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Limits on the Power to Amend the Constitution: A Comparative Analysis of History, Values and Institutions of India and the United States of America

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ABSTRACT

This paper outlines the comparative history and experience of two great constitutions in the world, those belonging to the Republic of India and the United States of America. Through contextual analysis, looking at the different histories, political and personal values, the paper seeks to examine the powers to amend the constitution in action and determine what makes the US constitution one of the most "rigid" and the Indian constitution oe of the most "flexible" constitutions in the world.

I. INTRODUCTION

What counts as an amendment to the constitution is hard to define.[2] While this paper will only deal with amendment in terms of usage of the specific provision, it does not mean that amendments cannot be or should not be achieved through any other process.[3] In fact, this paper will try to severe the specific provisions from the 'amendments' to the Indian and the United States Constitutions.

In the United States of America ("USA"), Article V of the Constitution of the Constitution of the United States ("US Constitution") provides a system to amend its Constitution.[4] On the surface, its provisions seem to be quite simple, and there is no specific doctrinal limit on the process.[5] When passed by two-thirds majorities in both Houses of Congress and approved by

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2 For a discussion on what should or should not be defined as an Amendment *see* Sanford Levinson, *How Many Times Has the United States Constitution Been Amended? (A)<26;(B)26;(C)27;(D)>27:Accounting for Constitutional Change* in Sanford Levinson (eds.), Responding To Imperfection (1995).

3 Non-Article V means in this paper judicial interpretation and judicial deference to political power discussed in Stephen M. Griffin, *Constitutionalism in the United States: From Theory to Politics* in Sanford Levinson (eds.), Responding To Imperfection (1995).

4 U.S. Const. Art. V.

5 While there is scholarly debate on whether or not there is inherent limits on the power, there is no judicial precedent on the same. See John R. Vile, *The Case against Implicit Limits on the Constitutional Amendment Process* and Mark E. Brandon, *The "Original" Thirteen Amendment and the Limits to Formal Constitutional Change* in in Sanford Levinson (eds.), Responding To Imperfection (1995).

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three-quarters of state legislatures or special conventions convened for this purpose, an amendment becomes part of the Constitution.[6]

Article 368 of the Indian Constitution provides the procedure to through "a special majority of Parliament or by a special majority of the Parliament with the ratification by half of the total states".[7] The special majority is defined as at least half of all the membership in both houses and 2/3rd of the members present and voting. Only for certain provisions [the election of the President (articles 54 and 55); the extent of the executive power of the Union and the States (articles 73 and 162); the High Courts for Union territories (article 241); The Union Judiciary and the High Courts in the States (Chapter IV of Part V and Chapter V of Part VI); the distribution of legislative powers between the Union and the States (Chapter I of Part XI and Seventh Schedule); the representation of States in Parliament; and the provision for amendment of the Constitution laid down in article 368.] more than half the states should also ratify the amendment.[8]

There were three clauses entered under Article 368 through 24th and the 42nd amendments. Amendments which were struck down by the Supreme Court of India ("SCI"), these clauses are still there but they are no longer operable. The history of these amendments will be discussed in Chapter 5 of the paper. These clauses state:

(3) Nothing in article 13 shall apply to any amendment made under this article.

(4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article whether before or after the commencement of section 55 of the Constitution (Forty-second Amendment) Act, 1976 shall be called in question in any court on any ground.

(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.[9]

This paper will seek to find out what factors forced the Supreme Court of India ("SCI") to promulgate the Basic Structure Doctrine and why such a doctrine is not required in the USA. To that end, this paper will argue that there is nothing inherent in the constitutions making one more flexible than the other, except for the slightly more restrictive requirements under Article

[6] U.S. Const. Art. V.
[7] Indian Const. Art 368.
[8] Ibid.
[9] Ibid. *See also* The Constitution (Twenty-fourth Amendment) Act, 1971 and The Constitution (Forty-second amendment) Act, 1976.

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V.[10]

Under the Basic Structure doctrine, certain provisions of the Constitution are outside the ambit of being amended. These features are derived on a case-to-case basis by the Judiciary. Articulated by the SCI in the famous *Kesavananda Bharati v The State of Kerala*,[11] where it was held by the majority that the parliament could not destroy the basic features of the constitution through amendment. As Chief Justice Sikri put it, the amending power under the Constitution of India 'is wide enough to permit amendment of each and every article of the Constitution by way of addition, variation or repeal so long as its basic elements are not abrogated or denuded of their identity.'[12] These features are decided on a case-to-case basis and generally include the basic overarching framework of the Indian Republic.

In any state, there is tension between democrats who find constitutions a nuisance and constitutionalists who perceive democracy as a threat.[13] This paper will look at the historical, value based and institutional differences and identify such conflicts. This paper will argue that these conflicts made the US Constitution one of the most 'rigid constitutions' in the world and the Indian Constitution one of 'most flexible'.[14] This paper will argue that the historical differences, such as absence of societally ingrained systems feudal system in America as opposed to India which had both the caste system and a feudal system made it necessary for India to have a strong government to dismantle these institutions. This strong government made India more vulnerable to changes to constitution that may or may not in good faith.

This paper will argue that were significant value differences also at play, in America strong federal government was considered un-American.[15] Whereas in India, the Indian Constitution required a strong federal government, in fact people demanded one to fulfil the promises of their Constitution.[16] However, the results in the first two decades of the democracy left plenty

[10] 3/4th States instead of 2/3rd States.
[11] *Kesavananda Bharati v The State of Kerala*, (1973) 4 SCC 225.
[12] Ibid, para 619.
[13] For the argument and the counter argument on these points *see* Friedrich Hayek, The Constitution of Liberty 176-92 (1960) and Martin Shapiro (ed.), Introduction, The Constitution of the United States and Related Documents xxi-xxii (1968).
[14] This is an accurate statement if we are only looking at Amendments as textual changes to the constitution however if we see amendments in a wider sense, i.e., non-article V amendments or judicial interpretations which did not conform to the originalism of the U.S. Constitution, it is simply not true as we will see in this paper. For a more empirical construction of the same reasoning *see* Donald Lutz, *Toward a Theory of Constitutional Amendment*, in Sanford Levinson (eds.), Responding To Imperfection (1995); Dieter Grimm, *Types of Constitutions*, in Michel Rosenfeld and Andras Sajo (eds.) Oxford Handbook of Comparative Constitutional law 98, 111 (2012).
[15] *See* generally Samuel P. Huntington, American Politics: The Promise of Disharmony (1981).
[16] *See* generally Ambar Kumar Ghosh, *The Paradox of 'Centralised Federalism': An Analysis of the Challenges to India's Federal Design*, ORF Occasional Papers 272 (2020). https://www.orfonline.org/wp-content/uploads/2020/09/ORF_OccasionalPaper_272_Federalism_.pdf

to be desired and there were extensive gaps in the political ideals and political realities. Therefore, efforts had to be made whether well intentioned to not to bridge the gap, gain more power for the central government to achieve its goals.[17]

There were also institutional differences, competition among political parties began almost immediately in the United States.[18] While in India, Indian National Congress ("INC") was the party of its Independence and no party, no matter what the politics, could succeed if not under the banner of INC. Therefore, INC singlehandedly dominated the early politics in India, enabling it to control the Judiciary and the Executive. Indian politics must be defined as finding singular personalities (Nehru, Gandhi, and later Modi) to solve problems that prevail in the society, individuals who serve both as the hero and the villain depending on who you were.[19] Whereas according Louis Hartz, America "always had an American Hero available to match any American villain they found, a Jefferson for every Hamilton."[20]

Despite being drafted and signed more than 150 years apart (163 to be exact), drafters of both Constitution of India ("Indian Constitution") and Constitution of the United States of America ("American Constitution") considered it paramount that the constitution be capable of reflecting a changing society through Constitutional Amendments.[21] As noted by Alexander Hamilton, the ability to remedy defects and unintended consequences of a constitutional text can make it more enduring.[22] The statement given by Jawaharlal Nehru in the Constituent Assembly Debates makes it clear that the approach was similar in India:

While we want this Constitution to be as solid and permanent as we make it, there is no permanence in the Constitution. There should be certain flexibility. If you make anything rigid and permanent, you stop nation's growth, the growth of living, vital, organic people...In any event; we could not make this Constitution so rigid that it cannot be adapted to changing conditions.[23]

Despite having largely, the same provisions as it pertained to amendments, the history and the

[17] H. N. Bahuguna, in the 'Foreword' of *People's Victory—An Analysis of 1971 Elections*, All India Congress Committee (1971). Inaugurating the new session of Parliament, President V. V. Giri also characterized the election results as 'a massive mandate for change'.
[18] *See* Richard Hofstadter, The Idea of a Party System: The Rise of Legitimate Opposition in the United States, 1780-1840 (1970).
[19] *See generally* Kalyani Shankar, Gods of Power: Personality Cult & Indian Democracy (2005).
[20] Louis Hartz, Liberal Tradition in America 31 (1955).
[21] For arguments on Originalism and a Living Constitution see Antonin Scalia, *Common law courts in a civil law system: The role of the United States federal courts in interpreting the Constitution and laws* in Antonin Scalia and Amy Gutmann (ed.), Matter of Interpretation : Federal Courts and the Law 3-48 (1997); and David A. Strauss, The Living Constitution (2010).
[22] THE FEDERALIST No. 85. *See also* Zachary Elkins, Tom Ginsburg, & James Melton, The Endurance of National Constitutions (2009).
[23] *Constituent Assembly Debates*, 7 New Delhi: Lok Sabha Secretariat 322-23 (1948).

