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UNCONSTITUTIONAL CONSTITUTIONAL
AMENDMENTS: THE EXTRAORDINARY POWER
OF NEPAL'S SUPREME COURT*

Richard Stith**

INTRODUCTION

In the course of teaching jurisprudence each year, I try to show my students the problems posed for liberty and for legitimacy by the combination of legal ambiguity and legal finality. In particular, I ask them whether, especially in this post-Legal Realist age of non-interpretivism, they should not be afraid of a United States Supreme Court endowed with the power to write its own Constitution and call it the law of the land.

Every year, at least one loyal American student responds by pulling the democratic rabbit out of his or her hat, by invoking the possibility of constitutional amendments to restrain a renegade Court.¹ I respond

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* Copyright © 1995 by Richard Stith. All rights reserved. A slightly different version was published as The Extraordinary Counter-Majoritarian Power of the New Supreme Court of Nepal, 4 ASIA L. REV. 38 (New Delhi 1995). Notes are styled according to the author's preference.

** J.D., Ph.D., Professor of Law, Valparaiso University, Valparaiso, Indiana 46383, U.S.A. The author twice visited Nepal to gather information for this article, once in 1991 and again in 1992. The kind assistance of Delhi University and of the Indian Law Institute is gratefully acknowledged. Portions of his analysis of Indian constitutional theory were presented to gatherings of members of the law faculties of Delhi University and Poona University in those same years.

¹ The respected Indian scholar P.K. Tripathi has advanced a similar argument: [I]f the Supreme Court of the United States lays down a constitutional norm which is definitely not acceptable to the people of the United States, by and large, that norm can be set aside by the democratic process; with the result that in the United States also, as in England, the last word on the basic law and social policy of the nation rests with the elected representatives of the people and not with the courts.
both with practical arguments, such as that the amendment process in the United States is too cumbersome to be used effectively to limit the Court and with theoretical ones, such as that the Court can interpret the amendments as it sees fit. I fear, however, that many of my students escape the wonderful perplexity in which I have sought to trap them.

If my students’ faith in law extended to the law of Nepal, they could not so easily get away. The Nepalese Constitution of 1990 proclaims the invalidity of attempted constitutional amendments that violate “the spirit of the Preamble.” Since that Preamble, like most, is exceedingly vague and multi-faceted, a Supreme Court granted the power to enforce its “spirit” can legally put down any rebellion against judicial authority. There is thus no lawful way to bring a faithless Court back under the law.

Nepal’s is, of course, not the only constitution to limit the amending power. The United States Constitution contains at least a minor limit, Article V’s protection of each state’s equal representation in the Senate. And, for example, France does not permit amendments affecting the “republican form of government,” while Germany entrenches basic principles of federalism and human dignity. The Indian Supreme Court


3. It has been suggested that Article V’s protection of equal state suffrage might be amendable after all. Douglas Linder, What in the Constitution cannot be Amended?, 23 ARIZ. L. REV. 717, 722-727 (1981). On the other hand, it has also been argued that there exist other substantive limits on the power of amendment to the United States Constitution. Jeff Rosen, Was the Flag Burning Amendment Unconstitutional?, 100 YALE L.J. 1073, 1084-86 (1991).

4. LA CONSTITUTION [Const.] art. 89 (France) (1958).

5. Article 79(3) of the Basic Law reads as follows: “Amendments of this Basic Law affecting the division of the Federation into Laender, the participation on principle of the Laender in legislation, or the basic principles laid down in Articles 1 and 20, shall be inadmissible.” GRUNDEGESETZ [Constitution] [GG] art. 79(3) (F.R.G.).
enjoys extraordinary freedom. It has successfully claimed for itself the right to strike down amendments that violate the "basic structure" or "essential features" of the Constitution—without any real textual mandate or standard at all.\(^6\) Nepal is noteworthy, however, both for the rich ambiguity of its textual standard, and for the explicit mandate to go beyond the letter of that text to find and enforce its "spirit." Moreover, unlike France and Germany, but like India, Nepal has established a Supreme Court without Constitutional rival. That Court appears\(^7\) to be the sole and final interpreter both of statutes and of their constitutionality in all significant contexts.\(^8\) Furthermore, it has unusually great power to control its own docket and even its own future composition.\(^9\)
Why have Nepal's dominant political forces\textsuperscript{10} agreed to this stark consolidation of judicial power?\textsuperscript{11} In particular, why has the Left, which has at times sought to abolish the Nepalese monarchy newly legitimated in the Constitution, let the Supreme Court have the power to block future constitutional reform? This article explores three factors which must be considered in answering these questions: the contingencies of recent Nepalese political struggles, the influence of Indian constitutional theory, and the apparent lack of consideration of alternatives to judicial review. In a final section, I shall suggest that the text of the Nepalese Constitution may still leave open the path to certain of these alternatives.

I. THE NATURE AND POWER OF THE NEPALESE SUPREME COURT

Members of the Court have great power over the Court's future composition. Associate judges of the Supreme Court are appointed by the King, after having first been chosen by the five-person Judicial Council.\textsuperscript{12} The Chief Justice and the two seniormost judges on the present Supreme Court, however, form a majority of the Judicial Council, giving the core of the Court power over the Court's future composition.\textsuperscript{13} Furthermore, although the Chief Justice is selected by the more politically structured Constitutional Council,\textsuperscript{14} he or she must first have been a

\textsuperscript{10} The words "dominant political forces" are used advisedly, for the Nepalese people as a whole participated neither in any constituent assembly nor in any ratification process. See discussion infra, note 135 and accompanying text. Indeed, the constitution was drafted and promulgated over the objections of numerous ethnic and communal groups. Michael Hutt, Drafting the Nepal Constitution, 1990, 31 ASIAN SUR. 1020, 1028-37 (1991). Article 112(3) of the Nepal Constitution excludes from political life all parties formed "on the basis of religion, community, caste, tribe or region." In this it was following Indian precedent. For India, Section 123(2) of the Representation of Peoples Act, 1951, formally prohibits such appeals to standards of group loyalty.

\textsuperscript{11} The phrase "consolidation of judicial power" is taken from activist law professor Upendra Baxi. Professor Baxi has celebrated the Indian Supreme Court's "consolidation of supreme judicial power" through its "Basic Structure" doctrine in his work COURAGE, CRAFT, AND CONTENTION: THE INDIAN SUPREME COURT IN THE EIGHTIES viii (1985).

\textsuperscript{12} NEPAL CONST. arts. 87(1), 93(1).

\textsuperscript{13} Id. art. 93(1). The other two members of the Judicial Council are the Minister of Justice and "one distinguished jurist to be nominated by His Majesty." Id.; see The Revolt of the Indian Judges, ECONOMIST, Oct. 16, 1993, at 36 (explaining that India appears more recently also to be headed toward Supreme Court control of its own membership).

\textsuperscript{14} See NEPAL CONST. art. 117 (stating that the Constitutional Council is com-
member of the Court for at least five years.\textsuperscript{15} All Supreme Court judges may hold office until age sixty-five.\textsuperscript{16} Tenure as Chief Justice is seven years.\textsuperscript{17}

All other courts “and judicial institutions,”\textsuperscript{18} except the Military Court, are subordinate to the Supreme Court.\textsuperscript{19} “All shall abide” by decisions made in individual cases.\textsuperscript{20} Moreover, any “interpretation given to a law or any legal principle” established by the Supreme Court in the course of litigation is binding on the government and on “all offices and courts.”\textsuperscript{21} Thus the Court has power to make law through precedent.

