CONSTITUTIONAL ECDYSIS: HOW AND WHY THE INDIAN CONSTITUTION MAY TEST ITS ORIGINAL PROVISIONS

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Provisions in the Indian Constitution are capable of an 'ecdysis'. That is, they may completely shed their skin to don another. Their text may acquire a new legal meaning without any formal change whatsoever. This provokes a unique concern: Constitutional provisions may get pitted against one another. The conflict is a given due to the presence of the 'basic structure' doctrine. It demands that all under the Constitution be ever-compliant with fixed Constitutional mores. Only select provisions carry this essence of indispensability. They constitute the core around which the Constitution thrives and was born for. Dynamism denotes that provisions outside of the core may don an unpalatable meaning. Basic provisions may conflict with the circumstantial ones. The concern only deepens from thereon. Even the essential text may not be eternal for posterity. That is, the core provisions may themselves switch meanings. As such, the circumstantial and static provisions may again be in a conflict with the core. This time, obsolescence is the latter's undoing. Either way, interpretive fluidity heightens the risk of an inter-provisional conflict. A surgical scrutiny of the doctrine helps construct the conceptual aftermath. It was initially forged for unconstitutional amendments that attacked the core. Time has wrought on it details that enable an enhanced function. It now tackles all forms a threat may shapeshift into. The basis of this assertion is the doctrine's design. It is best justified as a manifestation of 'living-originalism'. This theoretical underpinning makes for a unique occurrence. India's Constitution may cauterise its own text for self-preservation.

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The author is delighted to dedicate this paper to his mother, Mrs. Shaili Sinha. She is also responsible for the paper's inception, inspiring fresh perspectives that initiated this academic exploration. The author is also in the debt of many who chose to comment on the draft versions of this paper. It is challenging for the author to effectively mention every contributor, and the degree of help by each. However, it is their remarks which drove the author to give an experimental push to some thoughts, which eventually took the form of arguments. Lastly, the team of NUJS Law Review deserve credit for their attention to detail, which is very keenly recognised by the author. If any arguments in the paper appear seemingly implacable, it is due to their suggestions. More than for this paper, the author thanks them for acknowledging the latent potential of drafts in the past three projects, lessons whereof have enriched this fourth project with them. That experience has introduced a great degree of order and pattern to what would have otherwise been a mere inventory of arguments. However, it is the author who is solely responsible for any errors. He may be reached at yashsinhaadv@protonmail.com.

I. INTRODUCTION

Written constitutions bear out an impression of fixity. Yet, they do not foreclose the possibility of a change. The Indian Constitution ('the Constitution') has a bright line delineating both. This boundary emanates from the basic structure doctrine ('the Doctrine'). This is a judicial stipulation which states that amendments shall not compromise the structural integrity of the Constitution. The structural integrity is forged by certain principles projected by the document, and the Doctrine declares the involved provisions as 'basic.'

Equally significant feature of this Doctrine is how it identifies these basic provisions. It uses the verbosity of the Constitution to identify certain patterns. It finds this pattern in existence when select groups of provisions repeat certain aspirations. The repeated projection of such aspirations makes the responsible provisions as 'basic' to the Constitution. What aspirational structure Indians bound themselves to at the time of its adoption, must bind them now. No force may smother the underlying provisions. Exceptions being any

improvements to them. Thus, the document gets cleaved into basic and circumstantial provisions. Herein, essentiality denotes indispensability.

Unconstitutional amendments through Article 368[1] forced the conception of this Doctrine.[2] Illustratively, amendments that made the election of the Prime Minister and amendment of the Constitution exempt from judicial review, were taken to be dissolving the very crux of our Constitution.[3] From thereon, it has adapted to threats from other sources. An assault by State actions may now be far from being an amendment. Yet, the Doctrine may reach out and tug their leash.

As with any other concept, its application may sometimes find shifty and not fertile soil. The most notorious problem is also easily visible: Constitutional provisions keep changing meanings.[4] The foremost illustration is the due process clause. Article 21 of the Constitution subjected the right to life and liberty to 'procedure established by law.' That is, on following recognised legal steps, the right so captured could be restricted by the State. However, a judicial decision[5] took this procedural stipulation and converted it into a substantive stipulation.[6] The lawfully designated procedure must not only be adhered to, but must also withstand Constitutional scrutiny itself, before the State uses it to restrict the right under Article 21. Procedural by text, the clause has morphed into possessing a substantive premise.[7] The complexity only compounds itself from thereon. This dynamism may occur both in basic and circumstantial features. This takes focus to the most conceivable concern. Namely, a fresh meaning may pit basic and circumstantial provisions against each other.

This paper suggests that finding essential features is an exercise in relativism. As such, an essential provision will overwhelm a circumstantial provision. When the clash is of two essential provisions, the 'more essential' feature will trump its inferior counterpart. The grist of the assertion, then, is that relative priority amongst provisions is identifiable. The paper frames this argument cumulatively. In doing so, it relies on the works of two Constitutional-law jurists - Prof. J. Balkin[8] and Dr. S. Krishnaswamy.[9] Balkin's work is relevant to establish that constitutional provisions, in any given system, exist in a hierarchy. His arguments suggest that a constitution is but an exercise in hierarchising certain norms and principles. By adopting it, the polity and the Constitution must shape up to that desired state where prioritised norms are best achieved/preserved. While it serves as a validation to the Doctrine, Balkin's work helps identify the nuances of how and when one Constitutional provision may be more relevant than another.

[1] Article 368 allows the Parliament to make amendments to the Constitution.
[2] The Constitution (Thirty Ninth Amendment) Act, 1975; The Constitution (Forty Second Amendment) Act, 1976, §55.
[3] The Constitution (Thirty Ninth Amendment) Act, 1975; The Constitution (Forty Second Amendment) Act, 1976, §55; Indira Nehru Gandhi v. Raj Narain, (1975) Supp SCC 1; Minerva Mills v. Union of India, (1980) 3 SCC 625.
[4] Joel I. Colón-Ríos, *Judge-made Constitutional Change* in ROUTLEDGE HANDBOOK OF COMPARATIVE CONSTITUTIONAL CHANGE 217-230 (Xenophon Contiades and Alkmene Fotiadou, Routledge, 2020).
[5] Maneka Gandhi v. Union of India, (1978) 1 SCC 248.
[6] V. V. Ramraj, *Four models of due process*, Vol. 2(3) INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 498-500 (2004).
[7] The Constitution of India, 1950, Art. 21; *See* Manoj Mate, *The Origins of Due Process in India: The Role of Borrowing in Personal Liberty and Preventive Detention Cases*, Vol. 28(1) BERKLEY J. OF INT'L. L. 216-260 (2010).
[8] JACK M. BALKIN, LIVING ORIGINALISM (Harvard University Press, 2011).
[9] SUDHIR KRISHNASWAMY, DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE IN INDIA (Oxford University Press, 2nd ed., 2011).

Krishnaswamy's work, in parallel, establishes a significant point: the Doctrine is a form of judicial review. While it helps establish the contours of the Doctrine, it lays the base for what the author posits in this article: the Doctrine strikes down any object, which carries legal currency, if it threatens a basic feature of the Constitution. Their respective works, collectively, help flesh out the key argument advanced in the paper: there exists a metric by which essentiality may be discerned, and due to the doctrine being a form of a judicial review, the more essential feature/provision may strike the ordinary provision down in case of a conflict.

Part II will locate a theoretical basis for the Doctrine. It will assess competing theories for a wholesome justification for its existence. The sub-Parts A-D capture their crux. In lockstep, the paper will expose their disapplication to the Doctrine. Amongst these, one theory will appear to be an island of relative congruity. This will be found in Part II.E. It will discuss Balkin's idea of 'living-originalism'. The paper will assert a neat alignment between this concept and the Doctrine. Balkin has captured two elements of the Doctrine that no other theory could. Namely, he justifies implied limits on changing a Constitution. In parallel, he has suggested how and why some provisions may completely nullify others.

Following this, Part III will describe the present forms of the Doctrine's practise. It uses the best conceptualisation of it, authored by Krishnaswamy. That is, the Doctrine is best understood as a novel judicial review. Interestingly, living-originalism proves to be the trace outline of this review mechanism. This Part makes this demonstration in steps. Part III.A will first describe the doctrine's application. These will be shown in cases which strike down high-level threats. Sub-Part (1) will dive deeper into the case that brought forth the doctrine. Given its extreme precedential value, the core of the decision will be discussed in depth. Sub-Part (2) will scrutinise the doctrine's interpretation by the later cases. These cases lack conclusive value like the decision that installed the doctrine. Yet, they are canonical for they combine in-depth scrutiny with very serious outcomes.

Part III.B will distil what Part III.A put forth. Subsequently, it will discuss the intelligent tweaks made to the summarised position. As will be revealed, the judiciary went about untying the small knots in the cord that bound the doctrine. This will lead to a single observation about the doctrine. Namely, a layered design is necessary to the basic structure review. There exists a gradation between provisions. This gradation also extends to creating a hierarchy amongst basic features themselves. Since basic features are but sums of their bearer-provisions, they resemble the first gradation. The implication of both the hierarchies is singular: some provisions are more equal than others. So is the premise for the hierarchies: advancing democracy.

Part III.C will then complete the paper's assertion. It will be argued that there is no cord that may bind the doctrine's objective. No basic or circumstantial provision may stand if it dilutes democracy. This portion will also stave off minor impediments to this argument, rooted in technicalities. But for the major part, it will make a more substantive assertion. It would be to show that the doctrine is a manifestation of living-originalism. Both Krishnaswamy and Balkin seem to adumbrate grounds for a perpetual licence. This would be enabling a Constitutional provision to strike down another.

For the sake of fluency, 'State' as used in the paper shall refer to the Government, as referred to in critical literature. Whereas 'state' shall be used to denote the federal units. The term 'court' shall refer to the Supreme Court of India, unless specified otherwise.

II. A PRECISIONIST CONCEPT WHICH THROWS THE MOST INVESTIGATIVE LIGHT

Krishnaswamy defends the Doctrine as well-founded in the Constitution, both for having legitimate roots in it, and as well as for being akin to a device liberally modified by the judiciary for its own use: judicial review. As per Krishnaswamy, the Doctrine squarely resembles other manifestations of judicial review.[10] He asserts this due to the presence of the basic elements that make up any 'judicial review'.[11] The first of these is that the judiciary screens the actions of other branches. The second of these is that there be a Constitutional sanction for this power. All this requires is that the permission be decipherable from the document. He says that both of these are present as regards the Doctrine.

Both the elements that make the Doctrine a judicial review mechanism also have two significant implications. Krishnaswamy has dwelled on the first of these. Namely, the State may not wrest away the basis of the Doctrine.[12] Amending a single provision will be futile, given the multiplicity of the Doctrine's sources: multiple Constitutional provisions.[13] Arguably, there is a parallel implication. Even if the identity drawn from multiple provisions is successfully smothered by damaging multiple provisions, the responsible assault can be nullified for merely having done so. That is, the diminution in the basic structure invalidates the responsible action as if it was invalid in law, since its existence. This is the very core implication of any judicial review.

However, it is best to understand if this unique Constitutional position has any theoretical basis. To discover the most accurate theory for the Doctrine, its mode of origins needs to be understood. The rudimentary essentials of the Doctrine were laid down in *Kesavananda Bharati v. State of Kerala* ('*Kesavananda*').[14] It declared that there exist implied limits to the Constitution. These, in turn, denote that there is a certain quintessence that may never be diminished by the Parliament. This was explicitly laid down in the context of amendments.

The proposition seems simple, but the theoretical basis drawn up saw a huge struggle.[15] *Kesavananda* saw the Constituent Assembly Debates ('CAD') as a necessary external aid to their enterprise. However, it spurred different, and often opposite, views in the participant judges.[16] Noting the same, the court felt compelled to adopt an approach that led to an incontrovertible position: a structural approach to interpretation.[17]

This approach may be broken down as follows. The immutable identity of the Constitution emerges from a perceivable set of vital principles. These principles emerge from groups of Constitutional provisions. These textual cliques exist because each group has a common emphasis on certain ideals. Hence, provisions on judiciary are clearly distinguishable

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[10] *Id.*, at 72-119.
[11] *Id.*
[12] *Id.*, at 5.
[13] *Id.*, at 3; While Krishnaswamy seems to be making an 'arduousness of the task' argument, there is further reason for the same. Namely, the combined effect of multiple provisions will always outrank the amended provision. So, if the amended provision allows the impeachment of the basic features, the bar set up by other provisions is violated. Since this bar is immutable for certain theoretical reasons, the tweak stands annulled; *See* Minerva Mills v. Union of India, (1980) 3 SCC 625.
[14] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.
[15] *See* discussion *infra* Part III.A.
[16] Anuranjan Sethi, *Basic Structure Doctrine: Some Reflections*, SSRN, November 4, 2005, 17, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=835165 (Last visited on July 16, 2023).
[17] *Id.*

from those on federal commerce. However, sharing ideals is not the only requirement. These common ideals must be the definitive elements of the Indian Constitution. The element will be said to be definitive if it is vital in holding the Constitutional system together.[18] Illustrative of these elementary principles are judicial review and separation of powers.

Pluralism of elements that make up a Constitution is justified. Horseshoeing all the provisions into one identifiable moral framework may be imprudent. This will be ignoring isolated incidents of Constitutional compromises with different moral provocations.[19] Illustratively, provisions of asymmetric federalism are different from those on quasi-federalism, arising out of different moral underpinnings.[20] Given unique requirements of certain states, the idea of a dominating Union and parity between states was compromised.[21] Several compacts led to the creation of provisions such as Article 371-F. This was to recognise a federalism that acknowledged differences across a polity, and did not compromise a cultural group's identity while tying it to the Indian polity.[22] Arguably, the Constitution compromised with the very concept of federalism to accommodate such concerns, and this tweaked resulted in an asymmetric feature in the larger scheme of the federation. In other words, and proposedly, powers of each state is no longer 'similarly distinguished' from that of the Union. The larger bent of the Constitution, as is generally accepted, is to place each state on parity with each other, while giving the Union a larger share in powers as compared to them.[23] Both the Union's predominating figure and equality between states is to peacefully tie and hold the nation together.[24] These variations, however, bend both the rules. They give such states more autonomy to cater to their unique circumstances and cultural concerns themselves, so as to stave off their cultural collapse or extreme secessionist movements.[25] Arguably, then, this is accommodating an entirely different moral provocation. In lockstep, an entirely different moral provocation led the document to embed within itself instances of 'quasi-federalism.'[26] Given that the country was thrown in war by partition, and the ills at the local-level may never let the Constitution achieve its goals, a strong unitary bent was installed at the time of foundation. Whereas, some may argue[27] that the unitary bent was given to build convenient circumstances for the incoming government at the time. In that case, its insertion in the document would be bearing only political, and no moral, weightage. It is not the intent of the author to weigh and measure the normative values carried by these constitutional elements. Instead, the argument

[18] Gautam Bhatia, *The Basic Structure Doctrine: Notes from Germany*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, September 24, 2013, available at https://indconlawphil.wordpress.com/2013/09/24/the-basic-structure-doctrine-notes-from-germany/ (Last visited on July 16, 2023).
[19] John F. Manning, *Textualism and the Equity of the Statute*, Vol. 101(1) COL. L. REV. 1-127 (2001).
[20] Rekha Saxena, *Constitutional Asymmetry in Indian Federalism*, Vol. 56(34) ECONOMIC & POLITICAL WEEKLY (August 21, 2021).
[21] L. Tillin, *United in Diversity? Asymmetry in Indian Federalism*, Vol. 37(1) PUBLIUS: THE JOURNAL OF FEDERALISM 46-47 (2006).
[22] *Id.*
[23] Yash Sinha, 'Compulsory *"Borrowing" of State Administrative Officers by the Central Government – Impact Upon the Federal Structure'*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, February 18, 2022, available at https://indconlawphil.wordpress.com/2022/02/18/guest-post-compulsory-borrowing-of-state-administrative-officers-by-the-central-government-impact-upon-the-federal-structure/ (Last visited on November 22, 2023).
[24] *Id.*
[25] See Rekha Saxena, *Asymmetrical Federalism in India: Promoting Secession or Accommodating Diversity?* in REVISITING UNITY AND DIVERSITY IN FEDERAL COUNTRIES 362-376 (Alain-G. Gagnon, Brill, Michael Burgess, 2018).
[26] State of Karnataka v. Union of India, (1977) 4 SCC 608; Samsher Singh v. State of Punjab, (1974) 2 SCC 831; Bhim Singh v. Union of India, (2010) 5 SCC 538; Kuldip Nayar v. Union of India, (2006) 7 SCC 1.
[27] H.M. Rajashekara, *Nehru and Indian Federalism*, Vol. 55(2) THE INDIAN JOURNAL OF POLITICAL SCIENCE 135-148 (1994).

is: any assertion that many variants of federalism were inserted due to the same normative concern, would be inaccurate and lack nuance.

Thus, not keeping all the provisions, or the principles they represent, at par, may be justified. However, this inevitably translates into a situation where provisions with different degrees of moral importance come to co-exist. Arguably, given the difference in relevance or the perception of different moral weightage carried by these different provisions, some provisions/principles in the Constitution may be declared as more significant than the others. The Doctrine does not go into whether basic features may compete with one another in terms of relevance, and this is seemingly because it was never its concern. However, if one were to speculate, a conflict between judicial review and separation of powers may be taken for illustration. If the judiciary, on charges of serious corruption against the Prime Minister, decides to form an investigative committee, it is hard to weigh and measure which way the Doctrine may sway towards. So, the conflict between two basic features has no clear markers.

However, a more basic conceptual loophole will appear on a closer scrutiny of what the Doctrine posits. It only deals with a dichotomy, basic and 'not basic' features, without explaining how is that dichotomy created. In other words, there exist only select morally relevant provisions which are identified as basic for the Constitution's existence. This must immediately bring into focus the premise of the Doctrine: certain provisions, but not all. By lexical necessity, certain Constitutional provisions are superior to the ones excluded.[28] This leads one to speculate about the grounds of exclusion pertaining to 'essentiality'. Presumably, these must be those provisions which do not emphasise on an ideal. Alternatively, they may envelope some concern about an ideal, but they do not find sufficient resonance in other provisions. There exists one more ground for exclusion. Certain provisions may collectively project an ideal. However, the ideal they embody may be dispensable to the Constitutional identity. Consider another illustration. Socialism is a declared basic feature of the Constitution.[29] Now, if policies favouring the market have the effect of denuding it, it could be argued that the right to free trade becomes dispensable.[30] Hence, prioritising a basic feature over another part of the Constitution is, presently, possible, but without clear reasoning about why this is the case. As will be discussed later,[31] the 'what' and the 'why' of the Doctrine's dichotomy are somewhat answered, but not the 'how'.

There ought to be a theoretical framework which is then accurate, or relatively proximate, in justifying these underlying assumptions. In other words, a good theoretical basis would be one that captures and convincingly justifies the two elements of the Doctrine. Namely, the existence of 'implied limits on amending powers', 'the grounds of exclusion,' and 'grounds for ascribing a particular degree of essentiality'. As will be revealed, theories do justify to a degree a few elements of the three. It is justifying the three together with which most of them struggle with, except for one: living-originalism.

A. THE DWORKINIAN THEORY

As stated previously, the most widely available external aid was generating opposing opinions in *Kesavananda*. To solve the conundrum of possible 'immutability', the court had to go beyond available rules and aids. This is a quintessential description of a

[28] Sethi, *supra* note 16, at 18.
[29] Samatha v. State of A.P., (1997) 8 SCC 191.
[30] Sethi, *supra* note 16, at 33.
[31] *See* discussion *infra* Part III.A.

Dworkinian 'hard case'.[32] To be clear, the precedent does not directly invoke Dworkin or his works. Instead, it is the author's proposition that how the judges tackled the challenge before them may be described as Dworkinian exercise. Thus, it is best to scrutinise this theorist's model first, for explaining the concept's unarticulated premises.

Dworkin believed that law and morality are inextricably linked to a degree.[33] Without a moral basis, the governed lack an incentive to frame and adhere to laws.[34] He thus borrowed from the Lockean idea that a community is the function of associative moral-obligations.[35] However, he disagreed with the Lockean distrust of "judges as supreme in moral reasoning".[36] Dworkin stated that legal training, and not moral authority, is the required qualification for this pursuit.[37] Accordingly, this makes judges the best functional-equivalent of the community in finding morality in the law.[38] He further grounded judicial review as an appropriate mechanism for hunting morality by citing democratic concerns. He viewed that social contractarianism has but one theoretical assumption: all participants are equal individuals.[39] As an unelected institution, the judiciary may preserve the minority's individual rights in the face of a majoritarian tempest.[40] This preserves the moral premise he supposed as unique to a democratic society.

As stated previously, the judges in the case had attempted to rely on the best external aid to discern whether unamendability was envisaged for any part of the Constitution: CAD. However, that reliance only ensconced the disagreeing judges in their conclusions even further.[41] Perplexed, they resorted to reading normative stipulations about the degree of permissible change, only by sifting through the dry text of the document.[42] While finding some irrevocable norms at the document's inception, they inexplicitly endorse the judiciary's supreme role in declaring the existence of a basic structure.[43] This judicial process was close to what Dworkin proposed must always exist: a link between the law and morality, and the judiciary's elevated role in discovering the link.

To cull out the underlying morality, he suggested that judges indulge in 'legal pragmatism'.[44] This, he stated, helps resolve conundrums such as the one in *Kesavananda*. In the case, the foremost illustration was finding 'infinite amending power' as impractical, since it would reduce the nuanced Constitution-making exercise redundant.[45] Furthermore, the concept involves deciphering the open-ended Constitutional provisions as manifestations of aspirational, moral, ideals.[46] In *Kesavananda*, the teleological approach was adopted in which the higher moral virtue of social justice guided it towards protecting related provisions from

[32] Abhishek Sudhir, *Discovering Dworkin in the Supreme Court of India-A Comparative Excursus*, Vol. 7(1) NAT'L. U. OF JURIDICAL SCIENCES L. REV. 13, 14 (2014).
[33] Ronald M. Dworkin, *The Elusive Morality of Law*, Vol. 10(4) VILL. L. REV. 631, 634-639 (1965).
[34] *Id*., at 634, 636.
[35] Upendra Baxi, *"A known but an indifferent judge": Situating Ronald Dworkin in contemporary Indian jurisprudence*, Vol. 1(4) INT'L J. OF CONST. L. 557, 560 (2003).
[36] *Id*.
[37] *Id*., at 561.
[38] *Id*.
[39] *Id*.
[40] Gautam Bhatia, *Basic Structure – II: The Argument from Democracy*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, November 4, 2013, available at https://indconlawphil.wordpress.com/2013/11/04/basic-structure-ii-the-argument-from-democracy/ (Last visited on July 16, 2023).
[41] Sethi, *supra* note 16.
[42] *See* discussion *infra* Part III.A.1.
[43] Sethi, *supra* note 16.
[44] Sudhir, *supra* note 32, at 15.
[45] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225, ¶ 1419.
[46] Sudhir, *supra* note 32, at 16.

drastic amendments.[47] Further illustration was going beyond the CAD to reach a firm conclusion, as stated previously.

In fact, this last aspect very squarely represents the analogy attempted here. The CAD's whittled-down utility is factored in by the Dworkinian approach. He states that the framers' thoughts do not qualify as 'morals'.[48] Firstly, this must be their intent, for else drafting open-ended provisions does not make sense.[49] Secondly, he proposed that historical traces such as those are ultimately governed by contemporary circumstances.[50] So while the framers' intentions may be implicative, they cannot be conclusive.[51] Hence, he found morality in Constitutional provisions to be a dynamic concern. Hence, the proposition of legal pragmatism.

The practical execution of this technique requires that the interpretation must not be morally offensive.[52] The text of the concerned provision(s) forms the major premise for discovering the 'morally appropriate' interpretation. To discern this, the judge must begin by gleaning the framers' (implicative) intent.[53] As such, some moral principle that may be under existential threat is then identified. Presumably, this identifiable principle forms the minor premise.[54] Combining the two premises shall propel an interpreter to the conclusion.[55] In other words, the text ought to be read in a way that staves off the attack on the text's conceivable moral ideal.[56]

Kesavananda identified a basic structure within the Constitution, and staved off a perceived attack on the Constitution's moral identity.[57] Yet, the convincing façade of the theory's application falls apart when viewed minutely. As Prof. Upendra Baxi put it, hunting the major premise is an exercise where a judge may ascribe, and not discover, textual intent.[58] Dworkin claimed to the contrary. He argued that his theoretical framework is sufficient in constraining subjective latitude. The constraints are two-fold.[59] The court must hinge its discovery on the framers' intent. In parallel, this discovered intent must not offend a Constitution's structural integrity. Yet, it is Baxi's apprehension that seems to have proven to be correct. Those judges in *Kesavananda* who rejected the Doctrine, had also deployed a version of Dworkinian thought as a justification.[60]

The biggest infirmity is submitted to be the theory's inadequacy in answering the questions at hand. It has no evident answers for why some discoverable morals will have preponderance over others. This is completely delegated to the courts' justification of it.[61] The same infirmity of vacillating subjectivity permeates the notion of 'structural integrity'. Illustratively, the right to property was supposedly not a basic feature, even when it was a

[47] *See* discussion *infra* Part III.A.1.
[48] Sudhir, *supra* note 32, at 23.
[49] *Id.*
[50] Badrinarayanan Seetharamanan & Yelamanchili Shiva Santosh Kumar, *The Quest for Constitutional Identity in India*, Vol. 6 INDIAN J. OF CONST. L. 191, 211 (2013).
[51] RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 8-10 (Harvard University Press,1999).
[52] Sudhir, *supra* note 32, at 18.
[53] DWORKIN, *supra* note 51, at 10, 13 & 15.
[54] *Id.*, at 302.
[55] *Id.*, at 301.
[56] *See* DWORKIN, *supra* note 51, at 301-302.
[57] Seetharamanan, *supra* note 50, at 211.
[58] Sudhir, *supra* note 32, at 25.
[59] DWORKIN, *supra* note 51, at 10-11.
[60] Sudhir, *supra* note 32, at 18; *See* Union of India v. H.S. Dhillon, (1971) 2 SCC 779 and its contrast with *Kesavananda* in spite of similar analytical routes.
[61] Sudhir, *supra* note 32, at 24.

fundamental right in the Constitution.[62] This goes against the views of the man credited with the Doctrine, late Nani Palkhivala. He had argued that the very essential rights to free speech, trade and religion are all structurally linked to the right to property.[63]

Yet, the preceding discussion is not entirely futile. It wrung out a very pertinent feature of a democratic polity: contractarianism. A large swathe of people forging a constitution compels a plausible assumption: they nurture a desire to keep the Constitution functional, so that their social association remains unperturbed. In other words, the 'sovereignty argument' locates a pre-eminence of certain Constitutional features. Their higher essentiality lies in their proximity to 'the people's will' of continuity. In parallel, democratic representatives can also be said to carrying the sovereign will. Resultantly, it is difficult to determine the site of weightier sovereignty. The Doctrine's existence suggests that the courts have decided in favour of the original will. Prominent theories have attempted to resolve this problem, albeit differently.

B. THE KELSEN-CONRAD APPROACH

The foremost scholarly view of the 'sovereignty argument' put forth is the application of the Kelsenian theory.[64] This view takes the Constitution as a fundamental source of all legitimacy in a nation.[65] This essentiality overrides the executive, legislative and the judicial powers it provides for.[66] The designation of a source as the 'core' of all legal norms is determined by a simple process of elimination. It must be that norm without which any given legal norm collapses. Consequently, the roving limbs of power cannot supersede or destroy the core they sprung from.[67]

Before testing its applicability to the grounds of exclusion, it is better to understand the underlying basis for this formulation more deeply. Kelsen's study of legal norms led him to conclude that every legal norm owes its existence to two factors.[68] The first of these is a higher legal norm, which enabled its birth. The second is its utility to the larger legal order, of which it is a constituent of. Its participation in this system explains why the higher norm provided for its existence. Finding the corresponding higher norm is then akin to peeling the layers of an onion. Sufficient discernment will bring to reveal one basic norm that will be the ultimate basis for all other norms.[69] Simultaneously, it will also justify the existence of the legal system, for it created the entirety of it.[70] This singular point of coincidence is the '*grundnorm*'.[71] The Constitution appears to aptly fit this schematic.[72] It enables the creation of

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[62] Jilubhai Nanbhai Khachar v. State of Gujarat, (1995) Supp (1) SCC 596, ¶ 22.