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usage of the process was anything but similar.

II. HISTORICAL FOUNDATIONS

To understand the practical importance of amendment procedure first we must understand constitutionalism and its prevalent ideas at the time of American Independence in the abstract.

(A) A Theory of Amendment

The authoritative articulation of the general principles, structures, and functions of the government or Constitutionalism, is deeply rooted in the western political culture. From Euripides,[24] Plato[25] to Aristotle[26] all tackled issues related to constitutionalism and created early ideological framework. Under the Roman republic, Cicero articulated government as a corporate body belonging to the citizens.[27] The function of the government being the need for mutual aid and just governance.[28] Subsequently for more than a millennium under Christian thought, the divine will theory reigned supreme. The higher natural laws and scripture acting as limits on power of the government.[29] The Medieval English Constitutionalism struggle started by the great meeting at Runnymeade in 1215 ended in the glorious revolution of 1688. The Magna Carta, the Petition of Right of 1628, and other important documents of English Law created the "unwritten constitution" clearly demarcating the powers and structure of the government and had a profound impact on American Constitutionalism.[30]

The 17th century was particularly important for constitutionalism. While efforts were being made to restore monarchy through writings such as Leviathan by Thomas Hobbes, the sole monarch no longer obtained his legitimacy through divine will. Rather, individuals who were the only actors in the state of nature, bestowed that power on the sole agent to escape the state of nature.[31]

The contribution of a radical political faction called the Levelers in 1640s England also cannot be overstated. They argued for ideas of popular sovereignty, protection of individual rights against unrestrained government and a written constitution. While the ideas of written constitutionalism did not survive restoration in England their ideas did find their place across the Atlantic.[32] Just before the Glorious Revolution of 1688, two Whig philosophers, Algernon

[24] Francis D. Wormuth, The Origins of Modern Constitutionalism 11 (1949).
[25] George H. Sabine, A History of Political Theory, 69-70 (1961).
[26] Aristotle, The Politics, T.A. Sinclair (trans.) (1981).
[27] Marcus Tullius Cicero, De republica (1826).
[28] Ibid.
[29] Scott Gordon, Controlling the State: Constitutionalism from Ancient Athens to Today (2002).
[30] A. E. Dick Howard, The Road from Runnymeade: Magna Carta and Constitutionalism in America (1968).
[31] Thomas Hobbes, Leviathan (1651).
[32] Edmund Morgan, Inventing the People: The Rise of Popular Sovereignty in England and America (1988);

Sidney and John Locke were writing some of the most important texts of all time.

Algernon Sidley in his *Discourses Concerning Government* rejected the Hobbesian idea that once individuals give their assent to the agent, they are bound under their rule. He argued people had perpetual sovereignty and could change even just governments to "to prevent or cure the mischiefs arising from them, or to advance a good that at the first was not thought on,"[33] and furthermore "being eminently above that of all magistrates, was obliged to no other rule than that of their own will."[34]

Locke on the other hand was not ready to go that far. In his seminal work, *The Two Treatises of Government,* a government retained its authority as long as it was faithful to the people and its duties. He defined the state of nature to be the opposite of Hobbes. In his view these individuals came together to form the "Social Compact" which was a civil society, this civil society was to be managed by a government. When this government did not fulfil its promises anymore the consent could be taken back, and the individuals reverted to a state of nature to begin the process anew.[35]

In the American Colonies, the notion of written agreements defining and limiting government was clear from the start.[36] Until the late 18th century, Lockean theory dominated the political landscape both after the revolution in Great Britain and in the American Colonies.

All this put square and centre the question, what is to be done when the constitution no longer suitable to the needs of the people? In the Lockean theory, violation of the original agreement between the society and the government was necessary to enact a new constitution or change the existing one. The circumstances surrounding the American Revolution were just that, a violation of the "Social Compact" between the colonies and Great Britain.[37] By 1776, it was clear that Great Britain intended to deprive the colonies of their agreement. Therefore, under

George Holland Sabine, History of Political Theory (1973), and Francis D. Wormuth, Origins of Modern Constitutionalism (1949).

[33] Algernon Sidney, Discourses Concerning Government 136 (1751).

[34] Ibid, at 19.

[35] John Locke, Two Treatises of Government, Peter Laslett (ed.) (1963). Modern Interpretations of Locke would argue that this was not necessary as individuals form two compacts instead of just one, one for a civil society and the other for the government. Therefore, the consent for the second compact could be taken back without reverting to the state of nature. However, this interpretation was dominant at the time of American Revolution. Willi Paul Adams, The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era, Rita and Robert Kimber (trans.) 139 (1980).

[36] For a more detailed analysis of the governance inside colonies and relationship with Britain *see* Charles M. Andrews, The Colonial Period of American History: The Settlements, 3 vols. (1934–1937). For rise of representative governments *see* Michael Kammen, Deputyes & Libertyes: The Origins of Representative Government in Colonial America (1969); Emmerich de Vattel, The Law of Nations; or, Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns, Joseph Chitty (ed.), 77 (1883).

[37] Locke, *supra* note 36.

the dominant theory at the time, giving the people the power to make a new constitution, free from Great Britain.

(B) US History and the need for an Amendment Procedure

The declaration of independence provided American colonies the "title deed of their liberties".[38]

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.–That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, –That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.[39]

Elements such as popular sovereignty, constitutions as a device to limit the government and define its powers and power to change the constitution when the conditions were appropriate, were all present. These abstract concepts however required to be put to practical use and the challenges were just beginning.

The first constitutions to be drafted in the USA were State Constitutions. The Constitution of New Jersey, adopted in 1776 contained the first reference to amendment. However, it was the constitutional document of Pennsylvania, adopted in 1776 also, which contained the first process to amend the constitution. This process bypassed the legislature and called for a convention. By the 1780s, most states had an amendment procedure.[40] By this time popular sovereignty was well understood in America, it became paramount to the spirit of the doctrine

[38] Charles M. Wiltse and Alan R. Berolzheimer (eds.), The Papers of Daniel Webster: Speeches and Formal Writings, vol. 1, 1800–1833 325 (1986).
[39] The Declaration of Independence (US 1776).
[40] The entire length and breadth of experimentation with amendment procedures by the states is beyond the scope of this paper. For a more detailed analysis on the same *see* Adams, *supra* note 36.

that constitutions be adopted in two phases – one, the constitution be drafted by a popularly elected body and secondly, the draft be ratified through popular consent, ideally a referendum.[41] This was established in the adoption of the 1780 Massachusetts and the 1784 New Hampshire Constitutions, while referendum became the part of later constitutional adoptions in the 19th century.[42]

After independence, the creation of a national government became paramount. The process to do so was more complicated than adoption of state constitutions as the framers took on the unprecedented task of formulating the structure of a multistate government. All the states were different, and these differences had to be resolved keeping in mind the evolving paradigm of constitutionalism. In late 1779, Articles of Confederation were ratified by the 13 states. This was done more out of necessity due to the ongoing war rather than an overt acceptance of the provisions therein.[43] Assurances were given to the states that the amendment procedure would give them the opportunity to come with solutions to problems not agreed upon at the time of ratification.[44] This thought process was obstructed by the amendment procedure which required unanimous consent between all the states. This made the Articles "not only unsatisfactory in practice but also impossibly difficult to reform".[45] The major issues faced by the confederation at the time being: the federal government's inability to generate revenue, negotiate trade or other agreements abroad, the issue of enforcing its laws and embarrassingly the inability to maintain a quorum in the house.[46]

The further efforts to amend the Articles of Confederation also failed and a second convention was called to meet in Philadelphia.

The convention for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as

[41] Ibid.
[42] Ibid.
[43] Jack Rakove, Beginnings of National Politics 163 (1979).
[44] Merrill Jensen, The Articles of Confederation 87-89 (1940).
[45] David E. Kyvig, Explicit and Authentic Acts: Amending the U.S. Constitution 1776-2015 93 (1996).
[46] Ibid, Citation included, To be added to the Articles of Confederation were Articles Fourteen, giving Congress power to regulate interstate and foreign trade; Fifteen, requiring states that failed to pay requisitions within a time fixed by Congress to pay a 10 percent per year surcharge; Sixteen, giving Congress power to assess and collect taxes in states that failed to take action to meet requisitions after a majority of the states had done so; Seventeen, awarding interest to any state paying more than its share of a requisition and charging interest to states paying less than their share; Eighteen, making a congressional requisition of revenue for no more than fifteen years binding on all states once approved by eleven; Nineteen, allowing Congress to define treasonable offenses against the United States and to establish federal courts to which could be appealed all state court cases involving interpretation of treaties, regulation of trade and commerce, collection of federal revenue, and cases in which the United States was a party; and Twenty, disqualifying from further federal or state officeholding anyone who accepted election as a delegate to Congress and then failed to attend or withdrew without permission. Merrill Jensen, The New Nation: A History of the United States During the Confederation, 1778–1789 New York: Knopf 419-20 (1950).

