Bommai and the Judicial Power: A View from the United States

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> "The Indian Constitution is both a legal and social document. It provides a machinery for the governance of the country. It also contains the ideals expected by the nation. The political machinery created by the Constitution is a means to the achieving of this ideal."[1]

I. American Prelude

In an interview conducted after leaving the United States Supreme Court, Chief Justice Earl Warren was asked to name the most important case decided during his tenure on the Court. His choice of *Baker v. Carr* was doubtless a surprise to many people.[2] The Court over which he presided had been the scene of many landmark cases, including one – the school desegregation decision – that had changed the face of American jurisprudence, and perhaps American society as well. Why then choose *Baker*, a ruling limited to the question of whether malapportionment was an issue reviewable by the courts? To be sure, the Court made it possible for changes that could potentially provide a new set of answers to the classic question of who gets what, when, and how in American politics, but believing it would have such consequence arguably had more to do with wishful thinking than cold political calculation.

Warren's answer seems defensible, however, even if one concludes that the "reapportionment revolution" turned out not to be nearly so revolutionary as its most devoted advocates had once imagined. Thus in ruling that the Court was not precluded from entering the "political thicket" of legislative districting, the majority made a powerful statement about the Court's role in determining the meaning of contested regime principles, a point more candidly acknowledged – if regretted – in the dissenting opinion of Justice Felix Frankfurter: "What is actually asked of the Court in this case is to choose…among competing theories of political philosophy…."[3]. For Frankfurter, the rejection of the "political question" doctrine as applied

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1. *S.R. Bommai v. Union of India*, (1994) 3 SCC 1, 65.
2. *N.Y. Times*, June 26, 1969 (city ed.), 17. See also, Earl Warren, *The Memoirs of Earl Warren* (Garden City, NY: Doubleday, 1977), 306.
3. *Baker v. Carr,* 369 U.S. 186, 300 (1962).

to the apportionment issue in effect invited the Court to revive the Guaranty Clause (Article IV, Section 4) by affirming a judicial role in defining the meaning of "a Republican Form of Government." The Justice was not distracted by the "equal protection of the law" approach used by the proponents of reapportionment, for, "[t]o divorce equal protection from 'Republican Form' is to talk about half a question."[4] Any "inquiry into the theoretic base of representation" entailed a judgment as to what was an acceptably republican state.

Moreover, it was a judgment with notable symbolic and practical importance for the configuration of federalism. At a time when the standing of the national government was being challenged over fundamental issues of equality, imposition by the federal courts of a uniform constitutional standard to the structure of sub-national governmental institutions conveyed an unambiguous confirmation of the supremacy and moral authority of federal power.[5] As Anthony Lewis pointed out, more than the character of American legislatures, the issue in *Baker* was "the place of the Supreme Court in the American system of government."[6] Indeed, the Chief Justice might well have selected *Baker v. Carr* for the occasion it provided the Court to place its imprimatur on certain basic issues of constitutional identity. And with its certification of political representation as a problem appropriately within the domain of judicial supervision, Warren surely was encouraged by the Court's new prospects for shaping the process of lawmaking in accordance with constitutionally derived standards.[7] But ultimately it was in the enabling of other institutional actors to pursue socially progressive policies that the greatest potential for making a difference in American society lay, a prospect ominously understood by Frankfurter's fellow dissenter, Justice John Marshall Harlan, who thought it a mistake that "the Court should 'take the lead' in promoting

4. Ibid., 301.
5. Consider, for example, the observation of the most serious critic of national power in American history, John C. Calhoun. "Give to the Federal Government the right to establish its own abstract standard of what constitutes a republican form of government, and to bring the Government of the States, without restrictions on its discretion, to the test of this standard, in order to determine whether they be of a republican form or not, and it would be made the absolute master of the States." Richard K. Cralle, ed., *The Works of John C. Calhoun*, Vol. 6 (New York: D. Appleton, 1855), 221.
6. Anthony Lewis, "Earl Warren," in Richard H. Sayler, Barry B. Boyer and Robert E. Gooding, Jr., eds., *The Warren Court: A Critical Analysis* (New York: Chelsea House, 1968), 31.
7. "If everyone in this country has the opportunity to participate on equal terms with everyone else and can share in electing representatives who will be representative of the entire community and not of some special interest, then most of these problems that we are now confronted with would be solved through the political process rather than through the courts." Quoted in the *N.Y. Times*, June 26, 1969 (city ed.), 17.

reform when other branches of government fail to act." Warren's big hope was that the Court's intervention would ignite a surge of political activity at all levels of government that would, where necessary, transform the social order; and the significance of *Baker v. Carr* as a constitutional moment was lodged in this hope.

II. Constitutional Aspirations, Constitutional Moments

If in retrospect, the reapportionment decision appears to us as less momentous than it might have at the time it was rendered, it is largely because of the difficulty of translating the American constitutional mandate of formal equality into substantive equality. Achieving such a translation must depend solely on the vagaries of politics unassisted by the directed force of constitutional command. One need not embrace the simplistic view of the US Constitution as an essentially neutral framework document to recognize that its commitment to egalitarian goals manifests itself only in the most creative exercises of constitutional interpretation.

Such is not the case in India. Here, in explicit ways, the constitution is a potentially subversive presence in the social order, leaving the institutions of civil society vulnerable to transformative attacks emanating from a document that is fundamentally antagonistic to the status quo. These institutions are not left totally unprotected, and their defenders will find ample political and legal (including constitutional) resources with which to secure them from the ravages of radical reconstruction. But to the degree that the preservative presumption is slighted in constitutional design, defending the social order will be a more formidable task than in circumstances where the imprimatur of constitutional legitimacy extends to the prevailing configurations of that order. Inherent in the Indian constitutional condition is a plainly articulated gap between foundational ideals and existing realities; in this alternative understanding much more is involved than just an implicit reminder of the inevitable disharmonies between law and society, namely the constitutional obligation assigned to the state to resolve the severest of these contradictions.

This obligation is inscribed in the Constitution in many ways, including the various invitations extended to the state to regulate religious practices in the interest of social welfare and equality.[8] The depth of religion's penetration into a social structure that was by any reasonable standard grossly unjust, meant that the framers' hopes for

8. I discuss these provisions at length in *The Wheel of Law: India's Secularism in Comparative Constitutional Context* (Princeton: Princeton University Press, 2003).

a democratic polity would have to be accompanied by State intervention in the spiritual domain. But the most visible constitutional expression of the aspirations that stamped the document with a distinctive identity is to be found in Part IV, the Directive Principles of State Policy. The provisions contained in this section are not enforceable by the judiciary, but, as stated in Article 37, "…the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws." As has been noted with only slight exaggeration, the "Directive Principles of State Policy constitute the soul, the very spirit of the ethos of the Constitution. These principles are the epitomes of social policy whereupon the State has been enjoined to embark on the goals of distributive justice."[9]

Enter the judiciary. The Indian Supreme Court has been depicted as an institution constitutionally intended to function as "an arm of the social revolution,"[10] whose mission, according to a prominent former justice of that Court, is to serve as a "radical fiduciary and redemptive institution of the people."[11] To be sure, it would be surprising to find constitutional arrangements that did not include both preservative and transformational attributes. Thus in India social reform must always be balanced against the demands of multiple cultures, whose resistance to changes threatening to their way of life finds support in constitutional provisions that explicitly endorse cultural preservation. Such provisions are as much an expression of political reality as they are a measure of constitutional acquiescence, but they do serve in arguably salutary ways to moderate and restrain the radical transformational impulse. Or stated otherwise, the presence of these

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9. Sudesh Sharma, *10. Directive Principles and Fundamental Rights: Relationship and Policy Perspectives* (New Delhi: Deep & Deep Publications, 1990), 5. Of course, constitutional provisions that are important in one setting may not perform the same role elsewhere. Indeed, they might not exist in other places. There are no directive principles, for example, in the South African Constitution, a document that must be considered an obvious candidate for inclusion in any grouping of nations where the constitution confronts a social order hostile to the document's fundamental commitments. On the other hand, the directive principles in the Irish Constitution served as a model for the framers of the Indian Constitution, but they have had practically no influence on the substance of a jurisprudence that reflects the priorities of the acquiescent constitutionalism within which it has evolved.
10. Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford: Oxford University Press, 1966), 80. As Upendra Baxi has pointed out to me, there is something quaint about coupling courts, which are theatres of state adjudicatory power, with a revolutionary mission. The point is well taken, although Austin's use of the metaphor is, in his judgment, a fair representation of what many framers intended.
11. V. R. Krishna Iyer, "Towards an Indian Jurisprudence of Social Action and Public Interest Litigatio," in Indra Deva, ed., *Sociology of Law* (New Delhi: Oxford University Press, 2005), 297.