[63] SOLI J. SORABJEE & ARVIND P. DATAR, NANI PALKHIVALA: THE COURTROOM GENIUS 52, 118 (Lexis Nexis, 2021); For instance, the right to print news-media requires the media establishment's firm private right to the premises where it operates.

[64] Pathik Gandhi, *Basic Structure and Ordinary Laws (Analysis of the Election Case & the Coelho Case)*, Vol. 4 INDIAN J. OF CONST. L. 47, 56 (2010).

[65] Aratrika Choudhuri & Shivani Kabra, *Determining the Constitutionality of Constitutional Amendments in India, Pakistan and Bangladesh: A Comparative Analysis*, Vol. 10(4) NAT'L. U. OF JURIDICAL SCIENCES L. REV. 669, 712 (2017).

[66] Joseph Raz, *Kelsen's Theory of the Basic Norm*, Vol. 27(1) THE AMERICAN J. OF JURIS. 46-63 (1982).

[67] Shouvik Kumar Guha & Moiz Tundawala, *Constitution: Amended it Stands?*, Vol. 1 NAT'L. U. OF JURIDICAL SCIENCES L. REV. 533, 544 (2008).

[68] *Id*.

[69] *Id*.

[70] S.P. Sathe, *Limitations on Constitutional Amendment: "Basic Structure" Principle Re-examined* in INDIAN CONSTITUTION: TRENDS AND ISSUES 179, 187 (Rajeev Dhavan & Alice Jacob, N.M. Tripathi, 1978).

[71] Guha, *supra* note 67.

[72] *Id*.

other legal norms. Furthermore, its existential justification lies in its role as the seedbed of the Constitutional system. Jurist Rajeev Dhavan opines that the Constitution, and not constitutional law, is the *grundnorm*.[73] Constitutional law includes constitutional amendments and interpretations, and it depends on the Constitution for its own validity.[74] On the other hand, the Constitution generates its own validity.[75]

In parallel, a Constitution is but a sum of its elementary parts. All parts may not be indispensable to its core identity. As such, the whole Constitution may not be the *grundnorm*. Arguably, the *grundnorm* must then lie inside of the Constitution. Before *Kesavananda*'s occurrence, scholar P.K. Tripathi had suggested that it resided in the provisions pertaining to fundamental rights ('FRs').[76] The deployment of the word 'fundamental' combined with their civil-political importance to human rights, compelled this belief.[77] This is, however, not the adopted position.

Kesavananda interpreted the Kelsenian model with aid from a German lawyer's exposition of it.[78] Dietrich Conrad was of the view that rigidity in amendment procedures has a purpose.[79] He stated that this was to distinguish the concerns of political daily-routine from the larger constituent will.[80] The 'constituent will' is a power that creates a legal system and precedes all the laws therein.[81] He was evidently, albeit tacitly, echoing the concept of *grundnorm*. He also relied on the structuralist line of argument. He stated that certain constitutional provisions enunciate common principles. These principles are the pillars on which the said constitution stands.[82] However, an amendment-provision does not espouse this foundational quality.

Its availability to democratic representatives suggested to him a contrary possibility.[83] Namely, *realpolitik*[84] may demand the effacement of the constituent will. To demonstrate this point, he cited extreme but hypothetical amendments to the Indian Constitution. These include the deletion of Articles 1(1)[85] and 21,[86] the parliamentary system's extermination or the country's expulsion of states where the ruling federal government faced a rejection.[87] Such disruptive moves could not have been a part of the original constituent will, he asserted.[88] Yet, the amendment procedure was nevertheless admitted by the 'original

[73] Sathe, *supra* note 70.
[74] *Id.*
[75] *Id.*
[76] S.K. Agrawala, *Review: Some insights into fundamental rights by P.K. Tripathi*, Vol. 15(4) J. OF INDIAN L. INST. 657-680 (1973).
[77] *Id.*
[78] Monika Polzin, *The basic-structure doctrine and its German and French origins: a tale of migration, integration, invention and forgetting*, Vol. 5(1) INDIAN L. REV. 45, 54-55, 57 (2021).
[79] *Id.*, at 56.
[80] *Id.*
[81] *Id.*
[82] YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS 146 (Martin Loughlin et al., Oxford University Press, 2017).
[83] Polzin, *supra* note 78, at 55.
[84] *Realpolitik* refers to a political concept which holds a certain view about the dynamics in a polity. It states that a polity is driven by political concerns like self-interest or power rather purely idealistic principles such as morality or ideological commitments. Elevated to state-based polities, this concept denotes that State actors' actions are driven by such political concerns rather than ethics or morality, all to grasp, accumulate or preserve State power. *See* Hajo Holborn, *Bismarck's Realpolitik*, Vol. 21(1) JOURNAL OF THE HISTORY OF IDEAS 84-98 (1960).
[85] "India […] shall be a Union of States".
[86] The due process clause.
[87] Polzin, *supra* note 78, at 55.
[88] *Id.*

constituent will' itself. An interpretive innovation helped Conrad rationalise this quandary. He concluded that there must be deliberate and implied limits embedded in Constitutional amendments.[89] Two justifications seem to emerge from his views to suggest the same.[90] The first was the avoidance of a perceivable threat to the constituent will in the form of a revolution.[91] Voices in the Constituent Assembly shared the same view on Article 368.[92] Second was the textual prejudice in favour of an 'inertia'.[93] The tedious gridlock procedure of the amending procedure indicated this. The *grundnorm* as well as its protections were thus demonstrated.

Kesavananda relies on this 'implied limitations' theory to predict the existence of a basic structure.[94] Even those judges who did not support the Doctrine, were not unamenable to the concept of implied limitations.[95] However, the glimpse of Kelsenian theory through Conrad's lens is still incomplete. Conrad had partly relied on another jurist to construct his own views: Carl Schmitt.[96] According to Schmitt, the constituent will was a power which stipulated the manner and means of its own political existence.[97] Furthermore, this constituent power exists in parallel and outside of a Constitution.[98] This was a departure from Kelsen's views. Kelsen had rejected the notion of a constituent power outside of the constitution.[99] He suggested that it is dormant and not actively existent in parallel. It may morph into the latter on through special procedures, such as a new constituent assembly.[100] Schmitt, then, tacitly rejects this extreme upper-hand of a Constitution's authority.[101]

It is in this background that Conrad's view may be fully understood. He had rejected such a Hobbesian view of constituent power as espoused by Schmitt, but strictly in the context of Constitutional amendments.[102] He was silent on the minutiae: whether the constituent power remains dormant, exists in parallel and/or outside of the Constitution.

Rejecting this assertion invites the otherwise popular counter-argument. If the Constitution was constructed by 'we the people', logic compels that the same get to tweak it immoderately.[103] Furthermore, 'we the people' continue to exist outside of the Constitution. As such, every society must have latitude in sovereign decision-making power.[104] This cannot be reserved for principles thought of as essential by the dead and gone.[105] In that light, Conrad's

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[89] *Id*., at 55-56.
[90] *Id*., at 56.
[91] *See also* ROZNAI, *supra* note 82, at 142; Thomas M. Cooley had similarly argued for implied limitations to stave off revolutions.
[92] Subhash Kashyap, *The 'Doctrine' Versus the Sovereignty of the People* in THE SUPREME COURT VERSUS THE CONSTITUTION: A CHALLENGE TO FEDERALISM 99, 106 (Pran Chopra, Sage Publications Pvt. Ltd., 2006).
[93] *See* Deba Prasad Mohanty, *The Procedure for Constitutional Amendments in the Commonwealth*, Vol. 11(1) J. OF INDIAN L. INST. 87, 93 (1969).
[94] Polzin, *supra* note 78, at 57-59; ROZNAI, *supra* note 82, at 146.
[95] ROZNAI, *supra* note 82, at 44.
[96] Polzin, *supra* note 78, at 46.
[97] *Id*.
[98] *Id*., at 47.
[99] *Id*., at 49; Gandhi, *supra* note 64, at 56.
[100] Polzin, *supra* note 78, at 49.
[101] *Id*., at 55.
[102] *Id*.
[103] Yaniv Roznai, *We the Limited People? On the People as a Constitutional Organ in Constitutional Amendments*, Vol. 109 SUP. CT. L. REV. (forthcoming 2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4206373 (Last visited on July 16, 2023).
[104] RAJEEV DHAVAN, THE SUPREME COURT AND PARLIAMENTARY SOVEREIGNTY: A CRITIQUE OF ITS APPROACH TO THE RECENT CONSTITUTIONAL CRISIS 244 (Sterling Publishers, 1976).
[105] *Id*.

reading of substantive limits in a procedural stipulation seems erroneous.[106] This conflation is extremely problematic. The boundaries between 'the substantive' and 'the procedural' must exist. Suppose a procedurally valid amendment is passed, amidst a din of popular outrage against it. It may be said that the amendment does not embody constituent power. This intensifies the conundrum: how are a nation's sovereign authority, its people, then bound by it?[107]

It is proposed that there exists only one approach by which the 'implied limitations' principle may be justified. This is by dichotomising the concept of 'constituent power' and construing the sovereignty as a dynamic concern. According to this reasoning, the Constitution is, at best, a derivative of the primary constituent power. It is a 'constituted power/secondary constituent power'.[108] Whereas, the primary power continues to exist outside of it.[109] This power generates the political order.[110] This order is, in turn, the donee of trust reposed by those possessing the primary power.[111] The primary power merely recedes into the background having trusted itself with a system of governance, but never evaporates.[112] Thus, the constituent power, and not the Constitution, is the *grundnorm*. This view is then a hybrid of Schmitt and Kelsen's views. There exists supra-constitutional power in parallel to the Constitution (Schmitt). Simultaneously, a Constitution may be disposable/replaceable (Kelsen). Conrad has presumably modelled the implied limitations theory on protecting the secondary constituent power.

A law shall not violate a constitution. Similarly, the derivative may not violate the primary power.[113] Viewed this way, an objection popular in debates on Constitutional interpretations gets rebutted. Known as the 'dead-hand' objection, it states that contemporary politics shall be subordinated to past-super-majority decisions if the Constitution's original text is held to be taken as unshakable.[114] If this were to be extended logically, Constitution as the repository of constituent power allows for the dead-hand to rule. However, if the interpretation in the preceding paragraph is taken, the constituent power may challenge the Constitution's say on an aspect, and may possibly substitute the latter. That is, since the contemporary generation of 'we the people' hold the constituent power, they may tweak the Constitution by the older generation. In this manner, the future generations may validly replace the derivative, the secondary power (the Constitution).[115] In this light, reconsider the framing of amending power before the author proposed this explanation: "amendment is a means to access the primary constituent power".[116] In this phraseology, the amendment procedure is wrongly put on the same plane as its source. That is, it falsely equates a derivative with its source. Conrad's position is more justifiable in light of a hierarchical view of constituent powers. His intent was to help avoid legal revolutions through Constitutional amendments.[117] He grounds his concept of tacit limitations in Articles 76 and 368 of the German and Indian constitutions,

[106] Kabra, *supra* note 65, at 679.
[107] *Id*., at 680.
[108] *Id*., at 681-684.
[109] *Id*., at 680.
[110] *Id*., at 683.
[111] *Id*.
[112] *Id*., at 688.
[113] *Id*., at 683.
[114] Christopher L. Eisgruber, *The Living Hand of the Past: History and Constitutional Justice*, Vol. 65 FORDHAM L. REV. 1613 (1997).
[115] *Id*., at 689.
[116] *Id*., at 680.
[117] Polzin, *supra* note 78, at 56.

respectively.[118] Hence, the obverse inference is that the constituent power may be validly exercised due to its ex-situ existence. This explains why Constitutional amendments cannot alter the Constitution unreservedly. In parallel, the binding effect of valid amendments on the people stands explained. The receded primary power gives the secondary power a fiduciary authority to govern it. If the amendment is unamenable to the primary power, they will dispose of the secondary power. They hold a de-facto residuary power. It comes into being if the de-jure secondary power is found to be generating unpalatable outcomes.[119]

This, then, concludes the Kelsen-Conrad version of the sovereignty argument. The infirmity that will now be asserted by the author is less of a criticism. Instead, it is more of an observation that even the most plausible method of wringing sense out of this theory is laced with inconsistencies.

Proposedly, the precise status of the 'metaphorical pillars' of the Constitution is hazy. The fog arises as follows. The 'core essence' of a Constitution is ultimately derived from its provisions. Those, in turn, derive their validity from the primary constituent power exercised to create the document. This suggests that the primary constituent power does not reside in the Constitution. And yet, the quintessence is a feature of the secondary constituent power (the Constitution). So far, the theory and the author's supplied assumptions to it make sense. But Conrad's argument is not simply that the 'core' is essential to the secondary power's existence. Conrad plaintively states that implied limitations protect 'constituent power'.[120] For Conrad, this shielded power is the one which bears a "directly creative influence in the institution of all other authority".[121]

Hence, the Constitutional quintessence is equated with primary constituent power. The assertion is unreasonable for its reveals a tempting paradox. Either the (primary) constituent power has receded into the background, or is alive and being tinkered with. Conrad's conflation suggests he believed the latter. However, logic dictates that there be a presumptive retraction of primary power. For otherwise, the very existence of a governance system would be redundant. If the primary power can be omnipresent/actively involved to govern themselves, a Constitution's existence is futile. But Conrad clearly did not believe that daily political occurrences represented constituent will. These are, then, conceptual loose ends.

The author's attempt to rationalise Conrad's view in spite of the conflation is difficult. It may be posited that the basic features are transitional by nature. They may be secondary during the normal course of their existence. And yet, they transcend their nature when their existence is threatened. Indeed, Conrad[122] and *Kesavananda*[123] make out the basic structure to be a circumstantial phenomenon. It excites itself to a powerful level only in the face of fatal amendments. This is an inchoate assertion. This is saying that basic features are capable of a transcendence: they abandon their secondary nature to become an embodiment of the primary constituent power. It is inconceivable that a part of the secondary power may rival the primary power. It is akin to stating that ordinary law may be as forceful as the Constitution in limited circumstances.

[118] *Id*.
[119] Upendra Baxi, *Some Reflections on the Nature of Constituent Power* in INDIAN CONSTITUTION: TRENDS AND ISSUES 122, 137 (Rajeev Dhavan & Alice Jacob, N.M. Tripathi, 1978).
[120] Polzin, *supra* note 78, at 55-56.
[121] *Id*., at 56; Gandhi, *supra* note 64, at 56.
[122] Polzin, *supra* note 78, at 56.
[123] *See* discussion *infra* Part III.A.1.

Rejection of the dichotomised view of constituent power is further problematic. Not only does this revive certain inconsistencies discussed previously, it also deepens one: the dead-hand objection. The implied limitations, then, will equally apply as against the country's populace. By necessary implication, their status becomes subjugated to the Constitution, as they are not 'primary' anymore. A legal instrument to peacefully overhaul the Constitution completely, in spite of democratic consensus, may be hit by these restrictions. The reason is that the primary constituent power, the Constitution, cannot be effaced. The Kelsen-Conrad approach's explanation of implied limitations is evidently dissatisfactory.

C. THE ACKERMAN-HABERMAS APPROACH

There is another framework through which the Doctrine's theoretical justification may be advanced. The Ackermanian-Habermasian approach is that democracy has two vertical levels of law-making.[124] One level involves the democratic representatives making law for daily functioning of the polity. This is the ordinary law-making process. The other is a higher-level law-making. Herein, a much deeper public mobilisation occurs in response to a socio-culturally charged demand. This is a historically epochal moment that creates the legitimacy for ordinary law-making to take place, thus forth. Analogous to this may be the Indian Constitution's birth and its establishment of parliamentary democracy in India.[125] The ordinary level is inferior in terms of legitimacy. This is due to the lesser depth of public-engagement, and the relative lack of an intense transformative demand. Resultantly, it cannot tinker with the products of higher-level law-making.[126]

Evidently, these are process-based legitimisations[127] with an Aristotelian premise. Namely, deliberation is the ultimate marker for validity. It is so because the collective good demands the concession of individual biases.[128] To move smoothly in a linear fashion, the collective requires a common normative ideal consented to by every individual.[129]

The infirmity in the view is an incidental legitimisation of the dead-hand over future generations.[130] All substantive principles generated by the higher-level exercise become imperturbable due to their procedurally superior roots.[131] The other evident weakness is that the approach does not account for substantive nuances. All the substantive principles installed by the higher-level carry equal legitimacy. So while this may ostensibly justify 'implied limitations', it fails on a deeper level of scrutiny: the view displaces the basis of exclusionary grounds. All the basic constitutional provisions were entrenched by the same process as their inessential counterparts. As such, all ought to be equivalent in normative terms. In any case,

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[124] Mariela Vargova, *Democratic Deficits of a Dualist Deliberative Constitutionalism: Bruce Ackerman and Jürgen Habermas*, Vol. 18(3) RATIO JURIS 365, 368-370, 371-374 (2005).
[125] *See* JACK M. BALKIN, LIVING ORIGINALISM 60 (Harvard University Press, 2011).
[126] Vargova, *supra* note 124, at 367-370, 375; Habermas differed from Ackerman over the degree to which the two remain separated. Unlike Ackerman, Habermas was of the view that the ordinary-level deliberation may disrupt principles entrenched by the higher-level exercise, without the exact same level of mobilisation. *See* Vargova, *supra* note 124, at 375.
[127] Gautam Bhatia, *Basic Structure – IV: Constitutional Grounding and Identification*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, November 9, 2013, available at https://indconlawphil.wordpress.com/2013/11/09/basic-structure-iv-constitutional-grounding-and-identification/ (Last visited on July 16, 2023).
[128] Vargova, *supra* note 124, at 368, 375, 381.
[129] Gautam Bhatia, *Basic Structure – VI: Introducing Deliberative Democracy*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, November 16, 2013, available at https://indconlawphil.wordpress.com/2013/11/16/basic-structure-vi-introducing-deliberative-democracy/ (Last visited on July 16, 2023).
[130] Michael J. Klarman, *Review: Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, Vol. 44(3) STANFORD L. REV. 759, 777-785 (1992).
[131] Bhatia, *supra* note 127.

Ackerman himself acknowledges this view's limited application to the Indian scenario.[132] The process of Indian Constitution-making was dominated by a certain political class.[133] Its temporary charisma was put forth as popular sovereignty, thereby fogging the procedural legitimacy to an extent.[134]

D. THE NATURAL RIGHTS THEORY

Another theory worth consideration is 'immutability' as an extension of natural law. Originally an extension of theistic views, natural law was considered as an invincible aura protecting the innate human identity: a small chunk of divine will, manifesting as souls.[135] These were times when sovereignty was conflated with culturally authoritarian figures.[136] As non-theistic interpretations came to grow, human reason came to define 'innate humanity'.[137] The archaic approach's premise remained unaltered: natural law must protect innate humanity. However, these were opposed to considering any cultural suppositions as the prime definitional element of humanity. Instead, it was found to lie in individual life and its ability to exercise reason.[138] These views additionally challenged the domain of any sovereign to determine the composition of 'natural rights'.[139] Contrarily, the exposure of humans to the whims of a sovereign eventually conditioned the definition of natural rights.[140] The most prominent of these being given by Grotius, natural law became a constellation of protective rights necessary to preserve a socially-enabling individual life.[141]

This, then, makes for a content-based approach.[142] Fundamentally, the grounds of exclusion may be said to be grounded in an exercise of gradation. In a manner of speaking, this is the execution of what theorist Lon F. Fuller asserted: a law's significance must be judged by the degree to which it fulfils any moral principle.[143] Failing this, he states, those interpreting its text will have no signage to look up to, and the society will never be able to judge if laws continue to align with the normative framework they desired.[144] In other words, Fuller pressed for an evaluative element in laws so that they may be distinguished in terms of significance,

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[132] Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court*, Vol. 8(1) WASH. U. GLOBAL STUD. L. REV. 1, 34 (2009)

[133] *Id.*

[134] *Id.*; Albeit, this argument may be raised against the Ackermanian theory itself. Any constitution-building activity may mostly be the privilege of a certain section of the society. As such, truly legitimate higher-level deliberation may be a utopian desire.

[135] DAVID BRAYBROOKE, NATURAL LAW MODERNIZED, 3-28 (University of Toronto Press, 2001); Navajyoti Samanta & Sumitava Basu, *Test of Basic Structure: An Analysis*, Vol. 1 NAT'L. U. OF JURIDICAL SCIENCES L. REV. 499, 504 (2008).

[136] JENS BARTELSON, A GENEALOGY OF SOVEREIGNTY, 53-106 (Cambridge University Press, 2001).

[137] WILL DURANT, THE STORY OF PHILOSOPHY: THE LIVES AND OPINIONS OF THE GREATER PHILOSOPHERS, 124 (Simon & Schuster, 2nd ed., 1967).

[138] *Id.*, at 276-288.

[139] A. Lawrence Lowell, *The Limits of Sovereignty*, Vol. 2(2) HARV. L. REV. 70-87 (1888).

[140] Basu, *supra* note 135, at 503; Aditya Swarup, *Sovereignty, Law and the 'State of Exception*, Vol. 4(5) NAT'L. ACAD. OF LEGAL STUD. AND RESEARCH STUDENT L. REV. 41, 45.

[141] Basu, *supra* note 135.

[142] Bhatia, *supra* note 127.

[143] Peter P. Nicholson, *The Internal Morality of Law: Fuller and His Critics*, Vol. 84(4) ETHICS 308-324 (1974).

[144] *Id*; The author, however, does not consider that Fuller's views may be another possible terrain where the 'grounds of exclusion' may be found/explained. His theory does not state whose moral perceptions carry weight: the framers' or the contemporary generations'; nor does he state in as depth as Dworkin, about the ability or locus of judges to conduct this exercise; his work, unlike Dworkin, is silent on the utility of external aids like the framers' debates.

and the lesser laws must not be allowed to impede the better ones.[145] The natural-rights view may just succeed in supplying grounds to sort 'basic' and 'dispensible' features. They accord higher value to Constitutional provisions more approximate with natural rights, which is a form of a moral principle.[146] Accordingly, these get to displace the less reflective ones. However, the infirmity of the natural law theory is illustrated by its origins. Its definitional dynamism reveals a huge latitude for subjectivity. Without procedural fairness to attach greater legitimacy to any contesting views, determining 'natural rights'[147] may be an internecine conflict.[148]

E. LIVING-ORIGINALISM

The elementary bases of the most prominent theories demonstrably do not go beyond justifying 'implied limitations'. Albeit, a plausible view suggests that stitching them up constructs the ideal foundation of the Doctrine.[149] That would be a skin-deep evaluation. The very basis of capturing a concept in some theoretical model is to predict its growth-pattern, and its alignment with the concept's foundations. Both are better achieved when there is one theory, since the possible trajectory is the one enabled by it. For the subject of this paper, justification for the Doctrine's existence is one objective. The more crucial objective is to understand the parametric view of sorting Constitutional provisions. As such, the model that singularly offers both sought after justifications ought to be preferred.

'Living-originalism' proves that this pursuit is not a Lacanian desire but an easily demonstrable concern. It suggests that the Constitutional text must be taken as a starting point for forging an interpretation for contemporary circumstances.[150] It argues that the Constitutional text fixes a direction in which the evolving interpretation needs to strive towards.[151] In doing so, it is not necessary that it repeats historical outcomes or claim a rigid, unintelligibly rigid meaning.[152] In lockstep, it should not render the intent behind the text's insertion redundant.[153] This entire exercise in pushing taking the intent of the Constitution through many generations is to adapt it to contemporary circumstances and help it survive.[154] However, this brief explanation will not do justice to the finer mechanics of the theory, and it is best to grasp it by understandings its components. As the name suggestively impels, it is composed of two elementary parts: 'living-constitutionalism' and 'originalism'.

Living-constitutionalism accords greater weight to contemporary circumstances.[155] It argues that the focus ought to be on how constitutional principles change, and not on how they get entrenched in the society.[156] It exposes how law is always a coercion,

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[145] Rajeev Dhavan, *The Basic Structure Doctrine: A Footnote Comment* in INDIAN CONSTITUTION: TRENDS AND ISSUES, 160, 174 (Rajeev Dhavan & Alice Jacob, 1978).
[146] *See* R.R. Haule, *Some Reflections on the Foundation of Human Rights—Are Human Rights an Alternative to Moral Values?*, Vol. 10(1) MAX PLANCK YEARBOOK OF UNITED NATIONS LAW ONLINE 378-380 (2006).
[147] A large gap separates FRs from natural rights; *See* G. Jacobsohn, *An unconstitutional constitution? A comparative perspective*, Vol. 4 INT'L. J. OF CONST. L. 460, 474 (2006).
[148] Seetharamanan, *supra* note 50, at 210; *See* also Randy E. Barnett, *Constitutional Legitimacy*, Vol. 103 COLUM. L. REV. 111, 113 (2003); Gautam Bhatia, *Basic Structure – VIII: Conclusion (of sorts)*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, November 22, 2013, available at https://indconlawphil.wordpress.com/2013/11/22/basic-structure-viii-conclusion-of-sorts/ (Last visited on July 16, 2023).
[149] Bhatia, *supra* note 148.
[150] BALKIN, *supra* note 8, at 10.
[151] *Id*., at 72.
[152] *Id*., at 13, 43-44.
[153] *Id*., at 146.
[154] *Id*., at 4, 119.
[155] DAVID STRAUSS, THE LIVING CONSTITUTION, 44, 52, 100, 106, 119, 127 (Oxford University Press, 2010).
[156] *Id*., at 117.

either by a cultural figure or by an authority established by democratic rule.[157] As such, the 'command' angle of the law dictates that law be deciphered by the terms provided to us by a particular authority.[158] Living-constitutionalism argues that an interpretation confined to the views of this authority assaults the very episteme of a democracy. Contemporary understandings of the law emerge due to accreting interpretations.[159] Those, in turn, have been responses to contemporary needs which the original text could otherwise not contemplate.[160] As such, respect for Constitutional text is not an acknowledgment of authority.[161] Instead, it is to recognise the settlement of widely deliberated issues.[162] These concerns nevertheless remain dynamic and may require further functional tweaks.

As opposed to this, originalism views Constitutional text as 'the' governing means to resolve contemporary concerns.[163] The premise is that the text cannot account for every nuance in civil-political circumstances.[164] However, the text came about to discipline the interpretations deployed to deal with such nuances.[165] Living-constitutionalism accorded weight to situational expediency over text. Originalism considers the text to be the weightier factor. The interpretations may be conditioned by testing their alignment with the text's original meaning.[166] Alternatively, it may be a reference to the application most probably expected by the framers.[167] The crux of the theory thus treats the Constitutional text as the best procedural means for substantive outcomes. Norms may always be in a state of flux. However, a written Constitution installs higher normative standards to give that flux a direction.[168] So if the text bars 'unusual' punishments, it is a given that the contemporary norms will dictate its definition. However, an alleged practice will invite this definition if it shocks the conscience as much as the ancient punishments outlawed by the framers.[169]

Living-originalism bridges the disparity between the two approaches. Balkin espouses that there is a conceivable overlap. He asserts that both, originalism and living-constitutionalism, rely upon the open-ended nature of the provisions to propagate their individual views. Firstly, the broader precepts of all versions of originalism emphasise on the fixity of Constitutional meaning.[170] By way of rich case analyses, Balkin demonstrates that the varying contours of that meaning shows the flexibility of originalism.[171] He concludes the denotation to be an impetus common with living-constitutionalism: to find a meaning most suitable to the contemporary era. However, all that is required is that it be tethered to a founding principle. Again, the point on unusual punishments helps explain this. Text barring those do not mean they bar the cruel modes of punishment prevalent at the time of the Constitution's

[157] *Id*., at 37.
[158] *Id*.
[159] *Id*., at 3.
[160] *Id*., at 106-114.
[161] *Id*., at 104.
[162] *Id*.
[163] Keith E. Whittington, *Originalism: A Critical Introduction*, Vol. 82(2) FORDHAM L. REV. 375, 395 (2013).
[164] BALKIN, *supra* note 8, at 4.
[165] *Id*., at 62.
[166] *Id*., at 6-7.
[167] *Id*.; Sudhir, *supra* note 32, at 25.
[168] DENNIS J. GOLDFORD, THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM, 90 (Cambridge University Press, 2005).
[169] *See* BALKIN, *supra* note 8, at 7.
[170] GOLDFORD, *supra* note 168, at 74.
[171] BALKIN, *supra* note 8, at 7, 264; "Agreement on the proposition that the Constitution must have a fixed meaning leaves plenty of room for disagreement about what that meaning is, and how and at what level of generality it is to be ascertained".

drafting. It would bar any modern-day punishment which is perceived as such.[172] This approach predominantly distils and then preserves the original intent, while slightly relying on living-constitutionalism to avoid a fixed meaning.[173] Similarly, the Commerce Clause's allocation of power to the US Federal government cannot only extend to the plain meaning of inter-state 'commerce': trade or exchange of commodities. Instead, it would include the entire subset of economic activities like mining or manufacturing, with impact beyond state borders.[174] Secondly, the primary element of living-constitutionalism is that contemporary circumstances animate the skeletal text.[175] The 'constitutionalism' therein implies that the dynamic interpretation must be such that it honours the original intent behind the principle's insertion in the Constitution.[176] For instance, when markets required heavy State-intervention and social welfare, an expansion of bureaucracy occurred. Famously referred to as the New Deal era, the courts indulged in what may be termed as a Constitutional 'construction', and not interpretation.[177] They did so by predominantly using living-constitutionalism, all the while adhering to the original text. The word commerce was narrowly construed to include only activities based in the private market, leaving the government to deal in and distribute commodities beyond across state borders.[178] It gave effect to the contemporary circumstances espousing social welfare and equality, while preserving the original intent behind the Commerce Clause to govern private-market operations.[179] Put simply, Balkin's concept distils the original intent and expected application by interpreting a text. Then, it constructs a judicial position out of it that factors in the contemporary circumstances, all the while holding on to the meaning so culled out.