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shall when agreed to by Congress and confirmed by the states render the federal constitution adequate to the exigencies of Government & the preservation of the Union.[47]

There was lively discussion on several topics, such as the structure of the legislature, the ratification process of the new document and whether this document shall be an amendment, or can they start on a blank paper?[48] However, amendment procedure was left until the last days of the convention. Framers had seen the times when the presence of veto power made the amending process almost impossible. This time it was a question to framing a smooth and a comparatively less rigid process for an amendment.

The initial proposal made was Congress may have the authority to call for a convention to amend the Constitution when 2/3rd requests it of the states.[49] Several states believed that the proposal was too easy to be processed as this would let the Constitution be changed at a very rapid pace. Delegate of Massachusetts Elbridge Garry argued that this process would let only states change the Constitution that will end up expanding the federal powers, that also on the states' cost, especially when 1/3rd of the states would be arguing against the proposed amendment.[50]

Secondly, delegate Alexander Hamilton expressed another concern over the possible rigidity that may disallow the Constitution to be amended, as the power to call the convention was vested in the 2/3rd majority of the states. Congress was left with no power to call up a convention to amend the Constitution. If this were not considered, the states would be applying for the alterations only when the amendment would only address their concerns. Hence, the federal houses must be given the due power to call a convention on their motion to strengthen a national legislature.[51]

To latter James Madison stood and proposed that to restrict, limit and prohibit the prospective subversion of power by the states to the amending power, no amendment be upholding in the Constitution unless ratified by the 3/4th of the several states while also giving the idea of

[47] Resolution of Congress, February 21, 1787, in Max Farrand (ed.), The Records of the Federal Convention of 1787, 4 vols., 3:14 (1937).
[48] For a detailed discussion on the Philadelphia Convention *see* Richard B. Morris, The Forging of the Union, 1781–1789 (1987); Clinton Rossiter, 1787: The Grand Convention (1966); Carl Van Doren, The Great Rehearsal (1948); Catherine Drinker Bowen, Miracle at Philadelphia: The Story of the Constitutional Convention, May to September 1787 (1966); Leonard W. Levy and Dennis J. Mahoney (eds.), The Framing and Ratification of the Constitution (1987).
[49] In this paper, Congress refers to two distinct entities. If mentioned in reference to India it refers to the party Indian National Congress or Congress (R), if used in reference to the USA, it refers to the lower house of the parliament.
[50] Farrand, *supra* note 47 at 2: 557–58.
[51] Ibid., 1: 227, 242–47, 282–311, 322; 2: 84, 188, 467–68.

amendment by State Convention.[52]

On the very last moments of summarising the agreement on the amending power of the Constitution, the delegate of South Carolina, John Rutledge, stood up and expressed his concerns over the position of non-slave states that may be empowered with the constitutional amendment process to act against the taxation and slave trade practices. This ended up inserting a clause in Article 5 of the Constitution that restricted the introduction of any amendment against the trade and tax practices concerning international slave trade practices until 1808.[53]

The fact remains, that for most of its history the Federal Government of the United States had extraordinarily little power, with the administrative powers 'to deliver the mail.'[54] After the Bill of Rights were added, there was very little change until the Civil Rights amendments, however, anti-federalism and localisation made these amendments very difficult to enforce by the Federal Government.[55] Afterwards, the provision was used rarely resulting in just 27 amendments in America's 245-year history. States had most of the powers, it their constitutions which provide the barometer for actual change, on average the state constitutions have been amended 117 times with each state having an average of 2.9 constitutions since the independence.[56]

(C) Indian History and the Rise of Indira Gandhi

Indian Constitution was one of the first in the wave of post-colonial constitutions, by that time amendment procedures were an integral part of any national constitution.[57] There is no interesting history as to why this particular provision was put in as it is and what kind of negotiations took place. There were more contentious issues in front of the drafters which related to forging a national identity while trying to unify the immense diversity which consisted of at least 8 major religions, 20 major languages spoken by at least 1 million people and incorporating more than 562 princely states.[58]

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[52] Ibid., 2: 559.
[53] Ibid.
[54] Griffin, *supra* note 3 at 45.
[55] *See* Harold M. Hyman, A More Perfect Union: The impact of the Civil War and Reconstruction on the Constitution 546-47 (1975) and Morton Keller, Affairs of State: Public Life in Late Nineteenth Century America 35, 289, 312, 318 (1977).
[56] Lutz, *supra* note 14, Table 1 at 248-249.
[57] Ger van der Tang and H. Th. J. F. van Maarseveen, Written Constitutions: A Computerized Comparative Study (1978).
[58] This paper draws heavily from the seminal work Granville Austin, Working a democratic constitution: A history of the Indian experience (2018). This book serves as the basis for most of the historical account as is presented in this paper. Compared to the US, scholarship on Indian Constitution particularly addressing its political and social history is not as extensive. While I would have loved to work with multiple sources, this book is the most authoritative text available and represents the highest level of scholarship on the subject. A work for which I might add the author was bestowed with the 'Padma Shri', the fourth highest civilian award in the nation.

The diversity of opinions forced them to design a constitution which deferred questions such as national language to the future and was plain ambiguous when it came to India's religious identity.[59] While it was a conscious strategy of the Constituent Assembly considering contemporary social and political circumstances.[60] BN Rau, the key legal advisor of the Constituent Assembly, expressed this view when he stated, 'we have to bear in mind that conditions in India are rapidly changing; the country is in a state of flux politically and economically; and the constitution should not be too rigid in its initial years'.[61]

The period from 1950-1966 is often considered to be the period of Nehru Years.[62] While it consisted of two Prime Ministers ("PM"), Jawaharlal Nehru and Lal Bahadur Shastri both governed in the same manner. They heeded to their subordinates and protected the democratic process and separation of powers.[63] The internal conflict between the leaders of the Congress party acted as opposition in the political process.[64] The political process was defined by self-restraint rather than adversarial parties. Nehru himself stated before becoming PM, "a little twist and Jawaharlal might turn into a dictator sweeping aside the paraphernalia of a slow-moving democracy".[65] However, the socialist Nath Pai described him as 'a great idealist whose faith in and loyalty to democracy are unimpeachable'.[66] In his conflicts with the judiciary,

Nehru would rail at lawyers and stamp his foot at the courts; yet he did not denigrate the judiciary as a vital institution in a democracy, nor did he attempt to tamper with its independence. He supported it. Instead, he would lead Parliament to amend the Constitution to nullify the effect of Supreme Court interpretations. With Nehru's departure from the scene, the respect would disappear, and the conflict intensify.[67]

The period between the death of Shastri and rise of Indira Gandhi ("Gandhi") into power is of great importance and intrigue, however it is not important for this paper. The period between 1967 and the next election in 1971 can be described as one defined by factionalism in the INC. The leadership could not decide on a person to lead them forward. Gandhi was chosen as the syndicate (a group of powerful Chief Ministers) thought that they could control her and in

[59] Ibid, at Chapter 1.
[60] Ibid.
[61] BN Rau, India's Constitution in the Making 360–66 (1960).
[62] Austin, *supra* note 58 at Chapter 1.
[63] Ibid.
[64] For an authoritative account till 1967 (before Indira Gandhi) of the internal working of the Congress Party *see* Stanley A. Kochanek, The Congress Party of India : the dynamics of a one-party democracy (1968).
[65] Nehru writing about himself in 1937 under the pseudonym Chanakaya. Cited in Hiren Mukherjee, The Gentle Colossus, 222 (1964).
[66] Austin, *supra* note 58 at 17.
[67] Ibid at 33.

absence of a real leader one with close connection to one was chosen, the daughter of Jawaharlal Nehru.[68]

Thought of as a transitional leader from the death of Shastri to the 1967 election. Gandhi had one job, win the elections in the way congress had always done. However, the 1967 general elections cut the Congress's majority in the Lok Sabha to twenty-five, lost it 264 seats in state assemblies and its majorities in eight states.[69] This loss was not attributed to Gandhi rather in 'post mortem' of the election the loss was attributed to neglect of socialist programmes and leaders consumed by competition for office.[70] Just what Gandhi needed to challenge the hierarchy.

This conflict between the established hierarchy and Gandhi escalated to the point that her membership and leadership of the Congress party was rescinded.[71] Eighty-four years after its birth, the Congress had split.[72] Gandhi however was able to keep her seat as the PM by forming the first minority government in Indian History supported by factions such as the Communist Party of India, Dravida Munnetra Kazhagam, and a few independents.[73] With these rag tag bunch of Young Turks, she formed the Congress(R) furthering her agenda of pushing socialist politics to the forefront. The influence of Communist leaders at the time who joined Congress(R) also cannot be overstated.[74]

The working committee of Congress(R) later adopted a 'ten-point programme' and aimed squarely at 'social control' of banks, nationalization of general insurance, limits on urban incomes and property, and the removal of the princes' privileges.[75] This programme set the stage for the conflict between the Judiciary and the Gandhi that was about to come.

The principal turning point towards absolutism was her resounding victory in the 1971 general elections. With Congress(R) winning 350 out of 520 seats, an absolute majority. To this end the promises had been made to abolish poverty; 'to overcome the impediments in the path of social justice' by amending the constitution; making public sector ownership of industries more

[68] Sudipta Kaviraj, *Indira Gandhi and Indian Politics*, XXI EPW (1986). https://www.epw.in/system/files/pdf/1986_21/38-39/special_articles_indira_gandhi_and_indian_politics.pdf and Austin, *supra* note 58 at 174-175.