preservative commitments in a predominantly confrontational document means that the enforcement of the constitution's militant agenda should occur within the parameters of feasibility. That is perhaps the best way of understanding the placement of the uniform civil code within the non-justiciable section of Directive Principles.[12]

While the remedial jurisprudence implicit in the Court's transformative responsibilities is constitutionally prescribed within the militant folds of the document, the Court has not embraced the role effortlessly or consistently. Along the path of its partial fulfillment of this purpose are several constitutional moments that have contributed substantially to the emergence of the Court as a key institutional presence in the shaping of Indian policies in conformity with constitutional aspirations. Any one of them could be cited as the decisive turning point in the narrative of Indian constitutionalism. Perhaps the most obvious choice is *Kesavananda Bharati v. State of Kerala*[13] called "the greatest triumph of the Supreme Court as an institution…."[14]. In its assertion of review power over the process and substance of constitutional amendments, the Court, as Upendra Baxi has said, performed "a remarkable feat of judicial activism, unparalleled in the history of world constitutional adjudication."[15]. Of course, an achievement of such noteworthiness – particularly one enhancing the political power of the judiciary — will engender mixed reviews. For example, a not atypical negative assessment worries about the effect of the judgment on the very fabric of constitutional government. "Prior to *Kesavananda Bharati*, the Constitution, with all its checks and balances, was considered supreme. The Supreme Court has emerged as the strongest wing of the state with unlimited and illimitable power."[16]

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12. In the United States, the non-acquiescent parts of the Constitution are largely embodied in the post-Civil War amendments. Acquiescence in a social order that tolerated slavery was itself an anomaly in a Constitution predicated on principles opposed to that institution. It took a bloody war to destroy slavery, but to eradicate the racial hierarchies that were engrained in the social order required a new constitutional militancy. This militancy may be seen in commitments implicit (perhaps even explicit) in the three amendments – to nationalizing the issue of racial equality, to penetrating the barrier separating public and private realms, and to promoting legislative solutions to the challenge of social reconstruction.
13. AIR SC 1461 (1973).
14. Fali S. Nariman, "Judicial Independence in India," in Venkat Iyer, ed., *Human Rights and the Rule of Law* (New Delhi: Butterworths India, 2000), 30. Nariman goes on: "[T]his was the real turning point for the Indian judiciary – a glorious manifestation of its determination to retain custody and control of the Constitution, which, in the 1970s, was in grave danger of being usurped by Parliament." Ibid., 30.
15. Upendra Baxi, *Courage, Craft and Contention: The Indian Supreme Court in the Eighties* (Bombay: N. M. Tripathi Private, 1985), 65.
16. P. P. Rao, "The Constitution, Parliament and the Judiciary," in Pran Chopra, ed., *The Supreme Court Versus the Constitution: A Challenge to Federalism* (New Delhi: Sage Publications, 2006), 73.

Whether viewed negatively or positively, *Kesavananda* stands clearly as a watershed moment in Indian constitutional development. Its eminence is such that the seminal case I have chosen to focus on in this article could not have occurred in its absence. Thus the Supreme Court's decision in *S.R. Bommai v. Union of India*, which addressed the legality of the Centre's dismissals of six state governments in 1992, represents a critical turning point in Indian jurisprudence, albeit one that builds upon the foundations of the earlier ruling. But let me anticipate at the outset the objection that a foundational case should always be viewed as greater in significance than its progeny.[17]

At the core of *Kesavananda* is the "basic structure" doctrine, according to which specific features of the Constitution are deemed sufficiently fundamental to the integrity of the constitutional project to warrant immunity from drastic alteration. Under the theory that *constitutional* change must not destroy what it modifies, the Court affirmed its institutional authority to invalidate any constitutional amendment whose adoption would, in its judgment, result in radical transformation of regime essentials. The political and jurisprudential implications of this unenumerated power were extraordinary, easily making the presumed counter-majoritarian difficulties of conventional judicial review pale in comparison. Armed with its new doctrine, the contents of which would be determined over time, the Court in effect designated itself enforcer of constitutional entrenchment at its deepest level, able now to nullify the results of legislative rule-making even when such action expressed itself in the exalted form of the constituent power.[18]

On paper, at least, this breakthrough was enough to vault the Indian Supreme Court to the forefront of the world's most activist judiciaries. But precisely because *Kesavananda* was not about ordinary politics, the actual impact of basic structure jurisprudence was likely

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17. For example, Chief Justice Warren selected *Baker v. Carr* rather than *Reynolds v. Sims* as the most important case decided on his Court. While the latter reached the merits of the reapportionment issue, affirming equal population districting as the appropriate constitutional standard, the earlier case was the necessary foundation for the substantive breakthrough announced two years later. S.P. Sathe, the noted Indian constitutional scholar, was ambiguous in ranking *Kesavananda* and *Bommai*, saying only that *Bommai* is the most important and politically significant decision of the Court since *Kesavananda Bharati*." S.P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (New Delhi: Oxford University Press, 2002), 152.
18. I have discussed this in detail in Gary Jeffrey Jacobsohn, "An Unconstitutional Constitution? A Comparative Perspective," 4 *International Journal of Constitutional Law* 460 (2006).

to be experienced more symbolically than tangibly.[19] *Bommai* adapted the doctrine for application to the politics of day-to-day governance, establishing it not only as a standard against which the Court could judge the constitutionality of others' actions, but also as a touchstone for directing the course of actions not yet taken. The great challenge of Indian constitutionalism is to deliver on the promise of its transformative aspirations. That arguably requires a Court performing more ambitiously than in the familiar nay-sayer role of the orthodox judicial review model, but also one attuned to the limitations of judicial power and the hollowness that is so often the fate of the more grandiose hopes for judicial interventions in policy-making.[20]

If, then, "basic structure" has become, in Granville Austin's apt phrase, "the bedrock of constitutional interpretation in India"[21], the Court's decision in the *Bommai* case to require adherence to its doctrinal mandates has enabled the judiciary to become a dynamic force for principled governance. Perhaps more than anything else, this achievement is the basis for singling it out in this article. A mark of a decision's ultimate importance is that it both fits within the aspirational DNA of a constitution and that it elevates the Court as a potentially vital institutional actor in the realization of the document's constitutive goals. Some of these goals will be expressive of the particular constitution in question, and others – for example, the rule of law – are included in the identity of any regime governed by constitutional rules; my discussion of *S.R. Bommai v. Union of India* will proceed through a discussion of four such essentials: 1) limits on executive power (especially with regard to emergencies); 2) federalism; 3) judicial review and the policing of institutional boundaries; 4) secularism and the pursuit of substantive equality.

19. As has been noted, the basic structure doctrine "should be seen as an attempt to identify the moral philosophy on which the Constitution is based." Salman Khurshid, "The Court, the Constitution and the People," in Pran Chopra, ed., *The Supreme Court Versus the Constitution: A Challenge to Federalism* (New Delhi: Sage Publications, 2006), 98. To be in a position to articulate the specific content of this moral philosophy is assuredly a more than symbolic undertaking, but doing so in a context where the invocation will have a direct effect on governmental policies ultimately matters more.

20. See especially Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991).

21. Granville Austin, *Working a Democratic Constitution: The Indian Experience* (New Delhi: Oxford University Press, 1999), 258. In his two important books on the Indian Constitution, Austin has organized his thoughts around the three strands of Indian constitutionalism, which he refers to as its "seamless web": "protecting and enhancing national unity and integrity; establishing the institutions and spirit of democracy' and fostering a social revolution to better the lot of the mass of Indians." Ibid., 6. If Austin produces a third volume it's quite possible that he will see the importance of the *Bommai* judgment for its role in advancing the various filaments in this web.