Balkin's views do away with the common infirmity of originalism and living-constitutionalism in a trot. Originalism inevitably supports predominance of judicial order over other democratic branches.[180] This is because it is the judicial 'last word' which precludes aberrant meanings from taking shape as laws.[181] Paradoxically, it is for this precise reason that living-constitutionalism also wants courts to read new rights into texts.[182] This is counterintuitive in Constitutions with separation of powers. Original text of the U.S. Constitution envisaged equal stature for all coordinate branches of the State. Balkin's concept keeps judicial review to a minimum. Living interpretations may stand only if there is some constitutional basis to them.[183]

This necessitates an explanation of what interpretation entails of under Balkin's theory. Interpretation may only perform two functions: construction or ascertainment.[184] Depending on the kind of text the interpreter deals with determines which of the two ought to apply. This giveaway is embedded in the text itself. If it is a fixed rule, the Constitutional intent was to limit discretion. Illustrative of this is the term limits of office bearers. There is no room for construction in these cases. The other class comprises of vaguely phrased texts. These are the principles/standards which the Constitution inspires its people towards. The constitutional

[172] BALKIN, *supra* note 8, at 6, 32, 40.
[173] *Id*., at 6, 32-33, 42-43.
[174] *Id*., at 150-151.
[175] *Id*., at 145.
[176] *Id*., at 143.
[177] *Id*., at 149-162.
[178] *Id*.
[179] *Id*.
[180] *Id*., at 266.
[181] *Id*.
[182] *Id*., at 278.
[183] *Id*., at 278-279.
[184] *Id*., at 4-5.

intent was to channel politics through key concepts, with the future generation deciding when and how. Equality provisions or those pertaining to freedom of expression are instances of the same. The overlap is as thus: the framers desired that the future generations engage in Constitutional construction at intended sites. The text provides the direction, while the principles decide how and when to propel thereafter.

However, this assumes that two vague-formulations can never conflict with each other. Albeit, Balkin nowhere explicitly addresses this, his idea of constitutional construction presents an answer the present paper has been looking for. The Constitution is nothing but a long-term political project, he states.[185] Its singular subject is to incorporate elements that infuse greater democracy. Democracy denotes mechanisms to divert social conflict into ordinary politics.[186] Presumably, the formulation which does so better trumps the conflicting counterpart. So suppose a Constitution provides for a three-tiered federalism only taking into account urban areas. The vague principle appears to be greater decentralisation, albeit no text specifies it as such. Further suppose an amendment introduces a fourth federal-tier to rural areas. That is, it executes the vague aspirational essence deductible earlier. Fulfilling an aspirational objective is the certification of this amendment. The amendment is also justified when viewed through another lens. Since the amendment will add more deliberative colour to the governance of a certain section of the populace, it will be justified. Hence, there exists evaluative criteria if two vague-provisions clash. Firstly, one must be more effective in fulfilling a Constitutional desire. If this does not solve the conundrum, the one advancing greater democracy shall triumph.

There is another weakness which living-originalism prunes out. The authorial source of the vague Constitutional principles and their execution do not have to wrestle for superiority. That is, the views of the dead are not necessarily superior to the ones of the living. Balkin refuses to locate sovereignty in the Constitution's finding moment.[187] Instead, he asserts that sovereignty is spread inter-generationally, with each wave of 'we the people' contributing to this project.[188] This an accurate voicing of dynamic sovereignty. Furthermore, judiciary does not have the last word on the matter.[189] Its coordinate status implies that legislative means may overrule its view of the matter.[190] This is not to suggest that the legislature/executive have the last word. The last word on democratic legitimacy belongs to the objection/silence in the Habermasian spaces.[191] Living-originalism takes constitution as a device to not just discipline judiciary or one branch of the State, but to channel and discipline politics.[192]

The 'implied limitations' and its hierarchic view of Constitutional provisions stand explained in this paradigm. The vague standards and principles constitute a list of aspirational demands. The originalist element of the theory suggests that these demands shall not be obliterated. A provision may dislodge another from the Constitution if it comes to acquire or lose democratic relevance. This is a crucial takeaway. Neither *Kesavananda* nor the discussed theories explain the equivalence between an individual's right to equality and federalism.[193] Both are basic features under the Indian constitutional law.[194] Living-originalism

[185] *Id*., at 60.
[186] *Id*., at 66.
[187] *Id*., at 65.
[188] *Id*., at 60.
[189] *Id*., at 68.
[190] *Id*., at 54.
[191] *Id*., at 54, 71.
[192] *Id*., at 61-63.
[193] Bhatia, *supra* note 127.
[194] *See* discussion *infra* Part III.

may justify them as equal elements of a democracy. Equality in individual voices is of no use if the government is distant to those voices due to excessive centralisation. This nuanced evaluative criterion solves the Dworkinian problem of discovering moral relativism amongst provisions. This is also solving the ills of the Ackermanian-Habermasian view whilst retaining the more lucid parts of it. Special treatment of the constitutional moment stands preserved. The dualist view of higher and ordinary law-making will work within its confines. In parallel, the present concept applies a 'substantive sieve' to the products of higher law-making. All procedural products of the higher tier do not stand on the same footing. Living-originalism makes for the substantive vacuity in the Ackermanian view.

The Kelsen-Conrad problem of locating sovereignty as a monist/dualist concept is also fixed.[195] Dynamic, as opposed to hierarchic, sovereignty explains why any generation's Constitutional view may bind or trump the other. The vague-aspirational indicia in the Constitution ought to have a dialogic relationship with this sovereignty. The *grundnorm*-like status is conferred upon the aspirational essence. And yet, the contemporary sovereign has a huge degree of influence over the *grundnorm*.

Lastly, it innovatively addresses the weaknesses of the natural-law approach. It grants both substantive and procedural legitimacy to one of the conflicting views on the categorisation of rights. The substantive grounds will proclaim victory for the view which is most aspirational. If both views further Constitutional aspirations, they will be tested for their democracy-enabling effect. Furthermore, any Constitutional provision, and not only which are rights-based, may attract the coveted 'basic' status. Most significantly, living-originalism makes up for the procedural vacuity in the 'natural law' view. The substantive evaluation is accompanied by a procedural screening. The say of the coordinate branches of the State as approved in Habermasian circles will all enjoy/acquire equal status. Summarily, living-originalism dissipates the theoretical smog that otherwise hung thick.

III. THE DOCTRINE, AND ITS PRESENT-DAY ALIGNMENT WITH LIVING-ORIGINALISM

While living-originalism explains the basis of the Doctrine, and gives a criterion on which the Doctrine's hierarchy is created, evidence to verify the same is essential. This part is devoted to arguing that the origins and growth reflect what is represented by the theory. In parallel, as case law and Krishnaswamy's work show, the Doctrine has become a form of a judicial review mechanism. That is, it pre-empts a violation of law, which in this case is the basic structure, or eliminates the violation's source. This is shown to make a larger point: if the Doctrine is treading the path carved out by living-originalism and acts like a judicial review, then the last logical extension must also be acknowledged. That is, basic provisions outrank the dispensable provisions of the Constitution, and must strike them down in the event of a clash.

A. THE CANONICAL CASES

Demonstrably, one theoretical model seems capacious enough for capturing the essential modalities of the Doctrine. However, the Doctrine has evolved since its inception. The true test of living-originalism's capacity lies in remaining synchronised with the Doctrine's

[195] Again, this is not to state that the Kelsen-Conrad view stands justified. In fact, the author is voicing an objection to it: even the most plausible logical explanation of it seems futile in light of living-originalism.

evolution. To this end, it is imperative to lay out the concept's most significant instances of application.

This Part discusses the primary body of case-laws that govern the functioning of the Doctrine. It explores the common elements in *Kesavananda*, and their development by subsequent cases. It argues that the intent and operation of the Doctrine was very expansive. This is shown by both the majority opinions in *Kesavananda*, captured by Part III.A.1 and the landmark cases that followed, shown in Part III.A.2.

1. THE SPARK OF IT ALL: *KESAVANANDA* AND ITS INFLECTION POINTS

To begin with, any incongruity between the concept's utilisation and outcome in *Kesavananda* itself needs to be probed. A preceding case had triggered the debate on Constitutional endurance in the face of amendments. *I.C. Golaknath* v. *State of Punjab*[196] had to deal with an amendment that put a land-reform statute beyond the clutches of judicial review. The text of Article 368 neither denoted nor implied its role as a source of any power.[197] In fact, the Constitution suggested that the power enabling the existence of Article 368 was residuary.[198] That is, the presumptive source for amending power was traced to Articles 245 and 246 read with Schedule VII, List I, *Union List*, Item 97 (Residuary power).[199] As such, Article 368 was more of a mechanical device for channelling that power. As Krishnaswamy points out, this was an impermissible position in light of the Constitution.[200] The implication of Article 13[201] is a dichotomisation of law as 'Constitutional' and 'ordinary/legislative'.[202] Aligned with this hierarchic notion, Article 245 subjects the validity of any Parliamentary law to other Constitutional provisions only.[203] *Golaknath* reached a different conclusion. It stated that Article 368 draws power from a provision enabling plenary 'legislative' power.[204] Additionally, it noted that Article 13(2) necessitates Constitutionality in "any law". It deemed an erroneous equivalence between the outcomes of legislative and amendatory processes. That is, they both shared the same source and restriction. The premise was that the Constitution did not distinguish between legislative and constituent powers.[205] Hence, Article 13(2) was held as extending to Constitutional amendments due to them being 'law'.

This conclusion is hard-pressed for logical foundations. Article 13(3) is fairly exhaustive of what it covers. Nowhere does its text extend to screening constitutional law. In any case, Krishnaswamy argues that it ought to be read with clause (1) of the provision. Article 13(1) preserves the application of laws preceding the Constitution's enforcement. Article 13(2) subjects all laws, including those preceding the Constitution, to the test it embodies. Arguably, an absurd result would follow if two are deemed as mutually exclusive. That is, if Article 13(2) does not include laws that preceded the Constitution but were saved by Article 13(1), absurd consequences would follow. Both post and pre-Constitutional laws may violate the

[196] I.C. Golaknath v. State of Punjab, (1967) SCR (2) 762.
[197] KRISHNASWAMY, *supra* note 9, at 5.
[198] *Id*., at 6.
[199] Article 245 demarcates the extent of legislative powers of the central and state legislatures. Article 246 mandates that either federal unit will have exclusive/shared control over legislative subjects. Schedule VII contains three lists affecting this division. It has two exclusive lists, one each for both the centre and the states. It carries one concurrent list. Entry 97 in List I gives the centre the power to legislate on anything not specified in all these provisions.
[200] KRISHNASWAMY, *supra* note 9, at 6.
[201] This provision strikes down any law if it is found violating any FR.
[202] Basu, *supra* note 135, at 509.
[203] KRISHNASWAMY, *supra* note 9, at 6.
[204] I.C. Golaknath v. State of Punjab, 1967 SCR (2) 762 ¶ 53.
[205] *Id*., ¶¶ 25-30, 36 (K. Subba Rao CJ).

Constitution, but the latter would be saved by this mutual exclusivity. Hence, a 'chronological precedence' would then protect the unconstitutionality of certain laws. The author agrees with this assessment. Article 395 has repealed laws that could otherwise be characterised as Constitutional in character.[206] Hence, Article 13 must be read to cover laws which both predate and follow the Constitution's enforcement. The implication of this reading carries the answer to the concern cited above. If Clause (1) refers to law which precedes the Constitution, strictly speaking, Article 13 does not extend to only those laws which were born with the Constitution's sanction. This necessarily suggests that 'Constitutional law,' which presumably must always must be one that is generated due to the Constitution, was not the subject of Article 13.

Kesavananda dealt with an amendment[207] that nullified *Golaknath*. It termed Article 368 as a source of power. Herein, the court carves out a solution much closer to the Constitutional text. Khanna J's view is the most crucial for its technical implications. It converts the opinion of six judges on the limited breadth of amending powers as the majority view.[208] In parallel, it agrees with the remaining six on the partial validity of a provision brought about by the 1st Amendment.[209] He subjected fundamental rights to the whims of Constitutional amendments. As will be shown later, his views have found no consequential acceptance. In fact, Sikri J's opinion became the premise of the later canonical judgments.[210]

a. Sikri CJ

Sikri CJ noted that the term 'amendment' was undefined in Article 368.[211] Instead of specificity, the provision's text suggested limitations that did not require mention.[212] The text went as follows: "[…]amendment seeks to make change in[…]". He proposed that the framers disregarded phrasing it as "change of" or to simply omit "in".[213] He illustratively gleaned this from the presence of Articles 54 and 55 and the exclusion of Articles 52 and 53 as subjects of change in Article 368. He said that the existence of a President in the Indian Constitutional system was, then, desirously indelible.[214] Furthermore, he equated fundamental rights with natural rights to discern immutability.[215] The restriction and abrogation of such imperative provisions was otherwise provided for in Articles 358/359 and Articles 33/34, respectively.[216] Reasoning being, Article 368 could have specified that FRs are well exposed to amendments. He grounded his reasoning by stating that the meaning of 'amendment' must neatly befit the context.[217] He asserts that this was a pattern where the Constitution provided for a defined amendment. Accordingly, the term has a confined grasp in Articles 4(1), 107, 169(2), 196(2), 197(2), 200.[218] Whereas, it was more capacious in Articles 35(b), 372, 243(2),

[206] KRISHNASWAMY, *supra* note 9, at 12-13.
[207] The Constitution of India, 1950, Arts. 13, 368 *amended vide* The Constitution (Twenty Fourth Amendment) Act, 1971.
[208] N.A. Palkhivala, *Fundamental Rights Case: Comment*, Vol. 4 SUPREME COURT CASES J. 57-58 (1973); The bench strength in *Kesavananda* was of 13 judges. Supreme court rules (both old and new) mandate that the most agreed upon conclusions on an issue are binding; *See* The Supreme Court Rules, 2013, Order XII, Rule 3.
[209] Palkhivala, *supra* note 208; *But see* P.K. Tripathi, *Kesavananda Bharati v. State of Kerala: Who wins?*, Vol. 1 SUPREME COURT CASES J. 3 (1974);
[210] KRISHNASWAMY, *supra* note 9, at 32; Albeit, his conclusion that FRs may be subjected to amendments in in the minority; Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225, ¶ 1537.
[211] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225, ¶ 47.
[212] *Id*.
[213] *Id*.
[214] *Id*., ¶ 50.
[215] *Id*., ¶¶ 295-297.
[216] *Id*., ¶¶ 131,133, 161-164, 296-297.
[217] *Id*., ¶¶ 62-65.
[218] *Id*., ¶¶ 70-72.

252, ¶ 21 of Schedule VI and Part VII (Schedule V, Part D).[219] He wanted to read its usage in Article 368 but without compromising any routes of/to a socio-economic revolution.[220] Akin to a Dworkinian resolution of hard cases, he deems 'implied limitations' as the most plausible way out.[221] The paradoxical part is that he did not/could not extricate amendments out of Article 13(2)'s screening.[222]

Nevertheless, the structural analysis is a very crucial step forward. The author reiterates the objections asserted earlier. Additionally, the weakness of the constituent power logic is very malleable. The court may use it to justify and not oppose certain acts of the Parliament regardless of how it modifies the Constitution. In fact, the very first amendment had restricted select FRs. The Parliament was unicameral, since the House of the States was yet to be inaugurated. The judiciary deemed that the House of the People was sufficiently capacious for the constituent power intended to be tapped into by Article 368.[223] The logic of constituent power is, thus, very shaky. Premising the Doctrine on the very build of the Constitution, thus, pre-empts an undesirable variable.

b. Shelat and Grover JJ

The otherwise comprehensive reasoning by Sikri J is conspicuously silent on constituent and ordinary powers.[224] Shelat and Grover JJ make up for this vacuity, all the while chiming a reasoning similar to Sikri J's. They cited the documented nature of the Constitution to assert implied limits.[225] They found further support for the concept in Section 8, Indian Independence Act, 1947.[226] In probing the 24th Amendment, they made a very cogent argument. They asserted that if Article 368 was truly omnipotent, the amendment was not required for specifying the same.[227] However, if the power was capped by the Constitution, any increment would be invalid.[228]

They then stressed on the exclusivity between the Parliament and constituent power. They stated that unlimited power would imply that Article 368 provides for self-disposal.[229] If the provision is eliminated, the Constitutional provisions on positive obligations will become redundant.[230] In eluding an absurd position, they held that no creature of the

[219] *Id*., ¶¶ 70-72; In fact, *Golaknath* in ¶ 78 finds more provisions that enable amendments. All these occur under the Parliament's ordinary law-making power. Namely, they are Articles 3, 10, 59(3), 65(3), 73(2), 97, 98(3), 106, 120(2), 135, 137, 142(1), 146(2), 148(3), 149, 169, 171(2), 186, 187(3), 189(3), 194(3), 195, 210(2), 221(2), 225, 229(2), 239(1), 241(3), 283(1) and (2), 285(2), 287, 300(1), 313, 345, 373.
[220] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225, ¶¶ 209, 210, 282, 287.
[221] *Id*., ¶ 210.
[222] *Id*., ¶ 55.
[223] Sankari Prasad Singh Deo v. Union of India, (1952) SCR 89; The decision has a binding effect only till the year 1973.
[224] *Id*., ¶¶ 188-204; Dr. Sanjay Jain & Amit Pai, *Chief Justice S.M. Sikri* in BASIC STRUCTURE CONSTITUTIONALISM: REVISITING KESAVANANDA BHARATI, 12, 21 (Dr. Sanjay Jain & Sathya Narayan, Eastern Book Company, 2011).
[225] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225, ¶¶ 486, 550.
[226] *Id*., ¶¶ 484-485; This provision confined the legislatures' powers within the applicable Constitution during India's transitional status. Its phrasing seems to refer documents both from the past as well as those of the future.
[227] *Id*., ¶ 494.
[228] *Id*.; An inarticulate version of the same argument was echoed by Reddy J in ¶ 1141 of the same decision.
[229] *Id*., ¶ 537.
[230] *Id*., ¶¶ 488-489, 538.

Constitution can be sufficiently sovereign to do so.[231] Only a supra-Constitutional sovereign is entitled to the same.[232]

This is a problem which mars their entire reasoning. They base their conclusion in the difference of sovereign and constituent powers. Simultaneously, theirs is the only opinion to take note of Palkhivala's distinction between inherent and implied powers.[233] Summarily, inherent limitations exist due to such an imposition by the birthing source. Implied limitations contrarily effuse from its structure, and the structure's source need not be looked at for their discernment. And yet, the concerned judges detect 'implied limitations' by analysing sources of powers. Hence, their hierarchic notion of constituent powers is absolutely perplexing.

c. Hegde and Mukherjea JJ

The reasoning of Hegde and Mukherjea JJ ally with both the preceding opinions, in parts. They note that 'no limitations' would make the Constitutional structurally incoherent.[234] They suggest that assenting to a draconian amendment may not be congruous with the President's oath to protect the document.[235] They thus found a relatively restrictive intent in "addition, modification or repeal"[236] as compared to other amendatory provisions.[237] They also hold that the Constitution does not encapsulate sovereignty.[238] Holding otherwise would make Article 368 a channel to make modifications to the otherwise sanctimonious theoretical concept.[239] This was deemed as impossible in the Constitutional sense. Framers were stated to be cognizant of the ills of a representative system.[240] This necessitated a preference for a counter-majoritarian view when two interpretations are plausible.[241] This was grounded by stating that the document grants a fickle representativeness to the elected.[242] Combined with the desire for social welfare, all the factors compelled that the power remain restricted, in their view.[243] This view is very aligned with the dynamic view of sovereignty.

d. Reddy J

Reddy J reached the same conclusions as Sikri J.[244] He, however, did not agree with the latter's position on amendments as 'laws'.[245] The reasoning is another strand of a multi-provisional analysis. He noted that Article 13(2) equally fails to mention both Parliamentary/state assembly legislations and Constitutional amendments.[246] And yet, the otherwise specific Article 13 ought to cover the former to avoid absurd consequences.[247] But

[231] *Id*., ¶ 540.
[232] *Id*., ¶ 538.
[233] *Id*., ¶ 547.
[234] *Id*., ¶ 639.
[235] *Id*., ¶ 663; The President's assent is the last step in procedurally validating an amendment.
[236] The Constitution of India, 1950, Art. 368(1).
[237] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225, ¶ 639.
[238] *Id*., ¶ 652; *See also* I.R. Coelho v. State of T.N., (2007) 2 SCC 1; B.R. Kapoor v. Union of India, (1989) 3 SCC 387.
[239] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225, ¶ 665.
[240] *Id*., ¶ 663.
[241] *Id*., ¶¶ 653, 663-664.
[242] *Id*., ¶¶ 663-664.
[243] *Id*., ¶¶ 665-666.
[244] *Id*., ¶¶ 1140, 1159, 1179.
[245] *Id*., ¶¶ 1087, 1122.
[246] *Id*., ¶ 1078.
[247] *Id*., ¶¶ 1078-1082.

that will necessitate a similar presumption about the products of Article 368.[248] Further necessitating this assumption was the phrase "the Constitution, as by law established".[249]

Reddy J states that this assumption only applies to parliamentary laws. The first reason was to stave off an absurd consequence. Namely, the Parliament cannot be allowed to have the licence to violate fundamental rights.[250] Secondly, ordinances under Articles 123 and 213 were covered by a plain reading of Article 13(2).[251] After acquiring the assent of the President, these are said to have the same effect as a law of the Parliament/State assembly.[252] By necessary implication, the latter was deemed as covered by Article 13.[253] He also found a clue to this effect in provisions functionally dependent on this assumption: Articles 14, 16(3), 16(5), 17, 19(2)-(6), 20, 21, 22(4), 22(7), 23(1), 25(2) 31, 32(3), 33, 34 and 35(a). Each of these were concerned with Parliamentary laws, and equally faced the bar of Article 13.[254] Hence, the larger purport to him was the selective inclusion of ordinary law.[255] But it is here he dichotomises ordinary and constituent law. He lumps original provisions with amendments as equally 'constituent'.[256] For him, amendments were also a product of constituent power. Article 13 does not extend beyond ordinary law, hence, excluding amendments. Dr. Sanjay Jain criticises this approach.[257] He suggests that Reddy J incorrectly locates constituent power in the Parliament. By the learned judge's own reasoning, the Parliament falls in the constituted/secondary-constituent category. As such, Jain supposes that the Parliament cannot then exude a power that brought about the Constitution.[258] With due respect, that is an erroneous take that takes the Parliament to only exhibit a monist nature. While only stated inexplicitly, Reddy J seems to be deploying the notion of dynamic sovereignty. He clearly construed the Parliament as playing a dualist role in an Ackermanian sense. The Parliament is both a higher-law maker and capable of ordinary law-making. As such, he considers that ordinary law is an exercise conducted by it as a constituted body. But it may indulge in higher law-making when the sovereign permits it to.

e. Khanna J

Khanna J's analysis is analytically bland insofar as it is mono-provisional.[259] He holds that the text of Article 368 denotes the Constitution's ability to withstand a change ('textual reasoning').[260] This excludes self-disposal by necessary implication.[261] In parallel, it was unpalatable to him that such a nuanced gridlock procedure be subject to all the provisions of the Constitution.[262] That would be the consequence if its source resided in Articles 245-248.[263] He did wade into a multi-provisional analysis temporarily. He echoed Sikri J's views

[248] *Id*., ¶¶ 1078-1082
[249] Dr. Sanjay Jain & Amit Pai, *Justice P. Jaganmohan Reddy* in BASIC STRUCTURE CONSTITUTIONALISM: REVISITING KESAVANANDA BHARATI, 56, 57 (Dr. Sanjay Jain & Sathya Narayan, Eastern Book Company, 2011); This phrase appears in Article 69 and Schedule III of the Constitution.
[250] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225, ¶ 1082.
[251] *Id*., ¶ 1078.
[252] *Id*., ¶ 1078.
[253] *Id*.
[254] *Id*., ¶ 1080.
[255] *Id*.
[256] *Id*., ¶ 1121.
[257] Jain, *supra* note 249, at 57-58.
[258] *Id*.
[259] Jain, *supra* note 224, at 19.
[260] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225, ¶ 1442.
[261] *Id*.
[262] *Id*., ¶¶ 1350, 1357, 1378.
[263] *Id*.

to distinguish between ordinary and constituent powers.[264] But he found this exercise redundant, for the textual reasoning was sufficiently dispositive for him.[265] In sum, he found implied limitations as a matter of procedure grounded in Article 368. It was not emanating from the Constitution as a whole.

