

SPECIAL ISSUE ARTICLE

SPECIAL ISSUE: THE NEW COMPARATIVE POLITICAL PROCESS THEORY

The Indian Supreme Court and constitutional amendments: insights for the debate on the comparative political process theory and the comparative representative reinforcement theory

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Abstract

Comparative Political Process Theory or Comparative Representative Reinforcement Theory (CPPT/CRRT) is an emerging scholarly field that theorizes about the courts' role in the broader comparative universe. Considered an intellectual descendent of John Hart Ely's work in the American context, CPPT/CRRT emphasizes the courts' role in preventing democratic backsliding, promoting equality, enhancing the efficacy of democratic institutions, fostering deliberative processes, and addressing the failures of majoritarian politics. CPPT/CRRT scholars generally advocate broadening judicial powers and capabilities to fulfill these roles. This article examines the practicality of such judicial responsibilities through the lens of the review of constitutional amendments in India. It concludes that, despite the theoretical aspirations of CPPT/CRRT, courts are unlikely to meet these expectations in practice due to their institutional limitations. The positive outcomes of judicial interventions tend to be more modest than the protective and proactive actions envisioned by CPPT/CRRT proponents. Moreover, the modest benefits also come at the cost of the potential adverse impacts that an empowered judiciary may impose on the constitutional fabric. Consequently, this article suggests a need for recalibration of CPPT/CRRT scholarship wherein its goals are moderated and its aspirational objectives balanced against the potential adverse effects of an empowered judiciary on constitutional systems.

Keywords: judicial power; unconstitutional constitutional amendments; basic structure doctrine; Supreme Court of India; public interest litigation

Introduction

A novel strand of scholarship has emerged amidst a scholarly environment preoccupied with concerns over 'the counter-majoritarian difficulty' and the advocacy for diminishing the powers of courts.¹ This body of academic literature, known as the Comparative

¹R Dixon, 'Courts and Comparative Representation-Reinforcement Theory' (Forthcoming).

Political Process Theory or the Comparative Representation Reinforcement Theory (CPPT/CRRT), aims to ‘recover and renovate a strand of constitutional scholarship that focuses on the role of courts as protectors and promoters of representative government’.² CPPT/CRRT is seen as a direct intellectual descendant of the principles articulated by John Hart Ely in *Democracy and Distrust*.³ Nonetheless, CPPT/CRRT aims to contemporize Ely’s ideas, conceived initially in the background of the American legal and political environment from the 1950s to the 1970s, and extend their applicability to the broader comparative context.⁴

At the outset, it is essential to clarify that CPPT/CRRT scholars do not speak in one voice. There are diverse perspectives and nuances within the CPPT/CRRT literature. In fact, Tiojanco suggests that the CPPT/CRRT agenda has begun to diverge significantly from Ely’s foundational ideas.⁵ Nevertheless, like Ely, most scholars engaged in the broader CPPT/CRRT discourse consider it an essential part of the court’s role to protect the sanctity of the political process and the rights of minorities.⁶ Several scholars working in the CPPT/CRRT space approach these topics more expansively in terms of the court’s role in safeguarding liberal constitutional democracy (and its associated values) from eroding⁷ and promoting societal equality.⁸ Many CPPT/CRRT scholars also see the court’s role as improving the quality and performance of democratic institutions and deliberation.⁹ This particular function also includes facets such as the pathologies of the party system, corruption, and weak state capacity.¹⁰ Several CPPT/CRRT scholars even consider the courts to be a vital forum for responding to majoritarian failures of the political process.¹¹ To empower courts to fulfill such roles, CPPT/CRRT scholars usually advocate expanding their powers rather than reducing them. They argue for granting courts sufficiently broad jurisdiction and significant remedial authority to enable them to undertake the aforementioned actions asked of them.¹²

An examination of CPPT/CRRT literature reveals a critical aspect: enhanced powers are not all that courts need for CPPT/CRRT undertakings. They also necessitate asserting these powers boldly in situations that mandate them. This is particularly true when courts

²Ibid.

