Legitimacy of the Basic Structure Doctrine

This essay proceeds from the standpoint that the ‘basic structure’ doctrine is antidemocratic and counter-majoritarian in character, and that unelected judges have assumed vast political power not given to them by the constitution.¹

The basic structure doctrine has, since its inception in Kesavananda in 1973, often been criticized as being illegitimate. In this work I have anticipated and countered many dominant strands of these criticisms. By breaking basic structure review into its component parts—constitutional justification; nature, scope and standards of review, and the grounds of review—and then identifying and analysing the relevant case law on each element of the doctrine. This elaboration and analysis of the scope and content of the doctrine and its precise contours in practice allows for a nuanced and accurate assessment of its legitimacy.

In this chapter I will respond to the key challenges to the legitimacy of the basic structure doctrine by engaging directly with the normative arguments about legitimacy of the doctrine while building on arguments of legal doctrine carried out so far. While there is no doubt that the range of appropriate criticisms of the basic structure doctrine is limited by its actual content and practice, I will begin by classifying and consolidating all the significant arguments against the

doctrine into types of legitimacy arguments and then respond to each type of argument in turn.

In the quotation excerpted above, Raju Ramachandran questions the anti-democratic character, and more generally the political legitimacy, of the basic structure doctrine. In this chapter I am concerned with the overall legitimacy of the doctrine which includes its political, moral, and sociological legitimacy. Any assessment of the legitimacy of the basic structure doctrine will draw on a general theoretical understanding of constitutional adjudication and legitimacy. I begin the chapter by sketching out how I understand the legitimacy question.

Legitimacy may be generally understood to be an assessment of whether an authority or a particular action is justifiable by reference to a set of criteria. The criteria by which legitimacy is assessed will vary greatly depending on the type of authority—a state regime or a parent—as well as the relevant circumstances kind of action taken. Legitimacy acquires a positive or normative character depending on the kinds of criteria that one employs in your assessment. Even where normative legitimacy is assessed, often this enquiry is fact-sensitive and temporal in character. The kind of criteria by which legitimacy is assessed allows us to categorize legitimacy to be legal, political, moral, or sociological. Often, claims of illegitimacy, particularly with reference to judicial decisions, combine these varied criteria to make a cumulative assessment. I now briefly examine how the constitutional legitimacy of a judicial decision may be assessed.

Richard Fallon advances a sophisticated account of the concept of legitimacy in constitutional theory which aids the enquiry in this chapter immensely. He follows Joseph Raz in suggesting that ‘[c]onstitutional theory comprises two major parts, an account of the authority of constitutions and an account of the way constitutions should be interpreted’. These two aspects of constitutional theory are partially interdependent but may also be explored independently.

An enquiry into constitutional legitimacy of the basic structure doctrine rests on the authority of the Indian Constitution and a model of constitutional interpretation consistent with this account of constitutional authority.

In this chapter I focus on the mode of constitutional interpretation and do not fully explore the extent to which this is an adequate account of constitutional authority. As I am concerned with the legitimacy of the basic structure doctrine—and not the legitimacy of the constitution in its entirety, I confine the discussion to an evaluation of the judicial role in creating and sustaining the use of the doctrine.

Fallon’s three-part division of legitimacy into legal, sociological, and moral concepts depending on the criteria by which legitimacy is assessed allows us to organize the varied criticisms of the basic structure doctrine. The concluding part of this chapter will bring together these strands of analysis to present an integrated account of how the basic structure doctrine is constitutionally legitimate.

**Legal Legitimacy**

To assess the legal legitimacy of a judicial decision one evaluates whether it complies with the legal norms applicable to the case. The legal norms which guide judicial decision making include those written into the constitution as well as those norms developed by the court interpreting the constitutional text. Both these types of norms do not determine the judicial outcome in all cases: they may be indeterminate or under-determinate in their guidance in particular cases. In these circumstances the decision maker enjoys some discretion in the interpretation of particular norms. Even where constitutional norms are determinate courts may consider other moral reasons to develop the law with an innovative decision. But such moral reasons for change must be weighed against the moral duties on judges to maintain continuity in a legal system. This is a matter I consider more fully in the section on moral legitimacy below.

Before I examine the legal legitimacy of basic structure doctrine we must take note of the objection that the classification of legitimacy into moral and legal assumes a positivist view of law. More specifically it seems to assume that criteria for legal legitimacy do not include
moral values, and that these two types of legitimacy may be evaluated separately. The separation of law and morals in positivist legal theory is an axiom related to the identity and validity of laws and not to the evaluation of the legitimacy of a legal rule. There is significant theoretical disagreement about whether moral criteria should play any role in answering the question as to whether a law exists. Once it is agreed that a law does exist, as the basic structure doctrine undoubtedly does, an enquiry into whether the law is justifiable or legitimate requires a wider and more multi-dimensional enquiry using various normative criteria including moral criteria. Even a positivist scholar would insist that an account of legitimacy should rely on moral reasoning and would simultaneously hold the view that the separation of law and morals is critical to debates about the identity and validity of law. A non-positivist scholar may argue that moral legitimacy lies at the core of the enquiry into what the law is, and not merely an assessment of its legitimacy. It is not necessary for the purposes of this chapter for me to deny the truth of the non-positivist claim about the relationship between law and morals. In this chapter, I do not fully engage with the philosophical debates on the nature of law as a view on this important question does not settle the legitimacy of the basic structure doctrine. To the extent that I respond to the moral legitimacy of basic structure review, I certainly am not avoiding the key issues raised by a non-positivist account of law.

So while the enquiry into legitimacy in this chapter will evaluate the basic structure doctrine using moral criteria, the separation of legitimacy into legal, moral, and sociological categories allows us to approach these discrete criteria in independent sections. The analytical benefits of such an exercise are manifold: the clarity of exposition is supplemented by our ability to respond to the varied strands of the existing Indian debates on the basic structure doctrine appropriately. The unequivocal admission that these are intricately connected and interdependent enquiries accommodates the non-positivist view that legal legitimacy should include moral criteria. Now I proceed to critically analyse the debates on legal legitimacy.

The *Kesavananda* opinion sparked an efflorescence of constitutional criticism and commentary through the 1970s and 1980s, the intensity of which has never been repeated again in Indian constitutional history. Almost every constitutional lawyer of the period, and several political commentators, strenuously denounced or commended the court’s decision, and many of them subsequently revised and modified their stand.\(^5\) Many of these earlier criticisms, together with more recent ones, dispute whether the basic structure doctrine can be understood as an interpretation of the constitution. Three arguments regarding the legal illegitimacy of the basic structure doctrine are often raised. Firstly, that the *Kesavananda* court had no textual basis for its conclusion; secondly it is argued that the doctrine is not supported by the constitutional text and establishes implied limitations divined by the judges unaided by the constitution. This second objection is supplemented by the claim that the court has no authority to read implied limitations into the constitution. Thirdly, it is argued that if the objections above are valid then it follows that the court effectively amended the constitution in the guise of interpreting it, an action it has no legal authority to do. These three arguments rest on particular understandings of the nature of constitutional interpretation and are dealt with in turn.

**Express Constitutional Meaning**

A significant strand of the criticism of the basic structure doctrine is rooted in the claim that the doctrine is not warranted by the constitutional text. More specifically it is suggested that no article of the constitution contains the phrase ‘basic structure’ or any equivalent phrase. Further, it is argued that the constitutional text does not even indirectly support the impact and consequences of the doctrine. These are arguments about the express and implied meanings of the constitution and I will deal with express meanings in this section and implied meanings in the next. They draw support in part from the lack of clarity in the justifications offered by the plurality opinions.

of the court in the early basic structure cases but ultimately rest on a misunderstanding of the nature of interpretive activity engaged in by courts.

These arguments assume that the words in the constitution present neatly carved out textual formulae which resolve complex interpretive problems which come before the court, thereby rendering unnecessary any further interpretation of the text or enquiry into constitutional design or function. This literalist approach to constitutional interpretation ostensibly requires limited resources: the text of the constitution, lexicographical aids to interpretation, and the rules of interpretation developed in the common law. By adopting such a view of constitutional interpretation commentators seldom find it necessary to articulate substantive reasons to support one interpretation of the constitution as superior to the other, and by denying the possibility of real interpretive choice the conclusions of the court are presented as indisputably right or wrong.

In Chapters 2 and 3 I have carefully analysed several cases to ascertain the constitutional basis for the basic structure doctrine. There is no argument in this work that the basic structure doctrine is expressly set out in any particular article or set of articles read together. This is not an altogether surprising feature of any constitutional doctrine: the doctrine of separation of powers which maintains the distribution of powers between the branches of government and the doctrine of pith and substance which assists the court to determine the zones of legislative and executive competence between state and union governments are similarly not spelt out in any constitutional provision. There is no doubt that both these doctrines are valid and legitimate constitutional law despite the lack of express constitutional sanction.

The expectation that every proposition or doctrine of constitutional law will have an express constitutional basis relies on an incorrect literalist understanding of constitutional law and adjudication. It gives no account of the extensive role played by constitutional

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interpretation of the court in fleshing out the inert provisions of any constitution. Decided cases become binding legal propositions through their application and refinement in subsequent cases where courts control the scope and application of these decisions through relevant rules of precedent. These legal propositions in various areas of constitutional law, taken together, constitute a body of constitutional common law which has developed enormously over the last fifty-seven years. There may be significant differences in weight and malleability of legal rules which rest on the constitutional text and those that are identified as constitutional common law. This is not a topic which I will explore further in this work.\(^7\) For the limited purposes of the argument in this chapter, it is sufficient for us to show that constitutional doctrine not expressly warranted by the constitutional text may still be a legitimate interpretation of the constitution.

If I am correct about the nature of constitutional doctrine spelt out above, then the illegitimacy of the basic structure doctrine cannot be because it is not expressly supported by the constitutional text. Then such a doctrine may be illegitimate as it goes beyond the proper limits of using implied meanings in constitutional interpretation. In Chapters 1 and 2 I argued that the court developed a novel approach to the interpretation of the constitution in *Kesavananda*, where the court no longer interpreted words or phrases set out in specific articles in isolation and instead sought to make sense of the relevant articles in the context of the wider constitutional mandate gleaned from the constitution as a whole. For example, Sikri in *Kesavananda* interpreted the word ‘amendment’ in Article 368 by first conducting a conspectus or survey of a wide range of constitutional provisions paying special attention to the fundamental rights and directive principles chapters to gather insights into the appropriate scope of the amending power under Article 368. Sawant adopts a similar approach in *Bommai* to conclude that the constitutional value of secularism constrains and guides the executive power to issue proclamation of President’s Rule

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under Article 356. This approach to constitutional interpretation, which may be described as a ‘structural approach’, has not been consistently adopted by all judges in these cases or by other courts deciding basic structure review cases. Despite this lack of unanimity in judicial opinion, arguably a structural approach to constitutional interpretation offers a potential explanation for the legal legitimacy of the basic structure doctrine.

**Implied Meaning**

Implied constitutional meanings have played a significant role in the court’s constitutional interpretation in basic structure review cases. Implied meaning plays a significant role in arguments about the constitutional basis of basic structure review and the identification of basic features of the constitution. The process of implication in constitutional interpretation has been differently expressed in three types of arguments in basic structure cases: first, the doctrine of implied limitations; second, the doctrine of necessary implication and third, the claim that the basic structure doctrine involves a ‘structural’ interpretation of the constitution. Before I explore each of these in turn I will critically examine the nature of implications in constitutional interpretation and more specifically, ascertain the extent to which it needs special justification over and above what is usually provided for express meanings.

The distinction between implied and express meanings rests on the directness with which meaning is conveyed. As meaning in constitutional interpretation is conveyed through written text, the text may communicate with varied degrees of directness. For example, one of the enduring debates in Indian constitutional law is the interpretation of Article 21 of the constitution which provides that ‘No person shall be deprived of his life or personal liberty except according to procedure established by law.’ The provision directly imposes restraints on the executive branch of government to act within the boundaries of the enacted law. Whether this provision imposes any restraints on the legislative branch of government has been the

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subject of intense debate.\(^\text{10}\) As the fundamental rights entrenched in Part III of the constitution generally bind all three branches of government, the proposition that Article 21 binds the legislature is a reasonable one. Moreover, restraints on legislative power to protect the life and liberty of citizens arguably have as much significance as the restraints on executive power. In this instance, as in many others, the important questions in constitutional interpretation cannot be resolved by resorting to the direct meaning ascertained from the constitutional provision. Further, the relatively indirect meaning of the provision is more significant in its impact on the protection of life and liberty and allows for the fundamental rights in Part III of the constitution to be read consistently.

This example illustrates a few crucial insights into the distinction between express and implied meaning: first, I do not examine the implied meanings of a provision because it is necessarily ambiguous or uncertain. Implications need to be taken into account even where the provision is phrased clearly and plainly in order to respond to situations to which the provision clearly applies but is under-determinate as to outcomes. Second, it is not always the case that express meanings are more important or significant than implied ones. The relative importance of express and implied meanings is contingent on the context in which they are applied. Finally, the directness with which a constitutional provision conveys meaning is a matter of degree which rests on the language conventions of the community of speakers and interpreters. So where a batsman in a cricket match being sledged by the bowling side is asked to ‘occasionally try to use his bat to hit the ball’, the implied suggestion that he should stop leaving the ball or using his pads is the more immediate purpose of the sledge than the direct request for him to use the bat.