But first we need to situate the case within two converging strands of constitutional development.

III. "…in accordance with the provisions of this Constitution…."

i. The Abuse of Power: Institutions

From its earliest days as an independent state, ethno/religious violence has been India's constant affliction. Nothing that has occurred since that time can quite rival the horrific bloodletting that accompanied the partition of British India into two states[22], but the subsequent history of deadly inter-communal conflagration is in its own way comparably appalling in what it reveals about the enduring nature of divisive group hatreds. Like so much else in India that is jarring in the magnitude of its incongruities, this history co-exists with a story of democracy that is remarkable for having unfolded as successfully as it has within such a distinctly inhospitable environment.

The story of *Bommai* is a part of this larger narrative, but of others as well, including one we might call, "The Taming of Executive Power." The main character in this second tale is Indira Gandhi, whose imposition of emergency rule in the nineteen seventies led many to question just how enduring the Indian experiment in democracy would turn out to be. Critical to her ambitions was reducing the standing of the judiciary as a meaningful presence in Indian politics. One need only observe recent events in neighboring Pakistan to know that this undermining of the courts is essential to the accretion of unchecked executive power.

Prominent in her maneuverings towards dictatorial power was Mrs. Gandhi's deployment of the amendment process to insulate certain issues from the oversight of judicial review. Much earlier, the Supreme Court had upheld the plenary power of Parliament to amend the Constitution, in these cases over the claim that the process had been used to deprive landowners of fundamental property rights guaranteed under the document.[23] These rulings stood up rather well until 1967 and the landmark decision of *Golak Nath v. State of Punjab*[24], in which a divided Court announced that duly enacted amendments

22. The destruction of the Babri Masjid mosque in Ayodhya, the event that was the occasion for the decision in *Bommai*, comes close. "No other event, barring Partition, in the history of twentieth century India has been as cataclysmic to the nation as the 'religious' rape at Ayodhya on 6 December 1992…." K. N. Panikkar, *Communal Threat, Secular Challenge* (Madras: Earthworm Books, 1997), 171.

23. *Shankari Prasad Deo v. Union of India* 1952 (3) SCR 106; *Sajjan Singh v. State of Rajasthan* 1965 (1) SCR 933.

24. AIR SC 1643 (1967).

could not be permitted to render a constitutional right unenforceable. It was, as one commentator has described it, a case that "began the great war…over parliamentary versus judicial supremacy"[25] Technically the decision did not invalidate the amendments in question, as the Court issued a prospective judgment essentially putting Parliament on notice that the days of its amendatory interference with fundamental rights were over. But the intense political reaction to the Court's move left little doubt that something very important had occurred.

This became glaringly obvious in 1973 with the historic ruling in *Kesavananda*. In essence, the Court – seven of the thirteen participating judges — affirmed the authority of Parliament to amend constitutional provisions involving fundamental rights, while rejecting its authority to place statutes enacted to implement the Constitution's Directive Principles beyond the power of judicial review. It thus reversed *Golak Nath*, but narrowly asserted its own authority to invalidate a constitutional amendment that was in defiance of the "basic structure" of the Indian Constitution. While relenting on its authority to designate specific provisions as immune from constitutional change, the majority invested the Court with a broader supervisory jurisdiction over the fundamental meaning of the document. In the fashion of *Marbury v. Madison*, the Court avoided a direct confrontation with the government, yet appreciably strengthened its powers in anticipation of battles ahead.

The "basic structure" doctrine might not have made it very far beyond the ruling in this case had it not been for the overreaching of the Indian Prime Minister. Among the first acts of her emergency regime were a series of very controversial constitutional amendments. One of them, the 39th Amendment, prevented any judicial inquiry into the election of the Prime Minister. As one noted Indian legal scholar remarked, "[n]owhere in the history of mankind has the power to amend a Constitution thus been used"[26]. Another, the 38th, shielded from judicial review any laws adopted during the Emergency that might conceivably impinge upon fundamental rights. Gandhi's claim was taken from the playbook of the controversial German theorist Carl Schmitt: in essence the constituent power, as an expression of the sovereign will of the people, was all-embracing and at once judicial, executive,

25. Granville Austin, *Working a Democratic Constitution: The Indian Experiment* (New Delhi: Oxford University Press, 1999), 198. Or as S.P. Sathe has noted, "*Golak Nath* marks a watershed in the history of India's evolution from a positivist Court to an activist Court." S.P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits*, 67.
26. Upendra Baxi, *Courage Craft and Contention: The Indian Supreme Court in the Eighties*, 70.

and legislative. It was such an extravagant claim that it accomplished what all previous debate over property-related amendments had not succeeded in doing – establish the legitimacy of the unconstitutional constitutional amendment.

The Supreme Court decisively repudiated the 38th and 39th Amendments. "The common man's sense of justice sustains democracies,"[27] wrote one of the Prime Minister's expected judicial supporters; the outrage provoked by these travesties must, he felt, be given due regard in determining the attributes of basic structure. In particular, these provisions were a blatant negation of the right of equality and were in sharp contravention of the most basic postulate of the Constitution. Hence, following *Kesavananda*, they could not stand.

This outcome was reinforced in 1980 with the Court's decision in *Minerva Mills v. Union of India*[28], in which parts of yet another amendment, the 42nd, were invalidated in a ringing affirmation of the basic structure doctrine. The amendment represented Mrs. Gandhi's last strike at the Court, including the provocative declaration that "No amendment…shall be called into question in any court on any ground"[29]. This led one of the judges to invoke "the theme song of *Kesavananda*": "Amend as you may even the solemn document which the founding fathers have committed to your care, for you know best the needs of your generation. But, the Constitution is a precious heritage; therefore you cannot destroy its identity."[30]

Of course, there are many ways to destroy the Constitution's identity. In federal systems of governance the attempt to concentrate power in a national executive comes not only at the expense of co-ordinate legislative prerogatives, but also as a challenge to duly elected local authority. While Indian federalism was by conscious design less deferential to state autonomy than in the United States, it was by all accounts a basic structural attribute of the constitutional order. Indira Gandhi stands alone among Indian leaders in her frontal assault on constitutional protections of liberty, yet she shares with all who have occupied her office the experience of having invoked emergency powers to dismiss governments at the state level.

Article 356, the provision that authorizes these dismissals, has been called "the cornerstone of [the] Indian Constitution," in that it,

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27. *Indira Gandhi v. Raj Narain*, AIR SC 2299 (1975), 2469.
28. 1981 SCR (1) 206.
29. Text of the 42nd Amendment.
30. *Minerva Mills v.Union of India*, 239.

according to this view, "constitutes the crux of the entire Centre-State relationship"[31]. Discussion in the Constituent Assembly indicates that the Guaranty Clause in the American Constitution served as its model, although it is also clear that the Indian framers were more inclined than their American counterparts to view the provision as a powerful statement of the intended dominance of the central government in constitutional politics. While the delegates to the Assembly could mostly agree that the article would in theory at least have a salutary effect on preserving the unity and integrity of the republic, strong doubts were expressed that it would be implemented for inappropriate reasons. Said one delegate of the holders of national power: "They will intervene not merely to protect provinces against external aggression and internal disturbances but also to ensure good Government within their limits. In other words, the Central Government will have the power to intervene to protect the electors against themselves."[32]

This worry, as it has turned out, seems in retrospect to be enfolded in a euphemism. If protecting electors against themselves means ensuring that the ruling party at the Centre maintains its lines of control at all levels of government, then the experience of more than a half-century clearly vindicates the concerns raised at the Assembly. Since 1950, there have been approximately 100 occasions when President's Rule has been invoked under Article 356; a substantial majority of them were inspired by partisan calculations, namely to advance the interests of the party in power in New Delhi.[33] In only twelve years during the period 1950-1999 were there no dismissals of State governments. Such a record suggests that the original justification for