[69] Indian National Congress, *The Fourth General Elections: a statistical analysis*, All India Congress Committee 2 (1967). For a more detailed analysis of the 1967 elections, *see* Stanley A. Kochanek, *The Loss of Hegemony* in Kochanek, *supra* note 64.

[70] *Congress Bulletin*, June–July 83–133 (1967).

[71] Austin, *supra* note 58 at 180.

[72] *Annual Reports*, 17–23 Ministry of Home Affairs 9285–8 (1969). For a detailed account of the Congress split, *see* Francine Frankel, India's Political Economy: The Gradual Revolution, chapter 10 (2005).

[73] AR, *supra* note 71 at 9291.

[74] Austin, *supra* note 58 at 183-86.

[75] *Report of the General Secretaries, February 1966–January 1968*, All Indian Congress Committee 29 (1968).

prominent and limitations on property rights.[76] Victories in 1971 general elections, 1972 state elections, her leadership during the war against Pakistan in 1971 and the liberation of West Pakistan (present day Bangladesh) made her 'an omnipotent Mother Goddess—who had protected her people and liberated another from the forces of evil'.[77] Thus began her quest for absolutism as she believed she had the 'divine right of support' .[78] She dominated the government both at the centre and at the state levels, through her charisma and her tactics.[79]

While party discipline in a characteristic feature of a Parliamentary Democracy, the other members of state and national legislatures basically owed their seats to her. This is also consistent with Indian Values which shall be discussed in Chapter 3. Summarizing the powers of Gandhi at the time, Austin wrote:

Suspicious of the courtiers in party and government who surrounded her, her attitude was 'if you oppose me, you are an enemy'. As a result, ministers, chief ministers, and party officials did not assert themselves. Opposition parties and leaders were not political opponents, but anti-national forces. Feeling alone, power was her comfort, that and her two sons. '[T]here is hardly anybody to whom one can go to talk or to ask advice—ulterior motives are attributed even for a chance remark,' she wrote to T. T. Krishnamachari. Her ruling style was to listen, keep her counsel, and act through others by hint and indirection. She preferred to lead from behind.

In combination, these factors led to the virtually one-person rule of 1971–7, during which her government first challenged and then subverted constitutional democracy. Owing their elections to her, chief ministers depended on her continuing favour. And she appeared to be 'deliberately manipulating Congress factionalism to prevent a healthy consolidation of power in the states'. Congress Party officials were in a similar situation, and she had fulsome supporters Shankar Dayal Sharma and Dev Kanta Borooah elected party president at different times. Her domination of Congress members in Parliament, most of whom also owed their seats to her political skills, evolved to the point described by Sir Ivor Jennings:' "The flexibility of the cabinet system allows the Prime Minister to take upon himself a power not inferior to that of a dictator, provided always that the House of Commons will stand by him."' The Lok Sabha barely objected to her aggrandizement of power, and with her ministers subdued, constitutional power migrated from the voter to his legislator to the council of ministers and

[76] Hemangini Mehta (ed.), Election Manifestos, 1971, chapter 7 (1971).
[77] Zareer Masani, Indira Gandhi, a Biography, cited in Frankel, *supra* note 71 at 461. For another perspective on her leadership and personality *see* Blema S. Steinberg, Women in Power: The Personalities and Leadership Styles of Indira Gandhi, Golda Meir, and Margaret Thatcher (2008).
[78] *Ashoka Mehta Oral History Transcript*, NMML 205 (1980).
[79] For a more detailed account for the tactics *see* Stanley A. Kochanek, *Mrs. Gandhi's Pyramid: The New Congress* in Henry C. Hart (ed.) Indira Gandhi's India: A Political System Reappraised (1976).

then to the Prime Minister. Mrs Gandhi had gone from vulnerability to the political system to mastery of it. The consequences progressively would become apparent.

III. VALUES

(A) American Values

What does it mean to be American? A rather contentious question. Americans don't really share a common thread which can bind all of them together. All other countries may quarrel over when they were "born", however, there is no doubt when America was born, 4th of July, 1776.

"We hold these truths to be self-evident", says the declaration of independence. Who are we? Americans? Who are Americans? The people who hold these truths to be self-evident? This kind of circular logic is hard to follow, but it applies in this case. Americans derive their identity from the revolution, the declaration of independence and the Constitution of the United States.[80] The values of "liberty, equality, individualism, democracy, and rule of law under a constitution" are common to all Americans.[81]

In response a question, 200 years after the American Revolution, 85 percent of the people responding to the question, "Speaking generally, what are the things about America that you are most proud of?" mentioned some aspect of the government or the political traditions. Compared to 46 percent of British, 30 percent of Mexicans, 7 percent of Germans, and 3 percent of the Italians.[82]

Americans identify their country and themselves not with social, cultural or geographical qualities but with political values in its founding documents.[83] The Founding fathers assumed men to be evil therefore government had to be weak, while the successors found the people to be good therefore government had no need to be strong.[84]

Americanism to an American is not an identity rather it is their ideology. We understand what it means to be fiercely American, fiercely Indian on the other hand, I do not know what that means. In his seminal work Democracy in America, the elements of American values or creed found by Alexis de Tocqueville in his travels from Maine to the Floridas were:

1. The individual has certain sacred rights;

[80] *See* generally Huntington, *supra* note 15
[81] Ibid at 14.
[82] Ibid at 15.
[83] Gabriel A. Almond and Sidney Verba, The Civic Culture (1963).
[84] Huntington, *supra* note 15 at 37.

2. Political power flows from the people;
3. Governments are limited by the application of law and will of people;
4. Local government is superior to national government;
5. Majority is wiser than the minority;
6. Finally, the lesser and weaker the government, the better.[85]

This view stemmed from the earlier adherence to Lockean principles, being controlled by a parliament to which they had no representation, therefore a constitution was their only protection from tyranny. A constitution higher than law made by parliament whether given representation or not.[86] Therefore, amendments to the constitution not only meant going through the extremely strict process under Article V but invariably changing the identity of the people of America. The bigger the change the deeper the threat to the American identity. The bigger the majority, the fiercer the opposition. The stronger the government, the larger the threat to the American people.

This was one of the reasons among others why the New Deal legislations went through non-article V amendment process and "court packing".[87] Proposing amendments suggests that Constitution is not adequate to deal with crisis, giving the opposition a perfect platform to run on, the people's reverence of the Constitution and the need to protect it from the government.

(B) Indian Values

The common man's view of the government is completely different in India than in the USA. The government "is parental, the source of good, of help, and of authority and oppression, of misfortune. As with the rest of life, there is no use protesting. '*Karma* made us listless and apathetic, accepting that we can't change things,' thought one-time Congress president S. Nijalingappa."[88]

In the *Manu smriti*, the oldest of Indian legal texts, *sila* (good conduct) is defined by 'piety, devotion to gods and ancestors, mildness, avoidance of giving pain, absence of envy, sweetness, abstention from injury, friendliness, sweet speech, gratitude for kindnesses, succouring the distressed, compassion and tranquillity.'[89] The concept of *Dharma*, which was

[85] *See* Alexis de Tocquieville, Democracy in America, Harvey C. Mansfield and Delba Winthrop (trans.) (2002).
[86] Kyvig, *supra* note 45 at 21.
[87] Griffin, *supra* note 3
[88] Austin, *supra* note 58 at 638.
[89] J. Duncan M. Derrett, *Social and Political Thoughts and Institutions* in A.L. Basham (ed.), A Cultural History of India 125 (1989).

equivalent to law in ancient India.[90] In India morality could not be severed from law, it was the law.[91] *Dharma* attributed different obligations on each person based on their age, gender, role in their family and caste. Another part of Indian culture is the concept of *Santosha*, literally contentment or satisfaction. Yoga Darshana, which includes commentary of Rishi Vyasa on Patanjali's Yogasutra, defines contentment as the inner state where, "exists a joyful and satisfied mind regardless of one's environment, whether one meets with pleasure or pain, profit or loss, fame or contempt, success or failure, sympathy or hatred".[92]

In India, these concepts, the imparted morality and encouraged behaviour that "introduces us to the fact that equilibrium rather than equality, peace rather than liberty were the fundamental ideals".[93] While these ideals are being changed through modernism, they are so pervasive in the society that one cannot hope to have grown up in India without being familiar with these concepts.

In India hierarchy is inherent, from home to school to workplace. Individual freedom and not *karma*, I would argue is the dominant view of the India's youth today. However, *karma* has had a head start of a couple of millennia and still is pervasive. Among the poorest, solace in *karma* remains common lest they drive themselves mad fighting against forces way beyond their ability.