In constitutional interpretation the ‘important question is always what the constitution means; whether the ideas are communicated directly or indirectly is incidental’.\(^\text{11}\) Hence, for many of the reasons explored above the justifying reasons which make one interpretation


\(^{11}\) J. Kirk, supra n. 8, p. 629.
of a constitution better or more legitimate in any case need not be weighted differently whether I am applying express or implied meanings. Nevertheless, the courts have historically been suspicious of the role of implications in interpretations and have attempted to develop doctrines to fence in the range of implications which may be legitimately considered. The Indian courts have been no exception to this general trend. In basic structure review cases implied meanings have been restrained through three distinct doctrinal formulations. I will examine each of these critically to ascertain the character and scope of these limits and whether they are successful in bestowing basic structure review with more legitimacy.

**Doctrine of Implied Limitations**

The doctrine of implied limitations was put forth with great conviction by lead counsel in *Kesavananda*, Nani Palkhivala. The doctrine draws on the administrative law rule relating to jurisdiction which posits that every grant of power is limited both explicitly and implicitly by the nature of the grant. In other words, a statute must be construed in a manner that maintains the balance between its parts by applying those explicit and inherent limitations necessary to promote the scheme and design of the instrument. 12 Palkhivala argued that this principle should apply to Parliament’s power to amend the constitution which was, like its ordinary legislative power, conferred by the constitution and relied on varied precedents of the Privy Council, Canadian, Irish, Australian, and US courts to support this claim. Six majority judges in *Kesavananda* led by Sikri accepted this claim, but seven judges including Khanna explicitly rejected the doctrine of implied limitations as having no foundation in the constitution. Since its rejection in *Kesavananda* the doctrine of implied limitations has played no part in the future judicial discourse on basic structure review.

The attempt to import the doctrine of implied limitations from its common law milieu to aid constitutional interpretation has several limitations. First, the constitutional version of the administrative law doctrine drew little support from the constitutional text. As the Indian

courts have relied on text based implications in basic structure review cases, the doctrine found little support. Moreover, as Rajeev Dhavan carefully points out, the doctrine could draw little or no support from other jurisdictions where it was considered by the courts. Any effort to articulate a sound doctrine of implied limitations will need to be grounded in a wider theoretical understanding of the nature of sovereignty and the distinction between amending and constituent power. These operate as broader justifying reasons and are particularly critical to the success of the doctrine of implied limitations as the version argued before the Indian courts and accepted by six of the Kesavananda judges paid scant attention to the constitutional text.

Dhavan, in an early review of the basic structure doctrine concludes that the Kesavananda court ‘managed to invent a whole new theory of implied limitations’. Coming as it does, at the end of his effective criticism of the doctrine of implied limitations, this conclusion is ambiguous about whether he understands the basic structure doctrine to rest on the common law doctrine of implied limitations or simply that it is sustained by constitutional implications of a different sort. In this section I have suggested that the doctrine of implied limitations plays no role in the judicial discourse on the basic structure doctrine since Kesavananda and this is a good outcome. In the sections below I will explore the role that implied meaning does play in basic structure cases and demonstrate why these implications offer a legitimate and persuasive interpretation of the constitution.

**Doctrine of Necessary Implication**

The most well-developed common law test for identifying those implications which may be legitimately drawn is the ‘doctrine of necessary implication’. This test is often portrayed as investing the

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15 R. Dhavan, supra n. 13, p. 164.
task of judicial interpretation drawing on implications with objectivity and neutrality thereby restricting judicial choice and enhancing the legitimacy of legal decisions. However, on closer examination the doctrine does not deliver on this promise.

The ‘necessity’ invoked by the doctrine clearly requires a greater degree of persuasiveness of acceptable implications and rules out frivolous and stray implications. However familiar problems which plague the interpretive task return to haunt this canon of interpretation. First, it is unclear whether the necessity required is logical or practical. Logical necessity exists where the implications sought to be drawn follow from the propositions of law as a matter of logical deduction. I may illustrate logical necessity by an example from the game of tennis that a player, who fails to keep the ball within the boundaries of the playing area, and a second rule provides that the boundaries of the playing area are measured from the inside edge of the marker line, then it logically follows that if a ball hits the boundary markers and no part of the ball touches the insides of the line, the point is lost. Though the two rules read together do not expressly set out the consequences of a ball hitting the boundary marker lines, it may be logically implied that in this instance the ball should be ruled out of the playing area. In this case, the rules fully determine the outcome but there may be cases where logical necessity may under-determine outcomes or may be indeterminate. It is clear from the above example that the outcome of the rules is not a practical necessity. The game of tennis would sustain the same level of skill and achievement even if a ball hitting the boundary markers was taken to be in rather than out. The doctrine of necessary implication may, in a particular case, sustain various implications that are logically or practically necessary and this ambiguity may result in different outcomes with the same set of rules.

The doctrine of necessary implication has not engaged the attention of the Indian courts in basic structure review cases. However, Seervai, in his Commentaries on the Constitution, seeks to justify the doctrine using this canon of construction and this explanation has gained significant currency. A critical examination of these efforts is both insightful and essential for an understanding of the basic structure doctrine. Seervai begins his explanation of the basic structure doctrine by citing a passage from the Privy Council’s ruling
in *R v. Burah* on the principles of interpretation of a constitution. The court held:

If what has been done is legislation within the general words which give the power, and if it violates no express condition or restriction by which that power is limited ... it is not for a Court of Justice to inquire further or to enlarge constructively these conditions and limitations.17

There is some disagreement whether this opinion on the scope of legislative power in a legal system where the doctrine of Parliamentary sovereignty is the norm applies without modification to a different constitutional tradition such as India. Seervai suggests that this interpretive principle does apply with two important caveats. First, the word ‘express’ ‘does not exclude what is necessarily implied.’18 Second, he proposes that ‘the nature of a constitution may be important on a question of construction’.19 For the purposes of this section, I will focus on the first caveat on necessary implications.

Seervai proceeds to show how the ambiguities resident in Article 368 necessarily imply that amending power in the Indian Constitution is limited in character. Let us examine one such ambiguity to ascertain the type of necessity that Seervai employs in this discussion. The central issue in Article 368 is whether the ‘constituent power’ to amend ‘any’ article allows Parliament to repeal all of the provisions of the constitution. Seervai answers the question in the negative as Article 368(2) provides that when an amending bill receives the assent of the President ‘the constitution shall stand amended’. Thus he concludes that:

[A] constitution which is repealed does not stand at all, much less does it stand amended. It is a necessary implication of the constitution standing amended, that all its provisions cannot be repealed, and the word 'any' does not mean 'all'.20

The necessity invoked by Seervai is logical and rests on the premise that every word in a constitutional or statutory document should be

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16 *R v. Burah* (1878) 3 AC 889 (PC) (India).
17 Ibid., 193–4.
19 Ibid.
20 H.M. Seervai, supra n. 18, p. 3141.
invested with significant meaning. This style of argument seems to be circular, as it assumes its conclusion: and moreover, fails to provide a strong justification. The logical necessity only makes sense if one assumes, with Seervai, that the phrase ‘the constitution shall stand amended’ carries with it both a formal consequence of the amending procedure as well as the substantive requirement that a full-fledged constitutional text must subsist at the end of the amendment carried out under Article 368. Even where the constitution is repealed in its entirety, there is no doubt that a constitutional arrangement continues to exist. This arrangement will consist of an amalgam of political conventions, statutory laws, and the common law rules much like the British Constitution. No doubt these constitutional norms are not contained in a single document but they are sufficient to satisfy the nominal and formal requirements of the phrase ‘the constitution shall stand amended’. To sustain the logical necessity that Seervai tries to show, he will need to find another mode of reasoning which does not assume that some part of the Constitution of India, 1950 must continue to exist.

The use of canons of constitutional interpretation like the doctrine of necessary implication, irrespective of the type and the strength of implication they seek to draw from textual resources, may at times operate satisfactorily unaided by more substantive arguments about constitutional values and principles. Such arguments are considered a satisfactory basis on which to justify a legal conclusion in court rooms and among the legal profession. Notwithstanding the merit of these professional uses of the doctrine, I find that Seervai’s use of the doctrine fails to decisively settle a rigorous academic debate over the interpretation of Article 368 amending power as I have shown that logical necessity invoked admits conclusions that he seeks to avoid. There is no way to sustain his argument unless one assumes that some conclusions, like total repeal of the constitution, are so absurd a result that it is not envisaged by the constitution. However, to assume this proposition as a premise would be to assume the conclusion sought to be justified. The doctrine of necessary implication unsupported by any of the substantive moral or political reasons which justify one interpretation over another is unlikely to provide decisive or convincing reasons on which the basic structure doctrine may legitimately rest. Structural interpretation offers us
a superior approach to understand the nature of constitutional implications and I will turn to this in the next section.

**Structural Interpretation**

In … structuralism, the Constitution is interpreted liberally, as a totality, in the light of the spirit pervading it and the philosophy underlying it… Structuralist interpretation can also be teleological, meaning that it understands the Constitution to be intended to achieve certain purposes. It is, in that sense, result-oriented. 21

Sathe suggests that the Indian court’s movement from a positivist to a structuralist mode of interpretation explains the emergence and development of the basic structure doctrine. This is a descriptive claim about the practice of constitutional adjudication in the Indian Supreme Court on which further analysis has the potential to provide a better legal justification for the basic structure doctrine. In the sections above I argued that the doctrine of implied limitations and the doctrine of necessary implications have not been endorsed, and do not help us understand the interpretive techniques deployed by the Supreme Court in basic structure cases. In this section I critically examine the character of structural interpretation and examine whether it helps us understand basic structure adjudication better and if it enhances the legal legitimacy of the basic structure doctrine.

It is not enough to affix the label ‘structural interpretation’ as a justification for the basic structure doctrine unless I can address several related questions. First, is structural interpretation a discrete method of interpretation? If so, what are the ingredients of such an approach? Second, is structural interpretation an appropriate or justified method of interpretation? A response to these questions will require a deeper and more sustained investigation into the character of ‘structural interpretation’ than that offered by Sathe. This investigation can draw usefully from the careful analysis that structural interpretation has received in other constitutional jurisdictions.

Sathe tells us that a structural interpretation views the constitution in totality, accounting for its philosophy and spirit. This description

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portrays structural interpretation to be a cipher through which metaphysical meaning is extracted from the constitution. In Chapters 2 and 3 I observed that the courts drew on various provisions of the constitution to clarify the scope of the amending power in Article 368 and the emergency power in Article 356. In these cases it is the words of the constitutional text which are the main resource in constitutional interpretation. There is little or no weight attached to the philosophy or spirit of the constitution. Any useful understanding of basic structure review as structural interpretation will need to account for text-dependent character of such judicial interpretation. While drawing justifiable implications lies at the core of a structural interpretation of the constitution, by understanding the character and strength of the implications drawn by the court I will analyse the legal legitimacy of the conclusions arrived at in basic structure cases. I begin by assessing the extent to which such implications rest on the constitutional text.

The implications in basic structure cases are multi-provisional in character.\(^{22}\) For example, limited amending power under Article 368 is implied not merely from the phrasing of the provision itself,\(^{23}\) but from other provisions: the preamble and directive principles which set out the objectives of government; fundamental rights, the division of power between levels of government and the separation of power between institutions of government which limit governmental power. I must be clear that multi-provisional implications are not necessarily superior or stronger than mono-provisional implications. In either case the strength of particular implications is grounded in the soundness of the reasons offered in support of the implications. However, multi-provisional implications allow the court to interpret the constitutional document in ‘totality’ so that integrity of the document is maintained. Further, such implications allow the court to reconcile various provisions which apparently conflict with each other in a principled fashion.

\(^{22}\) J. Kirk, supra n. 8, pp. 658–60.

\(^{23}\) Khanna in *Kesavananda* rests his conclusion on the limited amending power under Article 368 almost exclusively on the interpretation of the term ‘amendment’. The other majority opinions in *Kesavananda* and the opinions in subsequent cases where basic structure review has been extended to other forms of state action and basic features are identified draw implications from multiple provisions in the constitution.
Interpretations are frequently referred to as being structural in a different sense. Robin Elliot, analysing the interpretive approach of the Canadian Supreme Court, defines structural argumentation as a form of ‘argumentation that proceeds by way of drawing of implications from the structures of government created by’ the constitution and the ‘application of the principles generated by those implications—which can be termed the foundational or organizing principles of the Constitution—to the particular constitutional issue at hand’. The principles so generated are ‘not simply aids to the interpretation of provisions in the text of our Constitution, or otherwise to provide assistance in the resolution of difficult constitutional issues, but to be taking on a legal status equivalent to that enjoyed by provisions found in the text of our Constitution’.