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31. K. Suryaprasad, *Article 356 of the Constitution of India: Promise and Performance* (New Delhi: Konishka Publishers, 2001), 4, 246. The key part of the Article reads as follows: "(1) If the President, on receipt of a report from the Governor of a State or otherwise, is satisfied that a situation has arisen in which the government of the State cannot be carried out in accordance with the provisions of this Constitution, the President may by Proclamation – (a) assume to himself all or any of the powers vested in or exercisable by the Governor or any body or authority in the State other than the Legislature of the State; (b) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament; (c) make such incidental and consequential provisions as appear to the President to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this Constitution relating to any body or authority in the State."
32. Statement by Pandit Hirday Nath Kunzru, Constituent Assembly Debates 1949, 155.
33. For a detailed breakdown of these instances of President's Rule, see K. Suryaprasad, *Article 356 of the Constitution of India: Promise and Performance.* The official analysis of how President's Rule has been experienced is to be found in the *Sarkaria Report*, which recommended that Article 356 should be used only in extreme cases. Its findings and recommendations were relied upon extensively in the various opinions in *Bommai.*

including Article 356 powers, that they would be used only in the circumstances of a serious interruption in the workings of the democratic process, was in fact wildly unrealistic. It also suggests that the corruption of emergency power was not an extraordinary occurrence, a conclusion whose ominous implications extend well beyond the parameters of any given government dismissal. Thus the politicization of the process through which distant officials can effectively overturn a local electoral verdict of the people represents a serious threat to the maintenance of democratic institutions. Against the backdrop of this history, Indira Gandhi's emergency regime seems less aberrational than it might initially appear; what she did dwarfs in its destructive consequences any of the 100 impositions of President's Rule, but many of the latter instances reflect a similar blurring of the line between law and its negation.

ii. The Abuse of Power: Community

The importance of the Supreme Court's response to Mrs. Gandhi's perilous amendments is not diminished by the fact that any comprehensive explanation for its actions would have to feature the self-interest of the Court itself. It does, however, raise a question as to whether its willingness to challenge emergency driven executive actions would persist in the absence of any threat to the Court's own institutional interests. This question is underscored by the Court's passive history with respect to Article 356 exercises of power; thus the subject of President's Rule had, like its Guaranty Clause analogue in the United States, come to be identified with the judicially conferred status of non-justiciability.

When in 1994 the Court again confronted the issue of the Centre's dismissal of state governments, it found itself in the middle of a controversy generated by the defining issue of Indian politics – the place of religion within the polity. Precisely because it had survived its own crisis of institutional maintenance, the Court was now in a position to engage directly with questions of *constitutional* maintenance that implicated the country's most troubling uncertainties about its national identity. But the form that the issue took presented the Court with a dilemma. If it chose to enter the political thicket of communal disputation, thereby influencing the manner in which the identity question would be resolved, it could, by upholding an extreme type of executive action, jeopardize its future role in shaping a solution for this deeply vexed issue.

It was the orgy of Hindu-Muslim violence following the devastation in Ayodhya that triggered *Bommai*. The preponderance of the violence occurred in Maharashtra, but it was not from here that the ensuing legal turmoil flowed. Rather, it centered in three states — Rajasthan, Madhya Pradesh, and Himachal Pradesh — only the first two of which had experienced any bloodletting in the aftermath of the temple assault.[34] These three jurisdictions had all formed BJP governments based on legislative majorities obtained in the elections of February 1990. Their dismissal by the Central Government of a different party was portrayed as a blatantly political act very much in the spirit of the prevailing Article 356 model. The failure to dismiss governments in states in which similar incidents of violence had occurred, but where, unlike in these three places, there existed a correspondence between ruling parties at the state and federal level, made the charge eminently plausible. Why do nothing about the Congress-led administration in Maharashtra while deposing the government in peaceful Himachal Pradesh?[35] Could there be any doubt that emergency provisions were being selectively administered to gain political advantage?

The Supreme Court had several clear options. 1) Accept the allegation that the dismissals had been politically motivated, that they therefore constituted an improper use of Article 356 power. 2) Adhere to established precedent by ruling that imposition of President's Rule was a "political question" unfit for judicial intervention. 3) Uphold the dismissals as an appropriate exercise of emergency power in the face of a demonstrated failure to conduct the business of government "in accordance with the principles of the Constitution." The first option would of course have historic significance, as it would amount to affirmation of the principle that even the strongest exertions of executive power are reviewable by the judiciary. But its historic significance might well extend beyond its implications for executive/judicial relations, since it would likely also be read as an acceptance of government-sponsored activities in support of communal violence as

34. On the day that the attack occurred, December 6, the government of Uttar Pradesh was dismissed by the Central Government. The BJP government in that state had been heavily implicated in the events leading up to the demolition. The dismissal of the other three governments took place on December 15 in response to reports from the three Governors that the affairs of State could not be carried on in accordance with the provisions of the Constitution.

35. There may not have been any violence in Himachal Pradesh, but the Governor's Report from that state was similar to those of the other two states. In all three places the governments had made it very clear that their sympathies, and accompanying acts of support for the activities and ideas upon which the demolition rested, lay with those who had perpetrated the violence at Ayodhya.

consistent with the constitutional obligation to govern in accordance with the document's principles. As such it would, if inadvertently, advance the interests of Hindu nationalism. The second option would cast the Court as a complicit partner in a secular cabal determined to resist the rise of this communal threat to established national elites and their incessant preaching in the self-serving idiom of inclusive pluralism. But it would leave the Court as a passive observer of unchecked emergency power, thus preventing it from building on the stature it had earned from its earlier defiance of executive over-reaching. Finally, the third option would enable the Court to develop its basic structure jurisprudence by articulating a principled grounding for the rejection of abuses of power that, as in this case, stem from the predominant ethno/religious will in the community. But unless accompanied by an equally principled argument for limiting abuses of power that stemmed from nothing more than the commitment to maintain power for its own sake, the Court's rationale for upholding emergency interventions into the democratic process would risk being seen as little more than hollow rhetoric, as a convenient rationalization by one institution of the Centre in support of another.

In the end the Court pursued the third option, although the choices made by judges are rarely dictated solely by their commitment to principle.[36] These choices are available for many reasons, including the ambiguities present in constitutional language (enhanced in India by the weakness of originalism as a judicial philosophy) and the bundling of cases into omnibus litigation, both of which were important in *Bommai.* As for the text, the heading for Article 356 reads: *Provisions in case of failure of constitutional machinery in States.* The Article then goes on to establish the grounds for invoking President's Rule when the executive is satisfied that "the government of a State cannot be carried on in accordance with the provisions of this Constitution"[37]. Advocates

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36. This should be understood in two senses, both of which are relevant to *Bommai.* On the one hand, judges often make compromises in order to maximize their desired outcome. If commitment to principle is not the sole determinant of behavior, it still makes sense to think of it as a driving force behind the results in many cases. On the other hand, judges may also conceal their real objectives – which may be partisan in some cases – behind the rhetoric of principle. I believe the first view applies to the *Bommai* decision; although it is not surprising that detractors of the judgment will be more impressed with the second. For example, one constitutional scholar with ties to the BJP wrote: "[T]hey [the Left] had been in the forefront of demands for greater State autonomy and curtailing the powers of the Union Government. In a surprising somersault, their hatred and fear of a particular party made them forget their great concern for federalism and demand and justify the dismissal of three State governments on one go by an arbitrary order of the Union Government." See Subhash Kashyap, *Delinking Religion and Politics* (Dehi: Vimot Publishers, 1993).
37. The preceding Article 355 is headed: *Duty of the Union to protect States against external aggression and internal disturbance.* It then stipulates: "It shall be the duty of the Union

for the dismissed governments emphasized that Union intervention into the heart of State politics on the basis of a failure of constitutional machinery must mean that the only legitimate justification for invoking Article 356 powers is in the circumstance of a serious interruption in the workings of the democratic *process*. Accordingly, a duly elected government can be deposed if, and only if, it is manifestly unable to rule in fulfillment of its electoral mandate. But supporters of the Union's actions stressed that constitutional machinery was not a term connotative of process alone, but incorporated the fundamental principles of *this* Constitution's provisions. Their reasoning was that the inability to fulfill a mandate is ultimately less problematic than the fulfillment of one that was anathema to the animating principles of the regime.