This hierarchy starts from the family, in it, the father is autocratic and has the authority to determine his son's wife, his profession and even daily activities. The father demands unquestioning obedience and subservience from all members of the family below him.[94] According to Justice Jaganmohan Reddy, 'Domination' is the motif of society.[95]

Hierarchy determines the worth of the individual and more importantly it determines their self-worth. If one is taught to obey from birth, one is not comfortable confronting those above them in hierarchy. As has been put by Dharma Vira as he accused post-Shastri state and central legislators of 'blatant interference in administration', intimidating officials so that 'any officer having the courage to advise freely and fearlessly is now likely to get into serious trouble.'[96]

Centralisation of Government powers flows from this hierarchy and reverence for authority. In India, the government is looked up to, to provide what it already should but doesn't. In turn the

[90] This is a very crude characterisation of Dharma, for a more detailed understanding of the concept see John M Kroller, *Dharma: An Expression of Universal Order*, 22(2) Phil. East and West 131–44 (1972).
[91] Ibid.
[92] Alain Daniélou, Yoga: Mastering the Secrets of Matter and the Universe 36 (1991).
[93] Derrett, *supra* note 89 at 126.
[94] G. Morris Carstairs, The Twice-Born 159–60 (1967).
[95] See also Sudhir Kakar, The Inner World (1982) and P. Spratt, Hindu Culture and Personality (1977).
[96] Dharma Vira, The Administrator and the Politician 9 (1979).

government looks down upon the governed thinking of them inferior. People in actual need don't and can't make demands from the government, demands are restricted for those with power and further up the hierarchy, people in need implore to their "superiors" *haath jod kar,* literally with to make a request with a physical gesture of imploring which is joining both your hands.

The Indian society is a survival society. Always envisioning the worst that could come and planning for the same, as is described by Charlotte Wiser,

Each man feels himself directly responsible for his own family and its security …. He has been taught this so firmly that he disregards the state of those outside his immediate family, be they of another caste or of his own. He is not disturbed if they go hungry while he has plenty, because he can never be sure that the next harvest will provide enough for his own family's needs.[97]

This survival society requires that one looks up to and obey his or her superiors. Sycophancy and nepotism are pervasive.[98] All this leads to further centralisation as insecure leaders look to assert dominance and their subordinates become yes men to further their own ambitions and secure their jobs.[99] Quid pro quo is the name of the game and corruption is familiar to anyone who had the misfortune of dealing with authorities in India. B. K. Nehru wrote of the Emergency period: 'The cult of sycophancy, which is endemic in societies used to being ruled by potentates exercising absolute power which Jawaharlal had laboured consciously to destroy … returned with such vigour that that also seems now to be ineradicable'.[100]

All this means centralisation of authority is not only consistent with Indian values but is actively encouraged. The rolling ball of sycophancy makes people further up the society have more and more powers controlling each action of their inferiors. One looks for their own benefit and security in a survival society, the subordinate rather than speaking up on behalf of others. One looks to secure themselves and their family at the detriment of others creating a pyramid and those on top controlling everyone below.

In India, the government is looked at as a giver; a giver of change, of security, of bare necessities and more that the people low down on the hierarchy may or may not have otherwise. In contrast with the USA where the government is generally looked at as a necessary evil and

[97] William H. Wiser and Charlotte Viall Wiser, Behind Mud Walls, 1930–1960; With a Sequel: The Village in 1970 261 (1971).
[98] Dharma, *surpa* note 96 at 8.
[99] R. C. Dutt, *Indian Bureaucracy in Transition*, in Bidyut Sarkar (ed.), P.N.Haksar: Our Times and the Man 40 (1989).
[100] B.K. Nehru, Nice Guys Finish Second, Memoirs 561 (1997).

the taker of liberty.[101]

IV. INSTITUTIONAL DIFFERENCES BETWEEN THE USA AND INDIA

Parties form an important part of any democracy and in this case their dynamic can give us valuable insight into the working of the respective democracies.[102] India and USA had completely different beginnings as it pertained to parties. In USA parties were despised whereas in India, one dominated. This chapter will look at the evolution from no parties (at least not in the sense that we understand the term today) to a dynamic two-party system in USA to the dominant one-party rule of Congress in India for the first two decades of its independence. This paper will try and analyse what impact this had on the security of the constitutions under their respective amendment procedures, keeping in mind the values that we discussed earlier.

(A) Institution of parties in the United States of America

At the start, the founding fathers seemed to despise the idea of parties. Madison had proclaimed that one shall be vary of the dangers of parties and factionalism.[103] Jefferson on the other hand wrote talking about political parties, "such addiction is the last degradation of a free and moral agent. If I could not go to heaven but with a party, I would not go there at all."[104]

The truth is to get anything done in a democracy; you need some form of unity. While the history and particularities of how the two parties [Federalist and the Republican (not to be confused with the modern Republican party)] formed is very interesting, it is outside the scope of this article.[105] The fact was that by the time of third congress, one could see a two-party system in the US congress.[106] While these parties are not equivalent to modern mass political parties, for the purposes of this paper, any union or organisation which disagrees with other such similar union or organisation on 'great eternal principles'[107] serves the purpose of a party. The impact of the divide was immediately apparent in the famous case of *Marbury v. Madison* and appointment of "midnight judges" by President John Adams.[108] When President Thomas

[101] These are obviously gross generalisations of some of the most diverse and populous countries in the world but important ones for the subject matter of this article and not without merit. *See* generally Austin, supra note 57 and Huntington, *supra* note 15.
[102] For a detailed analysis of why parties form *see* John H. Aldrich, Why Parties? The Origin and Transformation of Political Parties in America, Chapter 2 (1995).
[103] James Madison, *Federalist No.10*, in Clinton Rossiter (ed.), The Federalist Papers (1961).
[104] In a Letter from Thomas Jefferson to Francis Hopkinson, 13 March 1789, https://founders.archives.gov/documents/Jefferson/01-14-02-0402.
[105] For a more detailed history on the same *see* Aldrich, *supra* note 101 at Chapter 3; Hofstadter, *supra* note 17.
[106] Aldrich, *supra* note 101 at Chapter 3.
[107] Ibid. This terminology comes from Aldrich where these principles were used to check whether or not there was a divide among members of the congress based on application of these 'great eternal principles'.
[108] *See* Kathryn Turner, *The Midnight Judges*, 109 U. Pa. L. Rev. 494 (1961).

Jefferson came into power, the Judiciary Act of 1801[109] was repealed, the new courts abolished and the "midnight judges" out of commission in a truly American fashion.[110] The signed commissions not yet delivered were to be ignored by then Secretary of State, James Madison which became the conflict in *Marbury v. Madison.* If there were no such divide and the appointees were made permanent, the impact could have been profound. A lively two-party system checks the abuses by the other in a way a judiciary never could, while a judiciary can curtail the powers of a government it can never take it away. This is only possible through a second party.

While the period from, 1800 to 1828 was dominated by the Republicans, their powers were limited by their own ideology. This period more accurately described as a period dominated by no party in a modern sense.[111] After 1828, the United States of America had flourished into a two-party state recognizable even today with the Democratic party challenging the Jeffersonian Republicans through utilisation of techniques now synonymous with parties, mass mobilisation, collective action and party organisation.[112]

Therefore, after this period health competition between the two parties acted as a formidable roadblock to tyrannical amendments to US Constitution.

(B) Institution of Political Parties in India

In India, the Indian National Congress was the most singularly dominant party before and after independence. Congress President and the Working Committee took all the important decisions before the Independence. However, after independence it had to adapt to deal with its newly acquired dual role. This adaptation may be divided into three major phases after which it was blown up completely, with the first dating from 1946 to 1951, a period of turmoil, Nehru had recently severed the parliamentary wing of the Congress from the Congress President and his working committee. Two of the four Congress Presidents during this period were forced to resign due to attempts to challenge the supremacy of the parliamentary wing.

The second period was a period of centralisation and convergence, from 1951 to 1954, Nehru himself merged the roles of the Congress President and the Prime Minister. Afterwards, Congress Youth leaders were given the reigns under the supervision of senior Congress Parliamentary leaders. Third phase was a period of equilibrium from 1963 to 1967. With

[109] Act of Feb. 13, 1801.
[110] "In a truly American fashion" refers back to the quote by Louis Hartz and American values, America "always had an American Hero available to match any American villain they found, a Jefferson for every Hamilton." For repeal of the Judiciary Act of 1801, *see* Act of Mar. 8, 1802, ch. 8, 2 Stat. 132.
[111] Aldrich, supra note 102 at Chapter 4 making reference to the "Era of good feelings".
[112] Ibid, at 98.

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Shastri as the PM, the positions such as Cabinet Ministers, Congress President and Working Committee demanded the power be shared and therefore had more impact than when Nehru was PM. Major decisions could only be made with the assent of state governments.[113]

After which marks the period of open warfare, Indira Gandhi as the Prime Minister wanted to break away from the constraints of established Party leadership and she did eventually.[114] Forming her own party Congress (R), the constraints of the earlier party mechanics were gone and a more cohesive party emerged with Indira Gandhi sitting on top of the Pyramid.[115] Before her win in 1971, the power was shared among her "kitchen cabinet", young socialists in Gandhi's inner circle.[116] Afterwards, Sanjay Gandhi (Indira Gandhi's son) and his caucus 'had virtually hijacked the government' and real power shifted from the PM Secretariat to the 'PMH', the Prime Minister's house.[117]

(C) Counterfactual Scenarios

1. If a vibrant 2 party system existed in India during Indira Gandhi's reign.

In this scenario, the abuses would be curtailed. However, this scenario poses an interesting question about Indian Politics in general. While the abuses would be curtailed, people still would not have been satisfied. The reason for this is simple, while in the US people want the status quo to remain intact, people in India yearn for change and the feeling is anything but the status quo. This kind of deadlock is exactly something that the people do not want and eventually the power would shift to one side or the other. In India, if not given the power to do what they want, nothing gets done, as the parties block each other from passing even the most sensible legislation. This is just so they can say in the next election that the ruling party did not bring any change and if we are elected, we will. If the cycle continues the only loser in this scenario, is the Indian citizen.