In parallel, he qualified his decision by stating that limitations existed to safeguard the existence of the Constitution.[266] Alterations not having this effect were permissible. Accordingly, he rejected the equation of fundamental rights with natural rights.[267] Khanna J first offered an implications-based argument. He argued that a special majority within the Parliament and of states ought to be able to amend Part III.[268] A contrary interpretation would have erected an unjust bar in his view. A lower-threshold procedure in Article 245 read with Schedule VII, , List I, *Union List*, Item 97 will then definitively not permit a new constituent assembly to take Part III away.[269] He feared the same for other ostensibly vital parts[270] that may nevertheless require deletion.[271] Moreover, an amendment to the Constitution must entail a possibility of redistributing the powers of federal units. That was barred if the power was situated in a list made as a result of that distribution.[272] The other reason for not making FRs unalterable was teleological. He viewed that social-welfare requires that FRs be altered, for they are a means to the former.[273]

f. The weighty conclusion

The decision grounds the fundamentality of the Constitution in the history that culminated in its creation.[274] Sikri and Khanna JJ find the essentiality borne by multiple indelible features.[275] Albeit, the basic features in the majority are disparately identified.[276] However, those are *obiter* insofar as they were inconsequential to the operative conclusions reached.[277] Textual argument was predominantly relied upon by the majority judges.[278] Teleological reasoning was also taken aid of, balancing Part IV with Part III.[279] The Kelsenian

[264] *Id*., ¶¶ 1369-1383.
[265] *Id*., ¶ 1357.
[266] *Id*., ¶ 1426.
[267] *Id*., ¶ 1469; He confirmed this in Indira Nehru Gandhi v. Raj Narain, (1975) Supp SCC 1, ¶1509-1515; However, Khanna J famously turned around in his dissent in ADM, Jabalpur v. Shivkant Shukla, (1976) 2 SCC 521.
[268] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225, ¶ 1400; This is why he refused the equation of fundamental rights with natural rights.
[269] *Id*.
[270] He cites the hypothetical deletion of Articles 85 and 172. These deal with the tenures of legislative sessions at both the federal levels; Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225, ¶¶ 1423-1425.
[271] *Id*., ¶¶ 1423-1425.
[272] *Id*., ¶ 1354.
[273] *Id*., ¶¶ 1475-1476.
[274] *See* Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225, ¶¶ 644-645, 647, 650-651.
[275] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225, ¶¶ 292-293, 475, 1426-1427,1437.
[276] As Arvind Datar's elaborate lists show, there is not a single basic feature which is common to all the majority judgments. Arvind P. Datar, *The Basic Structure Doctrine-A 37-year journey* in BASIC STRUCTURE CONSTITUTIONALISM: REVISITING KESAVANANDA BHARATI 159, 160-161 (Dr. Sanjay Jain & Sathya Narayan, Eastern Book Company, 2011).
[277] KRISHNASWAMY, *supra* note 9, at 147.
[278] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225, ¶¶ 91, 225–6, 311 (Sikri J), 580 (Shelat & Grover JJ), 1196-1197 (Reddy J), 1480 (Khanna J).
[279] *Id*., ¶¶ 147 (Sikri J), 488-489, 533, 596 (Shelat & Grover JJ), 630-631, 634 (Hegde & Mukherjea JJ), 1160, 1162 (Reddy J), 1476, 1480-1481 (Khanna J).

argument was similarly borrowed across the board,[280] even if not always with due credit.[281] Demonstrably, the judges seem to have toyed with all the theoretical models discussed previously. There exists both overlap in outcome and its bases. Baxi's critique that the teleological premise of social welfare from Part IV is correct.[282] As he rightly points out, FRs, like the elimination of forced labour, carry equal social-justice aspirations.[283] However, he is incorrect insofar as he calls the decision as frail as quicksand exposed to blazing winds. Baxi argues that if the social justice element were to be lacking, the court's decision would be rootless.[284] This is demonstrably incorrect, given the glaring residual platforms made up of Kelsenian and textual arguments. In fact, even the structuralist argument found resonance in majority judges apart from Sikri J.[285] In any case, even the minority opinions come to overlap with the majority when they predict the existence of 'good faith' limitations on amendments.[286]

Moreover, *Kesavananda* unanimously held the 24th Amendment as valid insofar as it located the 'power' of Constitutional amendment within Article 368.[287] S.P. Sathe's point adds to Krishnaswamy's argument cited previously. He lauds the tweak to *Golaknath's* mono-provisional reliance for immutability. This invincibility now had basis in multiple theoretical models and Constitutional provisions.[288] This, Sathe continues, brings indelibility of the Constitutional quintessence out of a positivist realm, which had made the Constitution very vulnerable to text-based amendments.[289]

Most significantly, Krishnaswamy rightly gleans a proto-version of a novel judicial review from the majority opinions. He claims that those couch a new review in negative terms, where they determine and test the breach of boundaries by the amending power.[290] Three boundaries perceptibly emerge. First is the bar on the deletion of the entire Constitution. Secondly, there shall be no damage or destruction of a basic feature. Lastly, the Constitutional identity shall never be put under threat. Arguably, the case has one limitation, most glaringly present in Khanna J's decision but also not resolved by the Sikri-line of reasoning. The basic structure is seen as devised for judicial convenience. Furthermore, it is relegated to the status of a response to amendments.

2. Of What Kindled from the Spark

a. Raj Narain

Cases dealing with implementing *Kesavananda* tacitly begin to work with the Doctrine. As necessary preface, note that *Indira Gandhi* v. *Raj Narain* ('*Raj Narain*') and *Minerva Mill* v. *Union of India* ('*Minerva*')[291] do not undertake a comprehensive multi-

[280] *Id*., ¶¶ 570–571, 979, 982, 1485, 2069 and 2151.
[281] *See* Polzin, *supra* note 78, at 57-59.
[282] Upendra Baxi, *The Constitutional Quicksands of Kesavananda Bharati and the Twenty-Fifth Amendment*, Vol. 1 Supreme Court Cases J. 46, 47, 51 (1974).
[283] *Id*., at 47.
[284] *Id*., at 46, 47-51.
[285] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225, ¶¶ 496 (Shelat & Grover JJ), 654 (Hegde & Mukherjea JJ).
[286] Baxi, *supra* note 119, at 127; Krishnaswamy wrongly argues that a majority of judges in *Kesvanananda* reject the theory of implied limitations; Krishnaswamy, *supra* note 9, at 173.
[287] Krishnaswamy, *supra* note 9, at 10.
[288] S.P. Sathe, *India: From Positivism to Structuralism* in Interpreting Constitutions: A Comparative Study, 215, 246 (Jeffrey Goldsworthy, Oxford University Press, 2007).
[289] *Id*.
[290] Krishnaswamy, *supra* note 9, at 74.
[291] Minerva Mills v. Union of India, (1980) 3 SCC 625.

provisional analysis. They base their decisions on what they perceive as the appropriate outcome of an analysis of the majority opinion in *Kesavananda*.

Raj Narain did not expand the Doctrine's application. The Parliament had amended a part of Article 329-A[292] to validate an invalid election. To prevent its impartial adjudication, it tinkered with judicial review. Ordinarily, judicial review exists to check executive power and ordinary legislative power.[293] This decision was concerned with extending the Doctrine to the latter. It found it theoretically impossible.

A multi-provisional analysis in the judgment suggested that the amendment violated the basic feature of democracy.[294] Ray CJ acquiesced with this view, but clarified that a derivative (free and fair elections) of a basic feature (democracy) is not protected by the Doctrine.[295] The unarticulated premise is that free and fair elections are dispensable to a democracy. He also held that the power of interpreting the Kelsenian higher-law makes such an authority a constituent power in itself.[296] Hence, judicial review was put on the same plane as the Constitution itself. Similarly, the Parliament wields constituent power by supposition. Failing this, it was unimaginable to him that a non-constituent power could validly supply changes to the product of constituent power (the Constitution) itself.[297] Hence, both judicial review and amending power were on a level field of constituent power. Accordingly, separation of powers was found unwarranted in the case. Parliament was capable of exercising a constituent power, and was simply tasked with exercising another constituent power. He held that Parliament could, thus, adjudge electoral disputes.[298] Except, this case saw a violation of a basic feature, namely, judicial review.[299] That is, the Parliament was given a half-baked power. Clause 4 of Article 329A enabled exercising judicial review without applying any law.[300] Such a diminished version of judicial review was not sanctioned by the Constitution.

An inexplicit expansion nevertheless occurs in the decision. Chandrachud J holds that the basic structure review operates like an Article 13-review to test amendments in light of FRs.[301] Minority in this case, the view was later accepted in the decisions which followed.[302] Generally, there exists a compliance-based review[303] for checking FR-based violations by ordinary laws. This requires that a law be struck down if it abridges a FR. Chandrachud J imports its standards into the basic structure review.[304] That is, an amendment would be struck down if it violates or conduces enabling circumstances for violating a FR. The reason he cited was of staving off an unacceptable implication. Namely, if an amendment is not struck down for having this effect, a consequential law banking on it may safely debilitate

[292] "Special provision as to elections to Parliament in the case of Prime Minister [...]".
[293] KRISHNASWAMY, *supra* note 9, at 44.
[294] Indira Nehru Gandhi v. Raj Narain, 1975 (Supp) SCC 1, ¶¶ 308, (Mathew J), 1539 (Khanna J).
[295] Kabra, *supra* note 65, at 725-726.
[296] *Id.*; Swarup, *supra* note 140, at 42-43.
[297] Indira Nehru Gandhi v. Raj Narain, (1975) Supp SCC 1, ¶ 574.
[298] Archana Balasubramanian & Namrata Yadav, *Amendmenace: The Constitution of India Unveiled*, Vol. 3 GOVERNMENT LAW COLLEGE L. REV. 29, 42 (2004).
[299] *Id*.
[300] Indira Nehru Gandhi v. Raj Narain, (1975) Supp SCC 1, ¶¶ 62-63.
[301] KRISHNASWAMY, *supra* note 9, at 71.
[302] Indira Nehru Gandhi v. Raj Narain, 1975 (Supp) SCC 1; Minerva Mills v. Union of India, (1980) 3 SCC 625, *See also* State of Karnataka v. Union of India, (1977) 4 SCC 608; Waman Rao v. Union of India, (1981) 2 SCC 362.
[303] State of Bengal v. Anwar Ali Sarkar, (1952) SCR 284.
[304] Indira Nehru Gandhi v. Raj Narain, (1975) Supp SCC 1, ¶ 679.

a FR ('the consequence' argument).[305] Most paradoxically, he does not determine a more fundamental effect of the 42nd Amendment. *Inter-alia*, the Amendment had immunised certain legislations from the scrutiny of Articles 14 and 19 for advancing directive principles.[306] He did not test if this assaulted other basic features, including judicial review itself.[307] Suppose an amendment damages judicial review, illustratively, by removing Article 13. It would have been apposite to analyse this using the consequence argument, but this does not take place. Chandrachud J's analysis, thus, becomes redundant.

In fact, the text suggested to the majority that judicial review was not a basic feature.[308] This is in spite of it being a facet of constituent power. Simultaneously, Chandrachud J, along with two others, held the Doctrine as inapplicable to ordinary laws.[309]

Regardless, Chandrachud J does lay the seedbed for the first expansion of the Doctrine's application. It lowers the threshold of a basic structure review from an existential threat to mere abridgment of an FR-provision.[310] All that is required for the Doctrine to apply is that the principle so abridged be related to the Constitution.[311]

b. Minerva

Minerva saw Chandrachud J preserving his stance of the Doctrine as a version of Article 13- review.[312] It began when a statute was put in Schedule IX of the Constitution. This schedule was inserted by the 1st Amendment. Any law in it was beyond the ambit of judicial review. The concerned statute nationalised a bank. This statute was inserted into the Schedule IX of the Constitution by the 39th Amendment.[313] The Doctrine's application to the 1st Amendment was the subject of other precedents, so the litigants took the closest permissible step: they challenged the 39th Amendment. However, the 42nd Amendment supplied an invincible aura to laws that advanced directive principles of state policy ('DPSPs').[314] This statute purportedly did so. Hence, the 42nd Amendment was challenged as a necessary step alongside the 39th Amendment. Notably, the 44th Amendment was already in force by the time of the challenge. The 44th Amendment had barred the prospective utilisation of the 42nd Amendment and had also obliterated (most of) it from the Constitution. Yet, the Doctrine of prospective overrule protected the effects of the previous amendments. The statute's insertion and protection from judicial review were a product of those effects.

Chandrachud J was in the majority this time. Applying the 'abridgement standard' to advance the consequence argument, and he struck down the 42nd Amendment (or the vestigial effects thereof). Krishnaswamy has criticised this approach. He says that the

[305] *Id*., ¶¶ 677, 681; So, the doctrine may wall off abridgments/abrogations of basic provisions. But the same judge refuses to apply the doctrine to laws that make a more direct attack to the basic structure. He deploys a Kelsenian reasoning to state that the law is the product of a lower power. As such, products of higher and lower powers cannot face the same reactive force; *See* Indira Nehru Gandhi v. Raj Narain, (1975) Supp SCC 1, ¶ 691.
[306] The Constitution (Forty Second) Amendment Act, 1976.
[307] KRISHNASWAMY, *supra* note 9, at 76.
[308] V.R. Jayadevan, *Basic Structure Doctrine and its Widening Horizons*, Vol. 27 COCHIN UNIVERSITY L. REV. 327, 342 (2003).
[309] Kabra, *supra* note 65, at 716.
[310] KRISHNASWAMY, *supra* note 9, at 78.
[311] Indira Nehru Gandhi v. Raj Narain, 1975 (Supp) SCC 1, ¶ 663.
[312] Minerva Mills v. Union of India, (1980) 3 SCC 625, ¶ 41.
[313] While the 1st Amendment installed Schedule IX in the Constitution, any law that required its protection needed to be inserted into it. Simultaneously, the only mode of insertion was prescribed to be a Constitutional amendment.
[314] DPSPs are positive obligations on the State. They list out goals towards which it should strive towards through governance. The execution is entirely at the discretion of the State, and are theoretically non-justiciable.

necessary implication is a false equivalence between a basic feature and Constitutional provisions simpliciter.[315] More specifically, FRs may be conflated as basic, and possibly as the exclusive basic features. This is opposed to gleaning the basic structure from the text of various provisions.[316] Factoring in Sathe's previous observation, this is a regression to a higher state of vulnerability.

Before further analysis, an adequate grasp of Constitutional judicial review is required. Jain states that India's judicial review varies by subject-matter: Articles 13, 32, 131-142, 226, 225-227, 245, 247.[317] That is, a specific context enables this power, all the while not spelling it as an exclusive concern of the judicial branch.[318] The author agrees, except that mechanisms to affect judicial review ought to be differentiated from the power of judicial review. Hence, all the Constitutional sites of judicial review may be better lumped into three categories:[319]

i) Federalism-related compliance and competence review (Articles 245 and 247);

ii) Rights based review (Articles 13, 32, 226);

iii) Common-law administrative review (Articles 14 and 21).

Notably, a constitutional amendment under Article 368 is nowhere indicated to be covered by any judicial review, as per the text.[320] Hence, the court had an opportunity to carve and justify a new review under the Doctrine. For reasons cited previously, 'basic structure' also functions like a judicial review. The above categories all have the basis of review emanating from the Constitutional text. While the Doctrine does not share this with the other forms as far as a textual basis is concerned, it nevertheless has a constitutional basis of existence: constitutional interpretation. Furthermore, *Raj Narain* held that judicial review gets invited by the occurrence of either of three triggers.[321] Firstly, a law is passed without Constitutional compliance. Secondly, it may violate a FR. Thirdly, it offends a Constitutional provision not falling under the former categories. Krishnaswamy argues that the basic structure review must not cover the same triggers. It ought to be able to put substantive limits on subjects not covered by the above reviews. Else, there shall be no difference between the Doctrine and the other kinds of review. This is why Krishnaswamy advances a multi-provisional basis to the Doctrine. The new judicial review must hinge on features emerging out of multiple provisions, and not provisions simpliciter.[322] The unarticulated premise is that locating the basis of review in select provisions will increase the chances of a conflation. For Krishnaswamy, this apprehension gets reified in *Minerva*.

[315] KRISHNASWAMY, *supra* note 9, at 87.
[316] *Id*.
[317] Dr. Sanjay Jain, *Kesavananda Bharati-A watershed in the evolution of jurisprudence of judicial review in India* in BASIC STRUCTURE CONSTITUTIONALISM: REVISITING KESAVANANDA BHARATI, 3 (Dr. Sanjay Jain & Sathya Narayan, Eastern Book Company, 2011); Satya Prateek, *Today's Promise, Tomorrow's Constitution: 'Basic Structure', Constitutional Transformations And The Future Of Political Progress In India*, Vol. 1(3) NAT'L. U. OF JURIDICAL SCIENCES L. REV. 417, 487 (2008)
[318] Jain, *supra* note 317.
[319] KRISHNASWAMY, *supra* note 9, at xviii.
[320] Chintan Chandrachud, *Constitutional Falsehoods: The Fourth Judges Case and the Basic Structure Doctrine in India* in AN UNAMENDABLE CONSTITUTION? UNAMENDABILITY IN CONSTITUTIONAL DEMOCRACIES 149, 157 (Richard Albert & Bertil Emrah Oder, Springer, 2018).
[321] Balasubramanian, *supra* note 298, at 48.
[322] State of Karnataka v. Union of India, (1977) 4 SCC 608, ¶¶ 120, 125-126, 128.

With due deference, Krishnaswamy has interpreted this decision wrongly. Unlike *Raj Narain*, *Minerva* found limited amending power and judicial review as parts of the basic structure.[323] It reached this conclusion on the basis of a multi-provisional analysis. To grasp this, note that the 42nd Amendment under challenge barred the judicial review of amendments. It justified this bar for the smooth functioning of laws ostensibly advancing DPSPs.[324] Chandrachud J found an essential trifecta formed by Articles 14, 19 and 21.[325] He offers a utilitarian argument. According to him, attaining social welfare is to achieve complete equality, freedom and the fullest right to life. That is, the DPSPs are a means to an end captured by the trifecta.[326] By necessary implication, Part IV overriding Part III will negate the very objective of this scheme. That is, the means cannot be enlarged to a degree which obliterates the ends they are meant to seek. Accordingly, the balance between the two was declared as basic.

The court then departs from its hybrid of teleological and multi-provisional reasons. It found limited amendment power as basic for Kelsenian reasons: the power of amendment was a derivative of a constituent power.[327] It was deemed as logical that the donor will never trust a donee with unlimited powers.[328]

In all of this, it makes little sense that adjudication of what constitutes as basic can be achieved by a circumstantial power. The majority, hence, also declared judicial review as a basic feature to address a necessity.[329] The declaration is telling in spite of the meagre articulation on it. It seems that the exclusion of judicial review resembled the covered heel of the infant Achilles. The court appears to have wanted a full immersion of the Doctrine into the invincibility-imparting Styx. Hence, it was to preserve two other basic features that the judicial review was made 'basic'. Notably, the concerned statute's insertion was not demolishing a basic feature, but only prepondering DPSPs over FRs in a very limited sphere (banking). As such, the court did borrow the 'abrogation' standard of an Article 13 kind of review. However, it is effectively doing what Krishnaswamy wanted: putting substantive limits on basic features gleaned through structuralism. Except, the standard is much lower than what the Doctrine was forged for: mere abrogation/abridgement of the basic feature, and not an existential threat to it.

c. Bommai

S.R. Bommai v. Union of India ('*Bommai*')[330] was an outlier in this set of canonical cases. It dealt with a much more unorthodox expansion of the Doctrine: its applicability to an executive action and not an amendment. Therein, six state assemblies were dissolved by the President on gubernatorial counsel. The proffered reason was communal instability. The mechanism deployed was of regional emergency as provided for by Article

[323] Minerva Mills v. Union of India, (1980) 3 SCC 625, ¶¶ 17, 21.
[324] The concerned statute nationalised a bank. This statute was inserted into Schedule IX of the Constitution by the 39th Amendment. The 42nd Amendment supplied an invincible aura to laws which advanced DPSPs. This law purportedly did so. Hence, the 42nd Amendment was challenged as a necessary step. Notably, the 44th Amendment was already in force by the time of the challenge, but the doctrine of prospective overrule protected the effects of the previous amendments.
[325] Minerva Mills v. Union of India, (1980) 3 SCC 625, ¶ 74; Chintan Chandrachud, *Constitutional Interpretation* in THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 73, 82-83 (Sujit Choudhry et al., Oxford University Press, 2016).
[326] Minerva Mills v. Union of India, (1980) 3 SCC 625, ¶¶ 57, 74.
[327] *Id*., ¶ 16.
[328] *Id*., ¶ 17.
[329] Balasubramanian, *supra* note 298, at 46; Rehan Abeyratne, *Abusive Constitutional Borrowing: The Latest Legal Iteration of a Political Crisis*, Vol. 12(2) J. OF INDIAN LAW AND SOCIETY 104, 112 (2021).
[330] S.R. Bommai v. Union of India, (1994) 3 SCC 1.

356.[331] However, it is asserted that it was more than a simple case of a horizontal expansion of the Doctrine. The abrogation standard for its application as if it were an FR-based review was already confirmed. This case adds another dimension to the Doctrine: it conflates common law administrative review with that of the basic-structure review.[332]

Much like Article 352,[333] Article 356 possesses both subjective and objective tick-boxes.[334] It requires that the President be satisfied for its invocation (subjective condition). It further requires certain pre-requisites be established in lockstep (objective condition). For the case at hand, the court only considered the possible application of one pre-requisite: breakdown of constitutional machinery. It explains it as normative in nature, signifying that there be a breach of a basic feature.[335] It bridges two types of judicial review by stating that emergency-declaration is prerogative, and hence administrative, in nature.[336] Consequently, it deemed unfit to treat it as ordinary executive power.[337] The court premises its reasoning in 'the consequence' argument.[338] It extends the Wednesbury principle[339] to testing a prerogative executive-breach of the basic structure.[340] Else, it apprehended that ordinary executive action could permissibly do so.[341]

An oft-repeated criticism of the judgment is that mere executive posture against secularism is susceptible to judicial review.[342] This is mistaken. What is required is that the abrogation/debilitating assault come from a high level executive 'action'. Additionally, the court in this case was not only re-iterating the judicial version of the Doctrine's application. It was crucially cementing the executive's concurrent role as the preserver of the basic structure. It was enunciating that one federal unit may interfere with the other's functioning because the Doctrine necessitates 'positive executive action' for its reinforcement.[343] It is in this facilitative context that it further declares federalism as part of the basic structure.[344]

This invites a logical anomaly. Article 368(2) is also very reflective of federalism.[345] As such, a clash between a product of Article 368(2) and another basic feature may be a conundrum. As the Doctrine will later be revealed to be, it adopts a living-originalist stance. This stance, arguably, justifies the Doctrine's existence and states that a Constitution propels forward by tweaking dispensable provisions, and enhancing (but never omitting) the indispensable provisions. Living-originalism functions to place provisions on separate rungs in

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[331] This provision allows the President to dissolve an elected state legislature, regardless of any pending tenure. The President does so on the advice of the concerned state's Governor.
[332] *See* KRISHNASWAMY, *supra* note 9, at 50-55, 71.
[333] This provision allows the President to dissolve the Parliament. The President does so on the advice of the Council of Ministers at the central/federal level.
[334] *See* KRISHNASWAMY, *supra* note 9, at 55.
[335] KRISHNASWAMY, *supra* note 9, at 55.
[336] *Id*., at 71.
[337] *Id*.
[338] S.R. Bommai v. Union of India, (1994) 3 SCC 1, ¶¶ 96, 100, 377.
[339] Wednesbury principle is a judicial device in common law, which tests administrative actions for legality. It allows the courts to strike down an action by public authorities if it were not permissible under any reasonable circumstances. *See* All India Railway Recruitment Board v. K. Shyam Kumar, (2010) 6 SCC 614, ¶¶ 23-39.
[340] S.R. Bommai v. Union of India, (1994) 3 SCC 1, ¶¶ 96, 100, 377.
[341] *Id*.; *But see* minority opinions refusing to conflate the standards of review in ¶¶ 35, 47, 215
[342] Sethi, *supra* note 16, at 32.
[343] Gary J. Jacobsohn, THE WHEEL OF LAW: INDIA'S SECULARISM IN COMPARATIVE CONSTITUTIONAL CONTEXT 147-157 (Princeton University Press, 2003).
[344] S.R. Bommai v. Union of India, (1994) 3 SCC 1, ¶¶ 14, 96-99, 165, 247.
[345] Certain amendments necessarily require ratification by the states; Yash Sinha, *GST Compensation to States: An Ineluctable Obligation on the Union*, Vol. 14(1) NAT'L. U. OF JURIDICAL SCIENCES L. REV. 1, 16 (2021).

a ladder of hierarchy. The most indispensable provisions, in turn, are those which found and preserve democracy. As such, the 'democracy enabling' test helps solve this, if not *Bommai*.

On the other hand, the decision elevated judicial review on a higher plane like *Minerva*. Except, *Minerva's* necessity-based justification was replaced with a Kelsenian argument. It stated that its existence as a basic feature implied its close proximity to the constituent power.[346] It then combines this with a hybrid argument composed of elements resembling Dworkinian and originalist thoughts:[347] the judiciary cannot merely list out values like the basic structure, and then presume legitimate compliance in/by political processes.[348] The Constitution is a political document, and its inclusion of judicial review must amount to something impactful.[349] As such, the logical next step of the judiciary reviewing political processes must have been inceptively factored in, it reasoned.[350]

Krishnaswamy criticises the dilution of standard for applying the Doctrine. He states that it is incongruous with the three boundaries cited earlier. Theoretically, the Doctrine preserves the Constitutional existence.[351] Accordingly, the preservation of the Constitutional identity ought to involve a very high standard in response to a high risk.[352] However, what he is not according value to are the common cores of both *Raj Narain* and *Minerva*. Firstly, both recognised that multiple basic features were under threat. Secondly, they hinge their conclusions on a possible violation of the Doctrine because of the multi-frontal attack. That is, the decisions premise the definition on a threat to the basic structure. The threat may risk one basic feature, and may be extremely heightened in its intensity. Alternatively, it may deal low-intensity damage to multiple basic features. The quanta of damage may be spread differently, but its weight is the same in both the cases. The Doctrine gets invoked in either scenario.

d. Nagaraj

In any case, the exclusivity of other kinds of review and basic structure review is a very impractical position. This is a position which took the shape of an advanced argument in *M. Nagaraj v. Union of India* ('*Nagaraj*'),[353] and requires context. The case saw the introduction of the 77th, 82nd and 85th Amendments pertaining to reservation in public employment. Two arguments, hinged on the Doctrine, were advanced against them. Firstly, it was contended that a greater reservation damaged the basic feature of equality. Secondly, the amendments were called an impermissible defiance of judicial precedents. As such, they were said to be violating another basic feature-judicial review.

A crucial point needs focus which will be necessary for a deep scrutiny of the case. The judiciary in India has mostly allowed the decisional veto to rest with the legislature.[354] The legislature may permissibly circumvent a judicial dictum if it can change the conditions on which it was given ('*Borough Municipality* principle').[355] *Nagaraj* dismisses the second

[346] S.R. Bommai v. Union of India, (1994) 3 SCC 1, ¶¶ 200, 256, 379; It also relies on A.K. Roy v. Union of India, (1982) 1 SCC 271.
[347] Sudhir, *supra* note 32, at 22.
[348] S.R. Bommai v. Union of India, (1994) 3 SCC 1, ¶ 213.
[349] *Id*., ¶¶ 96, 213.
[350] *Id*., ¶ 213.
[351] KRISHNASWAMY, *supra* note 9, at 86-89.
[352] *Id*.
[353] M. Nagaraj v. Union of India, (2006) 8 SCC 212.
[354] CHINTAN CHANDRACHUD, BALANCED CONSTITUTIONALISM: COURTS AND LEGISLATURES IN INDIA AND THE UNITED KINGDOM 46, 47, 50, 51, 52, 53, 54, 61, 99 (Oxford University Press, 2017).
[355] Prithvi Cotton Mills Ltd. v. Broach Borough Municipality, AIR 1970 SC 193, ¶ 4 (Hidayatullah CJ).

challenge, inexplicitly using these reasons.[356] Previously,[357] the court had cited Article 335[358] and limited the degree of reservation to fifty percent. Moreover, economic criterion alone was ruled out as a metric for discerning the need for reservation. This position risked getting upset when *Nagaraj* dealt with the introduction of Article 16A. It provided reservation for a new backward class (economically weaker section), and this also took reservation in employment beyond fifty percent. *Nagaraj* found that on adhering to the conditions stipulated under Article 16, if an enabling legislation provides for reservation beyond this limit and also for a study in backwardness, it is a given that states are deemed the best judge of whether Article 335 would be compromised.[359] Moreover, it is proposed that every basic feature identified by scholars or the judiciary has aspirational essence due to its vagueness. That is, a basic feature is an expression of an aspirational essence.[360] This is because abstract language gives room for interpretation that suits contemporary circumstances.[361] Specific standards run the risk of a debate on whether their enhancement is permissible, or lead to a wild goose-chase about whether a modern day phenomenon was covered by the drafter's foresight. Instead, unspecific language helps institution-building by reading or adding nuances into it that were neither mentioned, nor barred.[362] More specifically, vague language on important and polarising issues help paper over disagreements, and leaves the task to future generations to specify the precise content of the principles involved.[363] Hence, vague language appears to project a very significant aspiration, which is to be fulfilled by those bound by the Constitution.

Hence, vague provisions, and their constant judicial treatment which supply content to it, are a necessary part of any constitution.[364] Arguably, since judicial devices determine how to interpret vague provisions, and hence, determine their content, come to be a part of those provisions. For instance, a service law-rule is not only expected to satisfy Article 14's text, but also the various tests evolved by the relevant jurisprudence on Article 14, prior to or regardless of it reaching as an issue before courts. As Krishnaswamy himself states, judicial interpretations are always presumptively factored in by Constitutional amendments of basic features.[365] It is then impractical to state that the Parliament violates judicial review, as long as it is in compliance with the *Borough Municipality* principle.

