjected to a historical analysis to assess if they are compatible with the intentions of the framers of the constitution; third, we examine if the challenged amendments may be reconciled with the basic features of the constitution in a principled fashion so that the identity of the constitution remains intact. I look to each of these in turn.

In *Indira Gandhi* substantive review for the wisdom of the policy choices made by the legislature was rejected as the appropriate model basic structure review of constitutional amendments. Beg, responding to the argument that disputes surrounding the election of a private individual could not be the appropriate subject matter for constitutional amendments observed: ‘The subject-matter of constitutional amendments is a question of high policy and Courts are concerned with the implementation of laws, not with the wisdom of the policy underlying them’. By circumscribing the range of analysis appropriate to basic structure review the court signals a critical self-imposed limit on this model of review. In *Kihoto Hollohan v. Zachilhu*, Venkatachaliah speaking for the majority endorsed the view that where there ‘is the legislative determination through experimental constitutional processes to combat’ the ‘legislatively

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42 *Indira Gandhi*, supra n. 2, (Beg, J) 2464.
44 Ibid., p. 679 (Venkatachaliah, J).
perceived political evil of unprincipled defections induced by the lure of office and monetary inducements’ the court is not required to assess the ‘plus and minus of all areas of experimental legislation’ and must distinguish between what is constitutionally permissible and what is outside’. Having categorically ruled out a substantive policy analysis as the thrust of basic structure review, I will now proceed to consider how the court should assess compatibility with basic features.

The second method of substantive basic structure review is the historical method. This distinctive method of applying basic structure review was developed by Chandrachud in *Waman Rao* and *Minerva Mills*. In *Waman Rao* Articles 31-A, 31-B, and 31-C which had been introduced to advance the land reform programmes were challenged as violations of the basic structure of the Constitution. He observed that these ‘questions have a historical slant and content: and history can furnish a safe and certain clue to their answer’.

He then went on to review the legislative history of the Constitution (1st Amendment) Act, 1950 and noted that: ‘Looking back over the past thirty years of constitutional history of our country, we as lawyers and Judges, must endorse the claim made…that if Article 31-A were not enacted, some of the main purposes of the Constitution would have been delayed and eventually defeated …’. Despite this heavy reliance on political history, he also advanced an independent justification for the amendments as implementing the constitutional purposes as outlined in Article 39(b) and (c), namely ‘that the ownership and control of the material resources of the community are so distributed as best to subserve the common good’. This historical mode of assessing compatibility with basic features adopts a crude form of ‘originalism’. The court first seeks to establish the framer’s intentions with respect to the particular provisions being amended or constitutional objectives more generally. Then the court may analyse whether the challenged amendment was in accordance with such intentions.

46 Ibid.
47 AIR 1981 SC 271 (Chandrachud, CJ) 280.
48 *Waman Rao*, supra n. 48 (Chandrachud, CJ) 283.
49 Ibid., p. 284.
However, at other points in his judgment, Chandrachud criticizes the historical approach and observes that ‘conscious as we are that … extraneous aids to constitutional interpretation are permissible the views of the mover of a Bill are not conclusive on the question of its objects and purposes, we will consider for ourselves the question, independently…” 50 Further, one may add that the observations above, though strictly about the intentions of the framers of a constitutional amendment, apply equally to the intentions of the framers of the Constitution. Perhaps these intentions may be relevant insofar as they clarify the historical contexts which give rise to the general normative principles adopted by the freedom movement and thereafter enshrined in the Constitution. In this sense, the task of basic structure review requires the court to review the political history of the Constitution and identify the normative commitments therein, while paying careful attention to the particular form of their adoption in the Constitutional text. Thereafter, one has to evaluate whether the challenged constitutional amendments damage or destroy these constitutional principles embodied in the provisions of the constitution.

The role of historical analysis in basic structure review came to be settled further in Ganpatrao. Articles 291, 362, and 366(22) were omitted by the Constitution (26th Amendment) Act, 1971. The effect of these amendments was to do away with the privy purses and privileges granted to the former Indian Rulers of the pre-Independence princely states. The articles which were omitted by this constitutional amendment had inserted into the constitution the terms and conditions of the pre-constitutional Instruments of Accession, the Merger Agreements, and the covenants entered into by the Indian Union with the rulers of the princely states. The petitioners argued that these amended provisions were as a matter of historical fact the political basis for the integration of the princely states and the formation of the Indian Union. In that sense, these constitutional provisions were, as a matter of political history, ‘integral’ and basic to the constitution and their removal destroyed the basic structure of the constitution.

Ratnavel Pandian, speaking for a majority in this case, rejected such a political–historical approach to basic structure review in

50 Chandrachud on use of history.
favour of an alternate ‘socio-economic and political philosophy’\(^{51}\) perspective. He concluded that the amendment being challenged was compatible with the sovereign and republican forms of government adopted by the Constitution and advanced the egalitarian principles in the Constitution. Therefore the fact that the provisions omitted were crucial to the political arrangement which formed the Union as a historical matter was not decisive in basic structure review in this case. Basic structure review sought to ensure compatibility and coherence of constitutional amendments with constitutional principles. Basic structure review in this sense is a form of substantive review which seeks to preserve the normative identity of the constitution by ensuring that amendments do not make ‘any change in the personality of the constitution either in its scheme or in its basic features’\(^{52}\).

At this point I may summarise the discussion on the type of review. The alternative to a version of basic structure review which is an extension of Article 13 fundamental rights judicial review is an independent substantive judicial review that evaluates whether constitutional amendments damage or destroy overarching constitutional principles central to the identity of the constitution. The court may analyse the policy objectives or historical background of the challenged constitutional amendments or the constitutional provisions sought to be amended but the overriding concern in basic structure review is to preserve the integrity of the constitution as a statement of key constitutional principles. This ‘identity test’ has been reaffirmed in slightly different ways in several opinions\(^{53}\) on the basic structure doctrine. By confining the courts to arguments of constitutional principle this model gives basic structure review a clear focus.

**Conclusion**

In the section above, the contrasting versions of basic structure review advanced by the courts was discussed. I argue that the


\(^{52}\) Ganpatrao, supra n. 49, p. 1291.

character and type of basic structure review is best conceived as an independent and novel form of judicial review which seeks to protect a body of core constitutional principles central to our constitutional identity for the following reasons. Firstly, the extension of existing Article 13 fundamental rights judicial review to constitutional amendments is a legal proposition which was accepted in *Golaknath* and expressly overruled in *Kesavananda*. The reintroduction of rights-based review to constitutional amendments as an element of basic structure review subverts the holding of the court in *Kesavananda* which is binding on all subsequent cases.

Secondly, such an approach misunderstands the character and type of review necessary for the doctrine of judicial review to impose substantive limits on the amending power of the constitution. The discussion of *Golaknath* in Chapter 2 illustrates the futility of imposing text-based limits on the amending power as such limitations are easily overcome by Parliament. For example, in *Minerva Mills* the court was confronted with the Constitution (42nd Amendment) Act, 1976 which sought to amend Article 368 and conferred unlimited constituent power on Parliament and excluded judicial review of constitutional amendments. This amendment sought to displace the textual basis for the *Keshavananda* opinion. Any useful model of judicial review of constitutional amendments has to necessarily be for compliance with substantive constitutional principles traceable to the constitution, taken as a coherent whole, and not tied to the particular phrasing of any article.

Finally, the conflation of Article 13 fundamental rights judicial review with basic structure review invariably results in the mistaken identification of basic features with constitutional provisions, and more particularly with fundamental rights in the constitution. Arguably as I will show in Chapter 4, no basic feature of the constitution is embodied in a single article of the constitution. For example, the idea of equality finds expression in Articles 14, 15, 16, 17, 18, 25–8, besides the Preamble to the Constitution. It is not clear whether an amendment which violates the basic feature of equality should satisfy some or all of these articles. Arguably the amendment may omit or modify some of these articles and still satisfy basic structure review as it may preserve the constitutional principle of equality in some other textual format. Hence, a model of basic structure review which is focussed on the text of the constitution will
fail to preserve constitutional principles as it is both under inclusive and over inclusive in its scope of protection.

In this section I have advanced an independent substantive model of basic structure review as an approach which will overcome these defects and successfully review challenged constitutional amendments for compliance with constitutional principles. Like Article 13 fundamental rights judicial review, this independent model of review imposes substantive limits on the scope of constitutional amendment. However, these limits or basic features are identified as constitutional principles which are distinct from the constitutional provisions which embody these principles. Moreover, as a legitimate form of basic structure review must mark out the distinction between ordinary democratic law making and higher level democratic law making, it must rightly identify the different limits on these two forms of law making. Only an independent model of basic structure review which ensures that constitutional amendments do not destroy core constitutional principles can fulfil this requirement.

Executive Power

The Governor is a functionary under the Constitution and is sworn to ‘preserve, protect and defend the Constitution and the laws’. The Governor cannot, in the exercise of his discretion or otherwise, do anything that is contrary to the Constitution and law…

We had noted in Chapter 2 that basic structure review of executive power includes the review of two types of executive power: ordinary executive power exercised by the Union and State governments and executive power exercised by high constitutional authorities like the President of the Union and the Governors of states. This distinction relies on the different phrasing of constitutional provisions authorizing these powers. The court has applied this distinction in administrative law review and basic structure review. The categorization of executive power into lower and higher executive power allows the court to limit the scope of administrative law review to lower executive power and exempt higher executive power from the full rigours of such review. This distinction mirrors

54 Compare Chapter 5.
the English administrative law review to statutory executive power and prerogative powers such as power to grant mercy and the power to select a Prime Minister where there is no clear majority in the House. For the purposes of this section the distinction is relevant insofar as the court articulates a different approach to basic structure review to each type of executive power.

The key issue in cases where executive action is challenged on basic structure grounds is to identify the type and character of review that the court should employ. Bharucha’s observation excerpted above indicates that the court will use basic structure review, as is the case with the review of constitutional amendments, to impose substantive limits on the exercise of executive power. However, the court has on other occasions found it difficult to accommodate basic structure review with conventional models of administrative law review on the one hand and with rights compliance and jurisdictional competence review of administrative action on the other. Therefore, in the rest of this section I will consider each of these problems for the application of basic structure review to the review of executive action, at each point paying attention to the type of executive power being reviewed and the constitutional provisions authorizing that power.