³Ibid.

⁴For an overview of the existing CPPT/CRRT literature, See R Dixon, and M Hailbronner, ‘Ely in the World: The Global Legacy of Democracy and Distrust Forty Years On’ (2021) 19(1) *International Journal of Constitutional Law* 427–438.

⁵See B Tiojanco, ‘John Hart Ely Would Disown All of Us, His Intellectual Heirs (Or Maybe Not)’ (Forthcoming).

⁶MJC Espinosa and D Landau, ‘A Broad Read of Ely: Political Process Theory for Fragile Democracies’ (2021) 19(1) *International Journal of Constitutional Law* 548, 555–564; See also N Petersen, *Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada, Germany and South Africa* (CUP, Cambridge, 2017) 181; S Gardbaum, ‘Comparative Political Process Theory’ (2020) 18(4) *International Journal of Constitutional Law* 1429; R Dixon, ‘A New Comparative Political Process Theory?’ (2020) 18(4) *International Journal of Constitutional Law* 1490; R Gargarella, ‘From “Democracy and Distrust” to a Contextually Situated Dialogic Theory’ (2020) 18(4) *International Journal of Constitutional Law* 1466.

⁷See Espinosa and Landau (n 6), 544–555. Gardbaum (n 6) 1434–1447; Dixon (n 6) 1496; Gargarella (n 6) 1466.

⁸See Gargarella (n 6) 1472–1473; Dixon (n 1).

⁹Espinosa and Landau (n 6), 557–564; Gardbaum (n 6) 1434–1447; Dixon (n 6) 1496.

¹⁰See Espinosa and Landau (n 6) 555–564.

¹¹Ibid; Gardbaum (n 6) 1446–1448; Dixon (n 1).

¹²See Dixon (n 1).

are responding to threats by popular autocrats, undertaking functions typically reserved for the elected branches, and protecting the rights of socially ostracized minorities.

As institutions without the ‘power of the purse and sword’, courts depend on the elected branches for their functioning. They are restricted in their decision-making by the ‘tolerance interval’ of the elected branches.¹³ This interval is the zone of decision-making in which the elected branches will tolerate an independent court because they see a benefit in having one or because the backlash of curtailing courts is too extreme, perhaps due to massive public protests or future electoral losses.¹⁴ When courts decide profusely against the interests of the elected branches and the public is not behind the court or, worse, is against it, there is not much in the elected branches’ way to prevent them from neutering courts and/or compromising their independence.¹⁵ To stay within this ‘tolerance interval’, courts try to build their ‘reservoir of goodwill’.¹⁶ As a general matter, courts can sometimes be limited in their actions because of these institutional constraints.¹⁷ This aspect becomes even more salient in the comparative context, particularly within the Global South, where there is a pronounced deficiency in constitutional culture, and courts and their decisions are absent from the median citizen’s daily discourse.¹⁸

This leads to a critical question—Can courts fulfill the expectations set forth by CPPT/CRRT scholars? While CPPT/CRRT scholars often cite real-world instances to illustrate the various roles they envisage for courts, these examples are frequently ‘cherry-picked’ and represent the high points of judicial decision-making. They also lack comprehensive background context, such as the broader implications of the decisions, the political circumstances surrounding their issuance, and the trade-offs that courts had to make to arrive at such rulings.

Considering such facets surrounding decision-making, this article will discuss the judicial review of constitutional amendments in India to forward the CPPT/CRRT discourse. It does so by investigating courts’ actions and responses when needing to assert power boldly in ways CPPT/CRRT scholars would expect. Thus, instead of theorizing from a CPPT/CRRT perspective on what courts should do, this article seeks to aid CPPT/CRRT scholars (and scholars working on judicial roles more broadly) in their theorizations by illuminating the realities faced by courts in their decision-making processes—particularly in cases that necessitate the bold assertion of power—and how they either navigate or fail to navigate these realities.