2. A Dominant Single party in the US at both the State and Federal Level

In such a scenario the party will not be able to remain dominant much longer if they amend the constitution. Such a party could only exist if their reverence for the constitution was absolute and their interests in encroaching State's rights minimal. The constitution is America and

[113] For an incredibly detailed account of the internal workings of the Congress Party *see* Kochanek, *supra* note 63. For a detailed discussion on succession in India *see* Michael Brecher, Nehru's Mantle: The Politics of Succession in India (1966); and Michael Brecher, *Succession in India: The Routinization of Political Change*, 7 Asian Survey 423-443 (1967).
[114] *See* Kochanek, *supra* note 64.
[115] Stanley A. Kochanek, *Mrs. Gandhi's Pyramid: The New Congress* in Henry C. Hart (ed.) Indira Gandhi's India: A Political System Reappraised (1976).
[116] Pranay Gupte, Mother India: A Political Biography of Indira Gandhi 285–7 (1992)
[117] V. A. Pai Panandiker and Ajay K. Mehra, The Indian Cabinet: A Study in Governance 227 (1996).

America is its constitution. They would be able to change the constitution through non-Article V means but eventually the judiciary would step in like they did in India. To change it to the level Indira Gandhi did the leaders of such a party would have to command at least as much respect as the founding fathers which currently, in my opinion, is impossible.

V. USE OF OFFICE AND EMERGENCE OF THE BASIC STRUCTURE DOCTRINE IN INDIA

The fundamental structure doctrine can be traced backed to the Weimar regime in Germany. This was when the German jurist Professor Dieter Conrad was supposed to be influenced by the radical constitutional amendments in Germany, and the same has been believed as the birth time of the fundamental structure doctrine.[118]

The history of Unconstitutional Amendments in India has a rich history, however before Indira Gandhi the concerns that amendment procedures would be used for absolutism were absent.[119] Most of these amendments dealt with the right to property, land reforms and just compensation for the same.[120]

Nehru introduced the first amendment to the Constitution to acquire the citizens' lands under the land reforms legislation for public policy.[121] The amendment took away the power of judicial review through Article 31A.[122] The ninth schedule was inserted in the Constitution, all laws listed under the ninth schedule were outside the purview of judicial review.[123]

Eventually, in 1964, through the seventeenth amendment, the government brought forty-four land reform Acts under the list of the ninth schedule.[124]

Sajjan Singh v. State of Rajasthan was the first case that spoke of a basic structure in the Indian Constitution. Justice Mudhokar, in his dissent, wrote about the 'intention of the constituent assembly to give permanency to the essential features of the Constitution'.[125] Justice Mudhokar further wrote that:

It is also a matter for consideration whether making a change in a basic feature of the Constitution can be regarded merely as an amendment or would it be, in effect, rewriting a part

[118] Arvind P. Datar, Commentary on the Constitution of India 2022-23 (2007)
[119] M.K. Bhandari, Basic Structure of the Indian Constitution 159 (1993).
[120] Ibid.
[121] Constitution (First Amendment) Act, 1951.
[122] Article 31A of the Constitution of India.
[123] Ninth Schedule of the Indian Constitution.
[124] The Constitution (Seventeenth Amendment) Act, 1964.
[125] *Sajjan Singh v. State of Rajasthan* (AIR 1965 SC 845).

of the Constitution; and if the latter, would it be within the purview of Art. 368?[126]

In I.C Golaknath v. State of Punjab, being deprived of his surplus land, the petitioner filed before the Hon'ble Supreme Court and challenged the First, Fourth and Seventeenth amendment.[127] The bench of eleven judges, the highest number of judges at the time sat together. The issue: whether amendments fall under the ambit of Article 13(2)?[128]

By a thin margin of 6:5, the Court held that the Constitutional Amendment Act does indeed fell under the ambit of Article 13(2), and hence, the amendment cannot be brought to weaken the fundamental rights provided under Part III of the Constitution. The Court described fundamental rights to be transcendental, which cannot be changed even with the unanimous resolution of the Parliament.[129] The court overruled the earlier judgement in Sri Sankari Prasad Singh Deo v. Union of India, which held that amendment under Article 368 was an exercise of 'sovereign power in the states' and therefore not 'law' under Article 13(2).[130] Also, Court clarified that it has the power to review the constitutional amendments if they are alleged to be in derogation with the provisions of the Constitution and therefore created the power to review legislation in the ninth schedule.[131]

Another thing, which made this ruling landmark, was the application of the doctrine of prospective overruling.[132] Court took note of the mayhem that would take place if retrospective effect would be given to the ruling. To avoid the previously settled changes, the Court held that the Golaknath case would assume a precedential basis.

This judgement was given just before the 1967 election results, and the serious losses in the election combined with the judgement posed serious threats to socialism.[133] This marked the start of the war, the Ten-point programme, within which 8 out of the 10 objectives would require constitutional amendments, set the battlefield. Within five weeks, the Nath Pai bill was introduced, giving the parliament power to amend any part of the constitution, this bill however failed to pass but will find its place in the future.[134] Comparisons were made between this bill

[126] Ibid.
[127] *I.C. Golaknath v. State of Punjab* (AIR 1967 SC 1643)
[128] Article 13(2) of the Indian Constitution: *The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.* 'This part' refers to Part III of the Constitution, which lists the fundamental rights.
[129] *Golakhnath*, AIR 1967 SC 1643
[130] Ibid.
[131] Ibid.
[132] Hormasji Maneckji Seervai, Constitutional Law of India, 3111 (1967).
[133] Austin, *supra* note 57 at 198.
[134] *Hindustan Times*, 20 July 1969.

and the enabling act of the Weimar Constitution and people were vary of the effects.[135]

With the wounds from the Golaknath judgement still fresh and her inability to pass the Nath Pai bill in face of opposition from her own party and other socialists. There were two other judgements which stung her even worse, the decision in *R.C. Cooper v. Union of India*[136] and *Madhav Rao Jiwaji Rao Scindia v. Union of India*.[137] These cases concerned the other objectives in the ten-point programme, and dealt with bank nationalisation and princes' purse respectively, she was handed down defeats on both. The Congress did eventually nationalise banks, however the compensation had been substantial. Gandhi's attempts to amend the constitution in the princes' purse matter was failed by her own party in the Rajya Sabha.[138]

Nine days after the decision in the latter, she called to dissolve the parliament and three days after on December 27, 1970, it was done. She called a fresh election, the decision to nationalise banks had created more credit available to small farmers than previously had been and there was widespread acceptance to abolition of the princes' purse.[139] People were impatient for change and after her resounding victory in the 1971 it was time for change.

There were two amendments made to the constitution as soon as possible, the Twenty-Fourth and the Twenty-Fifth amendments. The Twenty-Fourth Amendment Act went beyond the Nath Pai bill and stated that the Parliament could amend any part of the constitution by way of 'by way of addition, variation or repeal', it put constitutional amendments outside the purview of Article 13(2) and just a cherry on the top, it amended Article 368 to require that the president must give assent to any constitutional bill submitted to them inserting "who shall give his assent to the Bill" in place of "upon such assent being given" when the bill is presented to the President.[140]

The Twenty-Fifth Amendments act concerned Right to Property specifically, in Article 31 the word 'compensation was replaced by 'amount', no suit could be brought in court on the grounds that the 'amount' was not adequate or even if not paid in cash. Article 31C was inserted, basically putting the non-judicially enforceable Directive Principles of State Policy on a higher pedestal than Fundamental Rights to equality, liberty and property, as fundamental

[135] *Indian Express*, 23 July 1969.
[136] *Rustom Cavajee (sic) Cooper v Union of India,* 1970 (3) SCR 530ff.
[137] *Madhav Rao Jiwaji Rao Scindia v. Union of India,* 1971 AIR 530.
[138] Upper house of Indian Legislature. Austin, *supra* note 58 at Chapter 9.
[139] Ibid.
[140] Constitution (Twenty-Fourth Amendment) Act, 1971. *See also* R.C. Bhardwaj, Constitution Amendment in India 41–42, 180, 317–318 (1995). For convention *see* the conflict between Dr. Rajendra Prasad and Nehru on the same matter discussed in Chapter 1, Austin, *supra* note 58.