**Executive Action by High Constitutional Authorities**

Although administrative law judicial review of executive action has not been expressly provided for in the constitution, in the last five decades the High Courts and Supreme Court have woven this into their interpretation of several constitutional provisions. The rights to equality and life in Articles 14 and 21 together with the powers of judicial review in Articles 32, 226, and 142 have carried much of this interpretive burden. The first issue to be resolved by the court is whether its rather well developed administrative law doctrine of judicial review should apply with full force to executive action by ‘high constitutional authorities’. Next, the court has to analyse whether basic structure review should apply to such actions and if so, whether it will be accommodated within administrative law review or operate as an independent type of substantive review.

In the early cases where executive proclamations of emergencies were challenged, objections were raised against the extension of administrative law review doctrine to executive action by ‘high
constitutional authorities’. In these cases the court articulated a limited basis for judicial review of such action which was reiterated by Bhagwati in *Minerva Mills* where a proclamation of national emergency was challenged in these words:

A Proclamation of Emergency is undoubtedly amenable to judicial review though on the limited ground that no satisfaction as required by Art. 352 was arrived at by the President in law or that the satisfaction was absurd or perverse or mala fide or based on an extraneous or irrelevant ground.

Although Bhagwati did not consider whether basic structure review could apply to the exercise of the executive power of proclamation, he did apply it to read down Clause 5 of Article 352 introduced by the Constitution (38th Amendment) Act, 1975 which sought to exclude judicial review of the proclamation by declaring the Proclamation to be final and conclusive. He applied basic structure review and also preserved two grounds of administrative law review—the *mala fides* and irrelevant considerations—to review executive action by high constitutional authorities.

In *S.R. Bommai v. Union of India* the court considered the extent to which basic structure review and administrative law review should apply to proclamations of regional emergency. The Union of India proposed that the scope of judicial review in constitutional law is limited to cases where there is an infringement of rights or a transgression of the scheme of division of power between the three branches of government. It was argued that it was a mistake to extend the rules and principles in the field of administrative law where the court reviews the action of public authorities to prevent excesses and irregular exercise of executive power under constitutional law judicial review.

This broad and incisive argument invited the court to locate and develop a coherent framework for judicial review of executive action by high constitutional authorities. The plurality opinions in the case endorsed the limited application of common law judicial review articulated in the early cases discussed above. Sawant’s lead

57 *Minerva Mills*, supra n. 15, p. 1839 (Bhagwati, J).
58 *S.R. Bommai v. Union of India*, AIR 1994 SC 1918 (Verma, J). In a brief concurring opinion Verma equates the scope of judicial review of executive
opinion distinguished between the nature and scope of the power of judicial review in administrative law and constitutional law. He found the argument that administrative law review had no place in the review of constitutionally conferred executive power ‘too broad to be accepted’ and concluded that ‘many of the parameters of judicial review developed in the field of administrative law are not antithetical to the field of constitutional law, and they could equally apply to the domain covered by the constitutional law’.\(^{59}\) He reasoned that where the constitution provides preconditions for the exercise of power by constitutional authorities or identifies the purposes for which a power is entrusted to such authorities, the court should exercise power to ensure that these conditions are satisfied and improper purposes avoided. He relied on the court’s role as the guardian and ultimate interpreter of the constitution in support of these conclusions. The challenge before Sawant was to articulate the role of basic structure review in this context where administrative law review of executive proclamations of emergency also applies.

Basic structure review, which had already been applied to constitutional amendments, could potentially be re-formulated to apply to the judicial review of executive action. Sawant seems to embrace such a possibility when he notes that ‘provisions such as Article 356 have a potentiality to unsettle and subvert the entire constitutional scheme’.\(^{60}\) He is aware that the ‘exercise of power vested under such provisions needs … to be circumscribed to maintain the fundamental constitutional balance lest the Constitution is defaced and destroyed’\(^{61}\) and recognizes the need to ‘scrutinize the material on the basis of which advise is given and the President forms his satisfaction’\(^{62}\) to ensure that basic features are preserved. Surprisingly these observations do not lead him to the conclusion that basic structure review should hereafter apply to executive action of this sort and instead he concludes that this ‘can be done by the courts while

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\(^{59}\) Ibid., p. 1963 (Sawant, J).

\(^{60}\) Bommai, supra n. 57, p. 1976.

\(^{61}\) Ibid.

\(^{62}\) Ibid.
confining themselves to the acknowledged parameters of the judicial review ... illegality, irrationality, and mala fides.’63

His effort to accommodate basic structure review by modifying administrative law review rather than supplementing it with an independent substantive model of review is similar to the development of basic structure review with respect to amendments as traced in the section above. While reviewing the existing models of constitutional judicial review, Sawant fails to account for basic structure review as an independent substantive model of judicial review distinct from competence and fundamental rights compliance review. This failure to appreciate the distinctive type and character of basic structure review prompted him to accommodate basic structure concerns by grafting these on to existing administrative law grounds of review. Moreover, he seems to be concerned that the ‘scrutiny of the material …’ should ‘be within the judicially discoverable and manageable standards’.64

As there is no further case law on basic structure review of executive action by high constitutional authorities, it is still not settled whether such a modified administrative law review model will persist or whether basic structure review will emerge as an independent substantive model of review. This is an argument that I will return to below after discussing how basic structure review has developed vis-à-vis other forms of executive action.

**Ordinary Executive Action**

Basic structure review of executive powers has developed more rapidly in cases unrelated to the proclamation of emergency. These include cases where executive power is conferred by statute or directly by constitutional provisions. In the section above I noted that constitutionally conferred executive powers should properly belong to the category of executive action by ‘high constitutional authorities’.

However, for no clear reason, the Supreme Court has treated these categories of executive power as being distinct and of different status. I observed that the distinction between ordinary executive action and executive action by high constitutional authorities may be

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63 Ibid.

64 *Bommai*, supra n. 57, p. 1976.
based on two criteria: first, the source of executive power and second, the extent of judicial review of the power. Neither criterion supports a further distinction between executive power exercised by higher constitutional authorities and constitutional executive power.

However, the application of administrative law review and constitutional judicial review for competence and fundamental rights compliance to ordinary executive power, but a lesser level of judicial review to other types of constitutional executive power generates an unsustainable distinction between these types of executive power. On closer scrutiny I find that the court does not deal consistently with the latter executive action by constitutional authorities as it has been reluctant to apply constitutional judicial review and administrative law review to executive proclamations of emergency but has applied such review with full rigour to other forms of constitutional executive action. For the purposes of this section I will ignore this inconsistency in the court’s approach to constitutional executive action, and discuss the recent cases on constitutional executive action and ordinary executive action together in this section. I will begin with a recent case on the exercise of a constitutional executive power before I turn to cases involving the review of ordinary executive power.

In *B.R. Kapur v. State of Tamil Nadu* the court was called on to determine whether a person who is not elected to the legislature and has been convicted of a criminal offence, but whose conviction has not been suspended on appeal, may be sworn in and continue to function as the chief minister of a state. Article 164(1) provides that the ‘Chief Minister shall be appointed by the Governor.’ and provides for a non-legislator to be appointed chief minister provided she gets herself elected to the legislature in a period of six months. Article 173 which provides for the qualifications and disqualifications for membership in any State legislature set out in clause (c) that Parliament may by law ‘prescribe other qualifications as it deems fit’. The Representation of Peoples Act, 1950 is law made under Article 173 prescribing qualifications and it provides that those convicted of the offences listed in the statute and other corrupt practices are disqualified from membership of any legislature.

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65 AIR 2001 SC 3435.
66 Article 164(1).
The petitioners argued that the Governor had exceeded his discretion by inviting a person who is convicted of a criminal offence to be chief minister and pressed the court to issue a direction in the nature of a writ of quo warranto against the chief minister. Two key arguments were raised in this case: first, whether the discretion of the Governor under Article 164 was limited by the other provisions of the constitution and second, whether it is constitutionally impermissible for the court to judicially review the governor’s action in appointing a chief minister who had secured an overwhelming popular mandate.

Bharucha relied on the holdings in *Keshavananda* and *Minerva Mills* and concluded: ‘Nothing can better demonstrate that it is permissible for the Court to read limitations into the Constitution based on its language and scheme and its basic structure.’ He found that the Governor’s discretion to appoint a chief minister under Article 164 should be understood in the context of his role as a functionary under the constitution and observed that the ‘Constitution prevailed over the will of the people as expressed through the majority party… The Governor is a functionary under the Constitution and is sworn to preserve, protect, and defend the Constitution and the laws.’ These obligations which arose out of his constitutional role meant that the Court could judicially review the Governor’s action as the ‘Governor cannot, in the exercise of his discretion or otherwise, do anything that is contrary to the Constitution and the laws…’. In the instant case, Bharucha concluded that the Governor had overstepped his discretion under the relevant constitutional provisions and laws in appointing as Chief Minister a person who was otherwise disqualified, to be a legislator.

In *B.R. Kapur* the court developed the doctrine of basic structure review to apply to executive action independently of administrative law review. Where two interpretations of Article 164 were possible, one which accommodated the basic structure of the Constitution and another which did not, the court emphatically chose the former. Thereby, basic structure review imposes substantive limits on the ways

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67 *B.R. Kapur*, supra n. 64 (Bharucha, J) 2449.
68 Ibid., p. 3455.
69 *B.R. Kapur*, supra n. 64, p. 3455 (Bharucha, J).
in which executive discretion was exercised. Unfortunately Bharucha did not articulate the basic features at stake in this case and provide reasons why they support his conclusion in the case. He could have reasoned that ‘democracy’ which has repeatedly been articulated as a basic feature of the Constitution, would require a representative government led by qualified and properly elected leaders, which the Governor’s action failed to uphold.

Now I examine how the court accommodates basic structure review with administrative law review of ordinary executive action. Three recent cases have provided the court with an opportunity to develop the type and character of such review to ordinary executive action. As the court already possesses the power of administrative law review under common law doctrine and competence and fundamental rights compliance review under the constitution over such executive action I need to clarify the need for basic structure review and ascertain whether it performs a different function. In all three cases considered below, the basic feature of ‘secularism’ was invoked in support of, or to challenge, the executive action but in slightly different ways.