Article 88(1), the paragraph giving the Supreme Court the power to strike down legislation, deserves to be read in its entirety:

Any Nepali citizen may file a petition in the Supreme Court to have any law or any part thereof declared void on the ground of inconsistency with this Constitution because it imposes an unreasonable restriction on the enjoyment of the fundamental rights conferred by this Constitution or on any other ground, and extraordinary power shall rest with the Supreme Court to declare that law as void either \textit{ab initio} or from the date of its decision if it appears that the law in question is inconsistent with the Constitution.\textsuperscript{22}

Note that the Nepalese Court has here been given more than the duty of judicial review of legislation. The unlimited option of non-retroactivity can be read as an explicit permission to change the fundamental law of the land as of the date of its decision. Even more important may be the complete abrogation of all standing requirements for a petition alleging the unconstitutionality of a law.\textsuperscript{23} Any citizen may so petition, not posed of the following members: Prime Minister, Chief Justice, Speaker of the House of Representatives, Chairman of the National Assembly, Leader of the Opposition in the House of Representatives and (for appointment of the Chief Justice only) the Minister of Justice and “a Judge of the Supreme Court”).

\textsuperscript{15} \textit{Id.} arts. 87(1), 87(2).
\textsuperscript{16} \textit{Id.} art. 87(5).
\textsuperscript{17} \textit{Id.} art. 87(1).
\textsuperscript{18} \textit{See generally} \textsc{Constitutions}, supra note 2, at 20 (providing an earlier translation which used the potentially broader language “and other institutions exercising judicial power”).
\textsuperscript{19} \textsc{Nepal Const.} art. 86(1).
\textsuperscript{20} \textit{Id.} art. 96(1).
\textsuperscript{21} \textit{Id.} art. 96(2).
\textsuperscript{22} \textit{Id.} art. 88(1).
\textsuperscript{23} Bharat Raj Upreti, Reader in Law at Tribhuvan University in Kathmandu,
only someone harmed under the law in question or some designated office holder or holders. Few issues are likely to escape the scrutiny of a Court with such wide open standing requirements.

The Constitution, in Article 88(2), goes on to grant the Court carte blanche remedial powers:

The Supreme Court shall, for the enforcement of the fundamental rights conferred by this Constitution, for the enforcement of any other legal right for which no other remedy has been provided or for which the remedy even though provided appears to be inadequate or ineffective, or for the settlement of any constitutional or legal question involved in any dispute of public interest or concern, have the extraordinary power to issue necessary and appropriate orders to enforce such rights or settle the dispute.24

The above provisions concerning judicial appointments and tenure, stare decisis, judicial review of ordinary legislation, and remedies make Nepal's Supreme Court a formidable institution. The primary focus of this article is, however, on a further constitutional power that has been placed within the reach of this already very strong Court. Article 116 is entitled "Amendment of the Constitution."25 Section (1) thereof declares

A Bill to amend or repeal any Article of this Constitution, without prejudicing the spirit of the Preamble of this Constitution, may be introduced in either House of Parliament:

Provided that this Article shall not be subject to amendment.26

The remainder of Article 116 spells out the procedural requirements for amendment. Two-thirds of the legislature must be present, and two-thirds of those present must approve, in order for amendments to be made to the Constitution.27 The King may delay but not prevent

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24. NEPAL CONST. art. 88(2).
25. Id. art. 116.
26. Id.
27. Id.
amendments. The relative procedural ease with which constitutional amendments may be passed (the attainable majority, and the lack of any requirements for referenda, local ratification, multiple readings and the like) would seem further to enhance the importance of the interpreter of the "spirit of the Preamble." If many amendments are attempted, that interpreter can sift among them to shape the Constitution to its liking.

Who is that interpreter? Although there has been no definitive ruling on this matter, by the Supreme Court or by anyone else, all Nepalese legal professionals with whom I spoke assume without a doubt that it will be that Court. Therefore, I shall assume the same in the following pages, as we attempt to understand this extraordinary consolidation of judicial power. However, it will later be my contention that Article 116(1) need not be read to confer amendment-review power upon the Court. I shall seek to demonstrate my view in the last section of this article.

The Preamble itself is a decent and even stirring aspirational document, entirely suited to its function of introducing a new democratic legal order. But the text provides no real guidance for constitutional

28. Id.
29. Id. The preamble states:

WHEREAS, We are convinced that the source of sovereign authority of the independent and sovereign Nepal is inherent in the people, and, therefore, We have, from time to time, made known our desire to conduct the government of the country in consonance with the popular will;

AND WHEREAS, in keeping with the desire of the Nepalese people expressed through the recent people's movement to bring about constitutional changes, We are further inspired by the objective of securing to the Nepalese people social, political and economic justice long into the future;

AND WHEREAS, it is expedient to promulgate and enforce this Constitution, made with the widest possible participation of the Nepalese people, to guarantee basic human rights to every citizen of Nepal; and also to consolidate Adult Franchise, the Parliamentary System of Government, Constitutional Monarchy and the System of Multi Party Democracy by promoting amongst the people of Nepal the spirit of fraternity and the bond of unity on the basis of liberty and equality; and also to establish an independent and competent system of justice with a view to transforming the concept of the Rule of Law into a living reality;

NOW, THEREFORE, keeping in view the desire of the people that the State authority and sovereign powers shall, after the commencement of this Constitution, be exercised in accordance with the provisions of this Constitution, I, KING BIREN德拉 BIR BIKRAM SHAH DEVA, by virtue of the State authority as exercised by Us, do hereby promulgate and enforce this CONSTITUTION OF THE KINGDOM OF NEPAL on the recommendation and advice, and with the consent of the Council of Ministers.
limitation. Its aims are vague (e.g. "social, political and economic justice," "basic human rights," "fraternity," "equality," "the Rule of Law") and potentially in conflict.30

We may observe that the Preamble incorporates in its heart perhaps the greatest antinomy of modern law, the tension between formal legal justice and substantive social and economic justice. Should the law aim at rule compliance or at results? More concretely, should it strive for equality in form or in substance? This last dilemma has torn apart Indian constitutional theory for the last forty years, as we shall see below. Does equality mean that large landholders must be treated the same as or differently from other property owners? Are affirmative action quotas required or forbidden?

I submit that no one person or institution can answer these questions fairly. The genius of democratic theory has been to divide the task, with the legislature authorized to enact laws aimed at substance and with the courts charged with formal rule enforcement.31 So, for example, in the body of Nepal's Constitution, social transformation goals are called "Directive Principles and Policies"32 and made fundamental for legislation. Yet, unlike the rest of the Constitution, they are not to be enforceable in any court.33 The Preamble, of course, necessarily and properly incorporates basic aspects of these Directive Principles and Policies, so that an amendment-supervising Court ends up required to enforce them after all, along with the formal tasks more common to courts.

Even where the Preamble is most concrete it can provide little guidance to the Court, because its "spirit" is what must be enforced. That spirit could easily be said to contradict the mere letter of the Preamble.34 Can "Multi Party Democracy" be abolished in favor of single-party rule, even though the former is listed as a specific goal in the Preamble? Perhaps so, for a single party could be said to further the objective of "fraternity." Indeed, the only time the word "spirit" is actually used in the Preamble is in the phrase "spirit of fraternity."