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rights could no longer protect individuals against state action in furtherance of these policies.[141] "The dangers from Article 31C to the freedoms in Article 19 went 'unheeded because of this atmosphere of enthusiasm', recalled R. C. Dutt. Parliament had given the country 'socialism minus democracy', said S. N. Mishra."[142]

The supremacy in the parliament achieved, the next goal was 'mastery of the Supreme Court'.[143] This became all too clear in the judgement and aftermath of the case which introduced 'The Basic Structure Doctrine' in the Indian judicial precedent *Kesavananda Bharati v. State of Kerala*.[144] The petitioner challenged the 24th and 25th amendments to the constitution, this time under Article 29 of the Indian Constitution. It is one of if not the most important cases in Indian history; however, at the time of decision, it was tainted with the lack of consensus between the judges and the "un-constitutional" basic of the decision.[145] Eleven Opinions were handed down and it is difficult to analyse what the points of agreement and disagreement were.[146]

To summarise the judgement, the following was 'held' by the 'majority' through a 'statement' signed by nine of the thirteen judges. The Golaknath judgement is overruled, the word 'law' in Article 13 did include constitutional amendments. The 24th Amendment Act is valid, but eight

[141] Constitution (Twenty-Fifth Amendment) Act, 1971. The relevant Directive Principles were Article 39 (b) and (c): respectively, the State shall direct its policy towards securing that the ownership and control of the 'material resources of the community are so distributed as best to subserve the common good', and, the operation of the economic system 'does not result in the concentration of wealth and means of production to the common detriment'. The Fundamental Rights that could not be invoked were Article 14 (equality before and equal protection of the law), Article 19 (the 'freedoms' article), and Article 31 (property); *See also* Bhardwaj, *supra* note 140 at 42–43, 181, 318–320.

[142] Austin, *supra* note 58, at 255.

[143] Ibid, 256.

[144] *Kesavananda*, (1973) 4 SCC 225.

[145] The argument is simple, there is no mention of Basic Structure in the Constitution, nor there are any implied or express limits on the power to amend other than the one in Article 13(2). This judgment was a practice of judicial prudence at highest level, saving the Indian democracy not through the judgement in general, but through the proposal of the doctrine just before it was most needed; in the aftermath of Emergency in India.

[146] One can write a whole treatise on the judgement alone not even touching the impact and hence all the aspects of the decisions cannot be discussed here for further reference see P. Jaganmohan Reddy, Social Justice and the Constitution (1976), Rajeev Dhavan, The Supreme Court and Parliamentary Sovereignty (1976), and Rajeev Dhavan, *The Basic Structure Doctrine—A Footnote Comment* in Rajeev Dhavan, and Alice Jacob (eds), Indian Constitution: Trends and Issues (1978); S. P. Sathe, *'Limitations on Constitutional Amendment: "Basic Structure" Principle Re-examined'* in Ibid; P. K. Tripathi, *Kesavananda Bharati v The State of Kerala—Who Wins?* in Surendra Malik, Fundamental Rights Case: The Critics Speak! (2012); Upendra Baxi, *The Constitutional Quicksands of Kesavananda Bharati and the Twenty-fifth Amendment* in Ibid.; H. R. Khanna, Neither Roses Nor Thorns (1985); Seervai, *supra* note 132; K. S. Hegde, Judiciary And The People, A 'Friends of Democracy' (1973); and Abdul Gafoor Abdul Majeed Noorani, Public Law in India (1982). For the 'conclusions' of the justices, see 1973 (4) SCC 593–4, Ray; p. 959, Dwivedi; pp. 897–8, Mathew; p. 919, Beg; p. 405, Sikri; pp. 462–3, Shelat and Grover; pp. 511–2, Hegde and Mukherjea; pp. 666–7, Reddy; pp. 823–5, Khanna; pp. 1005–6, Chandrachud; p. 726, Palekar. For the 'conclusions' of the justices, see 1973 (4) SCC 593–4, Ray; p. 959, Dwivedi; pp. 897–8, Mathew; p. 919, Beg; p. 405, Sikri; pp. 462–3, Shelat and Grover; pp. 511–2, Hegde and Mukherjea; pp. 666–7, Reddy; pp. 823–5, Khanna; pp. 1005–6, Chandrachud; p. 726, Palekar.

[146] Austin, *supra* note 57, at 265.

of judges held that Article 368 "did not include the power to 'damage', 'abrogate', 'emasculate', 'destroy', or 'change or alter' the 'basic features/elements', 'fundamental features', or 'framework' of the Constitution."[147] The 25th amendment is valid except for Article 31C. The 'amount' in Article 31 however, could be reviewed by the judiciary. As for the 29th Amendment,[148] they held to be valid with no qualifications, six out of the nine signatories held that legislative acts in the ninth schedule could be examined if they 'derogated' the 'basic features' of the constitution. Four of the thirteen judges did not sign the statement as they disagreed on what had been decided. The 'basic features' would be decided on a case-to-case basis.

Zia Mody has summarised the variety of these interpretations in her book *'Ten Judgments that changed India'* as follows:

Chief Justice Sikri listed the following features as encompassing the basic structure of the Constitution: supremacy of the Constitution, republican and democratic form of government, secular character of the Constitution, separation of powers between the legislature, executive and judiciary, and the federal character of the Constitution.

Justices Shelat and Grover reproduced, broadly, a similar list, with the following two additional elements: the dignity of the individual (secured by fundamental rights) and the mandate to build a welfare state (in the directive principles of state policy), and the unity and integrity of the nation.

Justices Hegde and Mukherjea listed: the sovereignty of India, democratic character of India's polity, unity of the country, essential features of the individual freedoms secured to the citizens, and the mandate to build a welfare state and an egalitarian society.

Justice Jagmohan Reddy's basic features comprised: a sovereign democratic republic, parliamentary democracy and the three organs of the state.[149]

The minority of four judges, differing to the majority, upheld the three amendments and overruled the Golaknath judgement, however, they did not mention 'basic structure' and generally heeded to the power of the legislature to amend any part of the constitution.

The confusion that surrounded this judgement is described by Austin as follows:

Commentaries by eminent Indian legal thinkers about Kesavananda further muddied these

[147] Ibid.
[148] The Constitution (Twenty-Ninth Amendment) Act, 1972. Kerala Land Reforms (Amendment) Act, 1969 and the Kerala Land Reforms (Amendment) Act, 1971 were placed in the ninth schedule through this amendment.
[149] Zia Mody, Ten Judgments that changed India, Chapter 1 (2013).

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waters. Examining ten of these expert opinions (four of which came from justices who had been on the Kesavananda bench), one finds conflicting views on aspects of the decision. For example, Justice Jaganmohan Reddy later wrote that eight judges had held that there are basic features in the Constitution. According to Justice Khanna, the majority in the case numbered seven, and nine judges signed the statement indicating that this was the view of the majority—even though two had been in the minority in their individual opinions. Palkhivala also used this arithmetic. The statement of the nine judges, itself, was discredited by Seervai and Dhavan. Seervai believed that the four judges who had not signed it had refrained from doing so because 'there was a difference of opinion among the judges themselves as to what the majority had decided'. He submitted that 'the summary signed by nine judges has no legal effect at all'—this even in the revision of his book in which he accepted Kesavananda as law. According to Dhavan, 'only a hard core of six judges … really accepted the summary statement'. Justice Palekar had signed the statement by 'accident', and Chandrachud and Khanna really 'belong to the minority'. Dhavan hoped that the 'summary statement' would be rejected as either too ambiguous or misleading. Upendra Baxi, on the other hand, asks how an understanding of the Court's conclusions is to be arrived at if the 'statement' of the nine judges is disregarded. Justice Reddy many years later thought that the 'statement' was the operative part of the judgement.[150]

In a judgement that confounds scholars to this day, the Supreme Court had saved the Indian Constitution by strengthening the power of judicial review, replaced themselves as the whipping boy for the government's inadequacies to make their vision real by upholding the amendments, and prepared themselves for the battles that were yet to come.

In the aftermath, three senior most judges were superseded for the position of Chief Justice and Justice A.N. Ray was pronounced to be the Chief Justice.[151] A judge who had given favourable judgements in Kesavanand Bharati, Princes' Purse and Bank Nationalisation case. However, this act should not be seen as simply a knee jerk reaction to the judgement, this change was long brewing in the bowels of new Congress.[152]

In the years that followed, it became clear that for all her power, Gandhi could not deliver on her promises. With the judiciary out of their way, the Congress and she had no one to blame but themselves. There were mass protests by the opposition leaders, the people wanted change

[150] Austin, supra note 58, at 267-69.
[151] In Justice Khanna's view, the supersession 'was by way of punishment or show of government's displeasure at their [the judges] not having towed [sic] the government line in the [Kesavananda] decision'. H.R. Khanna, Judiciary in India and Judicial Process 22 (1985) This was also against the convention of promoting the senior most judge to the position of Chief Justice after the current Chief Justice retires at the age of 65.
[152] Austin, supra note 58, at 280.

but all they had received were empty promises. In a truly undemocratic fashion, on June 26, 1975, Gandhi imposed emergency in the nation without any consultation with her cabinet as is required by law. However, in a truly Indian fashion none of the cabinet ministers had the guts to challenge her when they were told in the morning. There were mass arrests of the opposition leaders, electricity was cut off in New Delhi so newspapers could not be printed, fundamental rights were suspended and the horrific violations of human rights were aplenty.[153]

At the same time, there were ghosts from the past that were coming to haunt her. Judgement was given by the Allahabad HC on June 12, 1975, concerning her alleged malpractices in the 1971 elections. If found guilty she would have to withdraw from office and be banned from seeking re-election for six years, while the Allahabad HC did find her guilty, there was an appeal to the Supreme Court.[154] Fearing what was coming her way, certain changes were made to the Representation of People Act, 1951[155] overruling the judgement in *Kanwar Lal Gupta v. Amarnath Chawla and Others*,[156] which stated that election expenses had to include any expense of which a candidate took advantage of. They did so with an explanation to section 77 which stated, "notwithstanding any judgement, order or decision of any court to the contrary, … any expenditure incurred or authorized in connection with the election of a candidate … [by anyone other than the candidate or his election agent] shall not be deemed to be and shall not ever be deemed to have been expenditure … authorized by the candidate or by his election agent for the purposes of this sub-section;"[157]