In Aruna Roy v. Union of India\footnote{Aruna Roy v. Union of India, AIR 2002 Supreme Court 3176.} and P.M. Bhargava v. University Grants Commission,\footnote{(2004) 6 SCC 661.} changes to education curriculum and policy were challenged using administrative law review and basic structure review grounds. I will examine each case in turn. In Aruna Roy, the National Curriculum for School Education published by the National Council of Education, Research and Technology was challenged for being anti-secular and for not following the established practice of consultation with an interstate body called the Central Advisory Board of Education. The Central Advisory Board of Education is a non-statutory board constituted by resolutions of the Ministry of Human Resource Development which supervises education policy. Despite its expertise in education policy and its significant role as a body aiding centre–state coordination of education policy there was little evidence of a legal requirement for such prior consultation. Surprisingly, no argument relying on a procedurally legitimate expectation to consult the Board was raised in this case. The court con-
cludes that while consultation was a good process to follow it was not essential for the formulation of policy and that it would not strike down the education policy for the failure to consult.72

The second challenge to the new National Curriculum was on the ground that it was anti-secular and therefore failed fundamental rights review and basic structure review. The petitioners argued that the inclusion of Hindu religious values into the school curriculum under the rubric of value-based education offended the right to freedom of speech and information,73 the right to education,74 and the constitutional prohibitions against religious instruction or religious worship in state-aided educational institutions.75 Besides these fundamental rights violations, it was argued that the executive orders implementing this modified curriculum damaged the constitutional principle of secularism, which is a part of the basic structure of the constitution.

The lead majority opinion by Shah, as well as the concurring opinions by Dharmadhikari and Sema, failed to distinguish the two different types of judicial review in this case. The opinions focused on the Article 28 bar on religious instruction in institutions maintained wholly out of state funds and the case law on this provision concluding that there was a distinction between religious education and instruction ‘inculcating the tenets, the rituals, the observances, ceremonies, and modes of worship of a particular sect or denomination’76 and education about religions as ‘an academic or philosophical study’.77 While the latter form of value-based education was constitutionally permissible, the former was not.

If the constitutional challenge to the new curriculum could be decided on an interpretation of Article 28 alone, the references to ‘secularism’ as a part of the basic structure of the Constitution were redundant or superfluous. Shah’s lead opinion takes the Indian constitutional principle of secularism to require the state to be neutral

72 Aruna Roy, supra n. 69, p. 3184 (Shah, J).
73 Constitution of India, Article 19(1)(a).
74 Unnikrishnan v. State of Andhra Pradesh AIR 1993 SC 2178 held that the right to education was a part of Article 21 Constitution of India 1950.
75 Constitution of India, Article 28.
76 Aruna Roy, supra n. 70, p. 3186 (Shah, J).
77 Ibid.
in matters of religion and its tolerance of religious practice does not make it a religious or theocratic state. This distinction between secularism in the Indian constitutional tradition and other constitutional traditions has been explored rigorously elsewhere and is not the central issue in this section.\textsuperscript{78} Shah goes on to enunciate the requirements of secularism using almost exclusively Hindu religious sources and idiom. He drew support from the S.B. Chavan report on which the Union government claimed the curriculum revision was based, which itself endorsed value-based education using language that was almost exclusively reliant on Hindu scriptures. Dharmadhikari draws on a more diverse range of religious resources in support of the proposition that religious pluralism was at the heart of the principle of secularism and that any curriculum devised must respect these constitutional principles. Neither opinion articulates whether basic structure review would operate independently of judicial review for compliance with the fundamental right in Article 28. Hence it is difficult to decipher the impact of the lengthy discussions on secularism as a basic feature on the outcome in this case. I will now turn to other recent basic structure challenges to executive action to examine whether they develop a better response to this issue.

In \textit{P.M. Bhargava v. Union of India},\textsuperscript{79} the petitioner approached the Supreme Court to issue a writ of mandamus directing the University Grants Commission not to start, or grant any funds for, Graduate and Post-Graduate Courses in ‘Jyotir Vigyan’ or Vedic astrology. Petitioners argued that the course in Vedic astrology cannot be termed as a course of scientific study as astrology had never practised the rigours of scientific method or engaged serious scientific research. It was also argued that the proposal to ‘introduce Jyotir Vigyan is a clear attempt on the part of the respondents to saffronize education and of thrusting their hidden agenda of imposing Hindu values in higher education’.\textsuperscript{80} This is the argument I am concerned with in this section.

As the petitioners did not allege the ‘breach of any statutory provision, rule, or regulation’, G.P. Mathur concluded that it was

\textsuperscript{78} G.J. Jacobsohn, \textit{The Wheel of Law}, New Delhi, Oxford University Press, 2003, pp. 91–119.

\textsuperscript{79} \textit{P.M. Bhargava v. Union of India}, 2004 (6) SCC 661.

\textsuperscript{80} \textit{P.M. Bhargava}, supra n. 79.
imprudent for the court to interfere in a policy arena where the ‘decision to start the course has been taken by an expert body… The courts are not expert in academic matters and it is not for them to decide as to what course should be taught in university and what should be their curriculum.’ This conclusion is plausible if the court was only applying common law rules and principles in administrative law review. However, when the petitioners ‘urged that the attempt of the respondents to introduce courses of Vedic astrology in the universities is malafide and it amounts to saffronizing education’ which offends the principle of secularism which ‘is part of the basic structure of the Constitution and is essential for the governance of the country’ the court was no longer confronted with an administrative law review challenge.

This is the first case in which basic structure review has been clearly identified as providing a basis for the substantive review of ordinary executive action in such a clear manner. As the executive action challenged in the case satisfies constitutional judicial review for fundamental rights compliance and competence and as the petitioners were unable to establish a serious common law administrative challenge, basic structure review comes to the forefront. The court responded to this challenge in a tepid fashion. While it did acknowledge that basic structure review of executive action is possible, it concluded that the executive action did not damage secularism as the judges did not agree with the petitioner’s argument that Vedic astrology is ‘something peculiar to Hindus and associated with Hindu religion.’ The weaknesses in the court’s conclusions are not confined to its sociological analysis of Vedic astrology but extend to its application of basic structure review.

Critically, the court did not articulate the type of substantive analysis or the extent of damage that such executive action must inflict before it is struck down under basic structure review. A fuller response would require that the courts elaborate what the basic feature of secularism requires of state policy in the funding and establishment of new courses by state-funded and supported institutions.

81 Ibid., (G.P. Mathur, J)
82 Ibid.
83 Ibid.
84 P.M. Bhargava, supra n. 78.
I noted in our discussions of *Aruna Roy* above that the Indian constitution embodied a constitutional principle of secularism that did not mandate a church–state separation but required principled distance from all religions. The court may well have instructed the University Grants Commission to introduce astrology into higher education curriculum only if it drew on the plural religious and cultural approaches to the subject of astrology and does not embrace a Hindu worldview. This may not have satisfied the petitioners who argued that astrology should be dropped altogether as it was a pseudo science, but it would have kept the executive action within the framework of the basic features of the Constitution.

The third and final case I will consider in this section is *State of Karnataka v. Thogadia*\(^85\) where the Additional District Magistrate of Dakshina Kannada district in the State of Karnataka barred the respondent from taking part in any public meeting in the district for a period of 15 days. This order under section 144 of the Criminal Procedure Code, 1975 was made on the grounds that the respondent had on previous occasions made communally provocative speeches and incited violence and that the district had become communally sensitive with a history of communal clashes starting from 1988 resulting in several deaths and damage to public and private properties. Two arguments were made against this action: first, that the Additional District Magistrate was not empowered to make such an order and second, that the respondent was merely engaging in political debates of national importance and hence that the order was politically motivated and bad in law. The court dismissed the first contention easily and spent some time on the latter issue.

Arijit Pasayat speaking for the court ruled that given the antecedents of the respondent the order was justified. He observed that ‘whenever the concerned authorities in charge of law and order find that a person’s speeches or actions are likely to trigger communal antagonism and hatred resulting in fissiparous tendencies gaining foothold undermining and affecting communal harmony, prohibitory orders need necessarily to be passed, to effectively avert such untoward happenings’.\(^86\) This conclusion was supported

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86 Ibid., (A. Pasayat, J).
by an elaborate discussion on the principles of secularism as a basic feature of the Constitution. Pasayat did not clarify how basic structure review may impact on the legality of the executive action to issue prohibitory orders under section 144. Though in this case the executive action drew support from the principles of secularism, one may easily anticipate that the refusal to take preventive measures against communal violence may damage the principles of secularism and for this reason executive action may fail basic structure review. In order to work out precisely how basic structure review would operate as a substantive review on ordinary action we need to examine the standards of review that the court should apply. This is considered in the section below in our discussion on the intensity of review.

So far in this section, I have considered the varied circumstances in which basic structure review has been applied to executive action. The court’s distinction between executive action by high constitutional authorities and ordinary executive action is designed to restrict the scope and intensity of review of these actions under common law administrative review grounds. This distinction is neither well supported by constitutional argument nor consistently applied in the case law. In B.R. Kapur, the Governor’s invitation to the leader of the majority party to be chief minister was an executive action by the highest officer in a State using powers granted under Article 164. If the distinction developed by the court pays attention to the source of the power—constitutional or statutory—or whether the power is historically regarded as a prerogative power to be exercised independently by the Governor, an invitation to form the government should be classified as one by a high constitutional authority. Arguably, the distinction has a sound basis if it distinguishes between constitutionally conferred and statutorily conferred executive power, but the court erred in B.R. Kapur in not applying the distinction consistently. This classificatory dispute on the type of executive action does have a direct bearing on the applicability of basic structure review to executive power if basic structure review applies differently to each type of executive action. However, if basic structure review is to apply as an independent substantive limit on the exercise of executive power, there is no need for a distinction based on the source of executive power.
I had noted in Chapter 2 that the court has failed to articulate a sound constitutional basis for the extension of basic structure review to executive power. In this section I show that the court has been unable to clarify the type and extent of basic structure review of executive action. A first step would be to establish how basic structure review relates to common law administrative review. In *Bommai* the court grafted basic structure review onto pre-existing common law administrative review by using basic features of secularism and democracy to circumscribe the proper purposes to which executive action may be directed. So in this case, administrative law review of executive action is modified to accommodate basic features of the constitution into pre-existing grounds of review, particularly illegality. In *B.R. Kapur* the court tentatively set out an independent and significant role for basic structure review by suggesting that basic features may impose substantive limits on the exercise of executive discretion. In this case basic structure review operates as an independent substantive review to ensure that executive action does not damage or destroy basic features of the constitution. If applied in this manner, the type of review carried out under basic structure review of executive action would be similar to that of constitutional amendments discussed in the earlier section.