The judiciary digs out indispensable features of a vague provision. If the vague provision is basic to the Constitution, the new feature will share the same essentiality.[366] As such, the feature's violation will be a violation of the Doctrine. So, while the law may not go against this interpretation, since one interpretation has fused with a basic feature, future judicial interpretations are as bound as the future laws. Illustratively, an argument that interpretations of FRs constitute 'derivative FRs' has been rejected in India.[367] It has been held that such an

[356] M. Nagaraj v. Union of India, (2006) 8 SCC 212, ¶ 102.
[357] Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217.
[358] Dealing with public appointment to the Union or the states, Article 335 states that claims of the Scheduled Castes and Scheduled Tribes shall be taken in consistency with efficiency in administration.
[359] M. Nagaraj v. Union of India, (2006) 8 SCC 212, ¶ 102.
[360] BALKIN, *supra* note 8, at 60-61
[361] *Id*., at 7.
[362] *Id*., at 282; *See* BALKIN, *supra* note 8, at 62; "Constitutional aspiration requires faith in the constitutional tradition's ability to grow and improve, without any guarantees of success. Far from being based on the fear that future institutions will rot or decay, an aspirational Constitution requires a steadfast belief that the evils of the present can and will be recognised and remedied, if not in our day then in the days to come."
[363] BALKIN, *supra* note 8, at 21-22.
[364] *See* M. Nagaraj v. Union of India, (2006) 8 SCC 212, ¶ 102.
[365] KRISHNASWAMY, *supra* note 9, at 64.
[366] *Id*.; *See* M. Nagaraj v. Union of India, (2006) 8 SCC 212, ¶ 9; Prateek, *supra* note 317, at 492.
[367] People's Union for Civil Liberties v. Union of India, (2003) 4 SCC 399, ¶¶ 41-42.

interpretation would override judicial rulings.[368] The court deemed it best that interpretations be held as inextricable elements of the FRs.[369] Hence, *Nagaraj* effectively recognises the judicial interpretation as subjugated to the Doctrine.[370]

Nagaraj, however, is more of an outcome that Krishnaswamy seems to have desired. To identify if an amendment to a FR may impact the basic structure, it developed two investigatory tests. The first is the identity test.[371] It states that the basic structure is an identity necessarily built by a combination of multiple-provisions.[372] It checks whether an amendment violates a basic feature. To do so, it checks if the proposed basic provision is a formative element of a larger principle reflected in other provisions. For instance, Article 14 appeared to be connected with Articles 19 and 21 to constitute an essential trifecta.[373] Hence, Article 14 simpliciter becomes a basis for being a formative element of a basic feature. However, Krishnaswamy's grouse is that the Doctrine was developed to tackle existential threats to basic features. A basic feature can never be grounded in one provision. This keeps the Doctrine distinct from pre-existing types of reviews, he argues.[374] However, the suggestion of the previously discussed line of reasoning by Chandrachud J makes more sense. If any formative element of the basic feature is done away with, the remainder cannot logically be its previous whole. The identity test, arguably, is the best articulation of the 'preservation of identity'[375] standard. It isolates the open-ended formulation in *Raj Narain*-"vague principles emerging from the Constitution as a whole"[376]- to the ones emerging from certain provisions.[377] Krishnaswamy's desire of an extreme exclusivity between reviews is highly impractical in that sense. However, a difference must exist. The case proceeds to find the fine balance sought herein.

Theoretically, the identity test is only one of the tests that may apply for the purposes of a basic-structure examination. Yet, the author finds this to be the first step in a cumulative, two-stage examination. It effectively performs the function of a sieve. It only helps establish if the Constitutional provision supposedly violated is indeed a basic feature. Any substantive violation remains to be checked. *Nagaraj* evolves a second test which advances the exclusivity between FRs-based and basic structure reviews. In doing so, it incidentally allays Krishnaswamy's concern of conflated reviews.

This second test is the width test.[378] It first notes a FR-review as it occurs under Article 13 to test ordinary laws for FRs violations.[379] Then, it demands that the said review be insufficient for the damage under scrutiny.[380] It is but obvious that all elementary provisions putting forth the principle will have intrinsic value content.[381] But the test is not concerned with a violation of any individual element. The insufficiency will be borne out by one factor. The

[368] *Id*.
[369] *Id*.
[370] M.P. Singh, *Ashoka Thakur v. Union of India: A Divided Verdict on an Undivided Social Justice Measure*, Vo. 1, NAT'L. U. OF JURIDICAL SCIENCES L. REV., 193, 204 (2008).
[371] M. Nagaraj v. Union of India, (2006) 8 SCC 212, ¶ 102.
[372] *Id*., ¶¶ 23, 28-29.
[373] First enunciated in Minerva; Minerva Mills v. Union of India, (1980) 3 SCC 625, ¶ 41.
[374] KRISHNASWAMY, *supra* note 9, at 87, 118, 120-122.
[375] *Id*., at 116, 118.
[376] Indira Nehru Gandhi v. Raj Narain, 1975 (Supp) SCC 1, ¶ 691 (Chandrachud J for himself).
[377] M. Nagaraj v. Union of India, (2006) 8 SCC 212, ¶¶ 23-25.
[378] *Id*., ¶ 102.
[379] *Id*., ¶ 103.
[380] *Id*., ¶¶ 102, 117.
[381] Prateek, *supra* note 317, at 483.

amendment must injure the very central principle of the concerned inter-related provisions.[382] Next, a mere possibility, and not probability, of this breach as per the most liberal interpretation of the amendment is sufficient.[383] Originally advanced by Palkhivala in *Kesavananda* where it was disregarded,[384] it found home in *Nagaraj*.

This wider injury must also be incapable of occurring through other forms of State-action.[385] This is an oddity, given that *Bommai* had levelled executive action with Constitutional amendments in terms of its potential to damage the basic structure.[386] There is no reason to assume that an ordinary law is incapable of dealing the same. *Nagaraj* is regressive as it perceives[387] such a high level of injury singularly from amendments. That apart, it is seen that the decision distinguishes between an Article 13 kind of review and the basic structure review, even if it gives all of it an appellation of an 'extension'. The source of damage was already different in both.

Applying the two tests, it identified that Article 16(4A) and (4B) do not invite a basic structure scrutiny.[388] The provisions embody consequential seniority and catch-up rules in administrative law.[389] The former deals with the implications of career developments on the seniority of the employee in the organisation.[390] For instance, a certain change of posting, a promotion or a longer duration on a post as compared to others may confer on the employee a vertical upgrade in the hierarchy. The catch-up rule ensures that circumstances, such as pending litigation, wrongful suspension or departmental enquiries, that may have stagnated the career of the employee, are treated as *non est*. This ensures a sudden parity between her and similarly placed employees who eluded such circumstances.[391] The court did not find them as debilitating to the equality code.[392] It boxed the other amendments similarly, finding them restricted to administrative nuances.[393] Contrarily, it considered that the amendments furthered curative inclusions in the administration.[394]

This has been lauded as the court recognising its coordinate role in adhering to the Doctrine.[395] It is admitting that judicial interpretation has the power to damage the basic structure, and the Parliament not curing it would amount to connivance.[396] Satya Prateek gleans *Nagaraj* differently. For him, the judiciary elevated the executive/legislature over itself in the domain of constitutional agendas.[397] The author asserts this view is infirm. The decision nowhere specifies judicial review as less essential than executive action. It is conceded that akin to *Kesavananda*, it treats amendments to be the singular source of a 'higher' threat. In

[382] *Id*.
[383] *Id*., at 482.
[384] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225, ¶ 531.
[385] KRISHNASWAMY, *supra* note 9, at 78.
[386] S.R. Bommai v. Union of India, (1994) 3 SCC 1, ¶¶ 96, 100, 377.
[387] Gautam Bhatia, *Reservations, Equality and the Constitution – VIII: Ashoka Kumar Thakur, 15(5) and the Basic Structure*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, April 6, 2014, available at https://indconlawphil.wordpress.com/2014/04/06/reservations-equality-and-the-constitution-viii-ashoka-kumar-thakur-155-and-the-basic-structure/ (Last visited on July 16, 2023).
[388] M. Nagaraj v. Union of India, (2006) 8 SCC 212, ¶¶ 117, 121.
[389] *See* M.G. Badappanavar v. State of Karnataka, (2001) 2 SCC 666.
[390] *See* M.Nagaraj & Others vs Union Of India (2006) 8 Supreme Court Cases 212.
[391] *See* S. Panneer Selvam v. State of T.N., (2015) 10 SCC 292.
[392] M. Nagaraj v. Union of India, (2006) 8 SCC 212, ¶¶ 102-104.
[393] *Id*., ¶¶ 99, 100, 108.
[394] *Id*., ¶ 107.
[395] Singh, *supra* note 370, at 211; Upendra Baxi, *Demosprudence versus jurisprudence: The Indian Judicial Experience in the Context of Comparative Constitutional Studies*, Vol. 14 MAQUARIE L. J. 3, 18 (2014).
[396] *Id*.
[397] Prateek, *supra* note 317, at 480.

fact, it categorises amending power as an exercise of constituent power like *Raj Narain*.[398] The court is thus well aware that the State's action may not always be accretionary, but debilitative. It may have labelled the amendments as 'curative'. However, it is presumed that the court was well aware of the value its stamp of approval carried. In its own words, it seems to be affecting a 'substantive limitation on constituent power'.[399] So while the Parliament is capable of exhibiting higher power and hence, a higher damage, the court has the necessary power to stop it. Hence, its treatment of Parliament as an equal better appeals to logic.

In any case, the court's relegation of executive action, if not other forms of action, is not binding. *Bommai* treated all threats to the basic structure equally, but its views on executive action are the ones which were present as an issue before it. Its greater bench strength thus maintains this position.[400] It is hard to imagine why executive action cannot result in a wider injury apprehended by *Nagaraj*.

e. Coelho

The wrestling of the FR-based review and the basic structure review continued in *I.R. Coelho v. State of Tamil Nadu* ('*Coelho*').[401] The case dealt with the validity of Article 31-B, inserted by the 1st Amendment. The amendment had created Schedule IX. This schedule protects central and state laws from a challenge on the grounds of violating Articles 14, 19 and 21. The insertion of law into the Schedule has to occur by way of an amendment under Article 368. The court held that the provision was Constitutionally valid. However, it stated that the laws so included must be tested for an Article 13 or a basic structure violation.[402] This will occur by way of 'an enlarged judicial review'.[403] Its observations[404] on direct amendments of any provision of Part III were not relevant issues before the court. They are consequently disregarded for the analysis herein.

The decision's premise is similar to *Nagaraj*. As discussed, the court was concerned with substantive violations. Except, the breach targeted there was that of a principle put forth by inter-related provisions. *Coelho* also concerns itself with a substantive breach. However, it endorses checking for breaches of mono-provisional principles as well.[405] The injury must percolate to harm the essence of a fundamental right provision simpliciter.[406]

In reaching its conclusions, the court strengthens the exclusivity among Constitutional powers. The court said that the basic structure of the Constitution flows from separation of powers. It explains the two elements it thought validated this assertion. Firstly, it noted that limited amending power is a declared basic feature.[407] This implied to it that there should be a counter-majoritarian force as against those who initiate amendments, namely, the elected.[408] Secondly, the logical conclusion of the first assertion is that the legislature must lack

[398] *See* M. Nagaraj v. Union of India, (2006) 8 SCC 212, ¶ 103.
[399] *Id*.
[400] *Bommai* was decided by a 9-judge bench, as opposed to *Nagaraj*, which was decided by a 5-Judge bench.
[401] I.R. Coelho v. State of T.N., (2007) 2 SCC 1.
[402] *Id*., ¶ 143.
[403] *Id*.
[404] *Id*.
[405] Some scholarly opinions hold that *Coelho* does so; Raju Ramachandran & M.V.K. Thallam, *The Obvious Foundation Test: Re-inventing the Basic Structure Doctrine* in APPOINTMENT OF JUDGES TO THE SUPREME COURT OF INDIA TRANSPARENCY, ACCOUNTABILITY, AND INDEPENDENCE 109, 113 (Arghya Sengupta & Ritwika Sharma, Oxford University Press, 2018); However, the author is of the firm view that nowhere does the decision say this.
[406] I.R. Coelho v. State of Tamil Nadu, (2007) 2 SCC 1, ¶¶ 109, 151.
[407] *Id*., ¶¶ 51, 126.
[408] *Id*., ¶¶ 102, 112, 136.

any exclusive domain on amendments.[409] Hence, separation of powers must be a device to ensure it has a counter-balance. To fill up this vacuity, and find this counter-balance, it focuses on the tool of judicial review. It was thought that amendment involves a judicial approval. That would place judicial review with an equal weight on the opposing scale.[410] It holds that the indicia of this supposition exists in the Constitutional scheme itself. The Parliament may only enact amendments.[411] That is, it may initiate a deliberation. The same authority cannot reasonably also determine the amendment's validity.[412] The deliberation must be dialogic.

The case was dealing with testing 'ordinary laws' inserted by way of 'Constitutional amendments'. Ackerman would have found himself floundering in a scenario such as this. There is no bright line to demarcate which tier of law predominates the genes of the final outcome. In this context, it is proposed that *Coelho* does not enunciate a principle for a basic structure review in general. Instead, it demonstrates how to test the constitutionality of laws which cannot be neatly situated as ordinary or constituent. This is best reflected by the court's own statement as follows:

> "[…] though an Act is put in the Ninth Schedule by a constitutional amendment, its provisions would be open to attack on the ground that they destroy or damage the basic structure if the fundamental right or rights taken away or abrogated pertains or pertain to the basic structure."[413]

The decision wrestles with a hybrid of amendments and ordinary laws. It cannot place the products flowing out of Article 31-B on a single Ackermanian-tier with ease. The author proposes that the products in such cases correspond more with ordinary laws. The state laws in Schedule IX will have operative force in the states they apply to. They do not function as Constitutional amendments as such. Amendment is only one step in the process. Any central laws therein also operate not because they emanate from the Constitution, but are merely protected by it. If a hypothetical deduction were to be conducted like Baxi does for *Kesavananda*, this position becomes more visible. Suppose Schedule IX and Article 31-B did not exist. All the laws then would be tested directly against FRs under an Article 13-review. Alternatively, consider Kamala Sankaran's very aligned view. If the laws in Schedule IX were missing, any amendments carrying them would be as good as non-existent.[414]

Imposing *Coelho* on amendments not covered by Article 31-B or the Doctrine in general would then be a mistake. The author proposes that *Coelho* covers a unique but limited scenario. It applies to State actions not strictly Constitutional amendments which cause damage as may be possible from ordinary laws. *Nagaraj* requires that this not be the case for its standard to apply.[415] As Sankaran agreeably puts it, *Coelho* has a limited purpose: it converts Part III into 'the' basic structure for screening the contents of Schedule IX.[416] This decision is as much an outlier as *Bommai*. *Coelho* has not been interpreted as the author reads it. Yet,

[409] *Id*., ¶ 115-116.
[410] *Id*.
[411] *Id*., ¶ 143.
[412] *Id*.
[413] *Id*., ¶ 151.
[414] Gandhi, *supra* note 64, at 66-67.
[415] Both *Nagaraj* and *Coelho* contradict each other on two counts. The first is the substantive standard required to call an injury as a 'basic structure violation'. The second count is that *Coelho* deals with entirely unique circumstances; *But see* Prateek, *supra* note 317, at 478.
[416] Gandhi, *supra* note 64, at 67.

decisions have found another restriction on its applicability. It has been limited to cases only if an amendment involves the exclusion of an entire Constitutional chapter.[417]

Another crucial development in the decision is the hint it gives about the grounds of exclusion. It held that only some Part III rights[418] fall under the basic structure. The court called them 'pre-constitutional' for their perceived proximity to human rights.[419] Denial of these FRs has an impact on the integrity of the Constitution and the country's governance, it stated.[420] Right to property doesn't definitively qualify as such, in the court's view.[421] So while the conclusion matches that of Khanna J's in *Kesavananda*, the latter's reasoning was rejected. Certain FRs will never be subject to a diminutive amendment. The neglect for Habermasian approval has already been covered for such a 'natural rights' approach. Judicial review is but one source of many in terms of creating a rights-hierarchy in a democracy. This is demonstrated by the legislatures constantly overruling judiciary.[422] This is including the judiciary's declarations on amendments and *Coelho* does nothing to perturb this trend.[423]

The decision then took its assertion to its logical end. Schedule IX laws will be constitutionally offensive when they fall foul of the Doctrine, which are otherwise protected from Part III scrutiny.[424] Thus, such laws would be unconstitutional if they violate 'basic FRs'. The court then proceeds to establish the test to detect these violations. It states that the outcome of the amendment ought to bring a substantive damage.[425] This carries an infirmity as was present in *Nagaraj*. It gives the impression that the law, without its insertion in Schedule IX, may not be tested for the Doctrine's violation. Suppose the law is indeed attacking the very essence of the basic FR and is not protected by Article 31-B. It is unimaginable that the law ought to be permitted to exist. If Article 31-B cannot protect such a debilitating law from the Doctrine, it cannot conceivably survive without it. Satya argues that this unprotected but heinous law will necessarily breach the lower threshold of an Article 13 review.[426] As such, its debilitating nature can be tackled without the Doctrine's screening of it. The author's problem with this view is that a proportional response to the level of Constitutional injury is extremely relevant. Future law-making is dependent on/is made of judicial interpretations.[427] As such, denunciation is a great mechanism to emphasise the intensity of injury any previous laws may have caused. Hence, a law violating basic structure ought to be struck down on that ground, regardless of its site.

There exist other anomalies. The decision gives an impression that Article 31-B protects the excluded law from all FR-based challenges outside of basic structure.[428] The counter to this is that the text of Article 31-B permits no challenges based on Part III.[429] *Coelho*, then, does not justify its permission of a test which is based directly on the FRs. Furthermore,

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[417] Indian Medical Assn. v. Union of India, (2011) 7 SCC 179, ¶ 144.
[418] Articles 14, 15, 16(4), 19 and 21 are recognised as basic. *See* I.R. Coelho v. State of Tamil Nadu, (2007) 2 SCC 1, ¶¶ 48, 57, 59, 60, 132-147; It is interesting to note that the Constitution does not make any such prioritisation of the sort. Articles 358 and 359 do, but then that hierarchy would be said to be a creation of the Constituent power. *See* Gandhi, *supra* note 64, at 67.
[419] I.R. Coelho v. State of Tamil Nadu, (2007) 2 SCC 1, ¶¶ 50, 59, 61-62.
[420] *Id.*, ¶ 55.
[421] *Id.*, ¶ 151.
[422] CHANDRACHUD, *supra* note 354.
[423] *Id.*
[424] I.R. Coelho v. State of Tamil Nadu, (2007) 2 SCC 1, ¶ 151.
[425] *Id.*, ¶¶ 56, 106-107, 114, 148.
[426] Prateek, *supra* note 317, at 487.
[427] CHANDRACHUD, *supra* note 354, at 55-64, 110-113.
[428] I.R. Coelho v. State of Tamil Nadu, (2007) 2 SCC 1, ¶ 102.
[429] Gandhi, *supra* note 64, at 67.

the decision lays down, such challenges may only be made when Article 32 is resorted to, and the grounds of challenge are basic-FRs.[430] The decision considers Article 32 as inextricably linked with Part III due to its remedial nature (and presumably, its location in Part III).[431] As a consequence, its categorisation of the select few FRs as more basic was seen as redundant if Article 32 could not help probe their violation.[432] To begin with, Article 226 is wider than Article 32 and its location out of Part III does not denote exclusivity from FRs.[433] There exists no bar on Article 226 to test the validity of amendments or laws. Furthermore, no previous decision barred High Courts from using the Doctrine, or that the judicial review by High Courts loses its essentiality. In fact, by the time of *Coelho*, Article 226 was declared as an equally integral basic feature as Article 32.[434]

However, the decision has a justification for requiring another necessary element for the basic-FR test: Article 368. Namely, it reinforces the view that the Doctrine came about only with respect to amendments.[435] Furthermore, a law introduced by way of an amendment denoted to the court an element of constituent power at play.[436] This decision's imperative focus on amendments is understandable, given how Article 31-B is phrased. Albeit, the decision still stands out as a blitzkrieg of analytical gaps.

It lays down a serial two-step test to determine a substantive violation. The first step is an adjudication by way of the 'rights-test'. From the case, it appears that it requires the same threshold as a violation under Article 13. The decision recognises that the laws in Schedule IX do not become a part of the Constitution.[437] As such, it found the ideal test to check for the amendment's effect and impact on the Constitution. The part where this effect/impact occurs was declared as irrelevant. It requires that there be an abridgment or abrogation of a basic-FR, as discussed earlier.[438] Upon this preliminary establishment, the court proceeds to conduct a deeper scrutiny. This second step is the deployment of the 'essence test'.[439] According to this view, the basic fundamental right is not the part of the Constitution. In fact, the part of the basic structure is the essence abstracted from the basic-FRs.[440] This essence may be borne out by a combined reading of basic-FRs, or simply the basic-FR itself.[441] It is when this essence is abridged/abrogated that the law/amendment hybrid will be declared as against the Doctrine.[442]

The crucial takeaways from the case stand despite the inconsistencies pointed out. Certain fundamental rights may be more significant than others. This hierarchy may exist amongst basic features as well. This is clear when the court grounds the essentiality of judicial review as emanating from its birth from another basic feature. It also provides a way out when the threat to the basic structure amorphously possesses elements of both a law and an amendment. Lastly, a basic feature may be gleaned without a multi-provisional analysis. Soli

[430] I.R. Coelho v. State of Tamil Nadu, (2007) 2 SCC 1, ¶¶ 39, 49, 102, 116, 118, 150.
[431] *Id.*, ¶¶ 39, 49, 102, 116.
[432] *Id.*
[433] State of W.B. v. Committee for Protection of Democratic Rights, (2010) 3 SCC 571, ¶ 57.
[434] *See* L. Chandra Kumar v. Union of India, (1997) 3 SCC 261.
[435] I.R. Coelho v. State of Tamil Nadu, (2007) 2 SCC 1, ¶¶ 75, 104, 151.
[436] *Id.*, ¶ 54.
[437] "[…] they derive their validity on account of exercise undertaken by Parliament to include them into the Ninth Schedule."
[438] I.R. Coelho v. State of Tamil Nadu, (2007) 2 SCC 1, ¶¶ 133, 149.
[439] *Id.*, ¶ 151.
[440] Virendra Kumar, *Basic Structure of the Indian Constitution: Doctrine of Constitutionally Controlled Governance: [From Kesavananda Bharati to I.R. Coelho]*, Vol. 49 J. OF INDIAN L. INSTITUTE 365, 385 (2007).
[441] I.R. Coelho v. State of Tamil Nadu, (2007) 2 SCC 1, ¶¶ 106, 123, 151.
[442] *Id.*, ¶ 114.

Sorabjee criticised this judgment. According to him, *Coelho* made FRs virtually unalterable.[443] This is indeed an impermissible position. *Kesavananda* permits amendments to basic features. The condition is that they don't obliterate it. The condition eventually became that basic features must not be abridged. But the cases responsible for this change in condition, namely, *Nagaraj* and *Minerva*, are of a weaker bench-strength when compared to *Coelho*. So, at the very least, *Coelho* must comply with *Kesavananda*. A neat reconciliation is achieved by the author's proposition. That is, the decision must be viewed as specific to limited circumstances described earlier. In any case, the court had qualified the use of the essence test. It may only be applied if an entire Constitutional chapter is deprived of its application.[444]

f. NJAC

Supreme Court Advocates-on-record Association v. Union of India ('*NJAC*')[445] also witnessed a constitutional amendment's negation. The 99th Amendment along with the National Judicial Appointments Commission Act, 2014 was introduced by the Parliament. The intent was to replace the collegium system of judicial appointments. The challenged system was shaped by precedents on Articles 124(2) and 217(1).[446] The new system proposed a National Judicial Appointments Commission which would have persons apart from the Chief Justice of India ('CJI'). Among the members, the CJI did not get a veto or an assured preponderant vote.

Khehar and Goel JJ held that judicial primacy in judicial appointments is a basic feature.[447] Lokur J held that the amendment did not provide for a consultation with the CJI.[448] As such, Article 124's intentional essence was departed from.[449] Interestingly, he strikes down both the amendment and the act for violating the Doctrine.[450] What all the majority judgments share in common is the view that the amendment assaulted judicial independence.[451] As such, a basic feature was discovered along with its violation.[452]

Note that interpretations, more often than not, add parameters for better examining any concerned provision's compliance. That is, judiciary effectively expands the ambit of a provision by reading new features into it. It may be argued that *NJAC* is theoretically sound in this context. A closer probe, however, reveals that *NJAC* has misread Constitutional features. Critics note that this is the first time that a 'derivative' of a basic feature was elevated to the holy plane of enduring rigidity.[453] Most notable of these critics was Raju Ramchandran,[454] who seems to have switched his stance.[455] This criticism was most inarticulate to begin with. A derivative is a product born out of a base concept. As such, a

[443] CHANDRACHUD, *supra* note 354, at 55.
[444] I.R. Coelho v. State of Tamil Nadu, (2007) 2 SCC 1, ¶ 142.
[445] Supreme Court Advocates-on-record Association v. Union of India, (2016) 5 SCC 1.
[446] Shamsher Singh v. State of Punjab, (1974) 2 SCC 831; Union of India v. Sankal Chand Himatlal Sheth, (1977) 4 SCC 193; Supreme Court Advocates-on-Record Association v. Union of India, (1993) 4 SCC 441; In re: Special Reference No. 1 of 1998, (1998) 7 SCC 739.
[447] Supreme Court Advocates-on-record Association v. Union of India, (2016) 5 SCC 1, ¶¶ 380, 1072, 1079, 1105.
[448] *Id*., ¶¶ 864, 865, 883, 924, 964 884, 885 and 965.
[449] *Id*., ¶¶ 864-865, 884-885, 965.
[450] *Id*., ¶¶ 879-880, 892, 928.
[451] *Id*., ¶¶ 1072, 1079, 1104-1105 (Goel J), 883, 924, 964 (Lokur J).
[452] *Id*.
[453] Thallam, *supra* note 405, at 114.
[454] *Id*., at 118.
[455] V. Venkatesan, *Eight Cases That Will Test Whether 'Basic Structure Doctrine' Can Safeguard India's Democracy*, THE WIRE, October 20, 2020, available at https://thewire.in/law/eight-cases-that-will-test-whether-basic-structure-doctrine-can-safeguard-indias-democracy (Last visited on July 16, 2023).

derivative must be an outcome of the basic feature's existence, not vice-versa. *NJAC* inverted this flow of causation. It stated that judicial veto in appointment nurtures an independent judiciary. The court's notion of judicial primacy in appointment is more akin to a formative base-concept. The appropriate criticism is, thus, that the decision wrongly conflates the two concepts: formative and derivative elements of a basic feature. Following this conflation, it mistakenly elevates a derivative feature deeming it to be formative.

Proposedly, a formative feature is one, which, if collapsed, will eliminate a basic feature of the Constitution. For instance, if secularism is taken to be a basic feature of the Constitution, Art. 16, which bars discrimination on grounds of religion, is carrying one of its formative elements. As such, this provision must necessarily be protected if the judiciary intends to defend the basic feature of secularism, and is a formative element of the concerned basic feature. To understand the impact of the unintended switcheroo, consider an illustration. A running vehicle will become dysfunctional if the engine designed for it is switched with another. For then, it will lack a formative element that helps it propel forward. A switch of persons in the driver's seat would not have the same consequence to its function as a vehicle. That is, the answer to the question "whether the vehicle is functional" remains in the affirmative, but only the responses to "how it functions" may vary. A similar test of indispensability will reveal that judicial primacy does not seem formative to judicial independence. Judicial primacy or the CJI's preponderant views may or may not advance judicial independence. However, claiming that the latter's survival depends on it has no empirical or legal basis.[456] Arguably, many arguments may be made that assert a diminution in judicial independence when judges get a veto in appointment. For instance, it does not serve to reason as to how junior judges can independently apply precedents involving senior judges who may one day consider their career-progression. Furthermore, such an insular process may make the entire process detached from the broader societal landscape. If other State organs do not have a preponderant say, it may also lead to a system of patronage.[457]

Even the framers' views and the Constitutional text do not denote dominance of judicial say in its appointments.[458] This is not simply testing a violation of the basic structure. This is consolidating a 'preferred route of strengthening it' as cast in stone.[459] According to the author, a threat to any basic feature may assail it *in toto* or one of its formative elements.[460] It is only for those circumstances when the Doctrine should apply. Judicial primacy in appointments is but one way of advancing its independence. Based on this, it is asserted that *Raj Narain* remains to be the valid authority in this regard. Derivatives of basic features are completely extinguishable. *NJAC* was referring to formative elements, albeit, inarticulately.