Two other Amendments were passed pre-empting the judgement which may be given by the Supreme Court, these were the Thirty-eighth and the Thirty-ninth Amendment Acts, the first barred the judicial review of emergency proclamations[158] and the second— which after two hours of 'debate' in the Lok Sabha was passed, the next day was passed by the Rajya Sabha and two days later received the president's assent—took from Supreme Court the authority to decide election petitions, such petitions now could only be heard by a 'body' established by the Parliament under the law.[159] Just to make it abundantly clear that SCs interference was not welcome, the Representation of the People Acts of 1951 and 1974 and the Election Laws

[153] Ibid at Chapter 13. *See also* Henry C. Hart, *The Indian Constitution: Political Development and Decay*, 20 (4) Asian Survey 428–451 (1980).
[154] *State of Uttar Pradesh v. Raj Narain*, 1975 AIR 865.
[155] The Representation of the People (Amendment) Ordinance, 1974 (replaced by an Act of Parliament on 21 December).
[156] *Kanwar Lal Gupta v Amarnath Chawla and Others* 1975 (2) SCR 2599ff.
[157] The Representation of the People (Amendment) Act, 1974.
[158] The Constitution (Thirty-eighth Amendment) Act, 1975.
[159] Article 329A of the Indian Constitution.

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Amendment Act were placed in the ninth schedule.[160]

The SC under most pressure in its history, set aside the original conviction against Gandhi, at the same they three out of the five judges found the 39th Amendment to be in violation of the Basic Structure, basically letting her get away with her past actions while making it clear such conduct would not fly in the future. Three days after the judgement, CJ Ray convened a thirteen-judge bench to overturn the basic structure doctrine, no one knows who filed the review petition if one was ever filed, no petitioner ever was found, and it was clear that CJ Ray himself had convened the hearings under pressure from the government. On 12 November 1975, the bench was dissolved by the CJ Ray. The government became so conceited by its power that there were actual calls for a new constituent assembly.[161] There was also the appointment of the Swaran Singh Committee, to look for amendments which may be passed to let 'social reform' be free from judicial interference and at the same time free the Prime Minister, the President and the Vice President from prosecution even in the future.[162] The committee report did not satisfy her even more radical changes were introduced in the 42nd Amendment which was nick named the "mini constitution". Changes were made to powers of the structure of the State and Central Government, powers of the Supreme and High Courts taking most of their powers of Judicial Review and the word socialist was added to the preamble. The number of changes were too numerous to mention and changes were made to Preamble, 40 Articles (arts. 31, 31C, 39, 55, 74, 77, 81, 82, 83, 100, 102, 103, 105, 118, 145, 150, 166, 170, 172, 189, 191, 192, 194, 208, 217, 225, 226, 227, 228, 311, 312, 330, 352, 353, 356, 357, 358, 359, 366, 368 and 371F), Seventh Schedule and added 14 New Articles (articles 31D, 32A, 39A, 43A, 48A, 131A, 139A, 144A, 226A, 228A and 257A and parts 4A and 14A) to the Constitution.[163]

The Congress and Gandhi so disillusioned by their previous victory, and all the manoeuvres to keep her in office, had forgot to look around them. Everyone and their mother knew that Congress would not win the election- when Congress called one on January 1977, to be taking place in March of the same year- all they needed was an alternative. With all the important opposition leaders in jail, they had not expected them to unite so quickly into the Janta Dal.

[160] The Constitution (Thirty-Ninth Amendment) Act, 1975.
[161] Uma Shankar Dikshit, Minister of Transport, told a meeting of Congress workers in Kanpur that if the Supreme Court debarred the government from making changes in the Constitution, a new constituent assembly might have to be convened to rewrite the Constitution to guarantee 'social and economic justice'. The government, Dikshit said, was making every effort to run the country according to the Constitution, but if the Constitution became an obstacle to 'ensuring the basic needs of the people … the government would not hesitate to make drastic changes' in it. *Indian Express*, 16 November 1975.
[162] Prashant Bhushan, The Case That Shook India 258 (1978).
[163] The Constitution (Forty-Second Amendment) Act, 1976.

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Leaders from varied ideologies from conservatives to communists came together to oppose Indira Gandhi and the Congress. This coalition marked the first defeat of Congress in the general elections since the independence. For all her faults, Indira Gandhi did not contest the results.[164]

The Janta Dal got to work quick and tried to undo the changes taken place during Indira Gandhi's reign and passed the 43rd and the 44th Amendments to undo most of the changes taken place through the 42nd Amendment. The judgement in *Minerva Mills v. Union of India*,[165] made rest of the provisions inoperable. In subsequent judgements the Basic Structure Doctrine became solidified, with today India boasting one of the most activist judiciaries in the world, for all the good and the bad that does.

Internal conflicts decimated the Janta Dal in two years and new elections were called in which Indira Gandhi was elected again. Showing that it wasn't a competitive party but an efficient one that the Indian people desired. That changes took precedent over liberty and freedoms. What good is freedom when you don't have food to eat?

VI. BASIC STRUCTURE DOCTRINE IN THE USA

The Basic Structure Doctrine in the USA could be accepted however, it would just lay dormant, in USA the constitution is protected by a political process which is much more restrictive than would be allowed by the judiciary for instance. The large degree of consensus needed making any important constitutional change practically impossible.[166] It can be and has been argued that the US Constitution is more rigid than it needs to be, not allowing it to deal with crisis such as the Civil War.[167] The scholarship in the US focused on making the amendment process more flexible rather than saving it from abuse.[168]

While there is scholarship on the whether there are inherent limits to the amendment power.[169] What the judiciary will and won't allow is only speculation until such a change takes place. When the politics so allowed the Supreme Court took a back seat. During the New Deal, the congress was given plenary powers to maintain a welfare state and nation's well-being.[170] This

[164] Austin, supra note 58, at 280.
[165] *Minerva Mills v. Union of India*, AIR 1980 SC 1789.
[166] *See* James L. Sundquist, Constitutional Reform and Effective Government 13-14 (1986).
[167] *See* Arthur Bestor, *The American Civil War as a Constitutional Crisis*, reprinted in Lawrence M Friedman and Harry N. Scheiber (eds.), American Law and the Constitutional Order: Historical Perspectives (1977).
[168] Akhil Reed Amar, *Consent of the Governed: Constitutional Amendment outside Article V*, 94 Colum. L. Rev. 457 (1994).
[169] *See* Vile, *surpa* note 5 and Brandon, *supra* note 5.
[170] *See* Alfred H. Kelly, Winfred Harbison and Herman Belz, The American Constitution 485-86, 509, 518, 665 (1991)

approach significantly deviated from the idea that the congress did not have power do anything not specifically granted to it under the constitution.[171] As Laurence H. Tribe put it, "In the years after 1937, the Supreme Court essentially offered the Congress *carte blanche* to regulate the economic and social life of the nation, its actions subject only to the requirement of the Bill of Rights" and refused to read grants on power as limits on other.[172]

This moved the amendment process from "theory" to "politics".[173] The Indian Supreme Court through their decision in the Kesavananda Bharti case had saved the Indian democracy, however, the US Supreme Court through this approach did something even more poetic. They gave the power back to where it came from, "the people", making them the ultimate protectors of the constitution.

VII. CONCLUSION

In *Toward a theory of Constitutional Amendment*, Donald S. Lutz tries to calculate an Index of Difficulty of amendment procedures in different national constitution as a function of the length and the amendment rate of the constitution.[174] He gives India a score 4.1 while giving US the score of 5.1 making India one of the more restrictive constitutions in the list.[175]

There is nothing inherent in the Indian Constitution making it more flexible than the US constitution other than the little less restrictive requirement of ratification by 2/3rd states rather than 3/4th states in the USA. However, it is worth mentioning that even if the requirement was 3/4th states should ratify it still would not make a difference, at least during the reign of Indira Gandhi. The impact therefore does not come from the provision rather it comes from the completely different values and histories making the Indian Constitution more flexible.

The numbers, 105 amendments to 27 amendments does not matter as the constitutions serve completely different purposes in both the countries. With one being one of the shortest constitutions in the world, dealing with very little while the other being one of the largest, dealing with a large variety of things that require amendments to deal with. Therefore, the Supreme Court did was forced to promulgate the basic structure doctrine due to the abuses by Indira Gandhi, who wielded the power to abuse due to the values such as reverence for authority, conditions such as India being a survival society, having the political legitimacy due to being the daughter of Jawaharlal Nehru and related historical context; and not because there

[171] Paul Brest and Sanford Levinson, Processes of Constitutional Decision Making 11-13 (1992).
[172] Laurence H. Tribe, American Constitutional Law, 304, 386 (quote) (1988).
[173] Griffin, *supra* note 3.
[174] Lutz, *supra* note 14 at 261, Table 11.
[175] Ibid.

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is something inherent in the Indian Constitution that makes it more predisposed to be abused..

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