However, this type of basic structure review has been poorly developed in subsequent cases reviewing ordinary executive action where the court considered the applicability of basic structure review in this fashion. In none of the cases discussed in this part has the court gone so far as to strike down executive action on the grounds of damaging and destroying the basic structure of the constitution. This is maybe, in part due to the facts and circumstances of the cases brought before the court. Moreover, the court has failed to develop the contours of a substantive model of review with a nuanced standard of review which pays attention to the subject matter of the executive action and the intensity of review. In the next part of this chapter I consider the arguments relevant to the development of the appropriate intensity for basic structure review to operate as an independent model of substantive review for all types of state action. But first, I consider the application of basic structure review to legislation in the next section.
Legislative Power

In most cases where legislation is challenged on basic structure review grounds, this challenge is often intricately intertwined with challenges to executive action sanctioned by such legislation or constitutional amendments which cast a protective umbrella over such legislation. Hence, it is not always possible to state with precision the type and force of the basic structure challenge to legislation in such cases. In the discussion below I will examine the possibility and utility of basic structure review of legislation. As the courts apply fundamental rights compliance and competence judicial review to ordinary legislation, I have to ascertain whether basic structure review plays any useful role with respect to such state action. This section will show that basic structure review plays a very useful role in grounding challenges to the constitutional validity of legislation which clearly damage basic features of the constitution, but satisfy other doctrines of judicial review.

In early cases like *Indira Gandhi*, *Waman Rao*, and *Minerva Mills*, the challenged legislations were protected under the rubric of constitutional amendments which were subject to a basic structure review challenge. The constitutional amendments which inserted Articles 31-A, 31-B, and 31-C into the constitution were challenged as these amendments exempted ordinary legislations of a certain description from fundamental rights judicial review for abridging Articles 14, 19, and 31 and other rights. Articles 31-A and 31-B provided for the inclusion of all protected legislation into a Schedule of the constitution. Therefore, in these cases the constitutionality of the protected legislation was contingent on the constitutionality of the constitutional amendment which inserted them into the Schedule and this led to the court applying the basic structure doctrine to such legislation. In *Waman Rao* the court clarified that the inclusion of various Acts and Regulations into the 9th Schedule ‘are open to challenge on the ground that they, or any one or more of them, are beyond the constituent power of the Parliament since they damage the basic or essential features of the Constitution or its basic structure’.\(^\text{87}\) This holding has been reaffirmed recently in *I.R. Coelho v.*

\(^{87}\) *Waman Rao* (Chandrachud, CJ), supra n. 35.
State of Tamil Nadu though the challenge has been rephrased to be a challenge to the constitutional amendment which inserts an Act into the 9th Schedule and not to the legislation itself. Nevertheless, the enquiry in such cases is into the ‘actual effect and impact of the law on the rights guaranteed …’ and ‘whether or not it destroys the basic structure’ of the constitution. Hence, it is the statutory ‘provisions’ which ‘would be open to attack on the ground that they destroy or damage the basic structure’ of the constitution.

In Bhim Singhji v. Union of India, it was argued that the Urban Land (Ceiling and Regulation) Act, 1976 destroyed the basic feature of equality. Krishna Iyer in his majority opinion took the view that the ‘question of basic structure being breached cannot arise when we examine the vires of an ordinary legislation as distinguished from a constitutional amendment’. He continued by noting that not ‘every breach of equality spells disaster as a lethal violation of the basic structure … Therefore what is a betrayal of the basic feature is not a mere violation of Article 14 but a shocking, unconscionable, or unscrupulous travesty of the quintessence of equal justice. If a legislation does go that far then it shakes the democratic foundation and must suffer the death penalty’. Iyer’s observations in this case are difficult to reconcile as he first denies that basic structure review should apply to legislation but then insists that legislation which offend core constitutional principles should be declared unconstitutional. The most accurate aspect of his observations are with respect to the distinction between a violation of Article 14 and the constitutional principle of equality recognized as a basic feature of the Constitution. Further, he accurately indicates the different standards which apply to judicial review for fundamental rights violations and for damage to basic features of the constitution. However, I will need to look elsewhere for clarity on the application of basic structure review to legislation.

It was in Ismail Faruqui v. Union of India where the Acquisition of Certain Area at Ayodhya Act, 1993 was challenged on basic structure

88 I.R. Coelho, supra n. 24.
89 Ibid., p. 239.
90 Ibid., p. 240.
92 Ismail Faruqui v. Union of India (1994) 6 SCC 360.
grounds and there was no constitutional amendment involved in the case. Thus, the court had the opportunity to consider the applicability of basic structure review to a statute independently of its application to a constitutional amendment. In order to appreciate the nature of the challenge I need to pay some attention to the factual background to the case. The Ram Janma Bhumi agitation, led by a coalition of right wing Hindu political organizations including the Bharatiya Janata Party, claimed that the site on which the Babri Masjid was located was the birth place of the Hindu god, Ram. The nationwide agitation led to widespread communal violence and resulted in a large number of deaths and culminated in the destruction of the Babri Masjid in Ayodhya which shook the political stability and viability of the state and federal governments at the time.

The Union government enacted the Ayodhya Act, 1993 to acquire the disputed property and thereby stymie the dispute. The Statement of Objects and Reasons of the statute provides perspective on the goals pursued by the Union Congress government: ‘As it is necessary to maintain communal harmony and the spirit of common brotherhood amongst the people of India, it was considered necessary to acquire the site of the disputed structure and suitable adjacent land for setting up a complex which could be developed in a planned manner wherein a Ram temple, a mosque, amenities for pilgrims, a library, museum, and other suitable facilities can be set up.’ Soon after passing the Act the Central Government utilized the power to make a Presidential Reference under Article 143 of the Constitution and referred the core of the dispute to the Supreme Court in these terms: ‘Whether a Hindu temple or any Hindu religious structure existed prior to the construction of the Ram Janma Bhumi-Babri Masjid (including the premises of the inner and outer courtyards of such structure) in the area on which the structure stood?’

The petitioners challenged the validity of the Ayodhya Act and the executive’s act of referring the dispute to the Supreme Court on basic structure grounds. The challenge paid particular attention to the purposes and effect of the reference and legislation and it was

93 Ismail Faruqui, supra note 92 (Verma, J) 384.
94 Special Reference under Article 143, signed by Shanker Dayal Sharma, President of India, on 7 January 1993 excerpted in Ismail Faruqui, supra n. 92, p. 384 (Verma, J).
argued that ‘the real object and purpose of the Reference is to take away a place of worship of the Muslims and give it away to the Hindus offending the basic feature of Secularism’. Other challenges included the violation of the right to equality guaranteed in Article 14 and the rights guaranteed under Articles 25 and 26 to the practice of religion by the acquisition of a mosque which was a place of religious worship. For the purposes of this section I will focus my attention on the basic structure review argument that ‘the statute… is a mere veiled concealment of a device adopted by the Central Government to perpetuate the consequences of the demolition of the mosque …’. This is the first case where this argument was pressed independently of other challenges to the validity of the statute.

Unfortunately the court divided on religious lines with the minority community judges concluding that the statute failed basic structure review while the majority accepted the state’s argument that the statute promoted secularism. However, both opinions approached basic structure review in a similar fashion. They considered what the basic feature of secularism and the rule of law required of law makers in this area and evaluated whether the enacted statute satisfied these requirements. Both opinions agreed that section 4(3) which provided for the abatement of all suits, appeals, or other proceedings related to the acquired property was unconstitutional. This conclusion rested on a violation of the basic feature of the rule of law as the special reference under Article 143(1) could not be construed as ‘an effective alternate dispute-resolution mechanism to permit substitution of the pending suits and legal proceedings’. The disagreement arose with the application of the basic feature of secularism.

The core of the disagreement was not about what secularism entailed for state action. Both opinions coalesced around a principle of secularism where the state has no officially sanctioned religion and guarantees equality in the matter of religion to all individuals and groups. Agreement could not be reached on the factual basis

95 Ibid., p. 389.
96 Ismail Faruqui, supra n. 92, p. 391 (Verma, J).
97 Ibid., (Bharucha, J).
99 Indira Gandhi, supra n. 2, held that the Legislature failed to comply with the Rule of Law by legislating a solution to a legal dispute before the courts.
for making an assessment whether this principle was honoured or breached and on the standard of review the court must apply. As I am concerned with the type of basic structure review in this section I will confine myself to the first question and return to questions regarding the intensity of review in the next part of this chapter.

Taking into account the undisputed fact that the Muslim Waqf Board owned and managed the Babri Masjid till its demolition by Hindu right wing groups, Bharucha found it ‘impermissible… for the State to acquire that place of worship to preserve public order…’ as it would ‘efface the principle of secularism from the Constitution.’ 100 Bharucha understood such an acquisition to merely compound the failure of the State to protect the property interests of the minority community and not repair the damage caused. The majority took a different view of the historical circumstances in which this acquisition took place. Given the communal riots unleashed in the country immediately after the Babri Masjid demolition they were satisfied that ‘any step taken to arrest escalation of communal tension and to achieve communal accord and harmony can, by no stretch of argumentation, be termed non-secular much less anti-secular or against the concept of secularism…’. 101 Moreover, they came to the conclusion that the acquisition was neither complete102 nor permanent and by preserving the prior community interests in the property albeit in an attenuated form, the state was doing the best it could in difficult circumstances.

A similar disagreement between the majority and minority judgments in the case is evident in the analysis of sections 6 and 7 of the Act. These sections imposed a mandate on the state to maintain status quo in the management of the area over which the disputed structure stood, as it existed at the time of acquisition. Bharucha was of the view that by imposing a status quo order on the date of acquisition rather than the date of demolition of the pre-existing mosque the statute effectively conferred legitimacy on the demolition of the mosque and installation of Hindu idols on the site. As this legislation disproportionately affects the interests of the minority community he concluded that the effect of the Act is to ‘favour

100 Ismail Faruqui, supra n. 92, p. 438 (Bharucha, J).
101 Ibid., p. 407 (Verma, J).
102 Ibid., p. 405.
one religious community and disfavour another’ thereby violating
the principle of secularism. Verma considered the circumstances
in which the legislation was enacted carefully and then concluded
that ‘the comparative significance of the disputed site to the two
communities and also the impact of the acquisition is equally on
the right and interest of the Hindu community’.103 He went further
to find that by freezing the scope of the Hindu community’s right
to worship on the date of acquisition, the Act imposed a punitive
sanction that the ‘Hindu community, must ... bear on its chest, for
the misdeed of the miscreants reasonably suspected to belong to their
religious fold.’104 Hence, the legislation protects the basic feature of
secularism rather than damage it.