Eliot critically identifies the key interpretive technique in a structural interpretation to be implications drawn from the constitutional text but calls such implications ‘structural’ as they draw on the ‘structures of government’ set out under the constitution. It may well be that the Canadian Supreme Court implies constitutional principles from the provisions setting out the structures of government, but the Indian Supreme Court draws multi-provisional implications from a wider range of constitutional provisions which are not confined to structures of government but extends to substantive values. Further, the Canadian court may accord these constitutional principles with a different legal status than that occupied by basic features in basic structure review. For the purposes of the argument in this chapter it is sufficient to note that while both the courts draw implied meanings from multiple provisions of the constitutional text the phrase ‘structural interpretation’ points towards different interpretive methods in each court.

The second axis along which I analyse structural interpretation in basic structure cases is the extent to which such implications reflect the intentions of the framers. In Chapters 1 and 2 I had noticed that a significant part of the arguments raised in support of, and against, the basic structure doctrine drew support from the speeches of the

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25 Elliot, supra n. 24, p. 69.
framers in the Constituent Assembly as well as the history of the freedom movement. After carefully assessing the evidence I had reached the conclusion that the weight of historical evidence did not clearly settle the question of the scope of amending power under the constitution. In these circumstances it is impossible to assert that the framers had a deliberate and clear intention which they had communicated using deficient means of expression. So far as it is possible to assert that basic structure review reflects the framers’ intentions, I may only suggest that these intentions were in the nature of ‘implicit assumptions’ about matters not expressly considered by them but taken for granted as integral to the exercise of designing the constitution.

Implicit assumptions are implications drawn from the intellectual and social context in which the constitution was drafted. This is not merely an exercise of identifying the expectations of the framers of the constitution, but of uncovering the theoretical and practical convictions on which the particular constitutional rules were adopted. The constant refrain of the courts in basic structure cases that the constitution was not designed to be the playthings of the majority reflects an assumption about the limitations inherent in the constitutional project where the political life of the collective is sought to be governed by a framework of rules. Though communication of ideas in everyday life, as well as through constitutions, cannot take place without implicit assumptions about the nature of the communicative act, there is no doubt that varied assumptions are consistent with the constitutional text and choosing between these assumptions is not a cut-and-dried process. Despite the significant role played by such assumptions about constitutional design in basic structure cases, using implicit assumptions allows the court to avoid the difficult task of articulating substantive and coherent justifications for the interpretations they choose. By adopting a moderate originalist stance the court hitchhikes on the legal legitimacy of the founders’ assumed intentions and thereby fails to confront the essential ingredient of judicial choice.

The third axis along which I will analyse Sathe’s proposal for structural interpretation as an explanation for the basic structure doctrine is the extent to which such interpretation is purposive or ‘teleological’ in character. I must be clear at the outset that a purposive interpretation is not intrinsically a ‘structural’ interpretation. Simply put, a purposive interpretation identifies the objectives sought to be achieved by the provision of the constitution and then secures that objective even if this requires a strained construction of words in the case at hand. To the extent that the objectives to be achieved are identified through multi-provisional implications, such an interpretation may be structural in nature. So in this sense, a structural interpretation may also be purposive in character.

Dhavan argues that in Kesavananda the court has abandoned a common law inspired ‘literal approach’ to constitutional interpretation and adopted a ‘teleological theory of interpretation which saw statutes and constitutions in their teleological context and purpose’. He approves of this shift as long as the courts clearly outline institutional safeguards by specifying the limits to which this ‘context-purpose’ approach may be used thereby limiting the discretion of the judges. Structural interpretation through multi-provisional implications offers us one possible institutional safeguard to the use of this context-purpose mode of constitutional interpretation. By requiring all claims about the objectives of the constitution to satisfy a rigorous multi-provisional test there is a reasonable safeguard against the callous recognition of constitutional objectives.

Structural interpretation offers us useful insights into the approach to constitutional interpretation I have come across in basic structure review cases discussed in this work. Structural interpretation allows us to satisfactorily explain the nature of implications employed by the Indian courts in establishing the constitutional basis of basic structure review and identification of basic features. By eliminating metaphysical arguments about the spirit of the constitution as the kind of structural interpretation on which the basic structure doctrine is founded and substituting it with an understanding of

28 Ibid.
29 Ibid., supra n. 27, p. 69.
multi-provisional implications as structural interpretation I am better able to explain judicial performance by specifying the different ingredients in constitutional interpretation involved in such cases. In this sense, structural interpretation offers us the best explanation of Indian courts’ approach to constitutional interpretation in basic structure cases.

In order to assess whether structural interpretation enhances the legitimacy of the basic structure doctrine I will need to develop a richer account of constitutional interpretation more generally. I had observed at the beginning of this part of the chapter on implied meaning that conventionally the common law and rules of statutory interpretation attempted to eliminate judicial choice in interpretation. In this conveyor belt model of legitimacy, judicial decisions are legitimate when they translate authoritative constitutional or statutory pronouncements without exercising any judicial creativity. Irrespective of the general viability of this model of constitutional interpretation, it provides us no guidance when the constitutional provisions under-determine the specific solution to which the basic structure doctrine responds. In such a context, interpretive techniques which are based on sound reasoning and are principled judicially manageable formulae offer us the only means by which to regulate otherwise open-ended judicial choice. To the extent that structural interpretation circumscribes the range of choices that judges may resort to in such cases, it offers a partial restriction on judicial choice. Structural interpretation, or any other model of interpretation, does not eliminate judicial choice but that model of interpretation or legal legitimacy is unavailable in the conditions of under-determination in which the basic structure doctrine is grounded.

**Amending or Interpreting the Constitution**

The third key argument made against the legal legitimacy of the basic structure doctrine is whether the Supreme Court, by creating this doctrine, is amending and not interpreting the constitution. This argument is put forth with varied convictions and motivations. At the core of the argument lies a distinction between judges declaring

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the law and making the law and a particular understanding of the judicial role. Before I engage with the theoretical debates around judicial creativity it is essential for us to recapitulate on the extent of creativity involved in basic structure review cases. It is to this that I now turn.

In the early basic structure cases, the Supreme Court was confronted with a question about the scope of Parliament’s amending power to which the constitutional text did not provide an unambiguous answer. The court had grappled with the question in previous cases and had come up with divergent responses: first, by allowing Parliament unlimited power to amend the constitution and then second, by holding that the power did not extend to the fundamental rights enshrined in Part III of the constitution.31 In Kesavananda the court overruled these precedents and held that Parliament’s amending power was plenary but did not extend to the basic features of the constitution. Hence, the Kesavananda court was creative or innovative in two senses: firstly, it answered the question regarding the scope of Parliament’s amending power in a novel fashion and second, by overruling the existing precedent on the point of contention. Since the Kesavananda opinion, the creativity of the court in basic structure cases has found expression in the extension of basic structure review to forms of state action beyond constitutional amendment and in the identification of basic features of the constitution.

The preliminary objection to any form of judicial creativity emerges from the formalist claim that it is the duty of judges merely to declare the law as it is. Hart’s critique of the formalist’s failure to understand the open-texture of language and the epistemic incapacities of the author, of a generally phrased rule, to anticipate the several factual circumstances to which it may potentially apply has made the case for legal indeterminacy in an emphatic and yet unchallenged manner.32 Raz extended this argument by showing the existence of, and the need for, judicial creativity in regulated disputes, covered by the existing law, as well as unregulated disputes or gaps in the law.33 For the purposes of the argument in this chapter, it is

31 Compare Chapter 1.
the distinction between interpretation and amendment that is critical
and it is beyond the scope of this work to fully engage with the
arguments about the existence and extent of judicial creativity. I will
assume that judicial creativity exists and argue that a meaningful
distinction may be drawn between constitutional interpretation and
constitutional amendment.

In basic structure cases the court has been confronted by legally
regulated and unregulated disputes where the law is indeterminate.
If I accept that the judicial role is to interpret the law to resolve the
disputes before it, then the court has to deploy a range of techniques
which do not amount to amending the constitution. The distinction
between interpretation and amendment in the context of constitu-
tional adjudication is analogous to the distinction between interpré-
tation and legislation in the context of statutory adjudication. As I
noted earlier in this section, interpretation as I understand it here
includes both declaring and making the law. The distinction I seek
to draw is between judicial law making and legislative law making
and extending that distinction to constitutional interpretation and
constitutional amendment.

I may begin with an uncontroversial distinction between these two
types of constitutional change: constitutional amendment always
entails constitutional change by changing constitutional provisions
through the appropriate legal process prescribed by the Constituion.
Judicial interpretation, even where it makes new law or changes
existing law, it does not alter the constitutional provisions themselves
but only chooses from a range of possible meanings attached to the
constitutional text and thereby alters constitutional meaning through
a change in constitutional doctrine. Though it is often asserted that
the constitutional text enjoys overall supremacy over constitutional
document, the relative weight of text and doctrine in deciding particular
cases is not fixed and unchanging. Moreover, while constitutional text
is invested with the authority of its makers, constitutional doctrine
acquires authority by the strength of its reasoning and its acceptance
by legal and political elites as well as the people at large.

34 This section of the chapter develops on the distinctions drawn in
A. Kavanagh, ‘The Elusive Divide between Interpretation and Legislation under
The distinction between interpretation and amendment is established by several institutional safeguards which continuously operate to regulate the scope and extent, as well as the types of constitutional change possible under each category of constitutional change. First, constitutional interpretation can take place only when parties bring a case before the court. The constitutional jurisdiction of the Indian Supreme Court is rather wide and allows a range of cases to come before it including cases which are not strictly bivalent disputes brought to the court at the instance of affected parties. These include presidential references of important constitutional matters\(^\text{35}\) and the expanding sphere of public interest litigation jurisdiction including some cases where the court has recognized some rights violations acting of its own accord.\(^\text{36}\) Even if I account for this expanded jurisdiction I may safely claim that the court does not effectively choose when, or on what subject, it may initiate constitutional change. Unlike Parliament which may amend any portion of the constitution at the time of its choosing, the court’s ability to interpret the constitution is necessarily structured around the interests of the parties who choose to engage it.

When a court is engaged by parties to resolve a dispute between them, the court must engage in ‘interpretive reasoning’\(^\text{37}\) to arrive at a justifiable conclusion. In order to ‘interpret’ the constitutional text the judge must isolate the meaning of the constitutional provision and provide justifying reasons for the conclusions that they reach in the particular case. As I have pointed out earlier in this work, this is not always a mechanical task as interpretation often requires a careful weighing of conflicting interests and values. The reasons which judges articulate must pay due regard to the reasons and purposes embedded in the constitutional text to be an interpretation of the text. Further, judges must engage with relevant precedent and integrate the reasoning in the present case with the reasons offered in previous cases. Even where judges choose to distinguish past precedents and develop the law in new directions they must articulate sound reasons

\(^{35}\) Constitution of India, 1950, Article 143.


\(^{37}\) A. Kavanagh, supra n. 34, p. 271.
for this choice. The discussion so far on the constraints on the
type of reasoning that judges may employ is at great variance with
the reasoning adopted by legislators amending the constitution.
Though legislators do take into account the legal history and practice
of the constitution they are free to develop an entirely novel
approach to designing constitutional rules. They may rearrange the
weights attached to different constitutional principles and introduce
new constitutional arrangements motivated entirely by forward-
looking reasons. This distinction between the types of reasoning in
constitutional interpretation and constitution amendment hints at
the varied extent to which these modes of reasoning may alter the
constitutional law of the land. I will now examine if the distinction
between constitutional interpretation and constitutional amendment
defines the extent of constitutional change that can be brought about
by each mode.

The restrictions on the judiciary related to the matters it takes up
and the constraints on types of reasoning it employs in resolving
them suggests that constitutional interpretation is amenable only
to piecemeal constitutional change. Even where the court goes
beyond the legal dispute before it and makes observations on
larger constitutional issues, these observations are considered to be
obiter dicta and do not operate as binding law in future cases. As
amendments to the constitution may ‘reform a whole area of the law
in a root-and-branch fashion”38 there is some truth to the suggestion
that interpretation is suited to making small-scale constitutional
changes. However, this observation should not be misunderstood to
lead to the conclusion that the scale of constitutional change bears a
linear relationship to the significance and impact of such change.

So far in this section I have tried to draw a general distinction
between two types of constitutional change: through constitu-
tional amendment and constitutional interpretation. I argue that
these types of constitutional change may be distinguished using
several criteria including the scope of permissible changes, the
types of reasoning the respective institutions apply, and the type
of constitutional changes possible under each category. Applying
these criteria to the judicial performance in basic structure cases I

38 A. Kavanagh, supra n. 36, p. 271.
argue that the courts have adhered to the key elements of this distinction satisfactorily.

The *Kesavananda* case was brought to the court by interested parties who argued that the court should overrule its precedent in *Golaknath*. The court agreed with the petitioners and developed the basic structure doctrine while interpreting the scope of the amending power in Article 368 while relying on the multi-provisional implications drawn from salient provisions of the constitution. Since *Kesavananda* the court has scrupulously avoided ‘amending’ the constitution by listing out a catalogue of basic features and has developed them on a case by case basis. Moreover, it has expanded the scope of the doctrine incrementally to bring other forms of state action under its ambit.

At this stage I may safely conclude that the constitutional changes through which the basic structure doctrine originated and developed satisfy the criteria of constitutional interpretation. The judiciary has developed the doctrine while adhering to the institutional constraints, styles of reasoning, and other interpretive obligations which are central to the distinction between constitutional amendment and constitutional interpretation. The argument that the judiciary has amended the constitution to introduce the basic structure doctrine rests on a fundamental misunderstanding about the nature of constitutional interpretation and may safely be disregarded.