30. Id.
31. As a socialist who is also a democrat, I support this division.
32. NEPAL CONST. arts. 24-26.
33. Id. art. 24(1).
34. See Consolidating National Gains: Speeches of Shrimati Indira Gandhi 258 (1976), quoted in D.C. Jain, The Forty-Second Amendment: An Evaluation, in INDIAN CONSTITUTION: TRENDS AND ISSUES 56 (Rajeev Dhavan & Alice Jacob eds., 1978) (stating that former Indian Prime Minister Indira Gandhi, for example, urged, on the occasion of the 25th Anniversary of the (Indian) Constitution, that "[f]orm and letter must sometimes change in order to preserve the spirit").
Why did the framers of the Nepalese Constitution decide to give such counter-majoritarian power and discretion to their new Supreme Court? The short answer, the merely political answer, will be explored first. It is not difficult to see how the present Article 116 emerged as a compromise in a moment of great political pressure. But why did this solution occur to the framers? The answer here takes us deep into Indian constitutional history, on which Nepalese legal culture, and particularly the new democratic regime, is based. There we shall see how such consolidated judicial power came to be regarded as legitimate and preferable. We shall also take note of the relative absence of Indian thought concerning institutional alternatives to judicial review.

II. COURT POWER AS THE CONSEQUENCE OF A "CONSTITUTION OF SUSPICION"

An observer at the meetings in which the final version of the constitutional text was drafted has stated that "ours is a constitution of suspicion."\textsuperscript{35} Mistrust among the three most powerful actors in the constituent process—the King, the Nepal Congress Party, and the United Left Front (ULF)—led each to turn to the Supreme Court as its "saviour."\textsuperscript{36} Because they could not trust each other, they decided to trust the Court.

That suspicion appears to have reasonable grounds. King Mahendra, the father of the current monarch, King Birendra, used his emergency powers to abolish the democratic Constitution of 1959 only a year and a half after it had gone into effect.\textsuperscript{37} The ULF was composed of various Communist factions, and therefore suffered from the anti-democratic behavior of sister parties that had installed one-party rule in other nations. The center-left Congress Party was not credible to either extreme, and must also have borne some onus as a result of the years of self-serving actions of its Indian namesake.

Moreover, one must bear in mind the astonishing rapidity with which the Constitution of 1990 was drafted and promulgated. The Congress Party and the ULF launched the "Movement for the Restoration of Democracy" on February 18, 1990.\textsuperscript{38} After some violence, the King ap-

\textsuperscript{35} Interview with anonymous source (Jan. 25, 1992) (name withheld upon request); see Bharat Raj Uperti, supra note 23 (confirming this view); see also Interview with Ganesh Raj Sharma, the respected monarchist (Jan. 27 1993) (on file with the author) (same).

\textsuperscript{36} See supra note 35.


\textsuperscript{38} Except as otherwise indicated, the source of the data on the drafting process
pointed an interim government led by the Congress Party with ULF participation. In late May, after further struggle, the nine-person Constitutional Recommendation Commission, headed by the Supreme Court's Justice Upadhyaya, began its deliberations. On August 31, 1990, the initial draft was completed.

According to press reports, Congress Party members had wanted three basic features of the new constitution to be non-amendable: constitutional monarchy, multiparty democracy, and the sovereignty of the people. At the last moment, however, the ULF refused to support the first two. Justice Upadhyaya succeeded in bringing about a compromise in which the "basic structure" of the Constitution would be subject to amendment, but only under the heightened requirements of a three-fourths legislative majority and a national referendum. Since it would have been up to the future Supreme Court to identify the contents of the "basic structure," it would seem that the transfer of control over amendments to the Court began at this point, though the popular perception continued to be that it was constitutional monarchy and multiparty democracy which were subject to special protections from amendment.

The Council of Ministers of the interim government then had a chance to make revisions, which it did. Sensing an important victory in the principle of universal amendability, despite the special hurdles to be overcome, most of the Left fought vigorously to retain the compromise just discussed. The King and Congress party members were alarmed, however, by the mere possibility of radical amendments. No one knew what results the first election might bring and how easy a three-fourths majority might be to obtain. This same uncertainty led some of those on the Left, who feared the potentially conservative tendencies of the masses, to discount the value of an open-ended amendment process. In the

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39. Hutt, supra note 10, at 1029. See the brief chronology by Gallant, supra note 2, at 1-11.
40. Id.
41. Id. at 1028-30.
42. Id.
43. Id. at 1032.
44. Id.
45. Id. at 1032. Hutt implies that specific amendatory limitations were still in the draft constitution at this stage, but the English-language copy in my possession has only the words "basic structure."
46. Interview with Tirtha Man Sakya, Joint Secretary, Ministry of Law and Justice (Sept. 2, 1991).
end, with the reluctant acquiescence of the ULF, the Council of Ministers adopted the present “spirit of the Preamble” wording of Article 116 in its final draft. The real victor here was the Nepal Congress Party, for the King later made an unsuccessful attempt to revert to a specific list of entrenched protections, and Left leaders later regretted their compromise (especially after doing quite well in the initial elections). On November 9, 1990, King Birendra promulgated the Constitution without further change in its amenderatory provisions.

Some of the framers had indeed worried that too much power was being entrusted to the new Supreme Court. The Constitutional Recommendation Commission thought, however, that one institution had to have final power to decide legal issues, and Commission members trusted the Court more than they trusted other institutions. There seemed no way to give someone else the ability to limit the Court without making matters worse.

III. INDIA’S ACCEPTANCE OF CONSOLIDATED JUDICIAL POWER

The concept of “basic structure” was the intermediate step between a textually limited Court and the present Court guided only by a “spirit.” That intermediate concept came directly from Indian constitutional law, where it had been closely associated with the Indian Preamble. To understand the availability and attractiveness of the route taken by the Nepalese drafting process, we must, therefore, turn to India. Despite their complexity, we cannot avoid summarizing some of the salient features of post-independence legal developments in that nation, for India’s prior consolidation of judicial power in a single supreme court made itself strongly felt in Nepal.

Like that of Nepal, the Constitution of India contains a set of Fundamental Rights, to be enforced by the Supreme Court against statutes. Virtually all these rights are classic negative defense rights of the individual against the State, rather than entitlements to positive assistance by the State. In other words, they require State inaction rather than State action. India also has a list of “Directive Principles of State

47. Upreti, supra note 23.
48. Sakya, supra note 46.
49. See Interview with anonymous source, supra note 35.
50. See infra note 104 and accompanying text (discussing India’s strong influence on Nepalese law).
51. INDIA CONST. arts. 12-35.
52. Id. arts. 13(2), 32(1).
"Policy" that spell out affirmative actions the State must undertake to achieve social and economic goals. These are, however, declared not enforceable by any court.

The first twenty years of the independent Indian polity saw a seesaw struggle between Court and Parliament as each sought to comply with its constitutional mandate. The legislature would enact laws (e.g. land reform) interfering with the right to property (then guaranteed by Art. 31) or interfering with the right to equal protection and equality before the law, in order to further some social welfare purpose found in the Directive Principles. The Court would often counter by declaring the law void for violating Fundamental Rights. Parliament would then use the amendment procedure found in Art. 368, requiring only a two-thirds Parliamentary majority for amendments relevant to fundamental rights and to most other parts of the Constitution, to validate its legislation after all.

Article 31B, inserted in 1951 by the First Amendment to the Indian Constitution, gives a marvelous sense of the depth and tragedy of this conflict. That article simply creates a list of state and national laws, the Ninth Schedule, that are declared valid regardless of whether they infringe on any Fundamental Rights. The list has been added to from time to time by two-thirds majorities in Parliament, while the state or national legislature originally passing each law is free to repeal it. In other words, in adding to the Ninth Schedule, Parliament does not merely abridge the Fundamental Rights, it does so without even attempting to articulate new and generalizable legal principles. A law on the list is valid. A similar or even identical law not on the list may be declared void.

Parliament may well have felt it was acting quite appropriately. No planner, public or private, no one who cares about results can operate efficiently if he or she must constantly reformulate every contingent and instrumental command as a universal formal rule. And no decent planner would want to modify or give up his or her ideals every time they were abridged in practice.