The discussion above vividly illustrates the application of basic
structure as an independent substantive model of judicial review to
test the constitutionality of legislation. The challenge to the consti-
tutionality of the statute in this case cannot be traced to particular
provisions of the constitution but to the constitutional principles
that the court identifies to be basic features of the Constitution.
First, the court has to identify the substantive limits imposed by the
constitutional principle, or basic feature, on this area of state action.
In this case, the principle of secularism was tested in exceptional
circumstances where the demolition of the Babri Masjid by Hindu
right wing activists generated a national crisis of seismic proportions.
The court then carefully considered the motivations for, and the
effects of, the challenged provisions of the acquisition statute. In this
case, the majority and minority judges disagreed about the results of
this substantive analysis primarily as they applied different historical
and normative frameworks to evaluate the statute. The application
of constitutional principles to test the constitutionality of legislation
will allow for a greater scope for disagreement about precisely what
the constitutional principle requires which is an issue I return to in
the next part of the chapter.

This form of basic structure review of ordinary legislation has been
reiterated recently in Indra Sawhney v. Union of India.105 The State

103 Ismail Faruqui, supra n. 92, p. 408 (Verma, J).
104 Ibid., p. 409.
of Kerala enacted the Kerala State Backward Classes (Reservation of Appointments or Posts) Act, 1995 to overcome the effect of the *Indra Sawhney (I)* decision on the constitutionality of reservation for the other backward classes in public employment. This statute sought to overcome the court’s ruling requiring the State to exclude elite sections of backward classes from the benefits of affirmative action policy by declaring that ‘there are no socially advanced sections in any backward classes who have acquired capacity to compete with forward classes’.107 Jagannadha Rao speaking for the court, pointed out that ‘Parliament … cannot transgress the basic feature of the Constitution, namely, the principle of equality enshrined in Article 14 of which Article 16(1) is a facet … What even Parliament cannot do, the Kerala Legislature cannot achieve’.108 However, the application of basic structure review in this case failed to appreciate key issues relating to the identity of basic features and the intensity of review in such cases. These are the important questions considered in the next part of the chapter.

The decision of the court in *Kuldip Nayar v. Union of India*109 where amendments to the Representation of Peoples Act, 1951 were challenged on the grounds of basic structure review are a sharp break in the development of basic structure review to test the constitutionality of legislation. In our discussion in Chapter 2 I observed that the court erred in concluding that basic structure review does not apply to legislation. For the purposes of our discussion in this section it is useful to briefly analyse the court’s view on the type of substantive review required under the basic structure doctrine and its independence of other forms of constitutional judicial review. Sabharwal spent considerable effort responding to the petitioner’s arguments on the impact of the amendments on the basic features of federalism110 and democracy.111 In doing so, he effectively engages in the substantive analysis of the limits imposed by constitutional principles on this area of legislation and inadvertently demonstrates

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107 Kerala State Backward Classes Act, 1995 Section 3.
110 Ibid., pp. 49–56 (Sabharwal, CJ).
111 Ibid., pp. 109–39 (Sabharwal, CJ).
that the legislation challenged in this case would survive basic structure review. Second, the existence of basic structure review as an independent model of substantive judicial review is not affected by the use of basic features, or core constitutional principles, as aids in the interpretation of the provisions of the constitution. Thus, if I disregard Sabharwal’s express rejection of basic structure review to legislation, the extensive analysis of federalism and democracy in this decision are good indicators of the type of substantive analysis which basic structure review of legislation must engage in.

In the first part of the chapter I identified the type of judicial review required under basic structure review and its relationship with existing models of constitutional judicial review. The court has adopted different approaches to basic structure review depending on the state action being challenged before it—constitutional amendments, executive action, and legislation. I have argued that irrespective of the kind of state action challenged before the courts, basic structure review operates as an independent substantive limit on constitutionally permissible state action. If used in this way basic structure review may be coherently developed to apply independently of other models of constitutional judicial review and require a distinct analysis of core constitutional principles to delimit the constitutional scope of permissible state action. To the extent that the court allows the normative force of basic features of the Constitution to have a bearing on the pre–existing models of judicial review by remoulding existing models of judicial review or as an interpretive aid, it should do so without confusing these types of judicial review with basic structure review. In the discussion above at several points there were cross-cutting issues relating to the level and intensity of scrutiny required under basic structure which I did not resolve. I take up this important aspect of basic structure review in the next part of the chapter.

**Intensity of Basic Structure Review**

Having developed the constitutional basis for basic structure review in *Kesavananda*, the court was yet to articulate the impact that such a doctrine would have on the review of amending, legislative, and executive power. In the previous section I examined the nature of review that the court applies to these types of powers and its
relationship with the other models of constitutional judicial review. I argued that basic structure review is an independent substantive type of review for compliance with constitutional principles identified as basic features of the Constitution. In this section I critically analyse the extent and type of compliance with basic features that basic structure review requires. This enquiry into the standards of scrutiny that the court develops must pay attention to two key factors. First, the court must consider the relevant consequences of applying general constitutional rules as opposed to specific rules in the constitutional text. Basic features are articulated at a level of abstraction which requires courts to articulate working rules which mediate between basic features and the facts and circumstances of each case. Moreover, there are cases where relevant applicable basic features may lend support to opposing conclusions.

The second aspect of scrutiny that courts must pay attention is to ensure that it respects the relationships between the legislature, judiciary, and the executive. The court may assume guardianship of the constitutional principles to the exclusion of the legislature and executive and enforce strict compliance with such principles. Alternatively, the court may choose to be dialogic in its relationship with other institutions and may defer in certain circumstances to versions of basic structure values advanced by other institutions. In the latter approach, the court will adopt a standard of review which is reflective of this institutional arrangement and require that a high threshold be met before basic structure principles may be said to be damaged or destroyed. Keeping these general concerns in mind I turn to a discussion on the level of scrutiny that the court must adopt in basic structure review.

Level of Scrutiny

The first issue I consider in this section is the level of scrutiny that courts must employ when exercising basic structure review. I argue that basic structure review calls for a very low level of scrutiny as only the most egregious types of state action are likely to ‘damage or destroy’ the basic structure of the constitution. The court must appreciate the particularly low level of scrutiny involved in basic structure review as it is in sharp contrast to the higher levels of scrutiny employed in other types of constitutional judicial review employed by the court.
Moreover, the level of scrutiny employed by the court is intimately connected to arguments about the legitimacy of the basic structure doctrine and hence deserves close attention. As discussions about the levels of judicial scrutiny are not common in Indian constitutional law I begin this section by briefly examining the practice of the court in pre-existing models of constitutional judicial review.

Article 13 provides that the ‘State shall not make any law which takes away or abridges’ fundamental rights in the Constitution and any law shall be void to the extent of such contravention. The courts have interpreted Article 245 which provides that the Parliament and State legislatures may make laws in their respective territorial domains ‘subject to the provisions of this Constitution’ to grant the Supreme Court power to judicially review legislation to declare them unconstitutional and void to the extent of such violation. The Supreme Court has construed these constitutional provisions to provide for fundamental rights compliance judicial review and competence judicial review to be activated as soon as a petitioner can demonstrate any violation of these provisions. While applying fundamental rights review, the court enquires into whether ‘the direct consequence and effect’ of the state action is to abridge the fundamental right. In jurisdictional competence review the court investigates whether the legislation or executive action is in ‘pith and substance’ within the scope of the legislative entry in the Seventh Schedule. Hence, the level of scrutiny under both these types of constitutional judicial review is very high and the legislature and executive branches of government are given a limited scope for action in these spheres. By contrast, basic structure review adopts a very different approach to the level of scrutiny.

In Kesavananda, Khanna set out the clearest statement of the standard to be applied in basic structure review cases and deserves to be quoted in full. He noted that:

112 Constitution of India, Article 13(2).
113 Ibid., Article 245(1).
114 A.K. Gopalan v. State of Madras, AIR 1950 SC 27 held that legislative powers were subject to the constitutional provisions, particularly fundamental rights.
The word ‘amendment’ postulates that the old constitution survives without loss of identity despite the change and continues even though it has been subjected to alterations … the old Constitution cannot be destroyed and done away with … a mere retention of some provisions even though the basic structure or framework of the Constitution has been destroyed would not amount to the retention of the old constitution. The words ‘amendment of the Constitution’ with all their wide sweep and amplitude cannot have the effect of destroying or abrogating the basic structure or framework of the constitution.

This passage identifies several key features which distinguish the level of scrutiny in basic structure review from that applied by the court in other forms of constitutional judicial review. It recognizes that there may be several amendments which may alter important parts of the Constitution but do not fail basic structure review. Further, basic structure review is not a quantitative assessment of the number of articles which may have been amended or conversely the number of articles which remain in the constitution. Instead, the court engages in a qualitative substantive assessment of whether the effect of the amendment is to ‘destroy or abrogate’ the Constitution or, in other words, whether the identity of the Constitution is altered.

For example, where an amendment is challenged on the grounds that it destroys the basic feature of democracy, the court should not be concerned with the number of constitutional provisions which have been amended. Instead, the court may usefully ask whether the effect of these amendments, individually or cumulatively, is that the constitution may no longer be characterized as being democratic in any sense of that term. Unlike other forms of constitutional judicial review, the court does not enquire into whether the amendment merely ‘violates’ the basic feature of democracy but requires a greater level of constitutional injury before it will interfere under basic structure review. Subsequent courts have come to characterize this level of scrutiny with the phrase ‘damage or destroy the basic structure of the Constitution’ and apply this test to review constitutional amendments and legislative and executive actions. In the rest of this section I will carefully examine a few significant examples of how courts have applied this level of review.

117 [1973] 4 Supreme Court Cases 225 (Khanna J) 767.
In *Indira Gandhi v. Raj Narain*, the disagreement between Mathew who found that the 39th Amendment violated the basic structure doctrine by providing that election disputes were no longer to be resolved in a judicial fashion, and Chandrachud who did not, presents us with a useful starting point. Both opinions agreed that democracy was a basic feature of the Constitution and that the 39th Amendment threatened this basic feature. They disagreed about what the basic feature, or constitutional principle, of democracy required with respect to the conduct of elections and the extent to which the courts must regulate state action under basic structure review. Mathew understood the basic feature of democracy to require that the representation of people in Assemblies was secured by a method of election which possessed three features: first, that elections are governed by pre-announced laws and regulations; second, that an executive body is charged with conducting these elections fairly; and finally, that a judicial tribunal should resolve all disputes. He concluded that the 39th Amendment damaged the basic feature of democracy as Parliament usurped the power to decide certain election disputes and did not follow due judicial process to settle these disputes which arose in the case.