I began the enquiry into legal legitimacy by identifying three key challenges to the legitimacy of the basic structure doctrine. First I examined whether the basic structure doctrine was expressly set out in the constitutional text and clarified that no part of this work advances this unsustainable proposition. Then I investigated whether implied meanings may be drawn from the constitutional text and whether there are limits to such an exercise. I noticed that various doctrines have been developed to circumscribe the range of implications which may be legitimately considered in constitutional interpretation. The phrase ‘structural interpretation’, when taken to indicate the use of multi-provisional implications which are sensitive to the context and purpose of the provisions, provide the best explanation for the type of interpretation adopted in basic structure cases. These structural implications are extensively used in arguments
about the constitutional basis of the basic structure doctrine and the identification of basic features of the constitution.

Insofar as drawing structural implications is a well understood mode of constitutional interpretation it contributes to the legal legitimacy of the basic structure doctrine. As legal legitimacy is a scalar category which admits of measurement by degrees, structural interpretation makes a significant contribution to enhancing the legal legitimacy of the basic structure doctrine. I conclude the first part of this chapter by outlining the key distinctions between constitutional interpretation and constitutional amendment and show that the argument that the Supreme Court amended the constitution to introduce the basic structure doctrine rests on a fundamental mistake about the nature of constitutional interpretation and an inadequate understanding of the distinction between interpretation and amendment as modes of constitutional change. Next I turn to the arguments regarding the moral legitimacy of basic structure review.

**Moral Legitimacy**

In this part of the chapter I assess whether the basic structure doctrine is morally legitimate. When I say that a constitutional law doctrine is morally legitimate we mean that it is respect-worthy and capable of moral justification. Clearly not all the evaluative aspects of a constitutional doctrine bear on the question of its moral legitimacy. Some doctrines may be virtuous as they are elegantly crafted and applied with clarity while others may be practically useful in a particular historical setting. An enquiry into legitimacy is concerned with those evaluative aspects which help us decide whether the doctrine is, all things considered, morally worthy, and therefore at least deserving of our respect, if not our obedience.

I will show that the basic structure doctrine is morally legitimate in the context of its evolution and practice in Indian constitutional adjudication. While it is not part of the argument here that such

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a doctrine is ideal or necessary for all constitutions, or for all
times, neither am I focused on the specific legitimacy of the basic
structure doctrine in a particular historical context. In this chapter
I am interested in a partly general and partly particular account of
the moral legitimacy of the basic structure doctrine where I take
the Indian Constitution and the Supreme Court decisions as the
background conditions for our assessment but take no other specific
historical or factual factors into account.

The moral legitimacy of judicial doctrine in constitutional law rests
primarily on considerations of political morality of the institutions it
creates and sustains, though in some fundamental rights cases we
may be concerned with the personal morality of citizen action or the
consequences of state action on the moral choices of citizens. The
moral legitimacy of the basic structure doctrine, which is our concern
in this part of the chapter, rests entirely on the political morality of
the institutional arrangements and relationships between the three
branches of government and the people at large.

I may assess the moral legitimacy of the basic structure doctrine in
one of two ways: first, by sketching out a general account of criterion
by which legitimacy is ideally measured and then demonstrate that
these criteria are satisfied by the basic structure doctrine. In the
alternative I may identify the main arguments that have been, or may
be, raised against the moral legitimacy of the basic structure doctrine
and then show that these arguments fail to identify, misunderstand,
or misapply, the criteria by which moral legitimacy is assessed.
Here I adopt the latter negative strategy to show that the doctrine is
legitimate in a minimal, even if not in an ideal, sense.

The question of the moral legitimacy of judicial doctrine, when
posed as starkly as I have at the start of this part of the chapter, suggests
that a simple yes or no answer is available. In order to respond to the
question in this binary fashion I must assume that the evaluation of
legitimacy that I seek to make is guided by clearly identified, discrete
criteria, shared by all participants in the legitimacy discourse who
agree about the precise scales by which each of these criteria are to be
satisfied. None of these assumptions are valid as the discourse around
ideal type theories of legitimacy is mired in deep disagreement about
the criteria and measures of moral legitimacy. Moreover, even if
there was unanimity and certainty about the moral criteria by which
legitimacy may be appraised since ‘moral justification can come in
degrees’, I can only assert that the basic structure doctrine is more
or less justified. Our effort in this part, and in the chapter as a whole,
is to show that the basic structure doctrine enjoys a substantial degree
of legitimacy.

The basic structure doctrine is a doctrine of judicial review which
allows the High Courts and the Supreme Court to invalidate state
actions which damage or destroy the basic features of the constitu-
tion. The power of judicial review in itself, is not controversial in the
Indian context as the constitution clearly vests the courts with a
wide range of judicial review powers to ensure that state action is
jurisdictionally competent, compliant with fundamental rights, and
follows proper administrative process. Hence, those parts of the
basic structure review which complement or supplement existing
models of constitutional judicial review have not provoked a great
deal of controversy and do not require extensive moral justification.
The controversial aspect of basic structure review is the court’s regu-
lation of the scope of Parliament’s constitution amending power.
Hereafter, I will identify and respond to the criticisms of this part
of basic structure review. If the justification of the basic structure
doctrine as it applies to the judicial review of constitutional amend-
ments are valid then they contribute significantly to support the
application of basic structure review to other less popular forms of
state action.

Basic structure review allows the court to review constitutional
amendments for compliance with the basic features of the constitu-
tion. The key concerns about the moral legitimacy of such a doctrine
include the following. Firstly, by proposing limits to the scope
of amending power, the court entrenches certain constitutional
principles permanently beyond the reach of the people and this is
undemocratic. Secondly, even if limitations on amending power
are defensible, there is no reason why a court exercising judicial
review power should police those limits. Both these related concerns
are addressed in the section below. Next, I consider the argument

41 A. Marmor, supra n. 40, p. 5.
42 This was pointed out with clarity by Patanjali Sastri in V.G. Row v. State of Madras, (1952) Supreme Court Reporter 597.
that the possibility of the court declaring a constitutional amendment to be unconstitutional fundamentally misunderstands the nature of sovereignty and the related concepts of constituent power and revo-
lution. I will explore these arguments in the second section below.

**Democracy, Limited Amending Power, and Judicial Review**

The principle of democratic decision-making requires a method of group decision where every member of the group is treated equally. There are no *a priori* reasons to assume that it is desirable that all decisions in all types of groups should be submitted to a democratic process. Since many complex political societies adopt the democratic principle as a legitimate model of decision making and institutional design in the political sphere, democracy has emerged as a pre-eminent normative standard for decision-making more generally. Most constitutions modify the democratic principle of group decision making insofar as they insulate important moral and political decisions against change by ordinary lawmaking by the government. This entrenchment of moral and political values may be overcome only by the process of constitutional amendment which usually requires some form of super-majoritarian political process of decision making. Once amendments secure this super-majoritarian political authority they are understood to be capable of undoing entrenched provisions of the constitution.

Insofar as constitutionalism is taken to be a legitimate political principle, it follows that the entrenchment against ordinary legislation and the role of constitutional amendment is legitimate too. Irrespective of whether constitutionalism and democracy are reconcilable as a matter of abstract principle, the Indian Constitution unambiguously reconciles between the two principles as a matter of constitutional design. The constitution subjects all ordinary law making power to the provisions of the constitution while other articles specifically provide for the special conditions under which various parts of the constitutional text may be amended.

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43 For a recent argument against the legitimacy of robust constitutionalism see A. Marmor, ‘Are Constitutions Legitimate?’, University of Southern California Legal Studies Research Paper No 6–9 (2006).
This conventional understanding of the relationship between constitutionalism and democracy embraced by the Indian Constitution is modified by the basic structure doctrine which imposes substantive limits on the scope of the amending power. The key question addressed in this section is whether limited amending power entailed by the basic structure doctrine is merely an extension of the conventional reconciliation of the constitutional and democratic principles, and if it develops rather than abandons this principle of constitutional design. In other words, does the basic structure doctrine adopt and extend the distinction between the ordinary law-making process and the constitutional law-making process or does the doctrine decisively reject the majoritarian premise of law making; that the only legitimate outcome to a decision-making process is a decision that a majority or plurality of citizens favours?\(^{44}\)

In this section I will explore this question in two parts: firstly, I examine whether the basic structure doctrine rejects the majoritarian premise or merely denies the exclusivity of amending power in changing the constitution. I will show that while the basic structure doctrine deepens the entrenchment of some constitutional values against conventional constitutional amendments it retains the option for radical constitutional change by the people. In other words the doctrine envisages a dualist model of democracy which distinguishes between a decision by Parliament and a decision by the people.\(^{45}\)

Secondly, I examine whether basic structure judicial review is illegitimate as it is anti-democratic. I respond to this argument in two ways: firstly, I argue that in a constitutional democracy the court may insist that certain background moral conditions be met before majoritarian decision making may be considered democratic and secondly, I show that basic structure review is essential to sustain a dualist democratic model which distinguishes between the decisions of a government and decisions by the people.

**Exclusivity of Amending Power**

The Indian Constitution envisages two levels of law making: ordinary law making where the legislature enacts laws subject to the


\(^{45}\) B. Ackerman, *We the People*, Boston: Balknap Press, 1993 (Vol. 1) p. 6.
provisions of the constitution and constitutional law making where the provisions of the constitution may be amended following a special procedure. The distinction between these two types of law making is maintained by the device of entrenching constitutional rules by insulating them from the ordinary law making process and requiring a special majority to alter or remove them. Hence, the constitution prescribes different levels of majoritarian support as threshold requirements for valid constitutional change. These thresholds typically distinguish between how specific majorities are constituted and the deliberative quality of their decision making. Most existing accounts of Indian constitutional law embrace this reconciliation of democracy with constitutionalism as providing a complete picture of constitutional change. Embedded in this account is the assumption that amending power set out in the constitution is the exclusive instrument of constitutional change.

In our preliminary survey of the modes of amendment authorized by the constitution in Chapter 1 of this work, I had suggested that besides the general amending power in Article 368, there are several other provisions which provide for the amendment of specific provisions of the constitution.\textsuperscript{46} So in this sense, clearly Article 368 is not the exclusive source of the power of constitutional amendment in the Indian constitution as other provisions of the constitution provide for its amendment. In this chapter I am concerned with exclusivity of amending power in a different sense. I enquire into whether Article 368, together with all other provisions of the constitution which authorize amendment, exhausts the legal and political avenues for legitimate constitutional change. This may also be understood as an enquiry into whether amendment under Article 368 is boundlessly inclusive\textsuperscript{47} as it encompasses all modes of constitutional change. The exclusivity of the amending clauses in this latter sense has a critical bearing on our understanding of the legitimacy of the basic structure doctrine.

\textsuperscript{46} Constitution of India 1950, Article 4 on the admission of new States and Article 169 which provides for the creation of Legislative Councils in States are examples of constitution amending power outside Article 368.

In *Kesavananda* the court held that amending power in Article 368 was not exclusive by holding that the amendment provisions in the constitution taken together did not exhaust the formal modes of constitutional change. As the court held that amending power was incapable of changing the basic features of the constitution, it had to develop the concept of the constituent power of the people. I have examined how the court interpreted the constitution to arrive at this conclusion in Chapter 1 and in the section on ‘Sociological Legitimacy’ below. I will now assess whether the non-exclusivity of amending power in Article 368 is morally defensible.

There has been no critical enquiry into this question in the Indian academic and legal debates on the basic structure doctrine. As there has been rigorous engagement with this issue in American constitutional scholarship I will begin by examining the central arguments on this issue in the debate on the exclusivity of Article V of the United States constitution. A useful starting point is Walter Dellinger’s argument for limited judicial review of constitutional amendments under Article V to ensure compliance with the amendment process. While Dellinger does anticipate several informal mechanisms for constitutional change, he concludes on the basis of limited historical evidence that the ‘formal amendment process… in Article V represents a domestication of the right to revolution.’ Akhil Amar Reed challenges this view after conducting an extensive review of the historical evidence to conclude that the people of the United States ‘retain an unenumerated, constitutional right to alter our Government and revise our Constitution in a way not explicitly set out in Article V’.

The exclusivist versus non-exclusivist interpretation of the amending process in a constitution does not have to rest on a historical argument particular to the founding history of the constitution of the United States. One may make a distinction between different modes
of constitutional change by assessing the quality and scope of deliberation which precedes it. Ackerman develops a ‘dualist democracy’ model which understands the United States Constitution as putting in place a two-tiered practice of democratic law making: ordinary law making through the legislative process and higher law making through constitutional amendment and other heightened deliberative modes of constitutional change—constitutional moments.51

In this model, higher law making goes beyond amendments to the constitution to include a process of: ‘signalling’ a shift from ordinary law making and amendment to a mode of fundamental revision of the constitution going beyond interest group positions; the making of proposals ‘in language the majority of the population can support’;52 a period of mobilized deliberation where the proposals secure ‘deeper and broader support from the general citizenry’53 and finally a process by which these new constitutional proposals are legally codified. Ackerman claims that this four-part process of higher law making results in a constitutional politics of a deliberative quality superior to that achieved through the formal amendment process.