Given this context, it is best to understand how it reached this conclusion involving the Doctrine. Summarily, three out of four majority judges deploy the Doctrine to reach their conclusions. The court began by stating that constitutional provisions are inextricably linked with their judicial interpretations.[461] In other words, judicial interpretations become a part of the basic structure. This is a cogent view, and the court is but toeing the *Nagaraj* line thus far. Khehar and Goel JJ relied on this espoused assertion heavily.[462] But from

[456] Thallam, *supra* note 405, at 117-118.
[457] *See also* APPOINTMENT OF JUDGES TO THE SUPREME COURT OF INDIA TRANSPARENCY, ACCOUNTABILITY, AND INDEPENDENCE (Arghya Sengupta & Ritwika Sharma, Oxford University Press, 2018)
[458] Thallam, *supra* note 405, at 118.
[459] Chandrachud, *supra* 320, at 163.
[460] The author is referring to features borne out by multiple and inter-related provisions. For reasons cited earlier, *Coelho* does not apply to general circumstances.
[461] Supreme Court Advocates-on-record Association v. Union of India, (2016) 5 SCC 1, ¶¶ 297-299 (Khehar CJ).
[462] *Id*., ¶¶ 776, 785-789, 798, 801 (Lokur J) 1017-1018, 1026, 1033) (Goel J).

thereon, lines between independent judiciary and judicial primacy get blurred. They cite precedents that hold independent judiciary to be 'basic'. These precedents had in turn gleaned this through provisions pertaining to judicial appointments.[463] A few of those were dealing with judicial primacy whilst appointments. *NJAC* conflates the judicial primacy as a pre-requisite as if it was the logical conclusion of the cited views. As soon as primacy is elevated to the plane of indispensability, the amendment is instantly hit by the Doctrine.

Lokur and Goel JJ also held that *Kesavananda* established a low standard for inviting the Doctrine's application. Both read the judgment as stating that an amendment will be struck down for merely altering the basic structure.[464] An alteration to the appointment system will be valid only if it does not disturb the judiciary's veto.[465] The inaccuracy of this observation is baffling. In *Kesavananda*, only Khanna J espoused the alteration standard.[466] The other majority judges therein permitted limited alterations.[467] Simultaneously, Lokur and Goel JJ imported the 'essence test' to circumstances dissimilar to the ones in *Coelho*. That is, the 'essence test' was applied to amendments in general.[468] As such, this decision makes the trigger for the Doctrine highly sensitive. The threshold for its activation was lowered. An amendment violating the essence of a basic feature or an interpretation of it will now be nullified. In turn, this amendment may violate the essence by merely altering it.

The alteration test has been lauded,[469] but the author is of a different view. Interpretation in exercise of judicial review infuses new meanings into basic features. As has been argued previously, judicial review is a basic feature subject to the larger basic structure. This is reasonable, for it effectively is but a cog in a larger enterprise to protect constituent power.[470] Lokur and Goel JJ's position then nurtures an incongruity. An amendment may not even alter basic features, but judicial review may do so permissibly. In other words, a constituent power (Constitutional amendment) may not alter the basic structure. To discern whether an amendment does so is a task delegated to judicial review. However, while performing judicial review, the courts may read new facets into a basic feature, such as in this case, thereby 'altering' it. The basic feature of judicial independence was altered to include judicial-primacy in its appointments. As per the logic above, then, a feature (judicial review) identified to prevent alterations to basic features by the constituent power, may do the same itself. This position is neither aligned with previously discussed cases,[471] nor does it appear reasonable. Alterations to the basic structure may include improvements to it. A strict bar on alteration eliminates this healthy space, and disregards the possibility of the executive or the legislature making such improvements. Furthermore, if the decision is indeed stating that

[463] Shamsher Singh v. State of Punjab, (1974) 2 SCC 831; Union of India v. Sankal Chand Himatlal Sheth, (1977) 4 SCC 193; Supreme Court Advocates-on-Record Association v. Union of India, (1993) 4 SCC 441; In re: Special Reference No. 1 of 1998, (1998) 7 SCC 739.
[464] Supreme Court Advocates-on-record Association v. Union of India, (2016) 5 SCC 1, ¶¶ 797-798 (Lokur J).
[465] *Id*., ¶ 346.
[466] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225, 1537 (Khanna J).
[467] *Id*., ¶ 512 (Sikri CJ), 634 (Hedge & Mukherjea JJ), 479, 608 (Shelat & Grover JJ), 1189 (Reddy J).
[468] Supreme Court Advocates-on-record Association v. Union of India, (2016) 5 SCC 1, ¶¶ 718-719, 839-841, 1030.
[469] Niveditha K., *Guest Post: The 103rd Amendment and a New Typology of the Basic Structure*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, September 19, 2019, available at https://indconlawphil.wordpress.com/2019/09/19/guest-post-the-103rd-amendment-and-a-new-typology-of-the-basic-structure/ (Last visited on July 16, 2023).
[470] The author is sticking with the judicial explanations for the sake of argument. However, as will be later demonstrated, all the proposed arguments are completely justifiable on the single basis of living-originalism.
[471] *See for instance* Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225, ¶¶ 488-489, 538.

judicial review outranks other basic features and the exercise of constituent power, no criterion for the same is put forth.

Another crucial development is the use to which this standard was put to: complete evaporation of a Constitutional framework. The court did not read the involved amendments down. Nor did it strike down a single State action or a new provision. It struck down the new framework to affect the appointments, entirely.[472]

Other lines of reasoning did not misread any standards for inviting the Doctrine. Yet, they generate an unpleasant outcome by conflating concepts. As noted, Khehar CJ does not seem to reject the *Nagaraj* view. But he also relied on means other than judicial interpretation to perform the conflation he did. His view was that determining a basic feature requires looking at its surrounding provisions.[473] He established judicial primacy in appointments as a Constitutional feature due to four reasons: precedents, framers' intent to constrain the executive, convention and the mechanics of the appointment procedure denoting the same.[474] He concluded that the new Articles 124A(1)(a) and (b) did not provide for an overwhelming dominance to the judiciary.[475] Goel J deems the precedents to conclude that the CJI's primacy in appointments is the *sine qua non* to judicial independence.[476] As he has been rightly criticised, convention does not denote legitimacy.[477] For reasons discussed previously, judicial primacy does not depend on the judiciary's veto in appointments.

The unassailable parts of their reasoning are where they link their conclusions with the Doctrine. Khehar CJ also reiterated 'independence of judiciary' as a basic feature by way of a multi-provisional analysis. His view was that identifying a basic feature requires looking at surrounding provisions.[478] This presumably meant inter-related provisions, which he looked at as a follow-up to this statement. He found a unifying thread in Articles 12, 36, 50, 124, 217 and 222.[479] Goel J does not seem to toe such a line. To him, this basic feature was a by-product of another basic feature: separation of powers.[480] Executive being a major litigant and precedents aggrandising judicial primacy in appointments led him to support this categorisation.[481] Clearly, the former's reasoning appears more in line with the development of the Doctrine. The problem with Khehar CJ, as with all the others in the case, is the notorious conflation. Judicial independence seems to have a supposedly symbiotic life with 'judicial primacy in appointments'. His judgment makes one more unjustifiable and unforeseen extension of 'judicial primacy': even the nuanced administrative oversight over appointments must belong to the judiciary. NJAC had appointed a bureaucrat to oversee the mechanics of its functioning, and was held as a threat.[482] This ties with the criticism offered earlier. This consolidates one path to judicial independence as a binding basic feature. This logical vacuity aside, there occurs a crucial positive development. Khehar CJ was clear in the applicability of the Doctrine to ordinary legislation. He states that a legislation may be struck down for violating one or many basic provisions, for assailing them individually and separately.[483] This

[472] Chandrachud, *supra* note 320, at 163.
[473] Supreme Court Advocates-on-record Association v. Union of India, (2016) 5 SCC 1, ¶¶ 299, 380.
[474] *Id.*, ¶¶ 19, 20, 89.4, 89.5, 11, 18, 300, 301.1, 380, 400, 558, 682, 693-694, 697-698.
[475] *Id.*, ¶ 308.
[476] *Id.*, ¶¶ 1054, 1071.
[477] Thallam, *supra* note 405, at 117.
[478] Supreme Court Advocates-on-record Association v. Union of India, (2016) 5 SCC 1, ¶ 299.
[479] *Id.*, ¶ 380.
[480] *Id.*, ¶¶ 1042-1043.
[481] *Id.*, ¶¶ 1036, 1040, 1054, 1065, 1067, 1071.
[482] *Id.*, ¶ 406.
[483] *Id.*, ¶¶ 380-381.

is not to be confused with validating a mono-provisional basis of a basic feature. He maintained the notion of essentiality as emanating from multiple provisions while stating this. If it attacks a synoptic common factor, the law shall be hit by the Doctrine.[484] Goel J differently stated that the legislation does not survive after the amendment's negation.[485]

Lokur J stated that a declared basic feature may not be overturned by the Parliament.[486] He deployed the effect and impact test to see if the amendment induced any alterations to judicial independence. In accordance with the low threshold he espoused, he takes the mere possibility of 'no judicial consultation' as injurious. He said that the NJAC permits appointment proceedings without the CJI's presence. Furthermore, nomination of fellow members on the NJAC may take place without the CJI's presence or consent. This skewed judicial say, in his view. Consequently, he found the basic feature of judicial independence to be damaged. In doing so, he does tacitly rely on the 'formative line' of logic. Kurian J saw another basic feature harmed. He only relies on the Doctrine insofar as he reticently finds a tilt in separation of powers. He nevertheless reaches the same conclusions as the other majority judges.

The case is of limited analytical utility. It is laced with some anomalies. However, the argument for applying the Doctrine in cases of legislations carries significance. Moreover, two of three majority judges affirm the *Nagaraj* standard. They suggest that the method to sniff out basic feature requires an anatomical snapshot. The alteration standard, however, has no basis whatsoever for the reasons discussed above. The author finds this standard implausible for another reason. Basic feature gives rise to both positive and negative obligations. Whereas, the alteration standard restricts the Doctrine to the latter. Nor does *Kesavananda* spell out what Goel and Lokur JJ claim it does. Them basing the alteration standard in the case is highly is logically unsound. *Kesavananda* had aspirational social justice as one of its premises. It is hard to assume that the court was suggesting that Part III never be tweaked for a better alignment with Part IV. Most significantly, the alteration standard is not proportionate to the injury it deals with. Ordinarily, the Doctrine should have a higher threshold than other judicial reviews. Instead, it now applies to injuries of a lower intensity. The alteration standard inverts the hierarchy of judicial reviews based on the injury they deal with. A review based on Article 13 deals with a less intense violation. It deals with compliance-based violations by ordinary laws. It requires that there be a 'law' and that it abridges/abrogates an FR. Whereas, as per the view questioned above, an existential threat to the Constitutional identity merely requires there be a change to one the basic features. The Doctrine may be more easily invoked, for a low-level 'injury', than the other reviews. This eludes all logic, and is diametrically opposed to the proportionality-sensitive width test.

B. FROM A TAME INCEPTION TO A RABID EXPANSION IN DEPTHS

The establishment of the doctrine and its fundamentals has certain characteristics. But the same are not bound to rigid meanings, and have a certain forward thrust to them. This part argues that the application of the Doctrine has also been expansive, with the growing objective to apply it liberally and protect the basic features from the slightest damage. Part III.B.1 distils the principles from the preceding part, and attempts to reproduce a *ratio* on a holistic reading. This *ratio* is comprised of parts from the landmark cases on the Doctrine which reconcile with each other, or give added depth to the Doctrine. Part III.B.2 will establish

[484] *Id.*, ¶ 221.
[485] *Id.*, ¶¶ 1066, 1108-1109.
[486] *Id.*, ¶ 816.

that cases applying the *ratio* continue to modify it. These changes have never been significantly discussed or theorised, but shaped up the Doctrine's application nevertheless.

1. Enduring Parts of the Canonical Arc

The jurisprudential development of the Doctrine throws up interesting features. To understand the present shape of the concept, it is best to indulge in analytical pruning. Anomalous and self-defeating judicial opinions must be chaffed. The remaining parts are mostly binding in precedential terms, but also logically imperturbable. Hence, it is best to summarise the Doctrine in terms of these incontrovertible features.

Kesavananda finds the basic structure of the Constitution to be a coagulant liquid. Its strength is inconspicuously present all the time. But it visibly strengthens its defences in the face of an assaultive force. Its existence was made out to be a reactive phenomenon. The force required to bring this inner strength out in the open ought to be obliterating. Furthermore, the threat will always be in the form of an amendment to the Constitution. Procedure of amendment was deemed as laced with substantive power. While there exist different kinds of amendments in the Constitution, the one that may threaten the basic structure, for the purposes of the Doctrine, is enabled by Article 368. In parallel, implied limits make sense because the Constitution's structure make it so. No sovereign power would want its established order to implode. This assumption necessitates that a valve exists to vent out mutational desires, but not the ones intending to dissolve the order. On a semantic scrutiny, this appears to be in line with the 'inherent limitations' approach. Yet, the term used by most in the case is 'implied limitations'. However, implied limitations were also gleaned by the case. Multiple textual sites indicated that certain common factors were deeply embedded throughout the Constitution. Both the lines unanimously signified to the court a certain thread running through the document. This thread was declared as sacred, for it holds the Constitution together.

The immediate focus was an attack on this thread by amendments. It is true that the Constitution sparingly characterises amendments as laws, either by text or by necessary implication(s). However, this did not sit well with what the Constitution's text had permitted amendments to do. Such amendments were permitted to tinker with products borne out of constituent powers (constitutional provisions). By their very nature, ordinary laws are barred from doing so. The amendments by way of Article 368, then, must have more force that they are not held by this barrier. But the text gives an impression that they are laws. Seen this way, text and theory did not seem bridgeable. The court nevertheless solves the problem by declaring that the haziness itself carries the answer. The amorphousness was seen as deliberate. It spoke to the court of the higher nature in the amendments under Article 368 when compared to ordinary laws. Consequently, the mechanism which screens ordinary laws, does not apply to amendments. But since implosion, through damaging amendments, cannot be a plausible intention, some mechanism to screen amendments must exist. The mechanism was found to lie in a theoretical assumption: the constituent power must have intended to eternally protect some features. This meant that amendments had boundaries. Viewed this way, the amendment provision was a product of the constituent power, but exercising an amendment was not. The decision logically extends this assertion. Boundaries implied that the expanse located within must never be vaporised. This expanse was the basic structure. As such, if this implied theoretical boundary was breached, an amendment would be struck down.

Thereafter, in *Raj Narain*, it hesitated in extending this test to ordinary laws and derivative features of the basic structure.[487] The Doctrine's existence as 'reactive' found

[487] Indira Nehru Gandhi v. Raj Narain, (1975) Supp SCC 1.

resonance. An existential threat was deemed as necessary for the Doctrine's force field to activate itself. In a trot, judicial review and large-scale amending power were presumed to be wielding constituent powers themselves. Else, interpreting and amending the workings of primary product of the constituent power (amendment-provision) was impossible. Anything lacking the figment of this power was otherwise relegated to a position below this primary product. But because judicial review had the same basis as the source of threats (amendment under Article 368), it was wrongly deciphered as 'not basic'. This case was also a confirmation of the inherent, and not implied, limitation theory. Albeit, no case has cared for this semantic difference and there has been a perpetual conflation ever since.

Subsequently, in *Minerva*, the differences in injuries caused by amendment and ordinary laws came to be diluted.[488] It was reasoned that an amendment may enable such ordinary law-making that may only chip away a basic feature. If the basic structure stands for preservation of features, no injury, regardless of its intensity, must be tolerated or enabled. In lockstep, it clarified the difference between the nature of Art. 368 and the outcomes of its utilisation. That is, it was made clear that amendment was not a constituent power, but only a derivative of it. Its objective was found to be in keeping the Constitution functional by allowing lubricating tweaks. Thus, the Constitution was held as more proximate to the constituent power, and amendments were declared as belonging to a lower-tier in the hierarchy. To preserve the vertical hierarchy between the Constitution and amending powers, amendments had to be prevented from damaging the document. This required that some basic feature performed a conservatory function and preserved the Constitution's basic structure against ill-motives of *realpolitik*. The ideal device to perform all these tasks was found in judicial review. However, it not being basic itself would have impeded these desired screenings. As such, it was declared as a basic feature.

But having the Doctrine in place was found to be redundant if it otherwise enabled laws to damage the basic structure. The court in *Minerva*, thus, adopted a 'consequence test' to check amendments for this possibility. Precisely, the court does not state that a law may violate the basic structure itself. Instead, an amendment is invalid for it merely creates circumstances under which such laws may come to exist. The subject of the doctrine remained amendments. Hence, chipping a basic feature by abrogating/abridging it would invite a negative judicial review. Even if an amendment enabled limited preponderance of positive over negative Constitutional obligations, can thus be tackled conclusively. As noted above, the subject of the doctrine continued to be amendments, but an implicit development occurs. This forged a solution for low-level injuries by Constitutional amendments, akin to the one caused by laws. Put simply, the court moved closer to a position where it could acknowledge that laws may be damage the basic structure, and should be made another subject of the Doctrine.

Next, in *Bommai*, the Doctrine then gets extended to higher-level executive actions.[489] The conditional existence of implied limitations on assaulting amendments was abandoned. State executive was recognised to be an equal threat. The abrogation/abridgment standard was sufficient for a basic-structure injury. An implied condition for the low threshold, thus far, was that there be a threat to multiple basic features. However, the perception of threat evolved in *Bommai*. According to this view, what seems to matter is the quanta of damage suffered by the basic structure. It could be concentrated and intense. Else, it could be low in intensity and yet high in frequency/be multi-frontal. The development was a wider recognition of threats. Furthermore, the executive was mandated to preserve the basic structure. Judicial

[488] Minerva Mills v. Union of India, (1980) 3 SCC 625.
[489] S.R. Bommai v. Union of India, (1994) 3 SCC 1.

review was again affirmed as a basic feature, but the basis was another view. If this constituent power inserted it explicitly at multiple Constitutional sites, it must be deemed essential.

Nagaraj brought a host of features with it.[490] One basic feature (judicial review) was declared as subject to the remaining basic structure. This recognises that a basic feature like judicial review itself may circumstantially breach the Doctrine.

The test for violation underwent a modification. A 'basic structure' challenge was hinged on the demonstration that a core principle of 'related provisions' was damaged. If satisfied, the damage needed to be wider than the ones caused by ordinary laws. However, this is to be reconciled with the previous dicta importing abridgement/abrogation standards. Hence, the position effectively became as thus. The Doctrine may be invoked in case of an extra-ordinary injury. This harm must percolate to a common core of inter-related provisions. At the same time, it may only dilute the core's nature. Its existence may not be put at threat for a basic-structure challenge to succeed. As cogent as *Nagaraj* looked in isolation, it becomes an incomprehensible mess when read with others.

Regressively, the required injury's intensity was elevated. The injury must be by an amendment. It must also be incapable of being wrought by other State actions. *Nagaraj* is retrograde in this sense, because other State actions get immunity for causing some damage to the basic structure. Termed as the width test, it was good as it helped distinguish the Doctrine from other kinds of judicial review. But is also illogical. According to this view, an amendment may not be tested, if some State action eviscerates a basic feature. In that case, the amendment's injury shall never be wider than a State action's injury. In this hypothetical scenario, the test gets converted into a declaration that amendments shall never damage the basic structure, for other State actions do the same or greater debilitation. Further extended, this would mean that amendments that deal this 'lesser' damage to the basic structure become permissible in constitutional law. This would be contra *Kesavananda*, which stated that amendments cannot damage the basic structure. Hence, this part of the dictum may be safely ignored. It is best assumed that the width test requires that there be an injury to basic feature, 'usually' not associated with other State actions.

The next development in *Coelho* solves an otherwise problematic riddle thrown up by precedents thus far.[491] This was dealing with a hybrid scenario. Herein, a threat was composed of unquantifiable elements of constituent and ordinary power. In doing so, it alters the basis of judicial review as 'basic' again. That is, judicial review was justified as a necessary element of another basic feature (separation of powers). This was backed by cogent reasoning and does justice with the multi-provisional basis for the basic structure. Some features are basic only because they help advance the others. The decision further makes some fundamental rights more basic than others. The implication of this assertion is sound, but not the premise it was based on. The reasons have been discussed in the preceding Part. The decision then explained the answer to 'when may be such an amendment be challenged on the grounds of violating the Doctrine'. It states the implication of the amendment matters. Its content or the Constitutional site where it occurs, don't. This implication must affect the essence of one or many basic features.

Lastly, in *NJAC*, where an amendment was struck down using the Doctrine, *Coelho's* assertions were imported as a general rule of thumb.[492] It confuses a derivative of a basic feature for a formative precept necessary for its existence. Regardless, assuming had it

[490] M. Nagaraj v. Union of India, (2006) 8 SCC 212.
[491] I.R. Coelho v. State of T.N., (2007) 2 SCC 1.
[492] Supreme Court Advocates-on-record Association v. Union of India, (2016) 5 SCC 1.

not, the reasons make some sense and are aligned with the 'consequence argument'. Ordinary laws may also damage the basic structure. A formative element's evaporation may facilitate the collapse of its dependent basic feature. However, the basic feature must either be a formative element of another, or be borne out by multiple provisions.

However, it would be a mistake to take this summary of the Doctrine as dispositive. There exist equally significant points of growth where it is used without striking down amendments. Additionally, other cases which use the Doctrine as an interpretive tool which matter. Like *Minerva* and *Raj Narain* were to *Kesavananda*, such cases wrestle with the mechanics of the theory espoused by all the canonical cases.

2. A Whirlpool Blend of Departures and Accretions

The Doctrine continued its symbiotic tryst with amendments. Basic structure was construed as a reactive concept when a deeply assaultive amendment came to the picture. When an amendment extinguished a constitutional right not holding this quintessence, it was held as permissible.[493]

But departures from canonical cases were brewing. With only *Raj Narain* in place and *NJAC* yet to come, the judiciary did not necessarily toe the precedent's line when it came to the derivatives of basic features. Once, it was contended that a dispute pertaining to anti-defection could not be adjudicated by the presiding officer of a legislative chamber.[494] Those who opposed this contention, however, won the outcome. It was held that such an assignment did not harm the basic feature of democracy.[495] The analysis focused on the host of responsibilities imposed on such officers. It viewed that the direct impact of political-party defection was on the chamber's composition.[496] As such, the vast responsibilities on such officers denoted this to be their concern. Additionally, disqualification proceedings were supposed to be the Speaker's, and not the House's, concern.[497] As such, the Speaker was not appropriating judicial review for a legislative concern.[498] Lastly, nothing made the Speaker's decision binding on the judiciary.[499] The judicial review of the Speaker was supplementing and not expropriating the judiciary's, and it was held as valid.[500] The court thus dismissed a derivative link between an anti-defection dispute and the requirement of independent electoral adjudication. Effectively, it is denying the basic structure argument by not categorising the subject provision as a 'derivative'. The obverse is that the Doctrine would apply in case it was. One view in *Raj Narain* had pronounced the exact opposite: it held that a derivative link does not qualify the provision as a part of the basic feature. The contradiction apart, both had advanced conclusions that they thought were more aligned with democracy.

In parallel, equivalence of derivatives with their concerned basic features was more clearly confirmed. The mechanism to implement a basic feature was declared basic in itself. In *L. Chandra Kumar v. Union of India* ('*Chandra Kumar*'),[501] the court dealt with

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[493] Raghunathrao Ganpatrao v. Union of India, (1994) Supp (1) SCC 191.
[494] Kihoto Hollohan v. Zachillhu, (1992) Supp (2) SCC 651.
[495] A. Lakshminath, *Precedential Value of "Kesavananda Bharati"-Rationalising the ratio of the case* in Basic Structure Constitutionalism: Revisiting Kesavananda Bharati 168, 179 (Dr. Sanjay Jain & Sathya Narayan, Eastern Book Company, 2011).
[496] Kihoto Hollohan v. Zachillhu, (1992) Supp (2) SCC 651; The dispute was regarding Schedule X of the Indian Constitution. This schedule deals with a situation when members of the legislature switch political outfits.
[497] Kihoto Hollohan v. Zachillhu, (1992) Supp (2) SCC 651, ¶ 97.
[498] *Id*., ¶ 94.
[499] *Id*., ¶¶ 101, 109.
[500] *Id*., ¶¶ 88, 110.
[501] L. Chandra Kumar v. Union of India, (1997) 3 SCC 261.

Articles 323-A(2)(*d*) and 323-B(3)(*d*). The provisions provided for administrative tribunals that may be manned by judicial members. They were asserted as excluding the writ jurisdiction of High Courts. The court read it down to preserve the jurisdiction of the High Courts.[502] It construed precedents as singularly denotative. Judicial review may only come about if it is invoked.[503] As such, Article 226, as one of its means, was said to be a basic feature unto itself.[504] Prior to this, a more blatant transgression was struck down. A state government conferred upon itself a conclusive power to invalidate such tribunals' decisions. *P. Sambamurthy v. State of Andhra Pradesh*[505] held Article 371-D(5) as violating the basic feature of judicial review. However, a close reading of the decision suggests that it did not rely on an equivalence as *Chandra Kumar*. Instead, it stated that judicial review is necessary for the rule of law to exist.[506] The latter was a declared basic feature as per *Raj Narain*. Thus, the court took a derivative (Article 226) of the first basic feature (judicial review) to preserve the existence of another feature (rule of law). A power on state executives may not violate the Doctrine if it loses conclusiveness over the tribunals' decisions.[507] This check applies to legislations setting up fora for adjudication.[508]

The concern is whether judicial review is a channel to something, as suggested by *Sambamurthy*, *Raj Narain* and *Coelho*. Pertinently, *Chandra Kumar* has also been read along the same lines during its application.[509] An anti-terror law set up an executive-appointed committee to review cases. It added a tier of executive review before a High Court could screen the concerned cases. As such, there was a definitive abridgment of Article 226.[510] The Supreme Court noted that judicial review requires that Article 226 has conclusiveness. It did not discern a violation, since the final say in the statute was read as subjugated to judicial review.[511] The test was that judicial review be violated to a degree that tears apart the separation of powers.[512] At the same time, the Doctrine has not completely strangled the State's functional space. A law providing for ousting jurisdictions under Article 226 was held as valid.[513] Thus, it permitted the State to not comply with a basic feature upon proper justifications.

Another line adopts a more consequence-oriented examination to find the nature of a provision. This involves weighing the effect on other basic features. In *R.C. Poudyal v. Union of India* ('*Poudyal*'),[514] the facts saw a reservation for certain religious and ethnic groups. The legislative assembly of a state would carve out some seats specifically for the representatives of such communities. The provision was Article 371-F(f), and secularism was deemed as violated. This was by then a declared basic feature due to *Bommai*. It was also stated that republicanism be identified as such as well, which was equally harmed by this amendment. A structural view did govern this decision then help disqualify this claim. The court decided that the proportionality of representation can never be specified with arithmetic precision.[515]

[502] *Id*., ¶ 79; Thallam, *supra* note 405, at 112.
[503] Kihoto Hollohan v. Zachillhu, (1992) Supp (2) SCC 651, ¶¶ 76-77.
[504] *Id*., ¶¶ 76-77.
[505] P. Sambamurthy v. State of Andhra Pradesh, (1987) (1) SCC 362.
[506] Thallam, *supra* note 405, at 112.
[507] Gurbax Singh v. State of Rajasthan, (1992) Supp (3) SCC 24, ¶ 3; Panipat Woollen and General Mills Co. Ltd. v. Union of India, (1986) 4 SCC 368, ¶ 9.
[508] Madras Bar Assn. v. Union of India, (2014) 10 SCC 1.
[509] Mahmadhusen Abdulrahim Kalota Shaikh (2) v. Union of India, (2009) 2 SCC 1.
[510] *Id*., ¶ 80.
[511] *Id*., ¶ 90.
[512] *Id*., ¶ 91.
[513] Union of India v. Major General Shri Kant Sharma, (2015) 6 SCC 773.
[514] R.C. Poudyal v. Union of India, (1994) Supp (1) SCC 324.
[515] *Id*., ¶¶ 120, 126, 1098.