Chandrachud agreed that democracy was a basic feature of the Constitution but for him this only required that the rule of the majority was ascertained through some fair electoral process. Though Mathew proposed a more elaborate conception of democracy, as noted above, their disagreement extends to the level of scrutiny that they consider necessary in such a case. Chandrachud went on to investigate the ‘kind and form of democracy [that] constitutes a part of our basic structure …’. He rejected the view that ‘the form of government’ must ‘strictly comport with some classical definition of the concept’ or that one must compare versions of democracy in other parts of the world. Instead he contrasted ‘the pre 39th Amendment period and

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118 AIR 1975 SC 2299.
120 *Indira Gandhi*, supra n. 118, p. 2378 (Mathew, J).
121 Ibid., p. 2468.
122 Ibid., p. 2467 (Chandrachud, J).
123 Ibid.
124 Ibid., p. 2468.
the post 39th Amendment period in the context of our Constitution¹²⁵ to find that the ‘rule is still of the majority … and no law or amendment of the fundamental instrument has provided for the abrogation of the electoral process.’¹²⁶ He elaborated that ‘it is hard to generalize from a single instance …’ that the legislation or amendment ‘has destroyed or threatens to destroy the democratic framework of our government. One swallow does not make a summer’.¹²⁷

The core of the disagreement in the two opinions discussed above may be traced to the different election mechanisms they considered to be required by the basic feature of democracy and the different levels of scrutiny they applied. As Mathew was of the view that judicial resolution of election disputes was a necessary element of the basic feature of democracy, he concluded that the 39th Amendment destroyed democracy by allowing Parliament to settle electoral disputes through a non-judicial process. Chandrachud tested the 39th Amendment for its effect on the principle of majority rule and a well-ordered election process and found that both these arrangements survived the amendment. As basic structure review requires judges to engage in a substantive analysis to utilize general constitutional principles to evaluate the particular state action challenged in every case, there will no doubt be some room for disagreement on what these principles require in a particular case. I will examine whether there is a greater likelihood of such disagreement in basic structure review in the next section below.

The second source of disagreement between the judges in Indira Gandhi arose as they took a different view of the intensity of review required under basic structure review. Chandrachud was right in clarifying that basic structure review evaluated the effect of the constitutional amendment on the basic feature of democracy, not in any general theoretical sense, but by having due regard to the particular expression of the democratic principle in the constitution and its practice in the Indian context. Moreover, he grasped the temporal dimensions of such review by comparing the effect of the state action on the basic feature as it stood before the challenged

¹²⁵ Ibid.
¹²⁶ Ibid., pp. 2468–9.
¹²⁷ Ibid., p. 2468.
state action and after it. Lastly, he emphasized that for a challenged
state action to be struck down under basic structure review it
must erase the basic feature from the constitution—a significant
constitutional injury which is difficult to demonstrate in any case.
Mathew’s application of basic structure review agrees with that of
Chandrachud on all of the above.

However, their disagreement emerges from the use of the last
phrase used in the quotation excerpted above—one swallow does not
make a summer. Mathew concludes that the challenged constitutional
amendment damages the basic feature of democracy sufficiently to
be declared unconstitutional while Chandrachud seems to suggest
that the amendment would be unconstitutional only if Parliament
had substantively altered the election framework set up by the Consti-
tution so that it may no longer be called free and fair. The metaphor
employed by Chadrachud suggests that the substantive analysis in
basic structure review requires a qualitative element as distinct from a
quantitative analysis of whether the basic features of the constitution
are damaged. It is this aspect of the level of scrutiny in basic structure
review that I examine below.

In R.C. Poudyal v. Union of India128 the reservation of a seat for
a representative of the Buddhist Sangha in the Sikkim Legislative
Assembly was challenged on the grounds that it violates the basic
features of democracy and secularism. I have considered the details
of the legal challenge and reasoning of the court earlier in this chapter.
In this section I will confine my analysis to the court’s approach to
the quantitative or qualitative aspect of the level of scrutiny in basic
structure review. Sharma dissenting in the case observed that ‘only
one seat has been reserved today for the Monasteries in Sikkim is the
thin edge of the wedge which has the potentiality, to tear apart, in the
course of time, the very foundation, which the democratic republic
is built upon’.129 Venkatachaliah, speaking for the majority, gave
some weight to the argument that reservation of a single seat when
understood in a historical context would not destroy secularism. No
doubt his conclusion in the case rested partially on the empirically
unsubstantiated claim that as Buddhist monasteries were a religious

128 R.C. Poudyal v. Union of India, AIR 1993 SC 1804.
129 R.C. Poudyal, supra n. 128, pp. 1822–3 (Sharma, CJ).
and social organization, such reservation was not based entirely on religious considerations and did not offend secularism.

This case is a useful example to illustrate that the ‘the damage or destroy basic features’ level of scrutiny requires qualitative and not quantitative analysis. In other words, not much would turn on the reservation of one or ten seats for religious bodies in the local legislative assembly. The enquiry is whether there is damage or destruction to the constitutional principle of secularism in this case. In order to succeed the petitioners will need to show that the challenged state action damages or destroys the constitutional principle of secularism to such an extent that the constitution may no longer be said to enshrine any reasonable version of the secularism principle. The reiteration of Chandrachud’s axiom about the qualitative character of basic structure in *R.C. Poudyal* is the last occasion on which the Supreme Court has considered the application of basic structure review in a quantitative or qualitative manner.

So far in this section I have considered the level of scrutiny which the court must apply under basic structure review of constitutional amendments. I observed that the level of scrutiny of the court under basic structure review is expressed in two ways: first, to ensure that basic features of the constitution are not damaged or destroyed and second, to ensure that the identity of the constitution is preserved. I will now assess whether both these expressions require the court to exercise the same level of scrutiny under both these tests and to all forms of state action. Further, while it is plausible that the above discussion on the ‘damage or destroy’ standard may apply equally when the court reviews legislation or executive action, the requirement that the state action must alter the identity of the Constitution may not always be easy to translate when the state action does not alter any provision of the constitution. I will conclude this section by briefly exploring the relationship between the ‘damage or destroy’ standard and ‘preserve the identity of the constitution’ standard and propose that these tests may be applied to other forms of state action with little or no modification.

Nani Palkhivala suggests that ‘[l]ogically speaking, the limit to the amending power should be that the Constitution cannot be made to suffer a loss of identity through the amending process. The identity of the Constitution is the sum of its essential features. If the
Constitution is not to suffer a loss of identity, each of its essential features has to be preserved.⁸¹³⁰ Although this clarifies that the identity of the Constitution may be lost even if a single basic feature is eliminated, and that it is not a defence in basic structure review to assert that other basic features are preserved, it is difficult to ascertain whether the court’s application of the identity-preserving element of the basic structure scrutiny is independent of, or complementary to, the ‘damage or destroy’ enquiry.

In *Ganpatrao v. Union of India*¹³¹ the Constitution (26th Amendment) Act, 1971 which abolished the privy purses and other privileges guaranteed to pre-Independence princely rulers of India was challenged on the grounds that it destroyed the basic features of equality and other provisions which ‘facilitate stabilization of the new order and ensure organic unity of India.’¹³² In this case, the court uses the ‘damage or destroy’ and ‘identity change’ tests to scrutinize the challenged constitutional amendment. Pandian observes that ‘on a deep consideration of the entire scheme and content of the Constitution … the removal of Articles 291 and 362 has not made any change in the personality of the Constitution either in its scheme or its basic features, nor in its basic form or character. The question of identity will arise only when there is a change in the form, character and content of the Constitution’.¹³³ He concluded that the challenged amendments reaffirmed the basic feature of the republican form of government and that they sought to achieve political, social, and economic justice. By eliminating the special privileges which had accrued to erstwhile princely rulers, Parliament had taken some steps to achieve ‘fraternity and the unity of the nation’.¹³⁴

In *Ganpatrao* the identity-preserving aspect of the basic structure scrutiny appears to be aligned with the ‘damage or destroy’ enquiry. In both enquiries basic structure scrutiny assesses the impact of the challenged state action on the basic features of the constitution. In *Ganpatrao* it was argued that the 26th Constitution Amendment

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¹³¹ AIR 1993 SC 1267.

¹³² *Ganpatrao*, supra n. 49, p. 1274 (Pandian, J).

¹³³ *Ganpatrao v. Union of India*, Supra n. 131, p. 1291 (Pandian, J).

¹³⁴ Ibid., p. 1292.
Act omitted the provisions of the constitution which were historically essential to the formation of the Indian Union and in that sense, are crucial to the identity of the Constitution. Pandian rejected such an approach and suggested that basic structure review sought to preserve the basic feature of equality and fraternity. This rejection of the historical argument about the identity of the Constitution is best understood as a reiteration of the normative character of basic structure review. While in a historical sense many particular events and provisions of the Constitution may be thought to be essential aspects of the Constitution, from the perspective of basic structure review the analysis is a normative and not historical one. I return to this case in greater detail when I consider the nature of basic features and how they are identified in Chapter 5. The analysis above leads to the conclusion that the identity of the constitution which basic structure review preserves is the normative identity of the Constitution, supported by a coherent interpretation of its core constitutional principles or basic features. An amendment, and for that matter, any other form of state action may be said to threaten this identity where the effect of such action is to damage or destroy any of these principles even where they are not completely erased from the constitution. In this sense, the constitutional identity-preserving aspect and the enquiry into damage to the basic features of the Constitution require the same normative constitutional enquiry expressed through different phrases. I now examine how this test may be applied to forms of state action other than constitutional amendment.

When the court subjects ordinary legislation and executive action to basic structure review as there is no change to the form or content of the constitution, it has been suggested that the core basic structure review enquiry into whether basic features have been ‘damaged or destroyed’ or whether there has been a constitutional identity requires some modification. This suggestion misunderstands the type of review the courts undertake under basic structure review. In this section I have tried to show that basic structure review, even where it applies to constitutional amendment, is not concerned with the quantitative analysis of the degree of textual effacement of constitutional provisions. The core concern in basic structure review is the maintenance of the normative identity of the constitution by ensuring that the core constitutional principles are not damaged
or destroyed, this test may be applied to all forms of state action without modification. In such cases the court is concerned with the consequences or impact of the challenged state action and not the manner and form in which it is advanced. However, there is greater diversity in the use of basic structure review in cases where ordinary legislation and executive action is challenged. I assess these cases in greater detail in the section below and show that this diversity relates more to the wider range of remedies available where state action other than constitutional amendments are challenged and does not affect the type of review that the court carries out under basic structure review.