The dualist democracy model is neither a necessary nor complete account of how majoritarian democracy and constitutionalism may be reconciled in constitutional design. Wherever constitutional politics resembles ordinary politics and is driven by interest group proposals which are not subject to extensive deliberation then the concerns arising out of popular majoritarianism in ordinary law making with constitutional amendment and higher law making.54 However, as several courts including the Canadian Supreme Court55 and the Indian Supreme Court through the basic structure doctrine insert themselves as guardians of the deliberative quality of constitutional politics they may well be able to ensure the integrity of this process.

52 Ibid., p. 290.
53 Ibid., p. 287.
A second criticism of the dualist democracy argument is that it is built on, and therefore limited to, the American constitutional experience. Hence, it is suggested that it does not help us explain or justify the non-exclusivity of amendments under Article 368 as a process of constitutional change in India. This objection may be overcome in two ways: firstly by recognizing that Bruce Ackerman’s efforts in the first volume of *We The People* has both descriptive and normative elements. The descriptive elements of the book are focused on the reconstruction of American constitutional history ‘without the assistance of guides imported from another time and place’. The normative argument in the book is that the dualist democratic ideal offers a better explanation of the process of radical constitutional change than monist or foundationalist democratic models. This is a general argument about the best reconciliation of democracy and constitutionalism as political concepts which may have application beyond the American constitutional context. Secondly, recent comparative constitutional law scholarship has successfully applied a modified version of Ackerman’s argument to the debates on constitutional amendment in Canada. Sen in a recent work argues that ‘the Indian constitutional tradition may be best understood through the Ackermanian distinction between democratic discourses occurring during normal political periods of self-interested political bargaining and those that involve leader–citizen engagement in debating issues of higher law principles’. These sophisticated applications of the dualist democracy model to understand non-American constitutions suggest that this path is worth exploring.

In Chapter 1 a critical examination of the constitutional basis of the basic structure doctrine with respect to constitutional amendments led me to conclude that the Supreme Court distinguished between two modes of changing the constitutional text: amending power

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56 B. Ackerman, supra n. 45, p. 3.
and constituent power. Both these modes of constitutional change mobilized popular support albeit through different mechanisms. While the first was exercised indirectly through representative institutions like Parliament and State legislatures, the latter is exercised directly by the people. By holding that the amending power in Article 368 was circumscribed by the substantive limitation of basic features the court is not denying the democratic principle or the power of the people to change the constitution, but merely denying the exclusivity of amendment under Article 368 as a mode of formal constitutional change. Seen in this light, the basic structure doctrine is best understood as a rejection of a monist and foundationalist democratic model and an endorsement of the dualist democratic model whereby courts scrutinize proposals for radical constitutional change to ensure that they comply with the deep deliberative requirements necessary for radical constitutional change.

**Judicial Review**

The argument that judicial review is undemocratic is on the ascendant in constitutional theory. Critics argue that judicial review is politically illegitimate as it allows non-representative judges to override legislative or executive choices thereby defeating cherished political principles like political equality and representation. This is a criticism that rests on the principles of composition and institutional character of governmental institutions in liberal democratic states and the process by which they arrive at their conclusions. A second type of criticism would be that judicial review has indeed resulted in worse decisions than legislative or executive action. This outcomes-based criticism would be contingent on adequate data on the decisions made by these institutions in a particular jurisdiction and a critical analysis of the decisions made.

Most criticism of the legitimacy of the basic structure doctrine has been of the former variety that rests on the institutional character of governmental institutions in India and their processes of decision-making. This is not surprising as an outcomes-based assessment of institutional performance to secure basic constitutional values

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would unanimously lead to the conclusion that basic structure review is justified. As discussed earlier in Chapter 3, and in more detail below, the court has struck down only the most flagrant abuses of parliamentary power under basic structure review. There is no reason to assume that the legitimacy of political institutions should be assessed only by non-instrumentalist reasons. An instrumentalist concern with the ends of political authority—good government—may allow us to choose between political decision-making processes and institutions.61

However, in this section I will focus on the non-instrumentalist argument against basic structure review and review the institutional and process based arguments raised in the literature. The general argument against judicial review is most frequently concerned with a court overturning the decision of a legislature or executive for failure to comply with fundamental rights. This argument has two salient features that must be emphasized: first, it is concerned with strong judicial review where the court is allowed to effectively over-ride another institution’s decision.62 In Chapter 3, I had argued that basic structure review as an independent model of judicial review empowered courts to strike down state action and in cases where basic features are applied in conjunction with other models of judicial review they serve as interpretive aids. Despite the courts’ reluctance to strike down state action under basic structure review it must be acknowledged that basic structure review resembles a strong form of judicial review. To this I must add a crucial caveat: the Supreme Court has time and again recognized that the basic structure of the constitution may be undone by the ‘people’ and thereby preserves an override by popular sovereign action.

Secondly, the general argument against judicial review is focused on review to ensure compliance with fundamental rights. The prevalence of widespread disagreement about the content and application of fundamental rights in popular and academic circles is thought to be a key ingredient in the argument against judicial review. I have argued


62 J. Waldron clearly identifies his target as strong judicial review of legislative action. J. Waldron, supra n. 60, p. 1353.
that basic features of the constitution are not fundamental rights, and are general constitutional rules of a substantive character, the meaning of which may be subject to, as much, if not more moral disagreement. The substantive character of basic structure review and the capacity of the court to order strong remedies would mean that the general argument against judicial review would apply substantially to basic structure review.

A third important distinction between the general argument against judicial review and basic structure review is that the general argument is conducted in a legal context where the constitution does not expressly authorize strong judicial review such as in the United States. In newer constitutions, like those in India or South Africa, the court is expressly conferred with the power to overturn the decisions of other governmental institutions on predetermined grounds. The impact of these pre-commitments on institutional design and the relationship between the legislature and the courts on the general argument against judicial review is a matter of controversy. In any event, it is not the argument in this work that the Indian constitution expressly provides for basic structure review and hence this argument may not carry any special weight.

Having cleared a few preliminary concerns about the applicability of the general argument against judicial review to basic structure review in the discussion above, I will now respond to this argument in two ways: firstly, I will argue that the general argument assumes that democracy is equivalent to the right to participate in the process of decision-making. Secondly, I argue that by privileging the right to participation such a conception of democracy adopts majoritarian voting arrangements as the sole source of all political legitimacy.

There are profound philosophical disagreements about the meaning and objectives of a democracy as a political principle by which decision-making in our societies is organized. Even if I begin with the assumptions about equal political participation as being an important value in our democracy there are significant disagreements about the decision-making processes and institutions that such a value requires. Most general arguments against judicial review emphasize the representative character of legislatures and executives and contrast this with the unrepresentative character of judiciaries. Such an argument makes mistakes at two levels: firstly, it proposes that voting systems
respect the principle of equal political participation without further scrutiny and secondly, it suggests that majoritarian decision-making is equivalent to democracy. I will examine each in turn.

Most liberal democracies constitute their legislatures and executives through some system of aggregating voting preferences of its adult citizens. While Waldron recognizes that voting systems are not perfect he argues that a reasonably functioning democracy will confer more political legitimacy on their elected organs. Most careful analyses of voting systems in mature democracies like the UK or India point out that the first-past-the-post system invariably creates legislatures and executives which do not enjoy a mandate from a majority of voters. Further, when I speak about a democratic judiciary, I imagine an institution which draws on ‘legal professionals of all ranks of society, and where access to legal education, information, legal advise and expertise, and a legal career are all widely dispersed, rather than being the prerogative of a small or relatively small group of people.’ 63 While it is not the argument here that the Indian judiciary, or for that matter the judiciary in any other country, is composed in this fashion I only need to show that such a principle of composition can be understood to be democratic in character. Moreover, it is often possible that judicial review itself becomes a viable channel of political participation which overcomes the institutional barriers inherent in the majoritarian voting process. When I consider that there is considerable scepticism about the precise institutional mechanisms through which the democratic principle should be realized the elevation of the voting mechanism as the sole vehicle to ensure equal participation is unjustifiable.

The Indian constitution confers fundamental rights on citizens and ordains the court with the authority to enforce these rights and override state action which violates these rights. Thereby the constitution recognizes that there may be circumstances in which the representative institutions of the state do not have the power to decide on certain issues. Hence it may be asserted that, as Dworkin argues in another context, the Indian constitution embraces a constitutional conception of democracy where collective decisions are ‘made by political institutions whose structure, composition, and practices

treat all members of the community, as individuals, with equal concern and respect.\textsuperscript{64} The constitutional conception of democracy requires that the state institutions respect democratic conditions such as equal status for all citizens in order to be politically legitimate. Further such a conception of democracy would elevate the conditions under which a decision-making process can be said to be collective to be more than a ‘statistical function of individual action.’\textsuperscript{65} In other words government by the people would require ‘that in a democracy political decisions are taken by a distinct entity—the people as such—rather than by any set of individuals one by one.’\textsuperscript{66}

Constitutions which embrace strong judicial review commit themselves to an understanding of democracy which requires that decisions taken by representative governmental institutions respect democratic conditions and hence restrict these institutions through the mechanism of judicial review. Further, in order to claim that a decision is supported by a majority of persons in a political community I must be able to show that such a decision-making process is a communal collective action by the ‘people’. Basic structure review embraces both these facets of the Dworkin’s conception of constitutional democracy. Though some basic features of the constitution protected by the court go further than the ‘democratic conditions’ of equal status and respect for all citizens, the version of basic structure review defended in this work envisages that this doctrine will not stand in the way of radical constitutional change carried out by the ‘people’ directly exercising their sovereign power.

I will now turn to the background assumption that Waldron makes to sustain the general argument against judicial review. Waldron suggests that his general criticism is not unconditional ‘but depends on certain institutional and political features of modern liberal democracies’.\textsuperscript{67} In this section, I will critically examine these background conditions on which the criticism of judicial review rests and argue that relatively young complex democracies such as India often fail to meet these conditions and that basic structure review is

\textsuperscript{65} Ibid., p. 20.
\textsuperscript{66} Ibid.
\textsuperscript{67} J. Waldron, supra n. 60, p. 1353.
carefully crafted to deal with such exceptions to the general argument against judicial review.

Waldron identifies four fundamental assumptions on which he builds his argument about the political illegitimacy of judicial review. In this part I will focus our attention on the first assumption about the character of democratic institutions. Waldron assumes that: “This society has a broadly democratic political system with universal adult suffrage, and it has a representative legislature, to which elections are held on a fair and regular basis”. 68 He then goes on to elaborate that such a society must practise a democratic culture of ‘responsible deliberation and political equality” 69 and clarifies that the core of this assumption is ‘process values and not outcome values’. 70 In other words, Waldron argues that the political legitimacy of an institutional framework should be assessed by examining whether it follows a democratic deliberative process of a quality which authorizes the outcomes of the process. Waldron’s concerns are with the judicial review of legislation and the legislative deliberative process which produces legislation—in other words, normal politics.

In the previous section, I elaborated on the dualist democratic model as a sound justification for basic structure review. This dualist model distinguishes between normal politics, which Waldron is concerned with, and the constitutional politics of higher law-making. If I accept this distinction between two modes of democratic decision-making as a normative claim, I would need to modify Waldron’s argument to require the ‘process values’ of higher law-making to be background assumptions against which I assess the legitimacy of basic structure review. If the argument in the previous section, where I claimed that basic structure review ensures that the deliberative quality for higher law-making is achieved before radical constitutional change is possible is correct, then basic structure review falls within the exceptions of the case against judicial review.

While Waldron does concede that the case against judicial review fails if one of the background conditions is not satisfied, he clarifies that this does not amount to a positive justification for judicial

68 Waldron, supra n. 60, p. 1361.
69 Ibid.
70 Ibid., p. 1362.
In order to make a positive argument for basic structure review as a politically legitimate form of judicial review, I must be able to show that this form of judicial review responds to some identifiable deliberative dysfunction. Basic structure review allows the court to mark the distinction between ordinary and higher law-making by declaring that certain forms of state action affect core constitutional principles which requires a heightened deliberative scrutiny. As the court does not decide the substantive constitutional principles to which all higher deliberative action must comply it does not impose any normative values on the people. It merely signals to the political institutions of the state that they have overlooked or ignored the level of deliberative scrutiny necessary for this type of constitutional change to be legitimate.

So far I have argued that basic structure review defeats the central argument against judicial review as it responds to the failure of democratic institutions to recognize and protect a dualist democratic model whereby the constitutional validity of constitutional change is assessed by requiring the appropriate deliberative democratic process to be followed. In other words, it responds to a deliberative dysfunction in higher law-making under the Indian constitution. I conclude by making a brief positive argument for the legitimacy of basic structure review by showing that it is primarily concerned with the process values of democratic deliberation that must attach to each proposal for constitutional change and does not allow the court to posit its normative choices on the political institutions or the people at large. Irrespective of the general viability of this argument, it does not provide adequate support for the substantive character of basic structure review that protects core constitutional principles.