Yet from a formal, legal point of view, more than specific individual rights were at stake. By its unprincipled use of amendments, Parliament

53. Id. arts. 36-51.
54. Id. art. 37.
55. Id. art. 14.
56. Id. art. 368.
57. Id. amend. I.
was sacrificing the very idea of a constitution, even a changeable one. Still, the Supreme Court upheld Article 31B, and forbore from challenging Parliament's plenary amendment powers until 1967.

In that year the Court finally made a stand. In *Golak Nath*, by a bare majority, the Court stated in dictum, prospectively only, that no amendment which violated the Fundamental Rights would be held constitutional. The Court's basic argument was simple: Article 13(2) states that any "law" taking away or abridging those rights is void. A constitutional amendment is a kind of "law." Therefore, amendments abridging the Fundamental Rights are void.59

Negative political reaction to *Golak Nath* was overwhelming among Indian opinion leaders, particularly those of the Left. Judicial review seemed to be a device for the protection of the rich minority against the poor majority, which in India is quite a majority indeed. Indira Gandhi swept back to victory in 1971, based in part on an anti-Court campaign, and her party passed two key constitutional amendments designed to counter *Golak Nath*. The Twenty-Fourth amended Articles 13 and 368 to make clear the former did not apply to the latter, and that the amending power itself was plenary.60 The Twenty-Fifth amendment inserted Article 31C into the Constitution. It provided that no law effectuating a policy aiming to secure the Directive Principles found in Article 39(a) and (c), dealing with property redistribution, was to be held invalid for infringing on equality (Art. 14), basic freedoms (Art. 19) or the right to property (then found in Art. 31).61 The Twenty-Fifth Amendment also strengthened the non-justiciability of the Directive Principles, by stating that "no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy."62

In the great *Kesavananda* case63 of 1973, the Supreme Court made a strategic retreat, only to advance much further. First, the Court declared the *Golak Nath* doctrine to be mistaken, on the ground that a constitu-

59. *India Const.* art. 13(2).
60. *Id.* amend. XXIV.
61. *Id.* amend. XXV.
62. *Id.*
tional amendment is really not a law in the ordinary sense. Furthermore, it upheld the two amendments mentioned above, except for the last section covering legislative declarations of intent, as well as some new additions to the Ninth Schedule.

At the same time, again by a single vote, the Court announced a new limitation on constitutional amendments. They may not abrogate the "basic structure" or "essential features" of the Constitution. Though there were varying concurring opinions rendered on the point, the net argument of the Court seems to be that the framers of the Indian Constitution could not have intended the word "amendment" in Article 368 to include changes so drastic as to alter the very identity of the Constitution.

The Court was not in agreement on the content of these basic features. Some judges focused upon the Preamble, which states:

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity; and to promote among them all FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;

65. Id. at 1470.
66. Id. at 1461. The expressions "basic structure," "basic elements," "basic framework," "basic features," "fundamental features," "essential features," and other like variations appear to be used interchangeably by the majority in Kesavananda. Id.
67. The arguments in support of this proposition are based in political theory as well as in textual analysis. It is said, for example, that the sovereign people would not have wished to delegate to Parliament the power to destroy the basic elements of the new Constitution. See id. at 1603, 1624-25.
68. Id. at 1534-35, 1603.
69. The words "SOCIALIST SECULAR" were added in 1976 by the Forty-Second Amendment. INDIA CONST. amend. 42.
70. The words "and integrity" were also added in 1976 by the Forty-Second Amendment. Id.
IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

Seven out of the thirteen justices stated in dictum, however, that the right to property did not impose any limit on constitutional amendments.\textsuperscript{71} This majority included those who favored no basic structure limit at all, plus one of those who had voted to impose such a limit but who explicitly excluded the right to property from the unalterable basic structure.\textsuperscript{72}

While the justices stated that all further additions to the Ninth Schedule would be examined for conformity to the basic structure, the only law actually struck down in \textit{Kesavananda} was, as stated above, the “declaration” clause attached to the new Article 31C.\textsuperscript{73} The Court could therefore, inspect Article 31C laws to make sure that they “give effect” to the appropriate policies.\textsuperscript{74}

Though the Indian Court gave up its \textit{Golak Nath} role of absolute defender of the Fundamental Rights, the Court arrogated itself an even more difficult task. The Constitution as a whole, especially the Preamble, contains extensive language supporting affirmative as well as negative rights.\textsuperscript{75} With regard to future amendments, the Court assumed the role of guardian of the essentials of both the Fundamental Rights and the originally non-enforceable objectives found in the Directive Principles of State Policy. In addition, as its approval of Article 31C makes clear, the Court’s role in supervising statutory law would also henceforth be enhanced, for it would be involved in judging various laws’ contingent and instrumental effectiveness in furthering social goals. In such \textit{ad hoc} judging of the usefulness of particular abridgements of fundamental rights, the Court, I submit, cannot but make the same kind of contingent and changing guesses that any legislature must make.\textsuperscript{76} Scholars both

\textsuperscript{72} Id. Justice Khanna cast the important swing vote on this point.
\textsuperscript{73} Id. at 1880.
\textsuperscript{74} Id.
\textsuperscript{75} \textit{India Const. pmbl.}
\textsuperscript{76} There can, of course, be disagreement as to how effective the legislation must be in order to be constitutional. That, it seems to me, is the crux of the debate between Chief Justice Chandrachud and Justice Bhagwati in \textit{Minerva Mills Ltd. v. Union of India}, 1980 S.C. 1787. The former (for the majority) claims, at page 1810, that only a “direct and reasonable nexus” is required between the law in question and the relevant objectives specified in the Directive Principles. The latter argues, at page 1856, that each provision of the law must be “basically and essentially necessary for
critical and supportive of *Kesavananda* have judged the Court thenceforth to be a "'constituent assembly in perpetual session,' corresponding to Parliament in the United Kingdom."\(^{77}\)

In other words, according to the Court, the essence of the Indian Constitution is contingent. What it requires and forbids depends in part upon judgments of effectiveness in achieving the social policy goals delineated by the Directive Principles. This result-oriented changeability alone might not serve to distinguish "basic structure" from many other highly indefinite legal concepts. At the same time, the Indian Supreme Court has, however, held that the framers intended this essence to be unchangeable, so that all amendments which seek to alter it must be struck down. This idea of an unchangeable changing essence, this strange juxtaposition of Platonism and instrumentalism, is surely a near antinomy.

Here is another puzzle. *Kesavananda* was at least as anti-majoritarian as *Golak Nath*. It gave the Court more power and much more discretion, for the undefined "basic structure" might include selections from any part of the Constitution. The search for the essence of the Constitution was described recently by the Attorney General of India as "a blind man in a dark room searching for a black cat which is not there."\(^{78}\)

Yet *Kesavananda* is today widely accepted while its predecessor was not. Why? Beyond the vast details of history, I think at least two reasons can be discerned.

First of all, the Court moved to the political left. It jettisoned the right to property and took upon itself the task of safeguarding the social welfare policies of the State. The new self-image of many of the Court's leading members can perhaps best be felt in the following description by Justice (as he then was) P. N. Bhagwati:

[The] independence of the judiciary . . . is a basic feature of the Constitution . . . . It is necessary for every Judge to remember constantly and continually that our Constitution is not a non-aligned rational charter . . . . The judiciary has therefore a socio-economic destination and a creative function. It has . . . to become an arm of the socio-economic giving effect to the Directive Principle." Both standards, however, must involve contingent estimates of the usefulness of the law in achieving the objective. For further discussion, see *infra* note 85 and accompanying text.