These interpretive issues would, of course, have been largely academic if the Supreme Court had chosen to avoid reaching the merits of the lawsuit. That instead it chose engagement was accommodated by the fact that the Ayodhya-related dismissal cases arrived at the Court conjoined with three entirely unconnected cases. Bommai himself had been the Chief Minister of Karnataka, whose dismissal was challenged on the grounds that improper procedures had been used to pursue blatantly partisan objectives.[38] Such were also the allegations directed against the political actors involved in the governmental removals in the three BJP-run States; in rejecting them while finding merit in the others, the Court managed a judicial trifecta: establishing criteria for intervention in emergency cases, policing the uncertain boundaries between state and central authority, and elaborating the substance of principles fundamental to Indian constitutional identity.

IV. S.R. Bommai v. Union of India

i. *Judicial Review*

In *Marbury v. Madison*, John Marshall effectively declared judicial review to be a part of the basic structure of the American Constitution. The absence of any express authorizing provision was no reason to deny

to protect every State against external aggression and internal disturbance and to ensure that the government of every State is carried on in accordance with the provisions of this Constitution."

38. The other cases came from the States of Meghalaya and Nagaland, where similar allegations of impropriety were developed. In Bommai's case, the Janata Party had formed a government in 1988 under the leadership of S.R. Bommai. Shortly thereafter several key legislators had withdrawn their support for the government, which led the Governor (a federal official) to send a report to the President saying that it was inappropriate under the Constitution to have a State administered by an executive consisting of a Council of Ministers that did not command the majority in the House. The Karnataka High Court ruled on the basis of precedent that the materials submitted to the President could not be faulted, despite the many objections that had been raised about them. The Supreme Court reversed this judgment.

the Supreme Court this power if the very essence of a written constitution required its recognition. In India one might think it would be easier to affirm judicial review to be a basic feature of the Constitution, since there is no similar textual deficiency in that nation's governing charter. Yet in a document of some 300 pages the specification of a particular function can hardly be considered evidence for its fundamentality. A determination to that effect comes about only when circumstances reveal the essential value of the function in question to the constitutional project as a whole. This is what happened in *Kesavananda,* and so the Court had no difficulty declaring in *Bommai*, "[j]udicial review is a basic feature of the Constitution."[39]

But the Court was quick to distinguish judicial review from justiciability, the former a constituent power that cannot be abrogated or abdicated, and the latter a self-imposed exercise of judicial restraint, which until *Bommai* had been invoked with regularity to uphold President's Rule under Article 356. The American model for this provision, its constitutional guarantee in Article IV, Section 4 that states maintain a republican form of government, also provided the occasion for formulating the doctrine that the Court should be careful to avoid "political questions"[40]. To abolitionists in the United States, the denial of *self*-government that was at the core of slavery amounted to a failure to secure republicanism in those states supporting that institution; but the same logic that would likely have kept the Supreme Court from reaching the merits of any federal intervention under Article IV in the end restrained the hand of the politicians from creating the predicate for such a case.[41] It was similar reasoning that was rejected by the Indian

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39. *S.R. Bommai v. Union of India*, 207. Echoes of *Marbury* can be heard here. For example: "It is a cardinal principle of our Constitution that no one, howsoever lofty, can claim to be the sole judge of the power given under the Constitution." Ibid. There were several opinions delivered in the case. None is identified as "the opinion of the Court." These quotes are from the opinion of Justice K. Ramaswamy. Unless there are grounds for thinking otherwise, I will refer to "the Court" when quoting from the judgment rather than to the individual justice who authored the quote. For example, all of the justices agreed that the exercise of power under Article 356 was subject to judicial review. Yet they differed as to the extent of that power. When speaking of the latter I will connect arguments with particular justices.
40. *Luther v. Borden*, 48 US 1 (1849). At the Constituent Assembly debates on the Constitution, Dr. Ambedkar said, "[I] would like to draw…attention to the article in the American Constitution, where the duty of the United States is definitely expressed to maintain the republican form of the Constitution. When we say that the Constitution must be maintained in accordance with the provisions contained in the Constitution we practically mean what the American Constitution means, namely that the form of the constitution prescribed in the Constitution must be maintained." Constituent Assembly Debates 1949, 175.
41. See William Wiecek, *The Guarantee Clause of the U. S. Constitution* (Ithaca: Cornell University Press, 1972). John C. Calhoun's view would in all likelihood have carried the day. "[T]he President would be obliged to support any extant legitimate regime." Ibid., 135.

Supreme Court in *Bommai*, which did not accept the counter-logic of the slaveholders, exemplified in Calhoun's intonation:

> "Give to the Federal Government the right to establish its own abstract standard of what constitutes a republican form of government, and to bring the Governments of the States…to the test of this standard, in order to determine whether they be of a republican form or not, and it would be made the absolute master of the States."[42]

Calhoun's argument resonates in the sentiments of *Bommai*'s detractors, who thought it "a clear fraud on the Constitution to use [Article 356] for dismissing stable governments with large popular mandates."[43] In similar fashion to the Indian claims made a century and a half later, guarantees of republicanism that were contingent upon the enforcement of norms of right conduct from the political center were held to be in essence a contradiction in terms. But unlike in the United States, this argument did not prevail. As an Indian scholar of President's Rule has noted, there is no instance where "the American Government has suspended or interfered in a State Government on the ground that the latter had failed to perform its constitutional obligation."[44]

The difference in the two nations' approaches goes back to *Kesavananda*. Thus the Indian Court's linking of "basic structure" limitations on the amending process with Article 356 responses to failures of constitutional machinery in the states has effectively cast the Centre as a proactive player in the enforcement and explication of the constitutional essentials of the Indian republic. In contrast, the American Court, which has studiously avoided all temptations to declare an amendment unconstitutional, has over the years embraced a distinctly positivist emphasis much more congenial to procedure than to substance. The same deference that must be extended to the constitutional amendments that emerge from the procedures of Article V is to be provided to the governments that are elected by popular voting in the states. These alternative judicial perspectives reflect fundamental differences in conception of the role of the Court as guardian of the official public philosophy. To maintain the requisite neutrality associated with the liberal state, American judges are as eager to avoid defining republicanism as their Indian counterparts are to engage that subject under the banner of basic structure.

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42. Quoted in Ibid., 219.
43. Subhash Kashyap, *Delinking Religion and Politics*, 37.
44. Harbir Singh Kathuria, *President's Rule in India: 1967-1989* (New Delhi: Uppal Publishing House, 1990), 6.

Elaborating standards of right conduct (which in the Indian case involved a showing of how secularism was a critical component of basic structure) meant, then, resisting the judicial temptation to exercise the passive virtues. To be sure, a decision to uphold the governmental dismissals as a political matter not to be questioned by the Court could have been accompanied by dictum detailing all the arguments for why the central government's actions in the Ayodhya-related instances were reasonable and proper. But the import of such an accounting would surely be diminished by its standing as dictum. This perhaps explains the Court's pointing out:

> "It will be an inexcusable error to examine the provisions of Article 356 from a purely legalistic angle and interpret their meaning only through jurisdictional technicalities. The Constitution is essentially a political document and provisions such as Article 356 have a potentiality to unsettle and subvert the entire constitutional scheme....Democracy and federalism are the essential features of our Constitution and are part of its basic structure. Any interpretation that we may place on Article 356 must therefore help to preserve and not subvert their fabric."[45]

The Court's emphasis on the Constitution's status as a political document establishes a principled rationale for intervening in the political thicket of emergency power. Thus, "[t]he betrayal of the democratic aspirations of the people is a negation of the democratic principle which runs through our Constitution"[46]. Consequently, any interference with self-governance should "both be rare and demonstrably compelling"[47]. Mindful of the historic abuses of the Article's implementation, the Court explained that self-governance expressed itself in India as a pluralist ideal, in which a multiparty system functioning within a regime of federalism was instrumental to the attainment of democratic ends. The party in power will always be tempted to solidify its control over the country by eliminating opposition at the State level. Removing the Government in a State of a different party than that of the rulers in Delhi "is not rare and in fact the experience of the working of Article 356(1) since the inception of the Constitution shows that the State Governments have been sacked and the Legislative Assemblies dissolved on irrelevant, objectionable

45. *S.R. Bommai v. Union of India*, 112.
46. Ibid., 117.
47. Ibid., 116.

and unsound grounds"[48]. And so:

> "[T]he federal principle, social pluralism and pluralist democracy which form the basic structure of our Constitution demand that the judicial review of the Proclamation issued under Article 356(1) is not only an imperative necessity but is a stringent duty and the exercise of power under the said provision is confined strictly for the purpose and to the circumstances mentioned therein and for none else"[49].