In this section, I have responded to the general argument against judicial review. I began by conceding that the general argument would apply to basic structure review even though it reviews constitutional amendments for damage to basic features or general constitutional rules. Two types of responses against the general argument have been proposed: firstly, arguments that challenge the equivalence of representative institutions composed by voting procedures to democracy and secondly, arguments that advance a constitutional

71 Ibid., p. 1404.
conception of democracy as the appropriate model for the Indian constitution. The second type of argument proposed assumes the validity of the general argument against judicial review but argues that basic structure review distinguishes between the two levels of democratic deliberation required for ordinary law-making and higher law-making, and therefore reiterates the deliberative process to be followed for higher law-making to be successful.

An evaluation of the arguments marshalled above leads me to conclude that while a reasonable justification for basic structure review can be made using non-instrumentalist reasons, an overwhelming argument remains to be made using an instrumentalist justification for basic structure review. As Raz observes, in a political society where there is disagreement about principles ‘the institutional question should be decided in a way sensitive to the traditions and the conditions of different countries at different times, and that the institutions which are most likely to best implement the correct considerations be entrusted with the task’.72

Rethinking Sovereignty

No Supreme Court and no judiciary will sit in judgment over the sovereign will of Parliament … Ultimately, the whole Constitution is a creature of Parliament.73

The concept of sovereignty and its relationship with the constitution is central to any understanding of the legitimacy of the basic structure doctrine. Jawaharlal Nehru, the first Prime Minister of India, in the quotation above embraces the view that Parliament is sovereign and the constitution and the institutions created by it are subordinate to it. The concept of sovereignty plays a critical role in both political and legal discourse—this dual character is critical to the argument in the rest of this section. The version of parliamentary sovereignty put forth by Nehru is difficult to reconcile with the constitutional text or with the basic structure doctrine. In this section I show that this strong version of parliamentary sovereignty rests on a misinterpretation of the Constitution of India, 1950 and an inadequate understanding of the concept of sovereignty in constitutional democracies. These

errors arise, among other reasons, from the peculiar circumstances in which the Constituent Assembly continued to exist as the first Parliament in independent India.

If the doctrine of parliamentary sovereignty is indeed mistaken and plays no role in Indian constitutional law then I go on to explore what notion of sovereignty should replace it. Critics of the basic structure doctrine suggest that the Supreme Court has ‘usurped’ the sovereignty of Parliament.74 This criticism caricatures the basic structure doctrine and its impact on the concept of sovereignty. I conclude this section by advancing a concept of sovereignty which can explain the reality of a legal system where there are ‘multiple unranked sources of legal power’.75 Such a concept of sovereignty best explains the place of sovereignty in Indian constitutional law and the role played by the basic structure doctrine. Let us begin by first setting out the understanding of sovereignty and how I develop on it in this section.

Sovereignty is a central concept in our understanding of the nature of political authority. The term is used to describe the phenomenon of ‘supreme authority in a territory’.76 The nature of supremacy of a political authority necessary for sovereignty to exist, the precise institutional forms or legal rules through which the sovereign may be identified, and the territorial basis by which members of a distinct political society are to be identified has been the subject of significant theoretical debates. This is not the place for this wider enquiry into the historical character of these debates.77 In this section I am primarily concerned with the role that debates on sovereignty plays in constitutional law and constitutional theory.78

Parliamentary Sovereignty

I began this section with Nehru’s views on the nature of parliamentary sovereignty and its relationship with the constitution. Nehru was not alone in proposing parliamentary sovereignty to be the model of sovereignty embraced by the Indian Constitution. Distinguished academic commentators79 and several other prominent political leaders80 laboured under the same premise. The persistence of the doctrine of parliamentary sovereignty in Indian constitutional law even after the inauguration of the Republic of India under the 1950 Constitution has much to do with the hold of the Diceyan formulation of English constitutional doctrine of parliamentary sovereignty81 on the Indian constitutional imagination.

The doctrine of parliamentary sovereignty occupies a central place in English constitutional law and history.82 The history of the doctrine reveals the changing relationship between parliament and the courts over time. The evolution of the doctrine in English constitutional law is best understood as a ‘blend of the normative and the empirical’.83 Dicey’s formulation of the doctrine of parliamentary sovereignty has come to occupy an iconic status and bears repetition. He proposed that Parliament ‘has under the British Constitution, the right to make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament’.84 Dicey asserted that it was empirically true that Parliament enjoyed these positive and negative aspects of sovereignty and that the ascription of sovereignty could be justified as Parliament ‘represented the most authoritative expression

83 P. Craig, supra n. 82, p. 212.
84 A.V. Dicey, supra n. 81, pp. 39–40.
of the will of the nation’. Though these arguments were taken to reflect the constitutional position of Parliament in the late nineteenth and first half of the twentieth century, this is the subject of a wider debate in contemporary political and legal debates.

The Diceyan doctrine of parliamentary sovereignty posits that the foundation of the legal authority of Parliament’s omnipotent law-making power rests on the legal fact that the courts enforce all Acts of Parliament. Since Dicey, the English constitutional debates have gone on to consider whether parliamentary sovereignty is of a continuing or self-embracing character and how these distinctions may explain the legal impact of the European Communities Act, 1972 and more recently the Human Rights Act, 1998. Moreover, there has been considerable theoretical debate on the contours of the doctrine of parliamentary sovereignty examining whether it is necessarily illimitable or indivisible or for that matter whether a Diceyan model of sovereignty provides an adequate account of the practice of English constitutional law today. This is not the place for an extensive account of the debate on the sovereignty and its place in English constitutional law as I am concerned with whether the doctrine of parliamentary sovereignty provides the best understanding of parliamentary amending power in the Indian Constitution.

The word ‘sovereignty’ appears once in the Constitution of India, 1950 in the preamble which proclaims India to be a ‘Sovereign Democratic Republic’. The court has not interpreted the word ‘sovereign’ in the preamble to provide substantive reasons for its judgments. Further, some judges have expressed the view that it is not ‘necessary to enter the academic question as to where sovereignty resides…’. Though it may well be prudent for judges to avoid an extensive journey into political theory to base their opinions in

85 P. Craig, supra n. 82, p. 221.
constitutional law cases, this is an enquiry someone investigating the legitimacy of the basic structure doctrine cannot avoid.

There is no doubt that some understanding of sovereignty underlies the reasons offered by the court in support of its decisions in a range of constitutional cases where the court is required to specify where ultimate political power rests. In order to justify the basic structure doctrine which circumscribes Parliament’s amending power, I must necessarily develop a view on the nature of sovereignty in the Indian Constitution. It has been argued that the doctrine substitutes parliamentary sovereignty with judicial supremacy. In the rest of this section, I will examine this claim critically and show that it rests on a misunderstanding of the doctrine and the concept of sovereignty in the Indian Constitution.

The doctrine of Parliamentary sovereignty has never been seriously advanced as a doctrine in Indian constitutional law. The unsuitability of its application was noted in one of the earliest cases before the Supreme Court. Fazl Ali in *re Delhi Laws Act 1912* discussing the doctrine of parliamentary sovereignty pointed out that the ‘sovereignty of Parliament is an idea fundamentally inconsistent with the notions which govern inflexible and rigid constitutions existing in countries which have adopted any scheme of representative government’.91 This was emphatically restated by Gajendragadkar in *Re Special Reference 1964*92 who noted:

In a democratic country governed by a written Constitution, it is the Constitution which is supreme and sovereign .... Therefore, there can be no doubt that the sovereignty which can be claimed by the Parliament in England cannot be claimed by any Legislature in India in the literal absolute sense.93

This observation has been reaffirmed subsequently in several cases94 and most recently in *Kuldip Nayar v. Union of India*.95 Surprisingly, the discussions on the nature of sovereignty in the amendment

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90 AIR 1951 SC 332.
91 Ibid.
92 AIR 1965 SC 745.
93 Ibid. (Gajendragadkar, CJ).
94 *Sub Committee on Judicial Accountability v. Union of India*, AIR 1992 SC 320 (Ray, J) 332.
cases did not refer extensively to these important precedents on the inapplicability of the doctrine of parliamentary sovereignty in Indian constitutional law.  

Perhaps most judges, including those dissenting judges who expressed an opinion, took the inapplicability of the doctrine of parliamentary sovereignty to be a settled legal proposition which required no restatement.

If the doctrine of Parliamentary sovereignty finds no judicial support from the earliest cases to more recent ones as I have shown above, the stubborn persistence of this doctrine in political and academic discourse on the basic structure is remarkable. This may, in part, be due to the tendency to conflate the concept of sovereignty with Parliament’s constituent or amending power. It is assumed that the amending power in Article 368 is the same as the sovereign power and constituent power of the Constituent Assembly. In the previous section I have adequately dealt with the distinction between amending and constituent power. The relationship between constituent power and the nature of sovereignty is one that requires careful theoretical elaboration, which is beyond the scope of this work. By responding to these two distinct, though related, categories separately I avoid several confusions which plague the present debate and present a clearer and better understanding of the doctrine.

Judicial Supremacy, Popular Sovereignty, or Shared Sovereignty

The basic structure doctrine, in the mind of many observers, appears to have replaced parliamentary sovereignty and the separation of powers with judicial supremacy.

96 Indira Gandhi v. Raj Narain, AIR 1975 SC 2299 (Beg, J) p. 2441 affirms the holding in Re Special Reference 1964.

97 Keshavananda Bharati v. State of Kerala, AIR 1973 4 SCC 225 (Shelat and Grover, JJ) 640. 'But the doctrine of parliamentary sovereignty as it obtains in England does not prevail here except to the extent provided by the Constitution. The entire scheme of the Constitution is such that it ensures the sovereignty and integrity of the country as a Republic and the democratic way of life by parliamentary institutions based on free and fair elections.'


In the previous section I argued that the courts have correctly taken the view that the doctrine of parliamentary sovereignty plays no role in the interpretation of the constitution. In this section I will examine whether the basic structure doctrine developed by the court accommodates an adequate understanding of the concept of sovereignty. I will now examine whether the courts advance an alternative to parliamentary sovereignty which is an adequate political conception of the relationship between the institutions of state and the people. If I can show that this is indeed the case, then the argument that the doctrine misunderstands the concept of sovereignty is mistaken and may be set aside.

I explore alternative accounts of the concept of sovereignty advanced by the court and academic commentators as underlying the basic structure doctrine: namely judicial supremacy, popular sovereignty, and shared sovereignty. I conclude that the only satisfactory account of sovereignty in the Indian Constitution must embrace an institutionally dispersed concept of sovereignty which is both legal and political in character and is composed of multiple and unranked sources of sovereign power. Let us begin this section by examining the argument relating to judicial supremacy in greater detail.

Judicial Supremacy

There is no doubt that the effect of the basic structure doctrine is to dislodge Parliament’s pre-eminent role in the constitution amending process and circumscribe its powers. When viewed against background assumptions of the doctrine of parliamentary sovereignty the doctrine was perceived to be a naked usurpation of sovereign power by the Supreme Court. The Kesavananda opinion which set out the basic structure doctrine prompted a shrill denunciation by the political class, which claimed that the court had usurped Parliament’s sovereign powers. This charge did not find significant academic or professional legal support though some scholars suggested that the court had now declared itself to be supreme as ‘it has an undefined … and therefore inexhaustible power to annul any amendment to the constitution’.

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The argument that the basic structure doctrine is a cloak for the proclamation of judicial supremacy misunderstands the nature and practice of the basic structure doctrine. First, this argument wrongly assumes that the basic structure doctrine allows the judiciary to exercise power whimsically and without limits, and fails to pay adequate attention to the form and substance of the doctrine elaborated in Chapters 3 and 4 of this work. In these chapters I elaborated on the nature and standard of basic structure review and the identity of basic features of the constitution to demonstrate that judicial interventions in the amending process are only likely in the most extreme cases of constitutional amendment. Further, where the basic structure doctrine is applied to other forms of state action it allows for judicial intervention only for the most egregious violations of basic features and is supplementary to other forms of constitutional judicial review available to test these forms of state action.

This low level of judicial intervention under the basic structure doctrine is best understood to be a result of the ‘damage or destroy’ standard of review as well as the general level at which basic features are identified, both of which are essential parts of the doctrine. This low standard of review as well as the other ingredients of the doctrine have been delineated, like many other constitutional doctrines used by the Supreme Court, at a level of clarity to be expected of the constitutional common law. As this standard of review is an integral part of the basic structure doctrine, it can hardly be argued that the doctrine offers a basis for asserting judicial supremacy.

Secondly, the argument of judicial supremacy pays inadequate attention to the practice of basic structure review in the past thirty-three years. Though the thrust of the arguments in this work is not quantitative, a cursory survey of reported Supreme Court cases which refer to the basic structure doctrine would indicate a steady increase in the invocation of the doctrine from its inception in 1973 to the present day. However, on closer scrutiny if the cases in which the Supreme Court strikes down state action using basic structure review are tabulated then this is a very small number. Sathe in a recently concluded survey of basic structure review cases in the Supreme Court found that the Court struck down state action very rarely....101

Moreover, a cursory analysis of the ratio of the number of cases in which basic structure review is invoked to the number of cases where state action is struck down on the basis of the basic structure doctrine remains extremely low. The claims made here refer only reported Supreme Court cases in the Supreme Court Cases Reporter series for the period under consideration and does not allow us to generalize beyond that limited data set. However, even this limited survey confirms Sathe’s observation that the Supreme Court has used the doctrine sparingly and it suggests that any claim that basic structure review is a doctrine that establishes judicial supremacy runs counter to the evidence available.