¹³See e.g., L Epstein et al, ‘The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government’ (2001) 35(1) *Law & Society Review* 117, 117–136.

¹⁴Ibid.

¹⁵See G Vanberg, ‘Establishing and Maintaining Judicial Independence’ in K Whittington and D Kelemen (eds), *The Oxford Handbook of Law and Politics* (OUP, Oxford, 2008).

¹⁶See D Kapiszewski et al, ‘Of Judicial Ships and Winds of Change’ in Diana Kapiszewski et al (eds), *Consequential Courts: Judicial Roles in Global Perspective* (CUP, Cambridge, 2013), 493 (Elected branches’ deference to judicial authority is not contingent on the immediate outputs of the case at hand, but rather upon the support elected branches and the people give it in the long run – also called its reservoir of goodwill. A court without a reservoir of goodwill, they suggest, may be limited in its ability to defy the preferences of the elected branches. A court can build its reservoir of goodwill by deciding in favor of majorities, popular minorities, or the elected branches over time. Conversely, it can take away from its reservoir of goodwill by doing the contrary.)

¹⁷See e.g., A Chilton and M Versteeg ‘Courts Limited Ability to Protect Constitutional Rights’ (2018) 85 *University of Chicago Law Review* 293.

¹⁸See D Landau, ‘Political Institutions and Judicial Role in Comparative Constitutional Law’ (2010) 51 *Harvard International Law Journal* 319, 324–328; See also A Sethi, ‘Taking the Constitution Away from the Supreme Court of India’ (2021) 33(1) *National Law School of India Review* 1, 13.

There are several reasons why this article focuses on judicial review of constitutional amendments. Primarily, the ability to review constitutional amendments represents a critical power that most CPPT/CRRT scholars deem essential for courts to enable them to monitor and prevent abusive constitutional changes.¹⁹ This function also signifies one of the boldest assertions of judicial power. This is not only because the court's reviewing and invalidating constitutional amendments is considered one of the most 'extreme'²⁰ counter-majoritarian acts but also because of the political dynamics that frequently exist when the elected branches pass constitutional amendments. Given the relative difficulty of passing amendments in most countries (including in this article's focal jurisdiction, i.e., India), amendments are usually enacted with sizeable multi-partisan support or when a political coalition is dominant. Thus, as scholars push the boundaries of what courts ought to be doing, studying the judicial review of constitutional amendments provides a helpful context to understand the extent of courts' abilities.

There are few better contexts in which to study the judicial review of constitutional amendments than in India. This is due to five reasons:

First, India was the first jurisdiction to invalidate constitutional amendments and has had this practice entrenched for over fifty years. Moreover, though the Supreme Court of India (SCI) took over two decades since its inception to invalidate a constitutional amendment for the first time in 1973, its involvement with constitutional amendments began much earlier in the early 1950s. As such, the existing legal culture imposes comparatively lesser constraints on the court's use of its power to invalidate amendments.

Second, during the seventy-five years the question of review of constitutional amendments has occupied the legal landscape, India has had varied political contexts—periods of dominant party rule, authoritarian stress, ordinary politics, and highly fragmented politics. This allows us to consider the issue under different political contexts.

Third, India is one of the few jurisdictions in the world where judicial appointments are formally removed from direct political supervision (at least from the early 1980s), as judges are appointed without the involvement of the elected branches.²¹ This puts the SCI in a better position to assert judicial power than jurisdictions with a more tangible link between the elected branches and judicial appointments.²² Even otherwise, the SCI has been hailed in comparative literature as one of the most powerful courts in the world and is considered a prototype jurisdiction in studying judicial roles (including by CPPT/CRRT scholars).²³

Fourth, constitutional amendments in India have covered significant ground, providing a range of issues, including many highlighted as ripe for judicial intervention by different CPPT/CRRT scholars. Though SCI has not used a CPPT/CRRT lens to assess the validity of constitutional amendments, the standard it applies (the basic structure test) encompasses several of the commonly discussed CPPT/CRRT grounds (if not all).²⁴

¹⁹See Dixon (n 1).