The Court's reliance on high-minded considerations to open the door to a supervisory judicial role in dismissal cases was unaccompanied by unanimity regarding the standards applicable to its review function. Justices differed, for example, over how intrusive the Court should be in scrutinizing the materials submitted to satisfy the President that a situation had arisen requiring and justifying his intervention. Should judicial review be concerned with the merits of the decision or be limited to the process by which the decision had been reached? Are there judicially discoverable and manageable standards for assessing the subjective satisfaction of the President? The bottom line, however, is that the President's power under Article 356 is a conditioned, not an absolute power, with the burden of proof resting on the Union Government to prove that "relevant" material existed to substantiate any undoing of the people's electoral decision at the State level.[50] In Karnataka, for example, "[a] duly constituted Ministry was dismissed on the basis of material which was neither tested nor allowed to be tested and was no more than the *ipse dixit* of the Governor."[51] Or in Meghalaya, the "prima facie…material before the President was not only irrational but motivated by factual and legal mala fides. The Proclamation was, therefore invalid."[52]

The discovery of these mala fides provided the Court with the bona fides to uphold the dismissals in Rajasthan, Madyha Pradesh, and Himachal Pradesh. The Governors' reports from the first two States

48. Ibid., 117.
49. Ibid., 118.
50. As a comprehensive study of President's Rule notes, "The scope of misuse of this power was substantially reduced after the Supreme Court verdict in the *Bommai* case….Now it becomes quite clear that though the Centre has sweeping powers, it has to act with restraint and caution." K. Suryaprasad, *Article 356 of the Constitution of India: Promise and Performance*, 127. Or, as the constitutional scholar and ex-Attorney General, Soli J. Sorabjee, declared, "[t] he decision in *Bommai* marks the high water mark of judicial review. It is a very salutary development and will go a long way in minimizing Centre's frequent onslaught on the States…." Quoted in Ibid., 226.
51. *S.R. Bommai v. Union of India*, 127.
52. Ibid., 131.

emphasized the connection between official behavior and the limited possibilities for stemming the tide of disorder, and in the third the same sort of evidence was adduced without tying it to any demonstrable inability to preserve public order.[53] Among the "relevant" materials relied upon to support the findings of a failure to carry on the affairs of government "in accordance with the provisions of this Constitution" was the election manifesto of the BJP written in connection with the 1993 General Elections. Its relevance had less to do with its specific purpose – the actions at Ayodhya occurred in December *1992* – than with their insights into the mindset of a party both unrepentant about the recent tragic events and eager to capitalize politically from them. It attributed the violence and destruction to "the obstructive tactics of the Narasimha Rao Government, inordinate judicial delays and pseudo-secularist taunts."[54] Surely, then, it was relevant, but to what: the proper enforcement of the political Constitution as emphasized in various opinions, or the same partisan impulse that was repudiated by the Court in the accompanying cases?

The Court, however, also considered earlier party manifestos that had been used to facilitate the rise to power of the targeted Governments. Prominent in these documents was blatant hostility directed at the minority Muslim community, such that "it was difficult [in the Ayodhya aftermath] for the minorities in the four States to have any faith in the neutrality of the four Governments"[55]. To reestablish a sense of security for those under attack it was necessary, the Court concluded, that the BJP governments be removed from power. "[I]t is clear," wrote Justice J. Reddy, "…that if any party or organization seeks to fight the elections on the basis of a plank which has the proximate effect of eroding the secular philosophy of the Constitution it would certainly be guilty of following an unconstitutional course of action"[56].

Also clear is the Court's (or at least some of its members) commitment to the Constitution as a "social document." If the political constitution set limits on the President's exercise of power under Article 356, the social constitution provides criteria for guiding its proper application. The secular philosophy of the Constitution is part

53. This evidence included support by the State Governments (including the Chief Ministers and their cabinets) for the *kar sevaks* who destroyed the mosque at Ayodhya, and membership in radical Hindu organizations such as the Rashtriya Swayamsevak Sangh (RSS) by the leaders of the governments.
54. *S.R. Bommai v. Union of India,* 141.
55. Ibid., 142.
56. Ibid., 236.

of its basic structure; hence by linking the failure of constitutional machinery in the States to actions that would encourage the erosion of this critical constitutive attribute, the Court in effect cast the Central Government (of which the Court is of course a key part) as a critical agent for advancing the constitutional essentials of the polity.[57]

As I argue in the next section, this linkage's implications for judicial review and the shaping of public policy in India are potentially far-reaching. Several of the justices explicitly accepted the argument that elected officials had an obligation in word and deed to follow the provisions of the Constitution.

> "The political party or the political executive securing the governance of the State by securing [a] majority in the legislature through the battle of [the] ballot throughout its tenure by its actions and programmes, it is required to abide by the Constitution and the laws in letter and spirit"[58].

In context, sentiments of this sort, echoed as well in the opinions of other justices, amount to more than the boilerplate rhetoric about legal obligation that they might appear on first glance to convey.

First, the reference to programmatic compliance with constitutional prescription suggests that the aspirational content of the Constitution was intended – or at least has been so interpreted – to establish enforceable standards expressive of a public philosophy whose content is not subject to the vagaries of electoral politics.[59] To deny that the dismissal of the Government in Himachal Pradesh had anything to do with partisan politics is unpersuasive; but to argue that the judicial validation of that action is, as some commentators with ties to the Hindu right alleged, confirmation of the Court's complicity with that partisan agenda, is similarly unpersuasive. Pointing out, for

57. The emphasis on essentials is critical. As pointed out by Justice Reddy, "[E]ach and every infraction of [a] constitutional provision, irrespective of its significance, extent, and effect, cannot be treated as constituting failure of constitutional machinery." Ibid., 228.
58. Ibid., 172.
59. Upendra Baxi has described the Court's ruling in regard to non-secular parties and their programs as the "peak" of "daring." Upendra Baxi, "The Avatars of Indian Judicial *Activism*: Explorations in the Geographies of [In]justice," in S.K. Verma and Kusum, eds., *Fifty Years of the Supreme Court of India: Its Grasp and Reach* (Delhi: Oxford University Press, 2000), 185. Elsewhere (*The Wheel of Law*, 144) I have contrasted the Court's treatment of the election manifesto with Justice Oliver Wendell Holmes' famous assignment in *Abrams v. United States* of the Manifesto of the American Socialist Party to a protected status beyond the reach of governmental regulation. This difference, like the varied approaches to constitutional amendments discussed earlier, bespeaks a philosophical disagreement over whether a liberal society can tolerate the endorsement of an official or public philosophy.

example, that violence occurred in places where dismissals did not occur misses the crux of the Court's constitutional argument, which is that a "failure of constitutional machinery" might have more to do with efforts to install a program in conflict with "the provisions of the Constitution" than with the inability to maintain public order.[60]

Second, the injunction that both letter and *spirit* of the Constitution require governmental compliance should be understood against the backdrop of the Court's basic structure jurisprudence. As pointed out earlier, the Directive Principles of State Policy are technically unenforceable by the courts, but the insistence that legislatures abide by the spirit of the Constitution arguably marks a judicial turning point in the ascendance of these principles into provisions of more than hortatory significance. India's judicial practice is an example of what Mark Tushnet refers to as "weak-form" review.[61] "Declaratory rights [i.e., directive principles]," he contends, "are marginally different from non-justiciable rights, in ways that are contingent upon the place courts have in a nation's political culture"[62]. As discussed in the next section, among the reasons for *Bommai*'s importantance is that the jurisprudence upon which it rests has enabled the Court, for better or worse, to re-position its place in India's political culture, thereby perhaps securing a more than marginal difference in the political enforcement of rights.

ii. Basic Structure Enhancement

Bommai is best known for its extended discourse on the meaning of secularism as an essential strand in the constitutional amalgam of basic structure. As S.P. Sathe rightly pointed out, it represented "a warning to the Hindu right and organizations that entertained the idea of a majoritarian Hindu state that any move in that direction towards constitutional amendment would be considered a violation of the basic structure of the Constitution"[63]. It was of course the successes of the Hindu right in electoral politics at the State level that led to the Court cases in *Bommai*, which in turn insured that a sub-plot in the eventual decision would feature the topic of federalism. But depending

60. The Court's argument is, however, quite controversial. According to K. Suryaprasad, "[t]o justify invoking of Article 356 of the Constitution public disorder must be of such an aggravated form as to result in the failure of [the] entire law and order machinery of the State." K. Suryaprasad, *Article 356 of the Constitution of India: Promise and Performance*, 66.
61. Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton: Princeton University Press, 2008), 237.
62. Ibid., 240.
63. Ibid., 98.

on which of the two converging narratives – emergency power or secularism – one focuses on, the subordinate federalism theme can be characterized in quite different ways.