77. Tripathi, *supra* note 1, at 34. Baxi rejoices in the Court's "concurrent constituent power." BAXI, *supra* note 11, at 69.

revolution and perform an active role... It cannot remain content to act merely as an umpire... [T]his approach to the judicial function may be all right for a stable and static society but not for a society pulsating with urges of gender justice, worker justice, minorities justice.... [The judiciary] must become an active participant... through a pro-active goal oriented approach. But this cannot happen unless we have judicial cadres who share the fighting faith of the Constitution.79

Bhagwati insists, quoting Justice Iyer, that a "social philosophy in active unison with the socialistic Articles of the Constitution"80 is indispensable for the appointment of a judge. His colleague Justice Desai adds in the same case that "[a]n activist role... is a sine qua non for the judiciary. If value packing [of the courts] connotes appointment of [such] persons otherwise well qualified... then not only the value packing is not to be frowned upon... but it must be advocated with a crusader’s zeal."81

In 1985, during his tenure as Chief Justice, Bhagwati commented that judges need not "feel shy or apologetic" about their "law creating roles":

The Supreme Court of India has been performing this role in the last 7 or 8 years by wielding judicial power in a manner unprecedented in its history of over 30 years.... The courts of India... started the legal aid movement... fostered the development of social-action groups... developed the strategy of public interest litigation.... In the process [the Court] has rewritten some parts of the constitution... contrary to the intent of the makers of the constitution.82

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80. Id.
81. Id. at 446.
82. See Judicial Activism in India, 17(1) GARGOYLE 6, 7-8. That “intent of the makers” was not ancient. The Constitution had gone into effect only in 1950. Jamie Cassels, writing in 1989, agreed with Chief Justice Bhagwati: “Painfully aware of the limitations of legalism, the judiciary of India has struggled over the last decade to bring law into the service of the poor and oppressed.” Cassels, supra note 23 at 497. According to Cassels, “[t]he new judicial activism may... be understood as part of... a strategic reversal of previous judicial priorities in order to win popular support and achieve a more prominent role in Indian society.” Id. at 510-11. Rajeev Dhavan has commented:

[spurred on by an inchoate alliance of social activists, lawyers, journalists and academics, some judges of the Supreme Court sought to rethink the fundamental concerns of the Constitution... The result of these efforts has been referred to as India’s ‘Public Interest Law Movement.’ Although these initiatives have been connected with varieties of social activism, the movement as a whole
H.M. Seervai, perhaps the leading constitutional theorist of India, has objected that the Directive Principles of State Policy are simply not intended to be enforced by the courts, either directly or indirectly by insisting on "effective" amendments or legislation. Nevertheless, the Court seems committed to the notion that the Directive Principles are as much a part of the basic structure as are the Fundamental Rights, and that structure will be used as a standard in striking down unconstitutional amendments. With regard to statutes, Justice Bhagwati has argued in dissent that, under a later addition to Article 31C, any laws with a "real and substantial connection" to a Directive Principle must be valid, regardless of the effect on Fundamental Rights. In a later case, Bhagwati was able to join the main opinion of a five-judge bench in holding to the trumping power of properly effective state policies, even against rights to equality and basic freedoms, and in declaring prior limiting language to be mere dictum. As has been pointed out by a leading commentator, this position may appear at first glance judicially modest, in that it cuts back on fundamental rights as a standard for review, but it actually widens the scope of review to include the contingent causal nexus between law and results.

The Supreme Court's new and active stance has been welcomed by leading academics and other emergent elites. One important writer-ac-
ativist has expressed his delight at the special access that social action litigators now have to a Court which is certainly not "independent" in the old legalistic sense. Indeed, many support the Court's imposition of "basic structure" precisely because it has no structure. Important Indian scholars have opposed any precise enumeration by the Court of the elements of the basic structure concept. Dr. Virendra Kumar has agreed that the Court must preserve the "total identity" of the Constitution by striking down amendments, but has argued that the Court must not explain specifically what its standard is, for that would make the Constitution "static." Professor C.G. Raghavan also wants the "unique intelligentsia" against *Golak Nath* for upholding the status quo, "there is now an agreement generally among all political parties, intelligentsia, the legal profession as well as the Press [sic] that the power to amend the Constitution must be subject to restrictions." *Id.* at 71, 91; see *supra* note 82.


Baxi’s *Courage, Craft, and Contention: The Indian Supreme Court in the Eighties* ends, significantly, with an appeal to Friedrich Nietzsche and an exaltation of "the judicial will to power." BAXI, *supra* note 11, at 110. The book also begins by quoting Nietzsche’s aphorism that “courage slayeth also fellow suffering.” *Id.* at 15. Baxi deduces that the Indian Supreme Court’s courage will help end the suffering of the masses.

Does it matter that Nietzsche’s kind of courage was meant to end pity rather than to end suffering? Baxi appears to have been misled by the words “fellow suffering,” which are an odd translation of the German *Mitleiden*. A better rendering would be “pity” or “compassion.” One of the major themes of the work Baxi quotes is the need of the will to power to free itself from pity for others. Compare *Thus Spake Zarathustra*, in *The Philosophy of Nietzsche* 172, 368 (Thomas Common trans., 1954) with, *Also Sprach Zarathustra* 120, 252 (Wilhelm Goldmann Verlag-Goldmanns Gelbe Taschenbücher, undated).

My point is not that Professor Baxi praised Nietzsche unthinkingly but that he praised the “will to power” unthinkingly. Or perhaps not so unthinkingly. Baxi recently felt sufficiently powerful to reprimand the Court for evincing the wrong kind of pity. When Chief Justice Ranganath Misra dared to criticize the activist lawyers involved in the Bhopal tragedy for "misleading victims," Baxi reportedly responded by denouncing such "judicial absolutism" and suggesting that the bar demand that the Chief Justice’s remarks be expunged from the judgment. *Judicial Accountability Panel Plea, Times of India*, Oct. 7, 1991, at 4.

90. Quoted with approval by Sathe. SATHE, *supra* note 87, at 92-93.
identity” of the Constitution to be preserved, but not by having its nature spelled out, for “an abstract and doctrinaire approach to the construction of the basic structure limitation has to be avoided since judicial functionalism and pragmatism are the desideratum . . . ”91 Professor S.P. Sathe, similarly, supports the high court judges’ careful use of the doctrine of constitutional essence, but points out that “[n]ow that they are the determiners of such a highly political and policy question such as what is basic structure, they have to admit that their function cannot be merely of the interpretation of the Constitution.”92

To recapitulate: The basic structure doctrine was built upon the premise that there is an unchangeable nature of the Constitution. At the same time, that structure was denatured by the incorporation of contingent instrumental policies. The resulting antinomy, however, became widely accepted by modernizing opinion leaders in part because both of its contradictory elements were useful. What better political weapon could there be than a nominal essence, a temporary eternal truth?

The Supreme Court’s move to the political left cannot, however, be the full explanation for Kesavananda’s acceptance. Why should the Basic Structure weapon be needed in the first place to further the Constitution’s social welfare policies? Since those policies are directed, by and large, toward securing the interests of the poor, who form the vast majority of Indians, why keep the basic structure limit at all? Why not just let Indian democracy, via a plenary amendment power, have its way?