**Hard or Soft Review**

In this section I briefly examine the normative character of basic structure review. I am concerned here with the extent and nature of compliance with basic features that the court requires and the remedies granted by the court in cases where the state action fails the review. In *Indira Gandhi* a majority in the court found the challenged amendments to be ‘unconstitutional’ and therefore void. Several other courts have granted such a remedy thereby modelling basic structure remedies along the lines of the other types of ultra vires review in the Constitution. While retaining the option to invalidate amendments later, courts have been willing to apply a bouquet of remedies by reading down amendments, applying the doctrine of severability to excise the offending portions of the amendment and to give their decisions prospective effect where there is likely to be a substantial disturbance to settled interests. This brief survey clearly establishes that with respect to constitutional amendments basic structure review operates as a hard edged model of ultra vires review where courts may declare a constitutional amendment invalid in full or in part

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135 *Minerva Mills v. Union of India*, AIR 1980 SC 1789 (Bhagwati, J) 1809. Bhagwati’s partial dissenting opinion in this case reading down Article 31-C which he otherwise found to be constitutional. Chandrachud’s majority opinion struck down the entire amendment as unconstitutional.

136 *Kihoto Hollohan*, supra n. 41, p. 693 (Venkatachaliah, J).

but are likely to fashion a wide range of remedies which respond to the facts and circumstances of the case.

In cases where other other forms of state action are challenged, the courts apply basic structure review in various ways: in some cases they modify the normative character of basic structure review so that basic features or principles of the Constitution—are utilized as interpretive aids to assist the court in applying existing types of judicial review;\(^{138}\) in other cases courts use basic structure review to impose substantive limits on amending, legislative, and executive power. While arguably, the normative force that basic features of the constitution exert on state action may depend in part on the type of action being reviewed as the court has to mould basic structure review depending on the action being reviewed, there is no reason to conclude that basic structure review should be soft judicial review in all other cases of state action apart from constitutional amendments.

The Indian constitution provides for both soft and hard judicial review. While Articles 13 and 246 set out a model of hard judicial review for competence and compliance with fundamental rights respectively, Article 37 provides for a soft model of judicial review for compliance with directive principles which allows for judicial cognizance but expressly bars judicial enforcement of these principles. Having developed the constitutional basis for basic structure review in *Kesavananda*, the court had to choose between these two alternative models of judicial review when applying the doctrine to review amending, legislative, and executive power. In this section I have examined whether basic structure review is best understood as a hard or soft model of judicial review. The brief survey of the relevant case law in this section suggests that the court has developed basic structure review along the lines of hard judicial review which in appropriate cases can lead to orders striking down the offending state action. There are other cases where the offending state action is not struck down and the court uses a range of remedies. Though this aspect of the doctrine is underdeveloped and it is possible that these hypotheses may be premature, basic structure review must on the present evidence be categorized as hard judicial review.

\(^{138}\) Ismail Faruqui, supra n. 3.
Rules and Principles

A significant unresolved aspect of basic structure review is whether such review allows the court sufficient textual or normative resources to resolve concrete constitutional problems that come before it. There are two ingredients to this argument about the ambiguity of basic structure review: First, the identity of basic feature of the constitution which I discuss in Chapter 4. The second source of ambiguity is rooted in the difficulty in applying these general constitutional rules to resolve particular problems that come before the court. I will address this second ingredient in this section and argue that whenever the court is confronted with generally phrased rules it must develop mediating working rules to allow it to resolve concrete problems in an intelligible and rational fashion.139

Where the court undertakes rights compliance and competence review for violations of the textual provisions of the constitution, the petitioner has to convince it that a provision of the constitution is violated and then it will step in to provide a remedy. Basic structure review requires the court to consider what the basic feature requires in the area of state action, and to evaluate the effect of the challenged action on these general constitutional rules. The task before the court is not merely a result of the linguistic determinacy of constitutional rules as distinguished from the more abstract, general terms in which a basic feature is expressed. Constitutional provisions are often expressed in terms which give rise to considerable doubts as to what they require in concrete cases. The Indian courts interpretation of the right to life in Article 21 is adequate evidence for the open–textured character of some constitutional provisions. By clarifying the character of normative guidance that basic features provide, I will eliminate a significant confusion that plagues the approach of the court in basic structure review cases. This aspect of basic structure review has received almost no attention in the judicial decisions of the Supreme Court. While potentially the distinction has application in almost every case that has come before the court, I will examine three cases as illustrations of how this distinction would clarify the scope of basic structure review.

I begin by briefly returning to a case discussed in the section above. In *Indira Gandhi* and *Minerva Mills* I noted that Chandrachud confuses basic structure review and rights compliance review. This confusion has three sources: first, a lack of clarity about the character of basic structure review; second, confusion about the identity of basic features as text-emergent constitutional principles or simply key provisions of the constitution; and finally, a failure to distinguish between review for compliance with constitutional provisions and constitutional principles under basic structure review. In this section, I focus on this third confusion as it arises in subsequent basic structure cases.

In *Kihoto Hollohan v. Zachilhu* the constitutionality of the Tenth Schedule introduced by the Constitution (52nd Amendment) Act, 1985 was challenged on the grounds that it violated the freedom of speech of members of elected assemblies, the basic features of democracy, and judicial review by curtailing the jurisdiction of the court. Parliament inserted the Tenth Schedule into the Constitution to ‘curb the evil of political defections motivated by the lure of office or other similar considerations which endanger the foundation of… democracy. The remedy proposed is to disqualify the member of either House of Parliament or of the State Legislature who is found to have defected from continuing as a member of the House.’ This drastic attempt to regulate unprincipled defections by reinforcing internal party discipline was bolstered by providing that the Speaker’s decision on whether the grounds provided in the Tenth Schedule have been satisfied is final and beyond the scrutiny of the court.

Of the two basic features which grounded the challenge, the majority and minority opinions agreed that the basic feature of judicial review was violated by the exclusion of the court’s jurisdiction to review the decision of the Speaker. The court was divided on whether this part of the amendment was severable in order to save the rest of the amendment from being struck down. In this section I am more concerned with the court’s analysis of whether

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141 *Kihoto*, supra n. 41, p. 670 (Venkatachaliah, J).
142 Ibid., pp. 718–9 (Verma, J).
Petitioners argued that the Tenth Schedule, by ignoring the freedom of speech, the right to dissent, and the freedom of conscience of the elected members of the legislatures, undermined the foundations of Parliamentary democracy. The court did not find that freedom of speech within the house was a part of the basic structure of the constitution. Venkatachaliah, speaking for the majority, took the view that as 'there is a real and imminent threat to the very fabric of Indian democracy by their utter and total disregard of well recognized political proprieties and morality' Parliament’s response may be said to promote democratic values. He acknowledged that elected representatives are to represent the concerns of their constituents, but this representative function in the Parliamentary system of democracy was attenuated by the need to maintain internal political party structures. Given that democracy as a basic feature or constitutional principle supported arguments on both sides of the argument on the constitutional validity of the Tenth Schedule the court needs to develop mediating rules to allow it to decide whether the amendment damaged the basic feature of democracy. In other words the court would have to specify what democracy requires in such a case.

The decision of the court in this case to hold the amendment constitutionally valid has been criticized. Sathe argues that the majority decision in this case was wrong for two reasons: first, it mistakes the interest being protected as being those of the member while the 'primary interest' sought to be protected by Article 105 and 194 'is of… society' as a whole. Second, he urges that ‘… this was the most deserving case for using the basic structure doctrine and the judicial restraint was misplaced’. Sathe’s criticisms are misdirected as the contention that the freedom of speech is a basic feature was

143 In P.V. Narasimha Rao v. State, (1998) 4 SCC 626 the court’s obiter observation that freedom of speech of a member of Parliament was a part of the basic structure of the constitution.

144 Kihoto Hollohan, supra n. 140, 679 (Venkatachaliah, J).


146 S.P. Sathe, supra n. 145, p. 93.
considered and rejected. Further, this criticism fails to account for the necessity for the courts to develop mediating rules that allow it to articulate an intelligible basis for decision making in basic structure review cases.

In *Kihoto Hollohan*, the court considered whether, and to what extent, freedom of speech could be considered to flow from the basic feature of democracy. It concluded that the preservation of the basic feature of democracy does not require the preservation of free speech interests of elected representatives in the assembly at all costs to the exclusion of all other concerns. The court emphasized the institutional mechanisms of the political party which are central to the realization of the democratic principle in almost all liberal democracies. It recognized the complexity of political practice in contemporary democracies and took the view that compliance with the basic feature of democracy could be achieved through a variety of institutional mechanisms. In *Kihoto Hollohan* the basic feature of democracy may be preserved with or without the anti-defection provisions of the Tenth Schedule. Unlike a specific constitutional rule which may be formulated in terms that allow a court to assess compliance in an either-or fashion, a general constitutional requirement such as preservation of democracy provides the court with a range of constitutionally permissible options, of which the Tenth Schedule may be one.

Sathe’s second objection to the ‘judicial restraint’ in the case fails to recognize the significance of the argument made above regarding judicial review for compliance with general constitutional rules. Unlike cases of judicial review where compliance with specific constitutional rules is called for, basic structure review requires that the court develop mediating rules that translate the general requirement into specific requirements in the case before it. The court while interpreting general constitutional rules will inevitably permit other state institutions sufficient scope to innovate while preserving these basic features of the constitution. These are not instances of the court adopting a posture of ‘judicial restraint’ but a necessary consequence of basic structure type review for compliance with general constitutional rules.

The next illustration of the confusion that arises from the failure to distinguish between basic structure review for preserving general constitutional rules and other forms of judicial review that secure
compliance with specific constitutional rules is the recent affirmative action cases. In *Indra Sawhney v. Union of India* the attempt by the Kerala state government was to overcome the creamy layer test evolved by the Court in *Indra Sawhney v. Union of India (I)* and *Ashoka Kumar Thakur v. State of Bihar*. In *Indra Sawhney (I)* and *Ashoka Kumar Thakur* the court had evolved the creamy layer test to filter out members of the Backward Classes who belonged to an economic class or educational status which disentitled them from belonging to the beneficiary category for affirmative action programmes. This body of constitutional doctrine was developed by the courts in these cases when called on to interpret the equality guarantee in Article 14 and the affirmative action provisions in Article 16. In these cases the court had noted that equality is a basic feature of the Constitution and supported the conclusions reached.