For example, according to Pratap Bhanu Mehta, "[t]he Court's 1994 ruling in the *Bommai* case made it clearer than before that there must be 'substantial constitutional' reasons for dismissing a State government, and has led the central government to be warier about imposing presidential rule on the States"[64]. In this accounting the effective end to the free rein granted by the Court to national authorities to impose their will in the most extreme fashion on the states represents something of a triumph for defenders of local governance. As framed by the Court,

> "The power vested…in the President…under Article 356 has all the latent capacity to emasculate the two basic features of the Constitution [democracy and federalism] and hence it is necessary to scrutinize the material on the basis of which the advice is given and the President forms his satisfaction more closely and circumspectly …. Decentralisation of power is not only [a] valuable administrative device to ensure closer scrutiny, accountability, and efficiency, but is also an essential part of democracy."[65]

Concurrent with the theme of State's rights is another premise that threads consistently through the various opinions in *Bommai.* Of the Constitution, "[o]ne thing is clear – it was not a case of independent States coming together to form a Federation as in the case of USA."[66] The point of this comparison is to emphasize that Indian federalism has a "bias towards [the] Centre," manifest in many ways, including the power given to the Parliament to form new States out of existing States, and, significantly, the power and responsibility "to ensure that the Government of every State is carried on in accordance with the provisions of this Constitution"[67]. Thus, even while limits are imposed on the Central Government's use of its emergency powers to prevent it from the singular pursuit of partisan advantage, grounds are

64. Pratap Bhanu Mehta, "The Rise of Judicial Sovereignty," 18 *Journal of Democracy* 70 (2007), *available at* http://www.journalofdemocracy.org/articles/gratis/Mehta-18-2.pdf (last visited April 1, 2008).
65. *S.R. Bommai v. Union of India* 112, 116.
66. Ibid., 215. The Court points out, however, that "even in the United States the Centre has become far more powerful notwithstanding the obvious bias in that Constitution in favour of the States." Ibid., at 217.
67. Ibid., 216.

established for the legitimate implementation of these powers when deemed necessary for the attainment of objectives essential to constitutional identity. In *Kesavananda*, the Attorney General of India had argued:

> "[T]he State is under an obligation to take steps for promoting the welfare of the people by bringing about a social order in which social, economic and political justice shall inform all the institutions of the national life"[68].

In its decision in that case the Court did not directly affirm such an obligation, but in establishing the "basic structure doctrine" it created the constitutional underpinnings for doing so in the future. *Bommai* rests on the jurisprudence of *Kesavananda*, but allows for an extraordinary expansion of the authority of "the institutions of the national life" – perhaps unanticipated in 1973 but consistent with the argument advanced earlier by the Attorney General.

S.P. Sathe captures the distinction very well:

> "When a constitutional amendment is challenged [as in *Kesavananda*], the question for the Court's determination is whether it destroys the basic structure. When the Presidential action under Article 356 is examined, the Court considers whether such action was necessary for saving the basic structure"[69].

The distinction is exemplified in what the Court concludes after reviewing the disturbing account from Ayodhya:

> "The destruction of [the] mosque was a concrete proof of the creed which the party in question [the BJP] wanted to pursue. In such circumstances, the Ministries formed by the said party could not be trusted to follow the objective of secularism which was part of the basic structure of the Constitution and also the soul of the Constitution"[70].

As the narrative in the *Bommai* cohort of cases turns to secularism, federalism's bias towards the Centre emerges as the critical variable in maintaining and furthering the aspirational commitments of the Constitution. "The law was laid down that if a State government acted in disregard of the basic structure of the Constitution, it could be

68. Quoted in Upendra Baxi, *Courage Craft and Contention: The Indian Supreme Court in the Eighties*, 91.
69. S.P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits*, 97.
70. *S.R. Bommai v. Union of India*, 143.

dismissed by the President under Article 356."[71]

But what does it mean to act in disregard of the basic structure? Does it require that the State be implicated in some positive way in actions that threaten a basic feature of the Constitution? The official reports to the President from the Governors of the three suspect States included evidence pointing to specific activities undertaken by officials of these governments that challenged, in fairly blatant and obvious ways, the Constitution's formal commitment to secularism. The Court's response to these provocations was noteworthy, in that "for the first time the Supreme Court used secularism as a reference for judging the validity of State action"[72]. Yet as significant as this breakthrough was, its long-term impact would remain indeterminate absent a clarification of the meaning of state action. Were the meaning to incorporate governmental inaction, that is, the failure of a State to commit itself to a program for achieving the aspirational content of secularism as a basic feature, the impact of the decision could potentially be quite extraordinary.

It is therefore important to take note of the Court's chosen emphasis in discussing religion and law. "*Secularism is…more than a passive attitude of religious tolerance. It is a positive concept of equal treatment of all religions*"[73]. Several Justices (Ramaswamy, Reddy, Sawant) were clear in tying this non-passive sensibility to the deepest of constitutional commitments – societal transformation. According to Ramaswamy,

> "The Constitution has chosen secularism as its vehicle to establish an egalitarian social order….Secularism, therefore, is part of the fundamental law and basic structure of the Indian political system to secure to all its people socio-economic needs essential for man's excellence and of his moral well-being, fulfillment of material prosperity and political justice"[74].

71. S.P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits*, 176. In correspondence with the author, Upendra Baxi appropriately emphasizes the discretionary aspect of the Court's ruling. "*Bommai* specifies criteria whereby elected governments may not come to or retain power, if they remain profoundly violative of the value of secularism. Their dismissal remains constitutionally sanctioned. But *Bommai* stops short of casting a constitutional obligation for the exercise of the power to impose a Presidential Rule. It says that the Supreme Court may concur with or veto some forms of the exercise of this power, but it does *not* say that the President has any constitutional duty to exercise such power in the face of public truths manifesting 'communal' governance (in the distinctive Indian meaning of this term). Nor does it say that outside this framework of governmental power, the Court has any constitutional duty to direct the President to thus act."
72. Ibid., 177.
73. *S.R. Bommai v. Union of India*, 233.
74. Ibid., 170.

The point's relevance to the state action issue is more transparent in Reddy's opinion, where the justice reminds us that Article 356 demands State compliance with the *provisions of the Constitution,* and that this, following *Kesavananda,* "take[s] in all the provisions including the preamble to the Constitution"[75]. That language speaks of the resolve of the Indian people to secure the "social, economic and political justice" appropriate to the Constitution's establishment of a "secular Democratic republic". Then, quoting from an address given by one of his predecessors on the Court, Reddy says of the Constitution that "

> [I]ts material provisions are inspired by the concept of secularism. When it promised all the citizens of India that the aim of the Constitution is to establish socio-economic justice, it placed before the country as a whole, the ideal of a welfare state"[76].