Albeit, the Constitution had laid down formulaic provisions for specifying the same. It also contained heavy departures.[516] Hence, the formulaic provisions on representation were found to be circumstantial as opposed to 'basic'. It dismissed the argument of a breach in secularism by evolving a new test. This was a test based on the overall strengthening/dilution of basic structure. The court looked at the basic feature that was apparently harmed (secularism). It also probed if any other basic feature was similarly diminished. It then compared it with the reinforcement occurring in other basic features. The subject beneficiaries of the reservation had belated cultural ties with the concerned state. And yet, their political representation was not adequately translated. Any increment in their social and political role was deemed as advancing religious diversity at a political level.[517] So it considered welfare and democracy as strengthened by the move, in tandem with *Kesavananda* and *Raj Narain*. In parallel, the positive action by the state was seen as supporting secularism, in tandem with *Bommai*. Individual basic features getting a boost implied that the basic structure was strengthened overall. This was a very interesting development for the court deployed what may be termed as a 'test of preponderance'. It first calculated the cumulative strengthening of individual basic features. It similarly assessed the total of diminutions to any basic features. Eventually, it assessed which was greater to determine how the basic structure was affected. If the enhancement or achievement of the basic features is greater the damage to them, the responsible act is valid. In *Raghunathrao Ganpatrao v. Union of India* ('*Ganpatrao*'),[518] the court reinforces this position. It dealt with the elimination of financial privileges for former regional monarchs. At the time of independence, they were granted the said privileges for a peaceful submission/acquiescence with the Indian democracy. Since these were Constitutionally entrenched, an amendment was affected for their retraction. The majority concluded that the amendment's effect was to advance sovereignty, republicanism and equality.[519]

Krishnaswamy finds a noteworthy element in the *Poudyal*'s analysis. This decision concerns itself with the larger effect on the personality of the Constitutional quintessence.[520] As such, minor deviations which have the effect of strengthening the basic structure will be valid. It re-orients the focus to a multi-provisional analysis. The author is of the view that this decision performs a function akin to *Bommai's*. It recognises that the legislature must take positive steps to reinforce the basic structure. As such, the decision consolidates that Doctrine's concurrent impact of instilling positive obligations in the system.

This takes focus to a decision which preceded *Bommai*, but dealt with a similar executive action. *Waman Rao v. Union of India,* [521]dealt with national emergency as opposed to a regional one. The Parliament had paused normal electoral time-lapse using the concerned provision. In this period, it passed the 40th Amendment that put some land-reform laws in Schedule IX. This invited three provisions existing from before:

> i) Article 31A, which protected the inserted laws from challenges based on Articles 14, 19 and 21;
>
> ii) Article 31-B, which created Schedule IX;
>
> iii) Article 31-C, which gave the State leeway to preponderate DPSPs over FRs;

[516] *Id*., ¶ 126; *See* The Constitution of India, 1950, Arts. 239-A, 240, 371-A.
[517] R.C. Poudyal v. Union of India, (1994) Supp (1) SCC 324, ¶ 137.
[518] Raghunathrao Ganpatrao v. Union of India, (1994) Supp (1) SCC 191.
[519] *Id*., ¶¶ 94, 96, 109.
[520] *Id*., ¶¶ 107, 137, 193.
[521] Waman Rao v. Union of India, (1981) 2 SCC 362.

This occurred in the 'inorganic' extended time-period. That is, the government would have ordinarily faced fresh elections by this time. The petitioner argued that the State could abuse emergency powers to postpone fresh elections indefinitely. To preserve the basic structure, it was argued that the provision enabling it be read down. Furthermore, the amendment was also sought to be struck down. Before the court could do anything concrete, the emergency was revoked.[522] Regardless, the court did not find possible jurisdiction, nor a judicial standard, using which it could have tested a national emergency.[523] Even if it did, it needed to connect both with the Doctrine otherwise developed in the context of amendments.

As has been described previously, *Bommai* solves all these concerns cleanly. Albeit, it dealt with regional emergencies, both declarations lie on the same level of executive power.[524] Otherwise, a fatal executive action endangering the basic feature of democracy would remain as is. The threat played itself out in spite of the 44th Amendment. This amendment had qualified the provision for national emergency by embedding in it more prerequisites. However, the Parliament introduced the unqualified and archaic version of the national emergency clause for imposing regional emergency in the state of Punjab.[525] This action remained untested and also very limited in duration(s). However, the point is the utilisation of such a drastic phrasing would have been stopped using *Bommai*.

However, the Doctrine was nevertheless consolidated as a tool for testing executive actions. A vital development took place when the Doctrine was used in the context of Article 164. This provision enables a Governor to appoint a Chief Minister from amongst elected representatives in a state. In *B.R. Kapur* v. *State of Tamil Nadu*,[526] gubernatorial powers were used to appoint a politician not yet a member of the state assembly. This is no bar, given that any such called leader may become one within six months of becoming a Chief Minister. However, the concerned representative was convicted of a crime. According to the Constitution read with the relevant electoral law, the representative would be disqualified to be a legislator. The court stated that the Governor's duty to preserve the Constitution was denotative.[527] It preferred an interpretation of Article 164 that advanced the basic structure. Krishnaswamy asserts that this was extremely evolutionary.[528] The basic structure was tangentially applied to testing an executive action. Except the equality and due process clause were not used, which constitute administrative law review in India. Thus, the Doctrine was consolidated as an independent judicial review mechanism.[529] Similarly, another case saw the erstwhile government affecting an education policy.[530] It introduced elements like Hindu astrology as legitimate subjects of educational pursuit. The court upheld the challenge against it. The ground was that the policy was advancing a communal agenda.[531] It admitted its limits on reviewing matters of policy, not permitted by an ordinary administrative law review.[532] However, the basic structure review to protect secularism was a sufficient cause.[533] The preceding two

[522] KRISHNASWAMY, *supra* note 9, at 46.
[523] *Id*., at 47-48.
[524] S.R. Bommai v. Union of India, (1994) 3 SCC 1, ¶¶ 20, 57-58, 97, 99.
[525] Gopal Subramanium, *Emergency Provisions Under the Indian Constitution* in SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA 134-139 (Ashok H. Desai & B.N. Kirpal, Oxford University Press, 2000).
[526] B.R. Kapur v. State of T.N., (2001) 7 SCC 231.
[527] *Id*., ¶ 67.
[528] KRISHNASWAMY, *supra* note 9, at 94, 101.
[529] *Id*.
[530] P.M. Bhargava v. Union of India, (2004) 6 SCC 661.
[531] *Id*.
[532] *Id*., ¶ 13; KRISHNASWAMY, *supra* note 9, at 98.
[533] P.M. Bhargava v. Union of India, (2004) 6 SCC 661, ¶ 16.

decisions have vital implications. Firstly, basic structure judicial-review was held as separate from administrative judicial-review. Thus, it was viewed as an independent mechanism of judicial review. Secondly, basic structure was asserted as more expansive in nature, as far as subject-matter jurisdiction is concerned.

Waman further thought that effectively, it was being asked to judge the amendment on its merits. This necessarily involved a tangential analysis of the very basis of Schedule IX: the 1st amendment. That was not the central concern for the court, and required another litigation process. However, the court here followed an implied form of the 'rights test' in upholding Article 31-A and a part of Article 31-C. As a consequence of an amendment, these were tested for validity as against the basic structure. Both were seen as furthering social welfare objectives, and thus inviting *Kesavananda*. It perplexingly imposed a bar on future cases to not test amendments predating *Kesavananda*.[534] The author only mentions this since it poses a facetious technical bar on testing Constitutional provisions. From the decision's text,[535] it appears that *Waman* misinterprets *Kesavananda's* application of prospective overrule for facts specific to it, as a temporal bar on using the Doctrine in general.

This is a minor procedural issue for the Doctrine, and will be discussed later.[536] The concern herein is the substantive development of the Doctrine. Its growth cannot be singly judged from its reaction to executive action. It began flirtatious examinations of other State actions, notable of all being the legislative kind. Legislative action came to be tested, and even used, against the Doctrine much prior to *NJAC*. This began with numerically shaky majority opinions. The enunciation was as simple as the logic: basic structure may be born out of implied limits, but it functions as an express mandate.[537] As is self-explanatory, mandate is ever present.[538] Cumulatively, if higher forms of constituent power cannot violate it, lower/ derivative forms like laws certainly cannot.[539] In two decisions following it, the court used the Doctrine as an interpretive device to strike down legislations. It struck down a central legislation for dealing with religious land. It was held as violating secularism, a declared basic feature.[540] In another case, it declared a state amendment to a central legislation as bad in law.[541] It reasoned that rule of law required that 'powers to enforce' stay with courts or tribunals. It treats rule of law as a basic feature, albeit without any explanation whatsoever.[542]

There exist departures where the Doctrine was considered as completely. In a later case, neither did the court use the Doctrine as an interpretive device, nor did it consider it for application. In *Kuldip Nayar v. Union of India*,[543] an election law statute was amended. The amendments pertained to the Rajya Sabha (House of States). It deleted the requirement for aspiring state-representatives to be the residents of the concerned state. Federalism was asserted to be a basic feature under threat, challenging the amendments. The court stated that there was no bar on the Union to eliminate states from the Union.[544] As such, federalism was not a basic

[534] Waman Rao v. Union of India, (1981) 2 SCC 362, ¶¶ 51, 68; The constitutionality of Schedule IX was tested well after the *Waman* deadline as it was a pending issue since *Kesavananda*.
[535] Waman Rao v. Union of India, (1981) 2 SCC 362, ¶¶ 32, 65
[536] *See* discussion *infra* Part III.C.
[537] State of Karnataka v. Union of India, (1977) 4 SCC 608, ¶ 125.
[538] *Id*.
[539] *Id*., ¶¶ 125-126.
[540] Ismail Faruqui v. Union of India, (1994) SCC 6 360.
[541] G.C. Kanungo v. State of Orissa, (1995) 5 SCC 96, ¶ 32.
[542] *Id*., ¶ 28.
[543] Kuldip Nayar v. Union of India, (2006) 7 SCC 1.
[544] *Id*., ¶ 71; *See also* State of Karnataka v. Union of India, (1977) 4 SCC 608, ¶ 129.

feature.[545] However, it found the feature's essentiality unnecessary for the facts before it.[546] An ordinary legislation was deemed as being incapable of tested under the Doctrine, applying *Raj Narain*.[547] It ignored the cases which had already departed from this position. Another crucial takeaway was that it did not consider the Doctrine to be an interpretive device. It was again treated as a reactive concept, which emerges under unique circumstances.[548] This decision is bad for multiple reasons. It ignores the line of reasoning posited by Chandrachud J, which became the law in *Minerva*. Doctrine may attack an amendment since it is a conduit for equally harmful laws. Given that the Doctrine is an eternal mandate, laws actually having this effect must be struck down. In any case, the decision has also not followed *Bommai* in taking, and not determining, federalism as a basic feature.

It is relevant to note how Krishnaswamy takes these developments as constituting a new judicial review. He is of the firm view that the Doctrine deals with a damage Constitution did not anticipate, or at least did not do so expressly.[549] Any other violation is squarely covered by the Constitution. A violation of a FR by ordinary law invites the strict scrutiny of Article 13. Minor transgressions from any Constitutional provision will subject State actions to a screening as per Articles 245-246. Any State action is otherwise covered by a FRs-based administrative law review, devised by reading Articles 14 and 21. But extreme violations destroy or damage Constitutional principles.[550] In parallel, the level of injuries the Doctrine deals with, are more perceptible.[551] That is, a more pernicious injury is more visible. The effect, he states, is the dilution of required efforts in scrutiny.[552] He advances his point by illustrations. For violation of a federal-competence based review, a court tediously locates the righteous government to be able to enact it. This by looking at the 'pith and substance' or 'colourability' in legislations to decide their subject matter.[553] Both these judicial concepts help determine the competent authority for enacting a law from between the Union and the states. Doctrine of 'pith and substance' looks at the content, objective and scope of a law to determine whether the law falls under List I/II, Schedule VII of the Constitution.[554] The concept of 'colourability' helps the judiciary discern if a law seemingly passed under one of the lists only deals with its subject obliquely, all the while substantially dealing with a subject on the other list.[555] Both, therefore, determine the competent legislature between the Union and state legislatures for the concerned law, and strike it down if its legislating body is not found as such. Similarly, the rights-violation test is satisfied only when two conditions are met.[556] The violation must be directly attributable to the State and must be its inevitable consequence.[557] A review under the Doctrine contrarily requires the basic structure to be abridged.[558]

The author does not agree with the premise. A higher level of injury may require equally heavy proofs for a petitioner to grapple with. Before establishing an injury to the basic

[545] Kuldip Nayar v. Union of India, (2006) 7 SCC 1, ¶ 71.
[546] *Id*., ¶147.
[547] *Id*., ¶¶ 106-107.
[548] *Id*., ¶ 468.
[549] KRISHNASWAMY, *supra* note 9, at 72.
[550] Krishnaswamy finds this standard espoused in *Raj Narain* as the most apposite; Indira Nehru Gandhi v. Raj Narain, (1975) Supp SCC 1, ¶ 15.
[551] KRISHNASWAMY, *supra* note 9, at 111.
[552] *Id*.
[553] Kartar Singh v. State of Punjab, (1994) 3 SCC 569; Ram Krishna Dalmia v. S.R. Tendolkar, AIR 1958 SC 538.
[554] The State of Bombay v. R. M. D. Chamarbaugwala, (1957) SCC OnLine SC 12.
[555] State of Bihar v. Maharajadhiraja Sir Kameshwar Singh, (1952) 1 SCC 528
[556] Rustom Cavasjee Cooper v. Union of India, (1970) 1 SCC 248.
[557] *Id*., ¶ 43.
[558] KRISHNASWAMY, *supra* note 9, at 111.

structure, a series of tasks need to be undertaken. The basic feature ought to be located. To discern this, the provision has to be seen as belonging to some web of provisions. All strands of the web must carry the same silk. That is, a synoptic principle must be the common factor in that group of provisions. The court will then apply the Doctrine if the assault touches one part of the web but judders all the strands. This exercise compounds itself in complexity if multiple basic features or 'webs' are involved. Upon this demonstration, the source of harm will determine how the Doctrine will conduct its examination. The court may also have to demonstrate how other forms of review do not apply. This discussion has only covered the Doctrine's application insofar as it acts like a negative obligation. Its imposition of positive obligations still requires more substantive benchmarks. A high level of injury may be more perceptible. But it is gauging the depth of it that bespeaks of an examination's grit. Not its perception on the surface. The distinguishing factors in injuries examined by all the reviews are their relative depths. Moreover, the injury is not always taking place on a clearly identifiable area, unlike other reviews. The basic structure review is, thus, very nuanced. Summarily, the high fatality of the injury does not necessarily lower the standard of proof. However, the author resumes his agreement with Krishnaswamy as far as the larger point is concerned. The Doctrine's review does stand out from the other forms of judicial review.

Krishnaswamy seems to be arguing for exclusivity among different judicial review mechanisms and its justifiability. It deals with an action carrying greater harm. Extending this reasoning, such an egregious act deserves a stronger, and thus, a different, denunciation not captured by other reviews.[559] The author asserts the same for a different reason, as stated previously. Since judicial interpretation forms a necessary part of all Indian law, a proportionate denunciation is extremely relevant. Moreover, keeping the same standards for Article 13 and basic structure reviews defeats the switch of judicial position captured from *Golaknath* to *Kesavananda*.[560] Krishnaswamy also finds that a text-based limitation is vulnerable.[561] That is, if the source of the doctrine were to be read down in a single provision, the Parliament may simply eliminate it and enjoy infinite amending power. This is also demonstrated by the concerned amendment scrutinised in *Minerva*.

Krishnaswamy concludes his assertion by describing an ideal. He states that a review of a high-level injury must emanate from a much more invincible source: Constitutional principles emerging from the larger whole.[562] Inexplicitly, he gives a more practical justification for the same assertion. Consider his 'failsafe' argument again. Even a minor tweak to one formative provision for the principle will not detract from the larger whole.[563] Proposedly, and by extension, this means that to shake the larger whole, a large-level injury is required. To judge the same, the standard must be unique as well. This position, insofar as permissibility of minor tweaks is concerned, is agreeable. The author takes it as enabling some latitude for Constitutional experiments in strengthening the basic features/structure. This better grasps the Doctrine as a device generating both positive/negative obligations.

Krishnaswamy makes another strong argument for the above position. He takes the larger outcome of the Doctrine as preserving a normative identity of the Constitution.[564] He says this to distinguish the Doctrine from history-based methods of analysing a Constitution.[565] He alludes to methods of finding worthy Constitutional provisions based on history, handing

[559] *Id*., at 72.
[560] *Id*., at 87.
[561] *Id*.
[562] *Id*.
[563] *Id*.
[564] *Id*., at 118.
[565] *Id*., at 18, 118.

judicial subjectivity unnecessary weight.[566] A multi-provisional analysis is more structured towards finding worthy provisions strictly in light of the Constitution's build.[567] The position is agreeable. Historical methods invite the objections applicable to the dead-hand theory and originalism. The emerging Constitutional Doctrines such as 'transformative constitutionalism' and 'constitutional morality' bear this precise problem.[568] They demand a history-based view of the document. Consequently, both led judgments to become a cesspool of moral opinions by those on the Indian benches.[569] Structuralism exclusively looks at provisions. These, in turn, carry interpretations in synchronisation with contemporary sentiments. It is the ideal equilibrium that Burke envisaged: a balance between the point of Constitutional inception and contemporary sensibilities.[570] The Doctrine has other features that maintains this Burkean balance.

The Doctrine solves/mitigates the problem of judicial subjectivity. Krishnaswamy posits that a multi-provisional analysis has this effect.[571] It compels the judiciary to glean implications out of Constitutional text as a whole. Arguably, it is but one such limiting feature of the Doctrine. Teleological interpretation, the test of preponderance, non-elevation of derivative features and the width test have the same effect.[572] That is, these features act as objective parameters to help discern a basic feature, akin to a multi-provisional analysis. Hence, the Doctrine comes with more than one discretion-limiting features. In any case, the court gets to invoke the Doctrine only when there is an extremely high level of injury.[573] Even in that case, it has to justify why other forms of judicial review are inapplicable. Moreover, this Doctrine binds the executive to tread the same path and take positive action accordingly. Similarly, the legislature is bound in terms of both present and prospective law-making. Each Constitutional body has equal say over the basic structure. But this does not mean they can abuse it, given they have a limited curative jurisdiction.[574]

Furthermore, if the amendments carry scope for future laws that may violate the Constitutional quintessence, will be struck down. No law may then be passed in any manner to circumvent this position. Even if it does, such as by getting into Schedule IX, or by any action that is amorphous for having both legislative and Constitutional bases, *Coelho* shall step in. The concept is very fool-proof.

In order to advance the basic structure, the courts have devised an array of tools. It has severed offending parts of an amendment[575] and read down provisions.[576] It imported the Doctrine of prospective overruling so that the Doctrine is not found to be 'practically inconvenient'.[577] The court realises that for the Doctrine to exist unassailably, it ought to be practical. In extension of the same, it also infused another ballasting element into the Doctrine.

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[566] *Id*.
[567] *Id*., at 118-119.
[568] Yash Sinha, *Constitutional Dysfunctionalism*, Vol. 14(4) NAT'L. U. OF JURIDICAL SCIENCES L. REV. 1, 18-24 (2021).
[569] *Id*.
[570] MARTIN LOUGHLIN, POLITICAL JURISPRUDENCE 63-74 (Oxford University Press, 2017); The author acknowledges that Burke took a pole position in electing between living-constitutionalism and originalism. However, a closer examination suggests that he aspired for a middle ground like Balkin.
[571] KRISHNASWAMY, *supra* note 9, at 182-183.
[572] *See* discussion *supra* Part III.A.2.
[573] KRISHNASWAMY, *supra* note 9, at 212.
[574] M. Nagaraj v. Union of India, (2006) 8 SCC 212, ¶ 107.
[575] Kihoto Hollohan v. Zachillhu, (1992) Supp 2 SCC 651, ¶¶ 66-70, 76-77.
[576] L. Chandra Kumar v. Union of India, (1997) 3 SCC 261.
[577] Waman Rao v. Union of India, (1981) 2 SCC 362, ¶ 32.

However, it is pertinent to point that the author finds this device to be a case-specific or a fact-specific phenomenon, and will be discussed later.

As Krishnaswamy notes, the Indian Constitution has two standards across judicial review mechanisms.[578] The ones other than the basic structure review test for a violation in the form an abridgment.[579] They are hard forms of review for they strike the State action down upon discovering one. But there also exist positive obligations. These are not enforceable, thus incapable of a violation. Yet, the court may factor that in whilst adjudications. This illustrates the existence of a soft judicial review. The Doctrine is a good blend of both.[580] It has assessed an action's impact of social welfare and a test of preponderance. So if the act does not violate the basic structure, its role of reinforcing it also invites a use of the Doctrine. Needless to state, its 'hard-character' precludes this usage if a violation is detected.

The claim that the Doctrine's central concern is the Constitution's normative identity has weight. Its application presently pervades legislative and executive domains. The regressive approach that an existential threat may be generated exclusively by amendments is done away with. Significantly, the implied limits are presently acknowledged as creating substantive boundaries. These have an independent existence, and can deal with the many forms that a threat may take. The very idea is to protect the normative core of the Constitution. Krishnaswamy finds this in select judicial opinions.[581] The author asserts that the Doctrine is centred around prescriptive features of the Constitutions from a synoptic view. *Kesavananda*, *Minerva*, *Bommai*, *NJAC*, *Nagaraj*, *Poudyal*, *Kihoto* and *B.R. Kapur* buttress this assertion. They have described an aspirational essence to be basic. They include secularism, social welfare, democracy, and the like.[582] If this definitional element is absent, they take declared basic features as analytical parameters. That is, cases have accepted 'essential features' as declared in other decisions and checked if an action is towards attaining the relevant aspiration. The author is inclined to agree with Krishnaswamy's conclusion: the Doctrine's utilisation has been to protect political and moral pre-commitments in the Indian Constitution.[583]

But the vital concern is if the Doctrine has a premise. To ferret out an answer, it is best to summarise all the elements discussed thus far and look for a theme. There is an expanded application to all spheres of State action. Contingency formulae of its application exist, in case of amorphous State actions. Judicial subjectivity is limited. A positive action on part of the State to strengthen the core Constitutional identity is also instilled. All of this occurs without upsetting practicality. Proposedly, the Doctrine's existence from the year 1973 thus seems very justifiable. Its durability speaks volumes about its acceptance. Constitutional text only requires sanction by its makers.[584] Whereas, a constitutional Doctrine requires political, social and legal acceptance.[585] Its acceptance is more than a judicial imposition.

In this rich context, the author is inclined to propose democracy as its thematic element. Krishnaswamy also finds the Doctrine's premise in the same principle.[586] According

[578] KRISHNASWAMY, *supra* note 9, at 120.
[579] *Id*.
[580] *See* KRISHNASWAMY, *supra* note 9, at 120-125.
[581] KRISHNASWAMY, *supra* note 9, at 146.
[582] Soli Sorabjee, *The Ideal Remedy: A Valediction* in THE SUPREME COURT VERSUS THE CONSTITUTION: A CHALLENGE TO FEDERALISM 199, 204 (Pran Chopra, Sage Publications Pvt. Ltd., 2006); Sorabjee identifies five basic features as recognised by the judiciary: Democracy, independent judiciary with the power of review, secularism and federalism.
[583] KRISHNASWAMY, *supra* note 9, at 163.
[584] *Id*., at 185.
[585] *Id*.
[586] *Id*., at 192.

to him, the Doctrine conduces the existence of a dualist democracy, and not of the Ackermanian kind.[587] This dualism distinguishes between the decisions of a Parliament and the people.[588] This is precisely what the author gleaned from living-originalism: dynamic sovereignty. His idea of democracy is strictly Dworkinian. Democracy implies equal respect to all the participating individuals.[589] The Doctrine, he continues, preserves this concept while maintaining the distinction advanced above.[590]

Krishnaswamy's premise is that Article 368 is not the fully legitimate indicia or means of Constitutional change.[591] He relies on the opinions of American scholars for Article V, U.S. Constitution.[592] He gives a hypothetical instance to buttress his position. In tacitly rejecting the Kelsenian *grundnorm*, he argues that there existed a Constitutional arrangement in India preceding its independence.[593] Presumably, he means that the deletion of 'repeal provisions'[594] simpliciter brings the old regime back to life. As such, "the Constitution shall stand amended" will be true even if the entire Constitution were to be obliterated by way of Article 368.[595] The illustration is disagreeable. The author gleans from the discussion in Part II that any Constitutional system is based on consent. The pre-existing arrangements cannot be said to be adequate in this regard. As much as they may be products of a resistance by the colonised, they still had the coloniser as a major participant. 'True consent' of the governed, then, would be far from being an accurate assertion. Arguendo, consent of the contemporary generation for re-establishing the old Constitutional regime must be a requirement. For otherwise it is a 'dead-hand' imposition. It also goes against Krishnaswamy's larger posture towards accepting 'dynamic sovereignty'.

However, the larger point Krishnaswamy makes is valid. The Doctrine and its elements establish that Article 368 is not the conclusive or the exclusive mode of Constitutional change.[596] Instead, its features ensure that the court scrutinises radical proposals to modify the Constitution for deliberative gaps.[597] The author is of the view that the same logic applies to the residuary power of amendment. It is because Article 245 read with Schedule VII otherwise deals with lower Constitutional injuries. Hence, whatever is prohibited for the power under Article 368, must also be definitively barred therein. The author is also compelled to reject that it supplies power for a new constituent assembly. Perceptibly, however, nothing bars its establishment from outside the Constitution.

The larger point Krishnaswamy makes also has another factor in support. He suggests that without the 'dualist' line of interpretation, majoritarian vote becomes the only

[587] *Id*., at 193, 196.
[588] *Id*., at 193.
[589] *Id*., at 192.
[590] *Id*., at 193.
[591] *Id*., at 192-196.
[592] *Id.*, at 195; A.R. Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, Vol. 94 COLUM. L. REV. 457, 458-459 (1994).
[593] KRISHNASWAMY, *supra* note 9, at 177.
[594] The author emphasises that this argument is very nuanced. Illustratively, consider Article 395 of the Indian Constitution. It repeals its predecessor, the Government of India Act, 1935. Since it is a repealing provision, its deletion may be argued as undoing the repeal. Now, § 6(a) in the General Clauses Act, 1897 bars automatic revivals on repeal. But it only applies to statutes. However, Article 367(1) runs a presumption that the Constitution be treated as an enactment for the purposes of the Act. Hence, Krishnaswamy's argument works only if the repealing provision is removed along with Article 367.
[595] KRISHNASWAMY, *supra* note 9, at 177.
[596] *Id*., at 198.
[597] *Id*.

repository of legitimacy.[598] This is also a logical argument. The Indian Constitution does not even accord the right to vote the status of a FR. An opinion deems the limitedness in electoral terms and multiple grounds of disqualifications as fickle representativeness.[599] Lastly, parliamentary sovereignty has been held as inapplicable in India.[600] The reason given is that a gridlock mechanism of amendment was a check against, not a manifestation of, power.[601]

The Doctrine thus functions to dissolve the Parliament as supreme. In lockstep, it imposes equal restrictions on the executive and the judiciary. As Chintan Chandrachud has painstakingly illustrated, the Indian judiciary's word mostly never binds, but kindles.[602] It only sets off a deliberative chain reaction.[603] In any case, courts using the Doctrine had used an array of tools to make the Doctrine defensible on practical grounds. Krishnaswamy states that those tools have the effect of facilitating democratic dialogue.[604] It has also gone beyond simply reading a potential breach down. In not finding a state's law as consistent with the Doctrine, it permitted the concerned state to cure it.[605] Further illustration is its protective, and not a proactive, stance in defending the basic structure. Its declared feature of socialism[606] has seen many executive/legislative policies that belong to the opposing ideology. And yet, no such action has been struck down because it has not yet caused a threat to the Constitution. Consequently, the Doctrine works to preserve equal individual will in the democracy.[607] It does so by restricting all State action and making every coordinate Constitutional branch equal.[608] It is but a signal to invite attention that high level of deliberative scrutiny is lacking in a certain State action.[609] Judicial review is precluded from foisting its prescriptive views. Krishnaswamy states this because the central concern is to highlight process values for 'democratic consensus'.[610] The unarticulated premise is that democratic consensus involves other State branches. Presumably, he asserts this because the court has itself subjected judicial review to the Doctrine, signalling that its views are not conclusive.

Thus, the Doctrine treats as if the Constitution is a long-term political project.[611] No authority is above it, except when the people decide to dislodge it. The document ensures the involvement of all coordinate branches,[612] scrutinising all their actions in lockstep. The objective is to further governance that preserves equality amongst individuals. There is a synchronisation between the Doctrine and living-originalism. However, this brings focus on the penumbra of this concept. Namely, the Doctrine is capable of prioritising select basic features and Constitutional provisions. If this capability exists, the Doctrine can test Constitutional provisions.