The answer most often found in Indian legal literature93 is that Indira Gandhi’s seizure and misuse of quasi-dictatorial emergency powers during the 1970s showed that in India even the majority needs the Court to defend it. But, as David Gwynn Morgan has well observed, the Indian electorate was sufficiently alert to eject Mrs. Gandhi from office twenty months after she had assumed those powers.94 The problem for the leading Indian elites may be that the electorate rejected Mrs. Gandhi for the wrong reasons—not because she had imposed press censorship and even imprisonment on opposition leaders, but because she had sought to impose family planning and sterilization upon the masses.95

91. Id. at 93.
92. Id.
93. Id. at 73-74, 91.
94. Morgan, supra note 63, at 335.
95. Interview with Solil Paul, Professor of Law at Delhi University (Dec. 1991).
In other words, as the Court had moved left, the electorate had moved right. This is a second reason for the acceptance by Indian academic elites of the *Kesavananda* doctrine. Indira Gandhi was feared not so much because she opposed the interests of the poor as because, for many months, she had their support. Justice Sibha Rao had long ago proclaimed it the “duty of the Court to protect people’s rights against themselves.”96 This task became much more important in the minds of many once it became clear that Indira Gandhi was not a true Leftist97 and that there had been a “socialism holiday” in her legislation since 1969.98 Professor Sathe has been most forthright in this regard, lamenting (without apparent irony) that in India the “ignorant masses can be managed, elections can be won, and majorities can rule without any regard for public opinion.”99 And what is this non-majoritarian “public opinion” which must be consulted? Professor Sathe elsewhere explains that “the Press, the Judiciary, and the Intelligentsia have to act as restraining forces on democracy [capitalization in original].”100 “[C]harisma, religion, and other populistic devices can be used for winning elections,”101 and in such a situation, “the Judiciary’s role is bound to be much more crucial.”102

Despite the presence of a few distinguished more conservative constitutional scholars, such as H.M. Seervai and D.D. Basu, my own inquiries convince me that the Indian academic response to the basic structure limitation resembles overwhelmingly that of Professor Sathe and the others quoted above.

Such widespread Indian acceptance of the basic structure doctrine, both as a useful socialist tool and as a necessary protection from the masses, strongly influenced the many Nepalese students studying at Indian law schools. Until quite recently, virtually all of Nepal’s lawyers were trained in India.103 Even today, Nepal is only just beginning to implement its own LL.M. program, so that postgraduate studies must still be done in India.104 It is easy to see how the Nepalese Left, in

96. SATHE, supra note 87, at 96.
97. Id. at 24.
98. Id. at 49.
99. Id. at 74.
100. Id.
101. Id. at 96.
102. Id.
103. Upreti, supra note 23. The chronology cited above indicates that from “the time of Buddha . . . , Indian juridical and political conceptions have had an important influence [on Nepal].” CONSTITUTIONS, supra note 2, at 1.
104. Interview with Bharat Bahadeer Karki, then dean of the Central Law Depart-
particular, would find the basic structure doctrine congenial, despite its potential for use by conservatives. It would be even more acceptable if a formula such as “spirit of the Preamble” were adopted—for then the new Supreme Court would have as its clear mandate the furtherance of Directive Principles and Policies as well as Fundamental Rights. When “Consultations in Constitutionalism” were organized in 1990 by two leading activist Nepalese lawyers’ groups, Forum for Protection of Human Rights (FOPHUR) and the Legal Research and Development Forum (FREEDEAL), it is significant that the only Indian jurist attending was the former Chief Justice of the Indian Supreme Court P.N. Bhagwati, whose strong support for a socialist construction of basic structure has been cited above.

IV. THE ABSENCE OF ALTERNATIVES TO CONSOLIDATED JUDICIAL POWER IN INDO-NEPALESE LEGAL CULTURE

Acceptance of the idea that there is a basic structure of the Constitution that may not be changed, and that this basic structure includes both individual rights and state welfare goals, need not in itself have led to the centralized supreme judicial power now found in India and Nepal. For the question still remains open: What institution or institutions shall decide whether the basic structure has been violated?

There is no text in the Indian Constitution that explicitly gives the Supreme Court this power. Indeed, there is no text which explicitly empowers the Court to do more than to enforce the Fundamental Rights, even against ordinary legislation. The Constitution need not have been read to grant the Court the right to use infringement of the rest of the Constitution as a reason to declare a statute ultra vires. In other words, the Court need not have been thought to be the sole final inter-

105. Article 13 voids only laws “inconsistent with or in derogation of the fundamental rights.” INDIA CONST. art. 13. Article 32 confers upon the Supreme Court only those powers necessary “for the enforcement of the rights conferred by this Part,” i.e., by Part III, “Fundamental Rights.” Id. art. 32. Article 141 makes the Supreme Court’s determinations of law binding on all other courts, but does not extend the scope of judicial review. Id. art. 141. Article 144 requires all authorities to act in aid of the Supreme Court. Id. art. 144. By contrast, the High Court of a State may issue writs to enforce Part III rights or “for any other purpose,” according to Article 226. Id. art. 226. Article 245 makes all legislation subject to the provisions of the Constitution, but does not specify an enforcement mechanism. Id. art. 245.
preter of the entire Constitution. Yet Indian lawyers and law professors almost universally assume that the Supreme Court must in the end decide all constitutional questions, or, on a more abstract level, that all important questions of law must in the end be resolved by a single supreme legal tribunal. Even Indira Gandhi at the height of her power does not seem significantly to have questioned the idea that the Court is the final arbiter of the meaning of the Constitution, for she always responded to its decisions with constitutional amendments rather than with simple denials of the Court’s authority.

V. TWO ALTERNATIVES TO JUDICIAL REVIEW

Nevertheless, there exist two clear alternatives to consolidated judicial power, over statutes or over constitutional amendments. The first alternative can be called “checks and balances,” and the second “separation of powers.” The first approach has received relatively more attention in United States thought and has been much more important in United States history. Since Marbury v. Madison, there has been little objection to the Supreme Court’s refusal to enforce legislation it deems unconstitutional. There has been, and continues to be, however, support for the parallel argument that other branches of government should refuse to cooperate with actions of the Court that those branches in turn deem unconstitutional. Thomas Jefferson believed that “nothing in the Constitution has given [the justices] a right to decide for the Executive, more than for the Executive to decide for them . . . . That instrument meant that its coordinate branches should be checks on each other.” Abraham Lincoln refused to acknowledge the Dred Scott decision’s pro-slavery interpretation of the United States Constitution to be binding upon the rest of the federal government.

106. DURGA DAS BASU, COMPARATIVE CONSTITUTIONAL LAW 277-80 (1984) might have been expected to explore other possibilities, but it contains only brief and dismissive discussions. Id. at 273-83, 465-81. The anti-judicial review opinions which he cites are all non-Indian. Id. Although Basu says that there are Indian “non-believers” in judicial review, he does not mention any names. Id. at 468. Of course, the Indian Directive Principles were intended to be enforced entirely by the legislature, so in this sense the omission of judicial review can be said to have Indian roots.

107. These are my own terms. See CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW 90-97 (1986). Wolfe refers to “coordinate review” and “legislative supremacy” as two alternatives to judicial review, with meanings close to mine. Id.

108. 1 Cranch 137 (1803).


110. Id. at 1011. One highly interesting mechanism for checking judicial review is
This "checks and balances" approach has, in my opinion, the virtue and vice of preferring law over order. Each branch of government seeks to adhere to the law itself, in this case the Constitution, rather than to any fallible interpreter of it. Judicial, or any other, tyranny thus becomes less likely in the measure that anarchy, or at least inefficiency, becomes more likely.

Fidelity to law may, however, be infectious. It is hard to see why only governmental authorities should be faithful to the Constitution rather than to its interpreters. As Sanford Levinson has recently argued, the logic of Jefferson's and Lincoln's resistance to dictatorship ought to apply to every citizen.111 Suppose all three branches of government conspire to subvert the Constitution. Should not every citizen resist? Perhaps surprisingly, there is a major world constitution that seems clearly to answer "yes," the Basic Law of the Federal Republic of Germany. Article 20(4) of that Constitution proclaims: "All Germans shall have the right to resist any person or persons seeking to abolish the constitutional order, should no other remedy be possible."112

Perhaps Article 13 of the Indian Constitution could be used in a similar way by the defenders of Fundamental Rights, in order to resist the Indian Supreme Court. That Article, after all, states that the "State shall not make any law which takes away or abridges the [Fundamental Rights]."113 And any law so made is void.114 But is not the Supreme Court a part of the "State"?115 Is not a Supreme Court decision "law"?116 Therefore, any Court decision abridging those individual rights is arguably void and need not be obeyed by any citizen.