It is rather easy to see how this conceptual linkage of secularism and egalitarianism creates constitutional obligations with important interpretive consequences. In addition to the Constitution's preamble, Justice Reddy adds that the provisions of the document include the chapters on Fundamental Rights and Directive Principles of State Policy.[77] Recall that in the Constitution these Principles were designated "unenforceable by any court," yet "fundamental in the governance of the country." The vagueness of that language was only heightened by the concluding words of Article 37, which stipulated "it shall be the duty of the State to apply these principles in making laws." Presumably that meant the sanctions behind the provisions in this section were political, an inference supported by Dr. Ambedkar's observation at the Constituent Assembly: "[I]f any Government ignores them, they will certainly have to answer for them before the *electorate* at the election time."[78]

But originalism is not nearly as potent an adjudicative norm as it is in the United States, and so the question is whether an additional inference is now justifiable, namely that a Government of a State (as opposed to the Centre since we are concerned here about Article 356) will also have to answer for ignoring the Directive Principles in a court of law. To be sure, the answer to this question depends in part on the results of a debate that had been going on for many years and

75. Ibid., 232. The "preamble is a key to understanding the relevant provisions of the Constitution." Ibid., at 236.
76. Ibid., 234.
77. Ibid., 220.
78. Quoted in Durga Das Basu, *Introduction to the Constitution of India*– 18thed. (New Delhi: Prentice-Hall of India, 1998), 142.

that often centered on the role that the framers of the Constitution had in mind for the Directive Principles of State Policy. In its most familiar form it concerned the proper relationship between the Principles enumerated in Part IV and the Fundamental Rights detailed in Part III. In case of a conflict between a right and a principle, which should be given priority?[79] A strict reading of the constitutional language decides in favor of a right that is enforceable in a court of law over a principle that is not. A less literal account insists on an equality between the two (hence in principle no possibility of conflict), with a harmonizing of right and principle as the objective of constitutional interpretation. A third attaches decisive importance to the "duty" assigned to the state in embodying the Directive Principles in law, and thus holds these provisions to be superior to any specific right with which they may come into conflict.

At the time *Bommai* was decided, it was the second of these positions that represented the predominant view on the Court.[80] Given

79. The question invites one to reflect on the well-known argument associated with the legal philosopher, Ronald Dworkin. For Dworkin, "taking rights seriously" means respecting the connection between principles and rights. This allows one to prioritize rights over policies, since the latter lack the moral weight that is associated with principles as opposed to utilitarian calculations. But in Indian jurisprudence, rights – even the important ones included in Part IV of the Constitution — do not necessarily carry the same principled significance, so the sort of tradeoff suggested by this query is one that would be odd when viewed from a Dworkinian perspective. This in turn provokes one to consider whether Dworkin's thesis has a more culturally bounded significance than he acknowledges. See Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977).

80. For a concise summary of these alternatives, see Sudesh Sharma, *Directive Principles and Fundamental Rights: Relationship and Policy Perspectives.* The first view was dominant in the early post-independence years. In a 1951 case, the Court said, "[t]he directive principles of state policy have to conform to and run as subsidiary to the Chapter on Fundamental Rights." *State of Madras v. Champakam Dorairjan*, AIR 1951 S.C. 226, at 228. In *Golaknath v. State of Punjab*, the Court presented the second view, calling for an "integrated scheme [that] was elastic enough to respond to the changing needs of the society." *Golaknath v. State of Punjab,* at 1656. "The constitution-makers thought that it could be done and we also think that the directive principles can reasonably be enforced within the self-regulatory machinery provided by Part III." Ibid., at 1670. This was, as Sharma notes, a significant shift, and meant that "the fundamental rights were to be construed in such a way as to enable the state to carry out the socio-economic obligations contained in the directive principles." Sudesh Sharma, *Directive Principles and Fundamental Rights: Relationship and Policy Perspectives*, 71. The third view was embodied in the 42nd Amendment, which gave precedence to the Directive Principles over the Fundamental Rights. The Court struck it down, saying, "[t]o destroy the guarantee given by Part III in order purportedly to achieve the goals of Part IV is plainly to subvert the Constitution" by disturbing the harmony that "is an essential feature of the basic structure of the Constitution." *Minerva Mills v. Union of India*, 254. The dissenting opinion of Justice Bhagwati presented the third view: "[t]he Directive Principles enjoy a very high place in the constitutional scheme and it is only in the framework of the socio-economic structure envisioned in the Directive Principles that the Fundamental Rights are intended to operate…." Ibid., 325.

the association of the third and most radical position with the discredited ambitions of Indira Gandhi, the possibility of its ever being embraced by the Court would have to be considered remote. But the doctrine of harmonious interpretation (position 2) may have already provided a sufficiently plausible basis for the further inference of dual liability. Thus the Directive Principles, having acquired a constitutional status of more than hortatory significance, could easily be invoked to establish legal as well as political accountability. "Any State government," according to Justice Reddy, "which pursues unsecular policies or an unsecular course of action contrary to the constitutional mandate renders itself amenable to action under Article 356"[81]. In conjunction with the developing understanding of positive secularism as a component of the egalitarian mandate incorporated in the Directive Principles, the long-term meaning of *Bommai* 's constitutional moment will be written in the decisions of public officials – both judges and politicians - who will or will not succumb to its temptations.

V. Conclusion: American Reprise

"The question here is the consistency of state action with the Federal Constitution"[82]. More accurately, the question in *Baker v. Carr* was the consistency of state inaction with the Federal Constitution, for it was the failure of Tennessee to reapportion its legislative districts on the basis of population that had caused voters in that state to allege a violation of their constitutional rights. This failure could not, according to Justice Brennan, be considered a "political question," as it involved the judiciary's relationship to the states rather than to a coordinate branch of the federal government.[83] Consistent with precedent, only the latter circumstance should have rightly triggered the Court's invocation of a doctrine designed to prevent the justices from reaching the merits of a case.

The consistency of state action with the Federal Constitution was also central to the Indian case, *S.R. Bommai v. Union of India*. But unlike in *Baker*, the intervention of the federal judiciary was attributable to more than a judgment about the appropriateness of entering the political thicket in controversies involving sub-national institutions. Article 356, like the Guaranty Clause in the American Constitution,

81. *S.R. Bommai v. Union of India*, 298.
82. *Baker v. Carr*, 226. The reference is to a 1901 state statute that called for reapportionment every ten years (as did the state's constitution). The constitutional claim in the case was that, according to Justice Brennan, "the 1901 statute constitutes arbitrary and capricious action, offensive to the Fourteenth Amendment…." Ibid., 207.
83. Ibid., 210.

applies to the Supreme Court's lateral co-institutions, but this proved not to be a bar against the Indian Court's direct engagement with the substantive issues raised in the dismissal cases. Indeed, the role of these institutions within the basic structure of the Constitution arguably provides an important incentive for a more intrusive judicial presence in the affairs of State.

Lawmaking institutions in the United States are not constitutionally *directed* to pursue particular social and political ends. They might have been so structured had the logic of the original draft of the Declaration of Independence prevailed, in which government was instituted to "secure... ends." But, as Morton White has demonstrated, the replacement of *ends* with *rights* entailed only the obligation to guard rights already enjoyed by the people rather than to attain ends not yet in their possession.[84] Without a specific constitutional mandate to direct the policy-making process, the reluctance of the judiciary to encroach upon the prerogatives of the political branches is therefore understandable.

Prudence may advise the exercise of a similar self-restraint by Indian judges, but an inclination to enter where their American counterparts fear to tread makes sense in light of the transformational aspirations and goals that are embedded in Indian constitutional identity. *Bommai* became the occasion for the Court to use the ameliorative objectives of secularism to adapt the doctrine of basic structure to the desiderata of ordinary politics. Or, as Upendra Baxi has argued, it has led to the "routinization of the charismatic basic structure doctrine," extending its reach well beyond the stated purpose of *Kesavananda*.[85] It has emerged, Baxi maintains, as the "*new common law of Indian constitutionalism,*" by which he means that it exists as both a canon of constitutional interpretation and a technique of statutory construction.[86] How salutary a development this turns out to be remains to be seen, but that it has the potential to shape in profound ways the future course of Indian constitutional development seems no longer in doubt.

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84. Morton White, *The Philosophy of the American Revolution* (New York: Oxford University Press, 1978), 249.
85. Unpublished abstract for a memorial for S.P. Sathe, March 2007. , This assessment is comparable to one made in connection with *Baker v. Carr*: "*Reynolds [v. Sims]*...was an earth-shattering decision, going well beyond what anyone could have anticipated from the Court's holding in *Baker v. Carr.*" Stephen Ansolabehere and Samuel Issacharoff, "Baker v. Carr In Context: 1946-1964," available at http://web.mit.edu/polisci/research/representation/baker-edit.pdf (last visited April 1, 2008).
86. Ibid.