In *Indra Sawhney (II)* the Kerala State Backward Classes (Reservation of Appointments or Posts in the Services under the State) Act, 1995 provided that ‘having regard to known facts in existence in the State of Kerala, there are no socially advanced sections in any Backward Classes who have acquired capacity to compete with forward classes’ and that the Backward Classes in the State were not ‘adequately represented’ in the services under the State and hence that they would continue to be entitled to reservation under Clause (4) of Article 16 of the Constitution. These provisions were challenged on the grounds of violating Articles 14 and 16 of the Constitution and damaging the basic feature of equality.

This basic structure argument is not critical to the outcome in this case as the court was dealing with ordinary legislation which could have been declared unconstitutional for non-compliance with constitutional doctrine developed by the court on Articles 14 and 16. Nevertheless, the court held that where ‘the creamy layer is not excluded there will be a breach, not only of Article 14 but of the basic structure of the Constitution.’ Rather unhelpfully the

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150 Kerala State Backward Classes (Reservation of Appointments or Posts in the Services under the State) Act, 1995 Section 3.
151 Ibid.
152 *Indra Sawhney (II)* (n ) 202 (Jagannadha Rao, J).
court continued that such ‘an illegality offending the root of the Constitution of India cannot be allowed to be perpetuated even by constitutional amendment’.\footnote{153} This ruling confuses both the character of basic structure review and the nature of basic features as general constitutional rules as distinguished from specific constitutional provisions. I distinguished between the types of constitutional judicial review earlier in this chapter and in the following paragraphs I will illustrate why the court failed to appreciate the nature of review for compliance with general constitutional rules.

In \textit{Indra Sawhney (I)}, besides the creamy layer test discussed in \textit{Indra Sawhney (II)} above, the court also held that reservation quotas in public employment could not exceed 50 per cent of the available seats and that there should be no reservation for seats to be filled up through promotions. The Constitution (76th Amendment) Act, 1994 inserted a Tamil Nadu statute which provides for more than 50 per cent reservation into the 9th Schedule to immunize it from constitutional challenges under Articles 14, 19, and 21. The Constitution (77th Amendment) Act, 1995 added clause 4-A to Article 16 which provides for reservation in favour of Schedule Castes and Scheduled Tribes even where public jobs are filled up by promotions. Further, the Constitution (85th Amendment) Act, 2001 amended Article 16(4-A) to protect consequential seniority of those who benefit from affirmative action in promotions. The Constitution (82nd Amendment) Act amended Article 335 to introduce a proviso to overcome the justification for the \textit{Indra Sawhney (I)} judgment. The Constitution (81st Amendment) Act, 2000 added Article 16(4-B) which overcame the 50 per cent limit to reservation quotas. These amendments taken together overcome the holding of \textit{Indra Sawhney (I)} which had justified its conclusions by pointing out that equality was a basic feature of the constitution.

Sathe anticipates a basic structure challenge to these constitutional amendments and suggests that the court is unlikely to do so as these amendments were enacted with bi-partisan support and in a sense constitute ‘political limitations on the basic structure doctrine’.\footnote{154} He

\footnote{153} Ibid., Section 4.
sagely recommends that the court must read the amendments ‘strictly’ and require the state to provide more empirical evidence in support of its policy.\textsuperscript{155} 

\textit{Indra Sawhney (II)} and Sathe’s discussion on the 76th and 78th amendments, makes similar mistakes in their understanding of basic structure review. These arguments proceed on the mistaken view that all the propositions upheld in \textit{Indra Sawhney (I)} are basic features of the Constitution. While there are obiter dicta in Jeevan Reddy’s majority opinion in \textit{Indra Sawhney (I)} which support such a view, this is surely a mistake as these propositions are interpretations of the detailed constitutional provisions which seek to work out what these provisions entail for the resolution of the disputes before the court. Basic features are those general constitutional principles identified at a level of generality which make them less able to resolve disputes about service rules in public employment. If there is a basic feature at stake in these cases, it is the principle of equality stated in these broad terms which will guide the court in assessing these constitutional amendments. Far from being a political limit on the operation of the basic structure doctrine, these amendments are merely political means of overcoming particular interpretations of constitutional provisions. For basic structure review to be useful in these cases, one must be able to show that state action does not advance any version of the principle of equality. A sceptic may suggest that basic structure review for constitutional principles at such a level of abstraction is far from useful in a wide majority of cases likely to come before the court, to which our reply must be that this is an inevitable consequence of the nature and standard of basic structure review.

The court had the opportunity to consider these suggestions in a recent case of \textit{M. Nagaraj v. Union of India}\textsuperscript{156} where all the above amendments were challenged on the grounds that they destroyed the basic feature of equality. Justice Kapadia speaking for the unanimous court applied a ‘width test’ and ‘identity test’\textsuperscript{157} and found that the constitutional amendments did not alter constitutional principles like ‘secularism or federalism …’ which led him to conclude that as

\textsuperscript{155} Sathe, supra n. 154, p. 96.

\textsuperscript{156} \textit{AIR 2007 SC 71}.

\textsuperscript{157} \textit{M. Nagaraj}, supra n. 156, 67 (Kapadia, J).
the constitutional amendments did not alter the equality code in the constitution set out in Articles 14, 15, and 16 and that they satisfied basic structure review. Justice Kapadia expresses his conclusions in his own inimitable style which pays too little attention to the language in which the basic structure doctrine was previously expressed, but nevertheless does capture the essence of basic structure review.

I conclude our discussion of the distinction between judicial review on the basis of specific and general rules with a discussion of Bommai, a case I considered more elaborately in our discussion above on the nature of basic structure review of executive action. Briefly, in Bommai the court held that where the President was satisfied that a state government has already acted or is likely to act contrary to the basic features of the Constitution, then he is justified in dismissing such a government under Article 356. While I endorsed the reasoning of the court in the discussion above, I explore some other complexities that may arise in the near future. Executive action proclaiming a regional emergency under Article 356, and in some circumstances the proclamation of a national emergency under Article 352, involve the suspension or dismissal of a democratically elected government. Almost by definition then in any case where such proclamations are challenged under the basic structure doctrine, the basic feature of democracy is at stake. So in a case like Bommai, the court must carefully consider the circumstances under which the proclamation power has been exercised to evaluate whether the defence of the basic feature of secularism outweighs the negative effects on democracy that necessarily result from such an action. In all such cases, basic structure review on the basis of general constitutional rules may result in basic features pointing to opposite conclusions. Such a possibility of conflict is inherent in the character of basic features as general constitutional rules. In such an event the court has no easy options and must explore the precise factual circumstances of the challenge in each case to assess the extent of damage to each basic feature and reach a conclusion in the particular case.

In this section, I have considered the distinct character of basic structure review which assesses damage to ‘general’ constitutional rules or basic features of the constitution. I have shown that the court applying basic structure review must appreciate that the character of basic features as general constitutional rules which require the court
to develop mediating rules which allow it resolve concrete disputes that come before it. The choice of mediating rules and the variety of institutional arrangements that satisfy a particular basic feature of the constitution has given rise to the suggestion that the court must exercise judicial restraint or judicial deference in such cases. I turn to this argument and conclude the discussion in this chapter.

**Conclusion**

Since *Kesavananda*, the Supreme Court has invoked the basic structure doctrine to strike down constitutional amendments five times, legislation just once, and never invalidated executive action. Several other constitutional amendments, emergency proclamations, and ordinary legislative and executive actions have been challenged on the grounds of violating the basic structure doctrine but have either satisfied basic structure review, or have been struck down on other grounds. Since the judgment in *Kihoto Hollohan*, when portions of the Constitution (52nd Amendment) Act, 1985 was struck down, 42 constitutional amendments have been enacted. Some of these amendments are significant in their scope and effect.

The Constitution (73rd Amendment) Act, 1992 and the Constitution (74th Amendment) Act, 1992 introduce a third tier of local government at urban municipalities and rural–panchayats. Moreover these amendments extended quota based representation on elected bodies for Scheduled Caste/Scheduled Tribe communities and introduced new quotas for women. The validity of these amendments has not been challenged. I noted in our discussions in the section above that some aspects of the *Indra Sawhney (I)* decision overcome by constitutional amendments which have been upheld in *Nagaraj*. Are these statistics and trends an outcome of the nature and standard of basic structure review or a sign of judicial deference to other branches of government?

Sathe suggests the latter and observes that ‘it is only through a judicial policy of giving maximum deference to the will of the legislature that the basic structure doctrine can be sustained without impairing democracy’.

A similar view has been advanced by Venkatachaliah in *Kihoto Hollohan* who observes that the amendments challenged

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158 Sathe, supra n. 154, p. 85.
are ‘pre-eminently an area where Judges should defer to legislative perception of and reaction to the pervasive dangers of unprincipled defections to protect the community’. Unfortunately, he offers no description of the area in which deference might be due or the reasons for such an attitude of deference.

An extensive body of critical commentary on the question of judicial deference in constitutional and administrative law review offers us guidance on how such an approach may be adopted in basic structure review. However, it is the argument in this chapter, and the work more broadly, that analytical clarity about the constitutional basis, nature and standards of basic structure review together with the identification of basic features of the Constitution will allow us to overcome many misconceptions and criticisms of the basic structure doctrine. The argument for deference may play some role in constitutional judicial review for rights compliance and competence where any violation of constitutional provisions and constitutional doctrine will result in invalidity. In this chapter I have tried to show that in the ordinary course, the nature of basic structure review for general constitutional rules and moreover the ‘damage or destroy’ or ‘identity preserving’ standards will ensure that if it were at all possible to accommodate state action within the normative boundaries of the basic features of the Constitution, the doctrine will not strike down such action. Such an outcome need not be contrived by an ill-thought out attitude of judicial deference where it is already woven into the warp and weft of the doctrine. However, the discussion on judicial deference alerts us to the critical need to identify the normative character of the basic features of the Constitution with precision. It is to this problem that I now turn.

159 Kihoto, supra n. 41, p. 680 (Venkatchaliah, J).