²⁰G Jacobsohn, 'The Permeability of Constitutional Borders' (2004) 82 *Texas Law Review* 1763, 1799.

²¹See text body accompanying footnotes 78–81.

²²N Garoupa, 'Empirical Legal Studies and Constitutional Courts' (2011) 5(1) *Indian Journal of Constitutional Law* 26, 29–30.

²³See e.g., 'What Makes for More or Less Powerful Constitutional Courts?' (2018) 29 *Duke Journal of Comparative & International Law* 1, 3; See also R. Dixon, *Responsive Judicial Review* (Oxford University Press, Oxford, 2023).

²⁴Presently, through a series of court cases, the basic structure doctrine is interpreted by the SCI to encompass democracy, federalism, the rule of law, judicial independence, the separation of powers,

Lastly, India's experience with the judicial review of constitutional amendments offers a substantial corpus of case law, enabling a holistic analysis of judicial decision-making and its implications for CPPT/CRRT discourse. Since 1951, India has enacted 106 amendments (albeit numerous technical ones), most of which have been subject to some form of judicial scrutiny.

This article will show that in situations where most CPPT/CRRT scholars might expect judicial intervention, due to the reality of judicial politics, the SCI has frequently tended to either defer to the government and/or endorse its moves. Such instances of inaction or explicit support have often facilitated the government's implementation of measures that could be classified as anti-CPPT/CRRT. Additionally, in many cases, the rulings of the SCI have occasionally been in direct violation of CPPT/CRRT ideals. This is not merely due to a failure to act due to institutional limitations but through judgments that actively counter CPPT/CRRT ideals. Such outcomes have manifested in cases where the SCI has employed its powers to review constitutional amendments for institutional self-aggrandizement in manners that could impede the democratic process or safeguard the interests of the elite, frequently to the detriment of societal equality.

While the SCI has not been ineffective in its constitutional amendment decision-making, its positive engagement in this area has been sporadic and more moderated than the proactive engagement CPPT/CRRT scholars generally expect. Furthermore, the positive impacts of its decision-making are primarily contingent upon specific political contexts. This article highlights two domains where the judiciary's broad authority to review constitutional amendments has yielded beneficial outcomes: (i) upholding the sanctity of the constitution and the principles of the rule of law and (ii) promoting restorative constitutionalism. These advantages have primarily emerged through the SCI's application of passive virtues, such as *obiter dicta*, in instances where it otherwise deferred to governmental authority. Moreover, many of these actions were witnessed well after the initial cause of action arose or during significant political fragmentation. *Prima facie* evidence suggests a similar trend in other forms of judicial intervention beyond constitutional amendment reviews.²⁵

Consequently, this article argues that the above observations might require a tempered future agenda for CPPT/CRRT. Such an agenda should align with the realities of judicial decision-making and seek to mitigate the potential drawbacks of granting courts enhanced powers—or, at the very least, aim to diminish the adverse effects.

The remainder of this article is structured as follows: Part 2 describes the initial phase of the SCI's interactions with constitutional amendments during 1951–1975, a period marked by the Indian National Congress's (INC) dominant party politics. Part 3 explores the SCI's scrutiny of constitutional amendments during India's authoritarian Emergency period and the subsequent era up to 1991, as INC's dominant status loosened. Part 4 examines the SCI's experiences with judicial review of constitutional amendments from 1991 to the present, a span initially characterized by a highly fragmented political landscape until the early 2010s, which then witnessed a return to dominant party politics, with arguable leanings towards authoritarianism. Part 5 integrates insights from the preceding substantive sections and offers directions for future CPPT/CRRT scholarship. The article concludes with Part 6.

fundamental rights (including equality and the right to life, each of which encapsulates a wide array of rights), and secularism, among other related values. For more on this, see generally, S Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* (Oxford University Press, New Delhi, 2009).

²⁵See text body accompanying footnotes 77–78 and 107–116.