Such radical priority of law over order is, however, frightening to many. For this reasoning, perhaps, the "separation of powers" alternative to judicial review has been much more common among the constitutions of the world, though, again, it has apparently remained little discussed.

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111. Citing the work of Ronald Dworkin, Levinson concludes (in a section entitled Toward Individual Authority to Interpret the Constitution) that "citizen review" is a vital necessity of any polity that purports to call itself constitutional." CONSTITUTIONAL FAITH 42, 46, 50 (1988).
112. GRUNDGESETZ [Constitution] [GG] art. 21(4) (F.R.G.).
113. INDIA CONST. art. 13.
114. Id.
115. Id. art. 12.
116. Id. art. 13(3)(a).
in India.\textsuperscript{117} The simplest version of this approach would involve no
review at all, neither of statutes nor of constitutional amendments. The
legislature would be left to abide by the Constitution according to its
own lights in its field of action (i.e., legislation and amendments) as are
the courts in their special field (i.e., fair trials and appellate processes).
Great Britain and Israel are often cited as examples of this approach—and
then dismissed with the remark that their constitutions are unwritten.
But there is no inherent contradiction between a written constitution and
the absence of judicial review. For example, pre-1958 French regimes
had written constitutions with at most very limited judicial review.\textsuperscript{118}

The great defect of this system of “no review” has to be the fact that
each branch of government is obligated to control itself. The traditional
natural law maxim “[n]o one shall be a judge in one’s own case” would
seem to indicate the shortsightedness of such permissiveness, its possible
invitation to lawlessness—even though high courts are regularly entrust-
ed with such self-limitation.\textsuperscript{119}

\textsuperscript{117} BASU, supra note 106, at 273-80. Even though Basu is an opponent of ju-
dicial lawmaking, \textit{id.} at 252-72, and of the basic structure doctrine, \textit{id.} at 353-66, he
does not appear to consider seriously the possibility that the “basic structure” doctrine
could be affirmed and yet left to the legislature for enforcement. Professor Sathe, who
later came to support judicial review of amendments, did once take just this position,
arguing that:

the only limitation upon the power of Parliament to amend the Constitution is
that such amendment cannot seek to destroy the enduring values such as liber-
ty, justice and equality enshrined in the Constitution. This limitation is however
only a rule of political morality. Its sanction lies not in the judicial process but
in the vigilance of public opinion and the working of the political process.
S.P. SATHE, FUNDAMENTAL RIGHTS AND AMENDMENT OF THE INDIAN CONSTITUTION
51 (1968). An American commentator has likewise recently urged the unconstitu-
tionality of amendments “incompatible” with the rest of the United States Constitution,
but has indicated a willingness, for democratic reasons, to leave the determination of
incompatibility up to political institutions. R. George Wright, \textit{Could a Constitutional

\textsuperscript{118} See generally Louis Henkin, \textit{Revolutions and Constitutions}, 49 LA. L. REV.
1023, 1044-56 (1989). See \textit{infra} note 121. The early argument against judicial review
by Pennsylvania’s Chief Justice John Gibson was also made in the context of a writ-
ten constitution. Eakin v. Raub, 12 Serg. & Rawle 330 (Pa. 1825). Herbert Wechsler,
in his classic defense of judicial review, conceded that some constitutional questions
are political, “meaning thereby that they are not to be resolved judicially, although
they involve constitutional interpretation . . . .” \textit{Toward Neutral Principles of Consti-

\textsuperscript{119} Without apparent irony, Justice Bhagwati (as he then was) in the same breath
both invoked this principle and claimed judicial exemption from it: “\textit{no authority . . .}
can claim that it shall be \textit{sole judge of the extent of its power} under the Constitution.
There are, however, many ways that power to review statutes could be "separated" without being abolished entirely. In Italy, for example, there are separate tribunals to decide the meaning of statutes and of the Constitution. In France today, a quasi-political Constitutional Council is appointed to review new parliamentary legislation, while legislation once promulgated may no longer be scrutinized for constitutionality; executive actions are monitored by the separate and independent part of the executive branch called the Council of State. There are surely many other conceivable ways to divide up the powers that the United States and India have consolidated in a single tribunal. Chile’s Supreme Court, for example, can refuse to apply laws it considers unconstitutional in particular cases, but it has no *stare decisis* or equivalent power to invalidate a law *per se.* The Chilean Constitutional Tribunal, on the other hand, can declare a statute entirely void, but only, as in France, before that law goes into effect. No jurisdictional conflict between the tribunals need arise, but there can easily develop in Chilean legal culture two different binding conceptions of what the same constitutional document requires.


120. The respective tribunals are the Supreme Court of Cassation and the Constitutional Court. See John H. Merryman & Vincenzo Vigorti, *When Courts Collide: Constitution and Cassation in Italy,* 15 AM. J. COMP. L. 665 (1967) (critiquing the resulting pluralism).

121. Only “organic laws” are reviewed, prior to promulgation, as a matter of course; other bills must be brought to the Council prior to promulgation by specially designated plaintiffs, usually minority legislators, at least 60 being required. LA CONSTITUTIO [CONST.] arts. 56-62 (France). Private citizens have no standing to protest the constitutionality of a law, before or after promulgation. F. L. Morton’s excellent article, *Judicial Review in France: A Comparative Analysis,* 36 AM. J. COMP. L. 89 (1988), concludes: “It is time that both American and European constitutional scholars conceive of constitutional control as the ‘genus’ and the American model as just one ‘species’ (the judicial variation) of constitutional control.” *Id.* at 110.

122. CONSTITUCION POLITICA DE LA REPUBLICA DE CHILE [Constitution] art. 80 (Chile) (1980).

123. *Id.* art. 82(2), (12). The Constitutional Tribunal was a creative invention of the rightist Pinochet regime, intended as a bulwark for the status quo against radical legislation. Article 57 even provides that a legislator who introduces a bill later declared "manifestly" unconstitutional by the Tribunal shall lose his or her seat for two years. *Id.* art. 57. The same penalty is imposed upon a parliamentary leader who permitted the bill to be voted upon. *Id.*
Such "separation of powers" approaches have the advantage of generating legal pluralism. They decentralize supreme judicial power, thus preventing the values of one entrenched body from dominating the whole legal order, without the dangers either of disorder or of tyranny. A constitution may still mean whatever its official interpreters say it means, but, because of the jurisdictional separation of these interpreters into various groups, it need not mean only one thing. Individual and community liberty—perhaps even more important, legal thought itself—can thus be preserved from domination by a single hierarchical superior.

In terms of the "law vs. order" dilemma mentioned above, each constitutional solution may be categorized as follows: If there is one final authoritative interpreter of constitutional materials, as in India today, then order ultimately has priority over law for everyone except that interpreter. If each citizen may resist the highest court's flagrantly unconstitutional edicts, as in Germany, then law finally trumps order. If multiple institutional interpreters exist, then most of us just follow orders, as in the first approach, but the multiplicity of leaders is a safeguard against one-dimensionality in the vision of each. In this last scenario, in order for any one institution to achieve dominance, it must persuade, not just command, its fellow law interpreters.