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[598] *Id*., at 200.
[599] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225, ¶¶ 663-664.
[600] KRISHNASWAMY, *supra* note 9, at 209; Kuldip Nayar v. Union of India, (2006) 7 SCC 1; Sub-Committee on Judicial Accountability v. Union of India, (1991) 4 SCC 699.
[601] In re: Delhi Laws Act, 1912, AIR 1951 SC 332.
[602] CHANDRACHUD, *supra* note 354.
[603] *Id*.
[604] KRISHNASWAMY, *supra* note 9, at 215.
[605] Indra Sawhney (2) v. Union of India, (2000) 1 SCC 168, ¶ 65(2).
[606] Samatha v. State of A.P., (1997) 8 SCC 191.
[607] KRISHNASWAMY, *supra* note 9, at 202.
[608] *Id*.
[609] *Id*., at 204.
[610] *Id.*
[611] *See* Jayadevan, *supra* note 308, at 335.
[612] BALKIN, *supra* note 8, at 68.

C. THE PATTERN IN VOLATILITY: INTELLIGENT FAVOURITISM

It has been argued thus far that both the foundation and the application of the Doctrine is founded in fluidity. This takes us to the final argument: how the does the Doctrine move forward? With time, has it revealed the criterion on which it is prioritising certain kind of provisions/basic features over others? If yes, what is the said criterion?

This part, thus, finds a pattern in the developments discussed so far. It suggests that an evaluative criterion to sort basic features was inexplicitly used by the courts in applying or understanding the Doctrine. The application of the Doctrine shall be complete only if the evaluative criterion may tackle the sole remaining threat to the basic structure: outmoded interpretation of Constitutional provisions, or the provisions themselves, if they are only capable of such an interpretation.

As it stands, the Doctrine has been seen prioritising within its defined realm of quintessence. Derivatives of basic features do not enjoy any heightened protection.[613] Formative elements do.[614] Judicial review has various causes to be a basic feature: Kelsenian logic;[615] utilitarian reasoning;[616] and derivative reasoning.[617] In fact, *Coelho's* inversion of *Raj Narain* has another interesting feature. It implied that separation of powers is the strongest basic feature.[618] This hierarchic prism also exists for rights. For instance, both an essential trifecta and an equality code have been found to be the most fundamental in the category of rights.[619] An alternative view deems certain FRs as imperative based on the natural-rights theory.[620]

These varying views of prioritisation are inevitable outcomes of a project. This experimental sentiment is also echoed by decisions deploying a teleological reasoning. In fact, this reasoning has been deployed in a decision which cured the defects of *Coelho*. In the concerned decision, multi-provisional implications and width of injury tests have been adopted for 'hybrid scenarios'.[621] Herein, another law was inserted into Schedule IX. The case reiterated that the violation's source may be ordinary, but impact is greater.[622] In doing so, it followed a part of *Coelho* by borrowing its impact test. But then it deviated by not applying the essence test. The reason was its concern regarding larger implications. It declared that Articles 14 and 21 espoused inter-generational equity and sustainable development.[623] The Doctrine's protection was extended to the same.[624] What mattered was a long term impact of the insertion. *Coelho's* essence test only looked at a Constitutional provision's breach in a silo. This has been realigned with the multi-provisional analysis tests, because of viewing the Constitution as a long-term project.

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[613] Indira Nehru Gandhi v. Raj Narain, (1975) Supp SCC 1.
[614] Supreme Court Advocates-on-record Association v. Union of India, (2016) 5 SCC 1.
[615] S.R. Bommai v. Union of India, (1994) 3 SCC 1.
[616] Minerva Mills v. Union of India, (1980) 3 SCC 625.
[617] I.R. Coelho v. State of T.N., (2007) 2 SCC 1.
[618] *Id*., ¶ 129; "Equality, rule of law, judicial review and separation of powers form parts of the basic structure of the Constitution. Each of these concepts are intimately connected. There can be no rule of law, if there is no equality before the law. These would be meaningless if the violation was not subject to the judicial review. All these would be redundant if the legislative, executive and judicial powers are vested in one organ."
[619] Minerva Mills v. Union of India, (1980) 3 SCC 625; M. Nagaraj v. Union of India, (2006) 8 SCC 212.
[620] I.R. Coelho v. State of T.N., (2007) 2 SCC 1.
[621] Glanrock Estate (P) Ltd. v. State of T.N., (2010) 10 SCC 96.
[622] *Id*., ¶¶ 24-31.
[623] *Id*., ¶ 27.
[624] *Id*., ¶¶ 28-30, 38; *See* Thallam, *supra* note 405, at 114.

This approach for an end-goal is seductively appealing. Arguably, only contemporary circumstances may reveal flaws in written precepts. Lack of prioritisation with fixity of meaning will result in absurd consequences. U.S. offers a contemporary illustration: the stripping off of the Constitutional status of abortion-rights.[625] The privileged section of a society did not envisage this while formulating the concerned Constitution. It did not categorise women's right as an overarching priority. Nor did it assimilate future scientific developments in healthcare as a 'Constitutional right by default'.

The Indian Constitution has problematic features that may be similarly hit by obsolescence. For instance, no other Constitution has felt the need to mention an exception for preventive detention whilst specifying human rights. Its due process clause does not bar death penalty.[626] Suppose, in the future, the Indian society rescinds with the literature that recidivism has other solutions or death penalty has no impact on crime. Additionally, consider another scenario: a proliferation of Indian laws that call for preventive detention. Citizens on the slightest threat may be detained, for undisclosed reasons. Both necessitate the removal of their Constitutional bases. A strict standard such as the alteration threshold (*NJAC*) will not allow for such erasures from the Constitution. This invalidates the judicial declaration that it is an 'ongoing' document.[627]

This is more so the case when such provisions are declared basic features. Consider the extension of *NJAC's* reasoning to categorise 'quasi-judicial bodies' as basic features. It has been declared that such bodies come in the fold of independent 'judiciary'.[628] As such, executive committees responsible for supervising appointments to them ought to have judicial members.[629] This is inexplicable, because quasi-judicial tribunals are not higher judiciary. Nor do they have writ jurisdiction like the higher judiciary. The higher judiciary lacks administrative/supervisory jurisdiction over them. Similarly, consider the suspension of writ jurisdiction during a national emergency.[630] The Constitutional bar on its judicial review has been termed to be a basic feature.[631] It has been reasoned that the disapplication does not amount to obliteration of the writ power.[632] There is a specific exclusion within an otherwise descriptive area of operation.[633] Due to its inceptive embedment in the Constitution, any such exclusion must also be a basic feature.[634] In a trot, then, the limits on a certain basic feature were also elevated to the same plane of quintessence.

The rabid expansion of the Doctrine is not always perceptibly unjustifiable. The larger pattern indicates that it is now a norm for evaluating more than State action, but drives the discretion of Constitutional authorities and Constitutional interpretation.[635] This assertion

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[625] Susan Matthews, *The Constitution Wasn't Written for Women*, SLATE, May 3, 2022, available at https://slate.com/news-and-politics/2022/05/roe-decision-constitution-wasnt-written-for-women.html (Last visited on July 16, 2023); June Thompson, *Letters to the Editor: Of course white men didn't write 'woman' or 'abortion' in the Constitution*, LOS ANGELES TIMES, May 9, 2022, available at https://www.latimes.com/opinion/letters-to-the-editor/story/2022-05-09/white-men-didnt-write-abortion-in-the-constitution (Last visited on July16, 2023).

[626] *See* Bachan Singh v. State of Punjab, (1980) 2 SCC, ¶ 136.

[627] Zee Telefilms Ltd. v. Union of India, (2005) 4 SCC 649.

[628] Rojer Mathew v. South Indian Bank Ltd., (2020) 6 SCC 1, ¶ 149.

[629] *Id*., ¶¶ 148-150.

[630] The Constitution of India, 1950, Art. 352(5)(a).

[631] Pran Nath Lekhi v. Union of India, 1976 SCC OnLine Del 125, ¶ 21.

[632] *Id*., ¶¶ 20, 23.

[633] *Id*., ¶ 20.

[634] *Id*., ¶ 23.

[635] Jayadevan, *supra* note 308, at 372.

finds force in decisions relying on the Doctrine. Consider the following instances, where the Doctrine has been used as an interpretive norm:

Principle recognised/for which the Doctrine was used	**Usage of the Doctrine**		**Source for essentiality traced to**
	Basic to the Constitution (Yes/no)?	**Non-adherence capable of violating a basic feature**	
Periodicity in federal/state elections[636]	Yes	-	Democracy and Separation of powers
Tackling Corruption in Legislatures[637]	-	Yes	Parliamentary Democracy
Payscales of lower judiciary[638]	Yes	-	Independent and effective judiciary
Ouster of Constitutional jurisdiction by a Parliamentary law on insolvency[639]	-	Yes	Judicial review
Right to file appeal under a municipal law[640]	No	-	Judicial review
Periodicity in municipal elections[641]	Yes	-	Unspecified

[636] In re: Special Reference No. 1 of 2002 (Gujarat Assembly Election matter), (2002) 8 SCC 237, ¶ 80.
[637] P.V. Narasimha Rao v. State, (1998) 4 SCC 626, ¶ 47.
[638] All India Judges' Assn. (3) v. Union of India, (2002) 4 SCC 247, ¶ 25.
[639] Pushpa Shah v. Union of India, (2019) SCC OnLine Bom 2385, ¶ 9.
[640] Chatter Singh Baid v. Corporation of Calcutta, (1983) SCC OnLine Cal 88, ¶ 13.
[641] Naresh Krishna Gaunekar v. State of Goa, (2007) SCC OnLine Bom 1106, ¶¶ 36-37.

Gender biased contracts/legal instruments[642]	-	Yes	Equality code
Administrative appointments[643]	-	Yes	Equality code
Constitutional provisions on temporally-limited quotas in legislatures[644]	-	No	Equality code, democracy
Fixity in Constitutional provisions that are functionally dependent on population data[645]	-	No	Democracy
Repeal of a state legislation pursuing a positive obligation[646]	-	Yes	Social welfare, FRs

Simultaneously, and like the Doctrine, the substance of Constitutional provisions goes through a change by way of interpretation. The due process clause was drafted as concerned with procedure. The judiciary came to read substantive due process in it.[647] Similarly, the sole reason that the argument of 'derivative FRs' was rejected because of this dynamism.[648] This argument stated that if an interpretation of a FR is not traceable to the concerned FR's specific text, it becomes a derivative FR.[649] Unlike a FR spelled out in the Constitution, this may be reviewed by the legislature.[650] The court has rejected this, and stated that any such interpretation becomes a part of the FR's text itself.[651] The new meaning captured by the judiciary is not 'derived' from the pre-existing FR. Instead, the new meaning is merely its clarification, and hence, the new form the FR's substance takes.[652]

[642] Pramila Saharia v. Mahesh Kumar Saharia, (2015) SCC OnLine Cal 907.
[643] Parmod Kumar v. State of Haryana, (2006) SCC OnLine P&H 1286.
[644] Kamal Kant Prasad Sinha v. Union of India, (2008) SCC OnLine Jhar 1323, ¶¶ 10, 23.
[645] A.P. Scheduled Castes Welfare Association v. Union of India, (2004) SCC OnLine AP 140, ¶ 27.
[646] Karnataka State Road Transport Corporation v. Karnataka State Transport Authority, (2005) SCC OnLine Kar 163, ¶ 13.
[647] Mate, *supra* note 7.
[648] People's Union for Civil Liberties v. Union of India, (2003) 4 SCC 399, ¶¶ 42-43.
[649] *Id.*
[650] *Id.*
[651] *Id.*
[652] *Id.*

The standards built for the Doctrine cannot keep up with the Constitutional developments if they cannot factor in this dynamism. Hence, the abridgment/abrogation standard, the essence and width tests, preponderance test and preservation of identity examination appear cogent. But these remain incomplete if the basic structure is itself not given a dynamic meaning. Fortuitously, the larger trend shows that the Doctrine's features have been interpreted as a dynamic concern.

Poudyal has been read as implying 'varying representation' closer to democracy.[653] Non-uniformity in vote exists because the basic structure is reparatory.[654] As such, it is a dynamic concept.[655] The courts have also not accepted the alteration standard. The 93rd Amendment introducing Article 15(5) was allowed, in spite of there being an alteration to a part of the equality code.[656] It imposed a positive obligation on the Indian states. Accordingly, states are to provide for reservations for the marginalised in educational institutions. This was in conflict with the FR that religious minorities have exclusive autonomy to admit as per their discretion. Additionally, the FR to freely engage in a profession was disturbed. It would appear that given two FRs of the institutions were involved, a test of preponderance may answer in their favour. However, the essence test found that the amendment was in pursuit of the singular objective of the equality code.[657] So the essence test was applied to a synoptically emerging principle. Tackling evolving forms of marginalisation was held to be the code's concern.[658] As such, egalitarianism was a dynamic concern that trumped static, basic features. Accordingly, the amendment was upheld.[659]

At the same time, positive obligations within the equality code cannot trump negative obligations.[660] In one case, a law was passed under Article 16(4A) but lacked sufficient nuance.[661] This provision provides for reservation for the marginalised in public employment. Within the marginalised community, the concerned law did not distinguish between the financially privileged and those lacking in means. As such, its effect was held as damaging the basic structure.[662] The implication is that there exists a hierarchy within the equality code. Negative obligations are more basic than their positive counterparts.

In fact, the equality code has clashed with the other basic features.[663] When a government made reservations for employment in lower-judiciary, the Supreme Court had to be selective. Preceding *NJAC*, the decision saw a tussle between Article 16(4) on the one hand, and Articles 233 and 234 on the other. It found the latter to be a part of two basic features: separation of powers and independent judiciary.[664] It suggests superior essentiality entirely based on numerical preponderance of basic features involved. Accordingly, it required that such moves mandate a consultation with the High Courts.[665]

The unarticulated premise of these positions is readily inferable. The Constitution has certain ends to meet. Any tension between a basic feature and a regressive

[653] J&K National Panthers Party v. Union of India, (2011) 1 SCC 228.
[654] *Id*., ¶¶ 25-27.
[655] *Id*., ¶¶ 26.
[656] Indian Medical Assn. v. Union of India, (2011) 7 SCC 179.
[657] *Id*., ¶¶ 149-150, 159.
[658] *Id*., ¶¶ 163, 172, 180.
[659] *Id*., ¶ 180.
[660] M.G. Badappanavar v. State of Karnataka, (2001) 2 SCC 666.
[661] *Id*.
[662] *Id*., ¶¶ 12-13.
[663] State of Bihar v. Bal Mukund Sah, (2000) 4 SCC 640.
[664] *Id*., ¶ 32.
[665] *Id*.

Constitutional provision will be resolved towards meeting that end. It will mould the tests devised for the Doctrine and stack provisions in a hierarchy. More often than not, this imperative aim is in preserving rule of law, separation of powers, social welfare or democracy. In other words, these are the vaguely framed principles found in multiple Constitutional sites. In a competing struggle between features espousing both, the overriding element is yet to be established.

It is asserted that the prime basic feature is democracy. From the elements listed above, consider all but democracy. It will remain as the thematic element, nevertheless. Separation of powers maintains that each Constitutional body has an equal stature. Without the same, an equilibrium in smooth governance stands eviscerated. It is but a very effective mechanism to achieve fuller democracy.[666] Rule of law exists so as to propagate systematic civilisation and governance.[667] Social welfare aspires for an egalitarian society. It both requires and aspires for democracy.[668] Democracy is built so as to accord each individual's thought the same respect. Each of the basic features is thus a means to one end: democracy. Democracy is a common factor for all the basic features imaginable. A good demonstration of this convergence towards democracy is Bangladesh's utilisation of the Indian Doctrine. It struck down an original provision of its Constitution.[669] This provision provided for Parliamentary impeachment of members belonging to the higher judiciary. The basic feature violated was deemed to be the independence of judiciary. However, a closer scrutiny reveals all the arguments establishing this violation were directly contingent on the political circumstances in Bangladesh's democracy.[670]

This priority is well cemented in the case of the basic structure. As has been stated previously, the right to vote is not a FR under the Indian Constitution. And yet, it withstood a clash with the due process clause. In the concerned case, the court read 'voting' to be a part of an individual's freedom of expression.[671] The State wanted citizens to not know about any criminal antecedents of aspiring politicians. Claiming right to privacy, sourced from the due process clause, it pleaded the Doctrine's protection. The basic feature of democracy compelled the court to dismiss the State's plea and resolve the said contest.[672] Similarly, it was once asserted the Presidential ordinances are not law for the due process clause.[673] The President is an executive functionary. As such, it was argued that construing her powers as 'legislative' would violate separation of powers. Citing an interpretation that favoured the basic feature of democracy, this dilution was tolerated.[674] When treated as law, Presidential ordinances become subject to the FR-based tests.

In any case, there exists a stronger reason for democracy to be the prime parameter. As discussed in the preceding part, the purpose of the Doctrine is to compel democratic consensus in decisions affecting the Constitution's quintessence. In parallel, democracy is one of the basic features the Doctrine protects. Hence, one of its features happens

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[666] James A. Gardner, *Democracy Without a Net? Separation of Powers and the Idea of Self-Sustaining Constitutional Constraints on Undemocratic Behavior*, Vol. 79 ST. JOHN'S L. REV. 293-317 (2005).
[667] Guillermo O'Donnell, *Why the Rule of Law Matters*, Vol. 15(4) J. OF DEMOCRACY 32-46 (2004).
[668] Dennis C. Mueller, *Constitutional Democracy and Social Welfare*, Vol. 87(1) THE QUARTERLY JOURNAL OF ECONOMICS 60-80 (1973).
[669] Advocate Asaduzzaman Siddiqui v. Bangladesh, (2016) 10 ALR (AD) 3, ¶ 383.
[670] Ridwanul Hoque, *The Evolution of the Basic Structure Doctrine in Bangladesh: Reflections on Dr Kamal Hossain's Unique Contribution*, Vol. 10 INDIAN J. OF CONST. L. 1, 19-20 (2021).
[671] People's Union for Civil Liberties v. Union of India, (2003) 4 SCC 399.
[672] *Id*., ¶ 62.
[673] A.K. Roy v. Union of India, (1982) 1 SCC 271.
[674] *Id*.

to be its very objective for existence. It is then hard to accept any other element to resolve competing validities of Constitutional provisions. However, this is only one factor for such an assessment. Democracy, is the second evaluative criterion, comes to play when two standards/principles clash. According to living-originalism, the first level of check only requires that a provision fulfilling the aspirational essence of a Constitutional provision may override a static provision.

Proposedly, there exists no reason why an original provision of the Constitution may never violate the Doctrine. Consider, for instance, *Chebrolu Leela Prasad Rao v. State of Andhra Pradesh* ('*Chebrolu*').[675] Therein, the Court read down a provision so as to make it permissible in light of the Doctrine. Schedule V, ¶ 5(1) gives wide gubernatorial discretion to categorise areas as marginalised. The court read its non-obstante clause to hold that the discretion was subject to select parts of the Constitution. This had the effect of limiting discretion. It became more susceptible to Constitutional provisions from before. This consequently saved the provision from an attack on the basis of the equality clause. The decision has been criticised by mechanical arguments. Firstly, *Waman* protects amendments made before a certain date due to 'prospective overruling'.[676] Secondly, original shape of the Constitution comes from the principles emanating from its original provisions.[677] As such, the court could not have read down an original provision and apply the Doctrine. Thirdly, the Doctrine came about to test amendments and not provisions.[678]

The arguments are off the mark. Even by a strictly mechanical approach, the *Waman* bar applies to testing the validity of amendments only. Testing provisions was nowhere barred. In any case, the argument is an exercise in extreme formalism. *Kesavananda* tweaked *Golaknath* to allow amendments to the supposedly unamendable Constitutional parts. It was to repel the dead-hand objection that it performed the tweak. The only check imposed was that an amendment must not adversely impact a principle enveloped by such parts. Thus, the mechanics of implementing the Doctrine cannot destroy its conceptual basis. Hence, *Kesavananda's* use of prospective overrule must be seen as a fact-specific phenomenon, and not as an imposition of a rule. *Waman* conflicts with *Kesavananda* in this sense. A chronological bar serves a singular purpose: freezes the imposition of a dead-hand.

Moreover, the objection is disingenuous in its logic. The argument is that the Doctrine is strictly applicable to amendments, not provisions. In parallel, the objection extends a bar espoused by an amendment-based decision to Constitutional provisions. Note that *Waman* came about in a time when the Doctrine was considered to have an exclusively symbiotic existence with amendments. It was much later that *Bommai* prompted its expansion. As was emphasised during the discussion of *Coelho*, the Doctrine exists on its own. As such, a judgment, dealing with certain areas concerning the Doctrine, is binding on those very aspects only. As *Coelho* must not be construed as the guiding principle for Doctrine in cases not dealing with Schedule IX, *Waman* is restricted by the same logic. As has been repeatedly shown, the confinement of *Kesavananda* to amendment-based situations was done away with by later cases.

Regardless, the viability of *Waman* is doubtful due to its absurd consequences. *Poudyal* also dealt with a Constitutional provision similar to the one in *Chebrolu*. The Doctrine was rightly treated an eternal mandate therein. There exists no reason why the Doctrine should

[675] Chebrolu Leela Prasad Rao v. State of A.P., (2021) 11 SCC 401.
[676] Shrutanjaya Bharadwaj, *Text Misread, Basic Structure Misapplied: The 100% Reservations Verdict*, Vol. 9 INDIAN J. OF CONST. L. 318, 327 (2020).
[677] *Id*., at 328.
[678] *Id*., at 327.

act against an existential threat based on the latter's chronological origins. This absurdity is also revealed when a provision is deleted and re-inserted by a Constitutional amendment.

Articles 105(3) and 194(3) were removed from the Constitution by the 42nd Amendment. According to these, the powers and privileges of legislatures may be self-defined. That is, they may make rules to such effect. As such, a stipulation that the legislative members are exempt from the clutches of Article 19(1)(a) is valid.[679] Both provisions were brought back by the 44th Amendment. The courts soon had to adjudge conflicts between the media's freedom to report and the legislature's privilege of censoriousness. The court stated that without a rule in place, the legislature's claim has presumptive but equal priority.[680] What it says in effect is that right to freedom is conflicting with the right to Parliamentary privilege, and both are sourced from Constitutional provisions. Two Constitutional provisions may not be pitted against each other.[681] A determinable conflict would have existed had there been a set of rules by the concerned legislature. For in that case, an ordinary 'law' would have been pitted against a Constitutional provision. Perhaps noting this reasoning, no legislature has made a rule in that regard.[682] Further cases have treated the re-inserted provisions as 'original' provisions of the Constitution.[683]

Academic criticism of this approach is correct. The re-instated provisions owe their existence to the concerned amendment, and not original Constitution-making. By using the pre-requisites of the theories on norm-formulation, the exhumation has been termed to be a product of an amendment.[684] The author proposes that this is also established by a simple test of checking indispensability. The 44th amendment re-inserted the provision and granted continued legitimacy to rules existing from before. Evidently, the old laws would not have acquired an extended lease of life but for the amendment. The Indian Constitution performs the same extension for laws predating Indian independence.[685] This does not imply that the British sovereign continues to exert itself over Indian citizens.

However, the author has a problem with this criticism. It reinforces the notion of the Doctrine's symbiotic dependence on amendments. The provision ought to be exposed to the Doctrine regardless of its origination. Its source changing from the Constituent assembly to the Parliament cannot be a factor in deciding its Constitutionality. An amendment is also borne out of a constituent power (*Raj Narain*), and is subject to the Doctrine. *Nagaraj* holds the same for another constituent power: judicial review. Furthermore, the Doctrine is not dependent for a certain kind of threat for its existence/application. Article 19 being a basic feature, is more proximate to the sovereign. A protection grafted for the sovereign's representative, whereas, has to be lower in hierarchy. When the two are opposed, the former should prevail. The hierarchy is equally evident by the vague phraseology of Article 19, which Articles 105 and 194 lack. Hence, Article 19 distinguishably carries an aspirational essence. Even if these were placed on the same hierarchical plane, the latter do not stand in the face of

[679] Shivprasad Swaminathan, *The Conflict Between Freedom of the Press and Parliamentary Privileges: An Unfamiliar Twist in a Familiar Tale*, Vol. 22(1) NAT'L. L. SCH. OF INDIA REV. 123, 125 (2010).
[680] *Id*.
[681] M.S.M. Sharma v. Krishna Sinha, AIR 1959 SC 395; This argument is proposed to be wrong, for the reasons in this paper. The author has argued that provisions may conflict with one another, and the Doctrine may strike the provision down if it violates the basic structure.
[682] Swaminathan, *supra* note 680, at 125.
[683] *Id*., at 125-126.
[684] *Id*., at 130-131.
[685] The Constitution of India, 1950, Arts. 13(1), 367.

Article 19. A democracy would require that the representatives be under constant and expressive scrutiny.

Hence, a provision may be incoherent to the larger Constitution as a whole to begin with.[686] But its limited exposure to the Doctrine's scrutiny based on its origins, is an absurd proposition. This seems to be the underlying premise when Constitutional provisions have been challenged in light of the Doctrine.[687] Summarily, the living-originalist approach performs two functions. Firstly, it is the theoretical model which best rationalises the Doctrine of basic structure. Demonstrably, this rationalisation is of both the Doctrine's theory and its implementation. Secondly, it gives a direction towards which the Doctrine should steer towards. It justifies the Doctrine striking down (un)constitutional provisions. Simultaneously, it endows us with a parametric system to go about it.

IV. CONCLUSION

The Doctrine bears a clear trajectory. It dissipated all the inceptive restrictions it was born with. It goes beyond screening amendments to the Indian Constitution. It has come to wall off the document's moral core, which facilitated a major social contract. The assailing force may take any form, but the Doctrine will blunt it. It is not a sudden and excitable concept. Instead, it has a calm yet looming presence that governs Constitutional development. Working as a form of judicial review, it calibrates its standards to search and pursue an attack. Yet, no theory could justify its existence to its last strand. The fact that a Constitution may limit the action of those in great proximity to it is still prehensile. The inexplicable part was the Doctrine's other crucial design-feature: its parametric basis. The immutability of the Indian Constitution has been rooted in prioritising ideals. It is in this engulfing darkness that an answer exists as a coruscating source of light.

Living-originalism is the most approximate in capturing the Doctrine. It explains implied limits very simply. A constitution is a large-scale social contract. The agreement here revolves around a set of agreed upon aspirational goals. A constitutional system may improve or preserve them. But it shall never indulge in their smothering. The aim of it all is not to let the bond between a constitution and democracy chafe. Living-originalism also edges through the limitations faced by other theories. It rationalises the existence of a hierarchy amongst provisions. The aspirational provisions demand that contemporary democratic power be channelled through them. This channelling may be in the form of new interpretations or alterations. But the suggestion is that the closer a provision comes to infusing democracy, the more valid it is.

The concept treats the said contractarianism as a dynamic concern. It acknowledges that the "parties" will continue to evolve contemporary sensibilities. The Doctrine performs the same check. The very crux of its existence is to infuse democratic consensus. Only that it is more elaborate in pursuing this concern than what Balkin espouses. The concept pressurises this infusion across Constitutional bodies. In lockstep, it differentiates between aspirations according to their facilitative role. Hence, the aspiration-bearing provisions and institutions both face a constant evaluation. The Doctrine has introduced an interesting nuance to constitutionalism. The provisions may shapeshift. They may be the closest to the moral core that weds a Constitution to its people. Yet, their status is dust if a provision bearing constituent power changes meaning and assails the core.

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[686] M. Nagaraj v. Union of India, (2006) 8 SCC 212, ¶ 24.
[687] *See* P.V. Krishnaiah v. Union of India, (2013) SCC OnLine AP 202.

Hence, the Doctrine and living-originalism have the most immaculate confluence. In a manner, the Doctrine is the practical manifestation of the concept. Constitutional phenomena must further ideals. If this becomes competitive and two phenomena clash, both have a solution. This controls the rapid adaptation of Constitutional provisions to newer meanings. At the same time, provisions may get outmoded if they feel to keep up. Constitutional parts may go through a safe ecdysis. The normative core of a constitutional-democracy is malleable to agreeable pressures. Yet, it has a safeguard installed if it somehow goes awry. Hence, the Doctrine's functioning and its theoretical underpinning forge a clear answer to the paper's concern. Undesirable provisions will be jettisoned to keep the Indian Constitutional ethos afloat.