Before I conclude this part, I must consider one other sense in which basic structure review may provide for judicial supremacy. It may be argued that basic structure review allows the court to be supreme as it has the last word. That is to say that the court is supreme as it cannot be overruled by the legislature or the executive. Judicial supremacy in this sense is relatively uncontroversial in India, as it is embedded in our constitutional system which explicitly recognizes judicial review and allows the court to strike down state action on the grounds of jurisdictional competency, compliance with fundamental rights, and principles of administrative law. Basic structure review may only extend this type of judicial supremacy in two ways: first, in its application to constitutional amendments to which other forms of judicial review are inapplicable and second, by providing for another basis for judicial review of state action in addition to existing models of review.

While at first glance there seems to be some basis for the claim that basic structure review enhances judicial supremacy, a closer examination of some recent constitutional practice suggests otherwise. For the purposes of this section I will look to a recent example of the modes of interaction possible between Parliament and the courts. In *Indra Sawhney v. Union of India*¹⁰² the Supreme Court held that equality was a basic feature of the constitution and that the 50 per cent limit on reservation quotas, the ban on quota based promotions in public employment, and the exclusion of the creamy layer in the identification of ‘Other Backward Caste’ beneficiaries

are binding legal propositions which emerge from this basic feature. Parliament has subsequently amended the constitution to expressly overcome these restrictions and when these amendments were challenged under the basic structure doctrine, the court upheld the constitutional amendment.103

The court did not articulate clear reasons for upholding these amendments. The court could have articulated justifications related to the nature and standard of basic structure review or gone further to refashion basic structure review as a dialogue between the courts and the other branches of government. First, the court could have clarified that its holding that equality is a basic feature of the constitution in *Indra Sawhney* does not entail the further legal propositions regarding the 50 per cent limit, the exclusion of the creamy layer, and the bar on reservations in promotions in public employment, as these propositions are derived from the court’s doctrine on the fundamental right to equality. This clarification would allow the court to distinguish the abstract nature of basic structure review, where the court assesses if the state action challenged before it ‘damages or destroys’ the basic feature of equality, from the fundamental rights compliance review where the court examines whether the state action complies with the court’s doctrine on the right to equality. The recognition that the concrete legal propositions advanced in *Indra Sawhney* are rooted in the court’s interpretation of the constitutional right to equality, it becomes apparent that these legal propositions may be overcome by a constitutional amendment. This equality doctrine articulated by the court is not an integral part of basic feature of equality with which basic structure review is concerned. Even if this equality doctrine is remoulded by constitutional amendment, the basic feature of equality can survive in the constitution. Basic structure review would strike down only such state actions which go so far as to efface any meaningful guarantee of equality from the constitution and the constitutional amendments in this case do not have such an effect.

A second type of justification which the court may have explored in support of its conclusions in *Indra Sawhney* would be to characterize basic structure review as a softer model of judicial review

103 *M. Nagaraj v. Union of India*, AIR 2007 SC 71.
which promotes a ‘democratic dialogue’ between the branches of government. Where a judicial decision in a basic structure case is open to reversal, modification, or avoidance\textsuperscript{104} then the remedy in basic structure review cases must be accurately characterized to be more like a declaration of incompatibility. Unlike fundamental rights compliance review, competence review, and administrative law review, where the relationship between the court and the legislature and executive is static; under basic structure review the court has the opportunity to advance a dynamic model of review where the court’s finding triggers a public debate about the basic features of the constitution and the ensuing dialogue between the institutions of government deepens our constitutional culture.\textsuperscript{105} Such a dialogue promotes democracy in two senses: first, the court allows the democratically elected arms of government to participate in the process of identification and elaboration of basic features of the constitution and secondly, it secures pan-institutional commitment to features of a constitutional democracy apart from majority rule.

So far in this part I have considered whether the basic structure doctrine makes the judiciary sovereign or the supreme institution of government. I argue that such a claim pays inadequate attention to the nature and standard of basic structure review and the low level of judicial intervention under the doctrine. Moreover, the court has tentatively used remedies in basic structure review cases to foster a democratic dialogue around key constitutional principles between the institutions of government thereby deepening our constitutional culture without reserving to itself the ‘last word’ on these matters. Further, in the next part of this section I will show that the doctrine does not establish the judiciary as the ultimate arbiter of basic constitutional values and expressly recognizes that this power rests with the people at large. If this is indeed the case, then the charge that basic structure doctrine elevates the judiciary to the supreme branch of government completely mischaracterizes the basic structure doctrine.


\textsuperscript{105} P. Hogg and A. Bushell, ‘The Charter dialogue between courts and legislatures (or perhaps the Charter of Rights isn’t such a bad thing after all) 35 Osgoode Hall LJ 75 (1997).
Popular or Shared Sovereignty

The claim that the Indian Constitution embraces a principle of popular sovereignty rests partly on a historical and normative argument and partly on legal arguments in the courts. The Constituent Assembly invested with the responsibility of drafting the Indian Constitution by the Indian Independence Act, 1947 proclaimed that it was acting in the sovereign interests of the people of India and not under the British legal authority which formally constituted it. This claim was reinforced by the Assembly adopting rules which gave it the power to dissolve itself.\(^\text{106}\) It would be incorrect to claim that the Constituent Assembly was composed democratically and represented all sections of society. Though Austin is sympathetic to the view that the Constituent Assembly was meticulously composed to be a microcosm of the country it was ultimately ‘a one–party assembly in a one–party country.’\(^\text{107}\) The preamble of the Constitution of India, 1950 reiterates the vesting of sovereign power by expressly proclaiming that ‘We, the People of India,’\(^\text{108}\) give unto ourselves this constitution. If I take these assertions of popular authorship of the constitution seriously, as normative claims about where sovereignty is located there is no doubt that framers of the constitution embraced some version of popular sovereignty. Dietrich Conrad’s careful analysis of the drafting of the Indian Constitution and the preamble led him to conclude that:

the legal authority of the Indian Constitution is to be assumed to derive from the authorship of the Indian people and that the Constitution is based upon the notions of popular, and not parliamentary, sovereignty.\(^\text{109}\)

Despite the strength of the historical and normative argument for recognizing popular sovereignty in the Indian Constitution, the courts have not advanced a robust legal doctrine in support of such

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\(^{108}\) Constitution of India, 1950, Preamble.

a claim. In Golaknath v. State of Punjab\textsuperscript{110} where the Supreme Court first introduced constitutional limits on the power of amendment, Subba Rao, confronting the argument on the nature of limits imposed by his ruling observed: ‘the residuary power of Parliament may be relied upon to call for a Constituent Assembly for making a new Constitution or radically changing it’.\textsuperscript{111} In Kesavananda, petitioner’s counsel advanced an argument of popular sovereignty which Hegde\textsuperscript{112} seemed to embrace, but most of the judges either rejected\textsuperscript{113} such a proposition or found that it was unnecessary to decide the question.\textsuperscript{114}

It was in Indira Gandhi v. Raj Narain\textsuperscript{115} that the court moved towards a concept of shared sovereignty as an explanation of the basic structure doctrine. Chandrachud suggests that the distinction between legal and political sovereignty is useful to understand the basic structure doctrine. He proposes that the dicta speaking of ‘sovereignty is of the people’\textsuperscript{116} is best understood to be about political sovereignty. Legal sovereignty, on the other hand, is entrusted by the people to ‘the three organs of the Sovereign Democratic Republic’\textsuperscript{117} to exercise power on their behalf. He is alive to the possibility that ‘political theory, faced with the complexities of modern life, finds location of sovereignty as a power concept too elusive and difficult a task to be satisfactorily carried out.’\textsuperscript{118}

Beg developed an extensive analysis of the concept of sovereignty in his concurring opinion in Indira Gandhi. He suggests that the only concept of sovereignty which is compatible with Indian constitutional law is one that is denuded of ‘all its customary connotations’.\textsuperscript{119} He endorses a view of sovereignty which is ‘divisible

\textsuperscript{110} AIR 1967 SC 1643.
\textsuperscript{111} Golaknath supra n. 110, p. 1670 (Subba Rao, CJ). Hidayatullah concurs p. 1705.
\textsuperscript{112} AIR 1973 SC 1861 (Hegde, J), 1623–4.
\textsuperscript{113} Ibid., 1603 (Matthew, J).
\textsuperscript{114} Ibid., (Chandrachud, J).
\textsuperscript{115} AIR 1975 SC 2299.
\textsuperscript{116} Ibid., p. 2443 (Chandrachud, J).
\textsuperscript{117} Indira Gandhi, supra note 115.
\textsuperscript{118} Ibid., p. 2444 (Chandrachud, J).
\textsuperscript{119} Ibid., p. 2436 (Beg, J).
and not... absolute and unlimited'. He anticipates that a proposal for radical constitutional change 'must be shown to have the sanction of all the three organs of the Republic, each applying its own methods and principles and procedure for testing the correctness or validity of the measure'. Baxi endorses Beg's view that the 'constitution... could... be regarded as the true or “ultimate” sovereign'. Such a view of the supremacy of the constitution entails that 'the Court is a co-ordinate branch of government with a constitutional mandate to ensure that purported amendment has become “in fact and in law” a part of the constitution'.

**Conclusion**

As the *Indira Gandhi* case was the last case in which there was a rigorous judicial enquiry into the nature of sovereignty in the Indian constitutional and political framework and its impact on the basic structure doctrine, there is no benefit of a further enquiry into the reasoning of the Supreme Court on this issue. In the first part of this section I argued that the doctrine of parliamentary sovereignty has little or no basis in Indian constitutional law. A cursory glance at the provisions of the constitution which distributes legislative power between central and state legislatures, separates powers and functions of the legislative, executive, and judicial branches of government, and imposes limits on the capacity of parliament to act in contravention of citizens' fundamental rights confirms that the Diceyan model of parliamentary sovereignty finds no place in the Indian constitutional scheme. The Indian Constitution clearly adopted the American model of constitutionalism with limited government and strong judicial review. Though some elements of the English Parliamentary system were adapted to Indian conditions—the composition of the higher executive and collective cabinet responsibility—it is difficult to

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120 Ibid.
121 *Indira Gandhi*, supra n. 115, 2436 (Beg J).
122 Ibid., p. 2436.
123 *Sajjan Singh v. Union of India*, AIR 1965 SC 845 (Mudholkar, J).
support the conclusion that this entails the doctrine of Parliamentary sovereignty.

I may surmise that the persistence of the doctrine of parliamentary sovereignty in Indian constitutional law is largely due to the historical legacy of Indian public law tradition being rooted in the English public law and the particular historical circumstances under which the Constituent Assembly which drafted the constitution continued to exist as the first provisional Parliament of independent India. This institutional continuity prompted the claim that this provisional Parliament had a special role in interpreting the constitution as it drafted the constitution and this enhanced interpretive role was sanctified through the ‘doctrine of contemporaneous exposition’. This method of interpretation cannot justify the accompanying assertions of parliamentary sovereignty which otherwise have no historical, political, or legal basis.

I then considered the claim that the judiciary was supreme and sovereign and found that this claim did not appreciate the nature of the basic structure doctrine and its practice over the last three decades. I noted that the court’s dicta has recognized that the people acting directly could give themselves a new constitution using a process which is yet to be determined. Moreover, the court has in recent cases developed remedies in basic structure cases which allow for an institutional dialogue between the institutions of government and this blunts the argument that the judiciary is having the last word on all these issues.

In the last part of this section I considered two alternative views of the nature of sovereignty which have found some support from the Supreme Court and academic commentators: first, popular sovereignty where sovereign power rests with the people at large and second, shared sovereignty or constitutional sovereignty where the constitution is supreme and all constitutional amendment has to be approved by the three branches of government. These two versions of sovereignty are sought to be reconciled by the court

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125 Minerva Mills v. Union of India, AIR 1980 SC 1789 (Chandrachud) 1791.
126 For recent confirmations of constitutional sovereignty see I.R. Coelho v. State of Tamil Nadu (2007) SC Almanac 197 (Sabharwal CJI) 212–14 and M. Nagaraj v. Union of India (2006) 8 SCC 212 (Kapadia, J) 244.
which takes shared sovereignty to be about political sovereignty and constitutional sovereignty to be about legal sovereignty. This reconciliation suggests that this is a ‘working theory’ which ‘should be acceptable to lawyers’.  

This uneasy reconciliation between popular and shared constitutional sovereignty proposed by the courts is convoluted and unnecessary. At the root of these arguments is an outmoded and static conception of sovereignty which assumes that it is ‘logical or empirical necessity for a legal force to one institution, or to have a legal rule that will, or can, decisively resolve conflict between different legal sources’. To provide an adequate account of sovereignty which can explain and allow for better understanding of the basic structure doctrine one needs an institutionally dispersed version of sovereignty which accommodates a ‘continuing legal system’ whose identity is determined by the continuity of its political institutions rather than a static rule of recognition. Such a theory of sovereignty would require a different account of judicial legitimacy which acknowledges that judges have a dual authority—legal and political—and hence require a revised account of the appropriate boundaries for the judicial exercise of power with multiple unranked sources of legal power.