VI. REINTERPRETING NEPAL'S CONSTITUTION TO ELIMINATE SUPREME COURT AUTHORITY OVER CONSTITUTIONAL AMENDMENTS

Let us look again at the constitutional text of Nepalese Article 116(1), which bars amendments intended to interfere with the spirit of the Preamble:

A Bill to amend or repeal any Article of this Constitution, without prejudicing the spirit of the Preamble of this Constitution, may be introduced in either House of Parliament:

Provided that this Article shall not be subject to amendment.\(^{124}\)

The fundamental question is whether or not the Supreme Court has been given the power, perhaps even the sole power, to enforce this provision.

\(^{124}\) Nepal Const. art. 116(1).
Note first of all that Article 116 itself is entirely silent on this question. By contrast, the article declaring ordinary laws void for inconsistency with the Constitution, Article 88, indicates in the very same breath that the Supreme Court may make this determination. Indeed, the supremacy of the Constitution over ordinary legislation comes into the Nepalese Constitution only under the heading "Jurisdiction of the Supreme Court" (Article 88), and no mention is made in that section of any jurisdiction to declare bills of amendment likewise void.

Of course, one could argue that the word "law" in Article 88 includes also the bills of amendment referred to in Article 116. But this Golak Nath-style argument has long been discredited in Indian jurisprudence. It seems settled there that laws and amendments are different in kind. Indian jurisprudence has likewise held that the measure of constitutionality is and should be different for statutes and for amendments, whereas incorporating bills of amendment into Article 88's word "law" would seem to subject both to the same standard. Of course, Nepal need not adhere to Indian jurisprudence in these matters, but parallel arguments that do not rely on Indian authority can easily be made. For example, Article 88 and Article 116 specify separate standards of review, i.e., "unreasonable restriction . . . of the fundamental rights . . . or on any other ground" and frustration of "the spirit of the Preamble" respectively. To review bills of amendments as Article 88 "laws" would be to impose two different and possibly contradictory standards on them.

Moreover, in Nepal, unlike in India, an amendment is to be stopped while still in the form of a "bill," which is draft legislation not yet voted upon. Only bills "introduced pursuant to clause (1)," i.e., bills that do not violate the preambular spirit, may be voted upon by the Nepalese legislature. (Note also that the first draft of the new Constitution placed its "basic structure-cum-referendum" limitations in a later clause of the text, making those requirements appear posterior to legislative approval. By contrast, the placing of the present limitation in clause (1) makes it seem a preliminary requirement.) The Supreme Court would require a most unusual substantive and procedural jurisdiction in order

125. Id.
126. Id. art. 88.
127. Id.
128. Id.
129. Id. art. 116.
130. See supra note 45 and accompanying text.
to be able to abort amendments still in this embryonic "bill" stage of development. The Constitutional text of Article 116 thus cannot easily be read to grant the Court the power to review bills of amendment.

A far more plausible reading would be to leave that power within the Nepalese legislature itself. It is, after all, legislators alone who are ordinarily concerned with "bills." Nepal would seem to have enacted a constitutional limit on amendments which is thus only politically rather than judicially enforceable. Such a limit at the amendment level is quite analogous to the constitutional guidelines at the statute level which are self-enforced by legislatures in nations such as Britain and Israel, and even in Nepal with regard to the judicially non-enforceable "Directive Principles and Policies" of Articles 24-26.131

There is, moreover, a close precedent for such an interpretation in world constitutional history. Norway has long had a quite similar clause in its constitution, providing that no amendment is valid if it alters "the spirit of the Constitution."132 The prevailing interpretation of that Norwegian clause is that it is only a directive for the legislature, and is not to be used by any court as an excuse for refusing to recognize the legal validity of an amendment.133 One should also note that this Norwegian provision was discussed at the beginning of a widely-read Indian law review article, the significance of which was acknowledged in the Kesavananda case.134 It is possible that the Nepalese framers drew upon Norwegian constitutional language in the course of their drafting.

Besides the above textual arguments, asserting that limits on amendments should be left to the Nepalese legislature, there is another, founded in political theory. The Nepalese Constitution was neither drafted nor ratified by the Nepalese people. No constituent assembly was elected, nor was any popular referendum held to approve the text. It was put together, rather, in negotiations among the politically most powerful groups and was promulgated by the King. Its felt or real legitimacy may, therefore, be uncertain,135 especially with regard to its prohibition

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131. NEPAL CONST. arts. 24-26.


133. Id. at 380 n.10e.


135. D. Conrad has argued that only with maximum possible popular consent can constituent power legitimately be exercised. D. Conrad, Constituent Power, Amendment, and Basic Structure of the Constitution: A Critical Reconsideration, 1977-78
on further amendments. Indeed, that prohibition would seem to conflict with the first sentence of the Preamble, which states that "the source of sovereign authority... is inherent in the people." How can the sovereign people be bound by a limit to which they never consented? On the other hand, if the interpretation of the amendment power is left in the hands of the people’s political representatives, the fact of non-amendment would, over time at least, be arguably a tacit ratification legitimating all unamended sections.

What of the argument that no one, not even the legislator, should judge his or her own case? Is it not important that some specialized agency be given the job of scrutinizing all bills of amendment for constitutional adequacy, an agency to some degree removed from those sponsoring and voting upon the proposed amendments? Even if such objections are persuasive, there are agencies other than the Supreme Court that could assume the task of review. Perhaps, by analogy to the French body of the same name, the Nepalese Constitutional Council could, by constitutional amendment, be given this function, in addition to its present less significant duties. That body is basically a council of legislative leaders—the Prime Minister, the speaker of the House of Representatives (lower house), the chair of the National Assembly (upper house), the leader of the opposition (in the House of Representatives), and the Chief Justice—but it does not precisely mirror the political form of the two houses that must finally vote on all amendments.

The Nepalese Supreme Court might well go along with the Constitutional Council as the appropriate and sole agency scrutinizing bills of amendment. There is a good deal of recent Indian jurisprudence discussing whether or not judicial review is a part of the basic structure. Some early cases seemed to say that it was, but recent opinions have clarified that constitutionality depends upon the form of fair and independent deliberations, not upon the location of the reviewing body within the judicial hierarchy. The Nepalese Constitutional Council, if operating under clearly fair procedures, might well be able to meet such a test.

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DELHI L. REV. 1 (1979); see supra note 10.
136. NEPAL CONST. pmbl.
137. In the case of the King's unreviewable discretion, these objections were obviously deemed insufficient. See supra note 8.
140. But if the Council appeared to become a "judicial institution," the Supreme Court might seek to claim authority over it under Article 86(1) of the Nepalese Con-
CONCLUSION

Under urgent political pressure, Nepal has adopted a Constitution giving extraordinary counter-majoritarian powers to its Supreme Court, the greatest of which may be the power to prevent constitutional amendments which violate the "spirit of the Preamble." Indian constitutional theory and history, which exert a strong influence on Nepal, confirm that this Court may well emerge as a leading or dominant political actor in Nepal. If the Nepalese people do not in fact desire such a result, there exists a legal alternative. The text of the Constitution of 1990 can be interpreted to permit the legislature, or a related political body, to become the appointed defender of the Constitution against inappropriate alteration.

stitution. That article declares: "All other courts and judicial institutions of Nepal, other than the Military Court, shall be under the Supreme Court." NEPAL CONST. art. 86(1); see supra note 13. However, a European-style "constitutional council" is usually conceived to be a legislative rather than a judicial body. ANTONIO CARLOS PEREIRA MENAUT, LECCIONES DE TEORIA CONSTITUCIONAL 249, 251 (1987). "The [French] Conseil is not a court . . . the Conseil is part of the legislative process." Henkin, supra note 118, at 1047.