At this point I have gone beyond what I set out to do at the start of this Chapter: to provide a minimalist account of the legitimacy of the basic structure doctrine that counters the primary criticisms of the doctrine. In this section, I have argued that the doctrine of parliamentary sovereignty cannot be the basis of a serious challenge to the constitutionality of basic structure review. I have proposed that the best understanding of the basic structure doctrine and sovereignty in a political and legal sense will require the development of a new account of sovereignty itself and this is a task that I will take up on another occasion.

The moral legitimacy of the basic structure doctrine has been the primary focus of the political and academic criticism of the doctrine. In this part of the Chapter I have responded to the three

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127 Indira Gandhi, supra n. 115, p. 2436 (Beg, J).
128 N. Barber, Sovereignty Re-examined, OJLS, 131–54 (2000) 139.
129 Ibid., pp. 150–2.
primary criticisms of the doctrine: firstly, that it is an undemocratic limit on the amending power; secondly, that judicial review of constitutional amendment is illegitimate and thirdly, that the doctrine misunderstands the nature of sovereignty. I have argued that the basic structure doctrine imposes limits on Parliament's amending power but acknowledges that the constitution can be radically changed by the people themselves. The general argument for the illegitimacy of judicial review overemphasizes the representative character of elected political institutions and underplays the democratic pedigree earned by non–representative institutions. Further, such an argument does concede that judicial review may be legitimate in some circumstances where representative institutions fail to maintain democratic essentials and basic structure responds to these situations. Finally, I show that the argument for parliamentary sovereignty has very little support in the Indian constitution or in the decisions of the court. An adequate understanding of basic structure review would require a revised account of sovereignty which is institutionally dispersed and envisages a legal system with multiple unranked sources of power.

Sociological Legitimacy

Kesavananda did not enjoy legitimacy in 1973… It was the Election case that earned legitimacy for Kesavananda.\textsuperscript{130}

Sociological legitimacy exists when the people at large, or a narrow segment of legal and political elites, regard the institutional arrangements of the state or some particular decisions made by it as ‘justified, appropriate, or otherwise deserving of support for reasons beyond fear of sanctions or mere hope for personal reward’.\textsuperscript{131} Legitimacy in this sense is an empirical category which requires the measurement of the extent to which the people, or a particular section of them, obey the legal system and the reasons for this obedience. A quantitative or qualitative social survey or a more focused ethnography may be


possible ways of gathering this empirical evidence. More often, the very fact that a majority of the people do not rise up in revolt or active disobedience of the political system is taken to be adequate evidence of the tacit legitimacy of the legal system or some ingredient of it. Thus, active agreement or mere acquiescence may be taken as ideal or minimal benchmarks against which sociological legitimacy may be measured.

Sathe’s invocation of legitimacy in the quotation above is best understood as evaluating the sociological legitimacy of the basic structure doctrine among legal and political elites in the 1970s. He suggests that popular legitimacy among the people at large is conditioned by the legitimacy of the basic structure doctrine among legal and political elites as ‘the ordinary people do not understand the intricacies of the law’.

Evaluations of the sociological legitimacy of the basic structure doctrine have been one of the central concerns in Indian constitutional law scholarship. The practice of conducting large surveys to ascertain the legitimacy of a judicial doctrine, though popular and widely used in other countries, is not common in India. Thus debates about the legitimacy of the basic structure doctrine are primarily concerned with the views of scholars of constitutional law and politics. In this section I will first critically respond to the two phases of intense argument about the legitimacy of the basic structure doctrine; namely early years of the doctrine beginning with the 1970s and then a second phase which begins after the Indira Gandhi up to the present times. I conclude this section by assessing the extent to which the sociological legitimacy of a judicial doctrine is contingent on its legal and moral legitimacy and what the insights into this complex relationship between the three strands hold for the future debates on the legitimacy of the basic structure doctrine.

132 S.P. Sathe, supra n. 130, p. 185.
The 1970s: Basic Structure Doctrine in its Early Years

In *Golaknath*, the Supreme Court for the first time imposed substantive limits on the amending power of Parliament to the extent that it abridged fundamental rights in Part III of the constitution. Seervai and Tripathi took the lead in demonstrating that this judgment was wrong and that the court was guilty of overstepping constitutional boundaries. They were joined in this chorus by almost every prominent legal academic and political commentator of the period. While some of them are categorical in their rejection of the *Golaknath* formula, others equivocate on the key issues. The one discordant note in this chorus of denunciation was that of Dietrich Conrad, a constitutional law scholar from the University of Heidelberg, who presented papers and then subsequently published an article for limitations on amending and constituent power. This careful analysis of the theoretical basis of the constitutional principles underlying the *Golaknath* decision had a decisive influence in *Kesavananda*. When the *Kesavananda* opinion was announced, Tripathi was emphatic that as ‘academic research had completely undermined the foundations of the arguments supporting the majority opinions in *Golak Nath’* this view was abandoned by the court without argument.

The hostile reception to *Golaknath* was more muted when the court delivered the *Kesavananda* judgment. However, Tripathi attacked the judgment with a strongly worded and carefully argued

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134 AIR 1967 SC 1643.
article which was extremely influential at the time. Other writers like Dhavan, Baxi, and Sathe published guarded appraisals of the *Kesavananda* judgment. Political elites of the Congress party were particularly disenchanted with the judgment and published extensive journalistic criticisms and organized seminars to denounce the doctrine for being anti-revolutionary and other related ills.

An overall assessment of the sociological legitimacy of the basic structure doctrine in this period among legal and political elites leads us to the conclusion that the doctrine was perceived to be illegitimate. A richer analysis of the sources of this perception will require a careful understanding of the intellectual and political setting in which this early assessment took place. The assumption that the concept of parliamentary sovereignty as a political principle was foundational to the constitution and the political discourse of socialist revolution which polarized political judgment of the period are particularly important factors which framed the reception of the basic structure doctrine among legal and political elites. A careful analysis of the social and intellectual history of the doctrine will allow for a nuanced and heightened appreciation of the remarkable performance of the court in generating the doctrine in rather adverse historical circumstances. But this analysis is beyond the scope of the work and best left to another author and another book. At this point it is sufficient to note that the basic structure doctrine at its inception found no willing and articulate support and it is fair to conclude that it was perceived to be illegitimate among legal and political elites of the time.

142 Ibid.
Indira Gandhi and Beyond: The Basic Structure Doctrine Today

The Indira Gandhi case marks a significant inflection point in the sociological legitimacy of the basic structure doctrine. The willingness of the Congress government to amend the constitution and enact laws to overcome the electoral disputes of Indira Gandhi was challenged in Indira Gandhi.\(^{147}\) The proclamation of the national emergency soon after and the passing of the radical (Constitution 42nd Amendment) Act, (1976), dramatically altered the perception of legal and political elites regarding the constitution and its relationship with the political process. In this context, the basic structure doctrine emerged as the bulwark against the excesses of political majoritarianism.

The political upheavals of the time were complemented in equal measure by the legal gymnastics of leading counsels and constitutional commentators of the time. H.M. Seervai’s volte face on the correctness and legitimacy of the basic structure doctrine was both, legally the most significant, and academically the most poorly articulated justification.\(^{148}\) Seervai proposed that the Indira Gandhi case had modified the basic structure doctrine to such an extent that ‘a critical discussion of Kesavananda’s case, taken by itself would be inaccurate and misleading without a discussion of the deeper analysis of the amending power in the Election case’.\(^{149}\) This is an outrageous claim when one considers that the constitutional basis of the basic structure doctrine was taken to be binding precedent by the court in Indira Gandhi and the court confined itself to applying the doctrine to a new set of legal and factual circumstances.\(^{150}\)

Sathe’s reassessment of the legitimacy of the basic structure is more forthright and reflective. He points out that ‘the Kesavananda decision acquired legitimacy because of the subsequent developments’\(^{151}\) and reflecting on Seervai’s change of opinion observes that

\(^{147}\) AIR 1975 SC 2299.
\(^{149}\) Ibid., supra n. 150, pp. 3109–10.
\(^{150}\) Ibid., pp. 3135–6. Seervai acknowledges this in passing while discussing the impact of the basic structure doctrine.
he and many of us came to favour that doctrine mainly because of the experience, during the Emergency'. Writers who appraised the basic structure doctrine in *Keshavananda* cautiously now endorsed the doctrine more emphatically. But this substantial turnaround in the appreciation of the basic structure doctrine did not lead to an elite consensus.

The dissenting voices gained prominence with the formation of the first Bharatiya Janata Party-led coalition government at the Centre. Their decision to constitute the National Commission to Review the Working of the Constitution at the turn of the century gave sceptics of the doctrine a new forum. ‘Though not all criticisms of the doctrine were motivated by the political agenda of the government,’ they are indicators that the sociological legitimacy among Indian legal and political elites is far from unanimous. Much of the recent criticism concedes that the basic structure doctrine did play an important role at a particular juncture in India’s constitutional history but then goes on to argue that in our present political and

152 Ibid.


154 For a fuller discussion of the political context against which the National Commission was set up. See ‘Introduction’.


economic context the doctrine hinders rather than advances our development.

The brief historical survey of the sociological legitimacy of the basic structure spanning the three decades of its existence makes it clear that the doctrine continues to face significant challenges. ‘As is generally true with sociological legitimacy, the acceptance was probably never unanimous’\textsuperscript{157} at any point in time. Like moral and legal legitimacy I may usefully speak only in terms of the extent and degree of sociological legitimacy at any point in time. By those standards it would be a fair assessment to say that the doctrine was widely perceived to be illegitimate among legal and political elites at its inception in the 1970s but secured a great deal of legitimacy in the Emergency period and soon after. At the turn of the century the doctrine is buffeted by new political and legal challenges which threaten to unseat it from the lofty perch it enjoys in Indian constitutionalism.

By paying attention to complex inter-relationships between moral, legal, and sociological legitimacy, I would emphasize the relative independence of legal and moral legitimacy of the basic structure doctrine from its sociological legitimacy at different points in time. Even if the doctrine was morally and legally legitimate when it was announced in \textit{Kesavananda} it did not enjoy the same degree of sociological legitimacy. As the doctrine came to be accepted as legitimate by the legal and political elites in dramatically different political circumstances, this had little to do with the arguments for the legal or moral legitimacy of the doctrine which remained constant across this period even if they were articulated in a more nuanced fashion. We will explore the overall legitimacy of the basic structure doctrine in a composite fashion in the concluding section of this chapter.

**Overall Legitimacy of the Doctrine**

The sociological legitimacy of the basic structure doctrine in significant measure rests on elite and popular understanding of the workings of the doctrine and the legal and moral legitimacy that it enjoys. In Chapter 1 of this work I identified key contemporary issues in

\textsuperscript{157} R. Fallon, supra n. 131, p. 1803.
Indian constitutional law and argued that the basic structure doctrine was one issue that needed better explanation and justification. In Chapters 2 and 3, I re-examined the constitutional basis for the application of the basic structure doctrine to constitutional amendment and other forms of state action respectively. I rejected the argument that the basic structure doctrine is a fanciful invention of the Supreme Court without constitutional foundation and proposed that it is a justifiable interpretation of the constitutional text. In Chapter 4, I showed that basic structure review operates as an independent type of judicial review through which the court ensures that state action does not ‘damage or destroy’ basic features of the Constitution. I argued in Chapter 5 that the court has committed itself to identify basic features as key constitutional principles at the core of the normative identity of the constitution through a common law adjudication technique. The careful reconstruction of the constitutional basis and working of the doctrine of basic structure in Chapters 2 to 5 allowed me to isolate and respond to the core legitimacy challenges to basic structure review in Chapter 6.

In this final chapter, I have responded to the key arguments against the legal, moral, and sociological legitimacy of basic structure review. I have argued that the utilization of multi-provisional implications to ascertain constitutional meaning is a justified model of constitutional interpretation. The constitutional basis of basic structure review and the identification of basic features of the constitution employ this mode of constitutional interpretation. Secondly, I have argued that while basic structure review does not allow Parliament to have the final word on constitutional amendments which damage the basic features of the constitution; this is not usurped by the courts but left to the people to exercise their constituent power. I have suggested that arguments against the illegitimacy of basic structure review takes too limited a view of the democratic qualities of institutions and the requirements of political participation and equal representation. Basic structure review enhances the degree of political participation in radical expansive constitutional change by requiring a higher level of deliberative decision-making to support such constitutional amendment. I conclude this chapter with a brief survey of the ebbs and flows of the sociological legitimacy of the basic structure doctrine. Clearly the basic structure doctrine does not enjoy unanimous
endorsement among Indian political and legal elites. This is not surprising in a vast complex democracy.

Insofar as this work is successful in better portraying the constitutional basis and workings of the basic structure doctrine and refuting arguments against its illegitimacy it will contribute to enhancing the sociological legitimacy of the doctrine. It would be naive to imagine that the sociological legitimacy or popular approval of the basic structure doctrine would be contingent on an academically oriented work like this. It is certainly my hope and ambition to take this work forward by developing the arguments brought out here and contributing to this goal.