The early years (1951–1975): The quest for judicial power, judicial self-protection, and anti-CPPT/CRRT actions

For the entirety of the period between 1951 and 1975, the SCI's scrutiny of constitutional amendments predominantly addressed the question of property rights. *Prima facie* cases adjudicated during this period might not appear significant to the CPPT/CRRT discourse. Nevertheless, the SCI's approach to balancing societal equality with the right to property provides valuable insights for the CPPT/CRRT conversation. It illustrates a vital facet of the SCI's decision-making: The SCI primarily leverages its reservoirs of goodwill to boldly assert judicial power to expand or safeguard its institutional position and powers—as opposed to other purposes, including protecting constitutional rights. They also highlight the probable pitfalls of courts wielding broad powers, a characteristic often deemed essential by CPPT/CRRT scholars. Broad judicial power can potentially lead to judicial actions at odds with CPPT/CRRT objectives.

The early constitutional amendments have roots in the British 'zamindari' policy predating India's independence. Per this system, large landowners (or zamindars) were permitted to regulate the affairs of their estates in return for an annual rent. Despite many zamindars relinquishing their lands to the Indian state after independence, a significant portion of land remained concentrated in the hands of a few. While India's legislative history is laden with instances of inertia on issues critical to several CPPT/CRRT scholars, necessitating judicial intervention, the period immediately following independence marked a notable exception. The central and various state governments, primarily governed by the dominant INC, enacted numerous land redistribution laws to correct skewed land ownership and promote a more equitable society.²⁶ They justified these laws in accordance with Article 39 of the Directive Principles of State Policy (DSPS),²⁷ which required equitable resource distribution and the prevention of wealth concentration. However, the SCI and various high courts struck down most of these laws.²⁸ These laws were found to violate the constitutional 'right to property' because they did not adequately compensate the landowners.

In response, the central government enacted the 1st Amendment in 1951. This modified Article 31 (right to property) by adding to it Article 31(A) and Article 31(B). Article 31(A) was removed from the purview of constitutional review laws enacted to abolish the zamindari system. Article 31(B) played the part of specifying these laws by placing them in an addendum to the Constitution called the Ninth Schedule. Overruling court decisions through constitutional amendments characterizes an intended exercise of the legislature's amendment power.²⁹ Nonetheless, through a series of rulings between 1953 and 1955, the SCI tried to limit the scope of these amendments. It repeatedly ruled that since land redistribution restricted the right to property, it needed compensation at market value.³⁰ It is worth noting that 'market-based compensation' is

²⁶G Austin, *Working a Democratic Constitution* (Oxford University Press, New Delhi, 1999) 79–89.

²⁷The DPSP is a list of non-justiciable goals provided for in the Constitution that the state should consider while framing policy.

²⁸Austin (n 26) 79–89.

²⁹R Dixon, 'Constitutional Amendment Rules: A Comparative Perspective' in T Ginsburg and R Dixon (eds), *Comparative Constitutional Law* (Edward Elgar, 2011), 96–98.

³⁰See e.g., *State of West Bengal v. Bela Banerjee*, AIR 1954 SC 170; *State of West Bengal v. Subodh Gopal*, AIR 1954 SC 92; *Srinivas v. Sholapur Spinning & Weaving Co* AIR 1954 SC 119; *Kameshwar Singh v. State of Bihar* AIR 1953 SC 252; *Bhagat Ram v. State of Punjab* AIR 1954 SC 621; *Saghir Ahmad v. The State of Uttar Pradesh* 1955 SCR 707.

not the sole perspective on what constitutes fair compensation when land is appropriated for redistribution purposes.³¹

To override these decisions, the government enacted the 4th Amendment, which broadened the scope of laws included in the Ninth Schedule and restricted compensation to instances of property acquisition by the 'state', excluding redistribution scenarios. Additionally, this amendment stipulated that compensation determination would fall within the government's purview rather than being subject to judicial review. Both the 1st and 4th Amendments were challenged before the SCI. While the courts did not invalidate these amendments, they became a significant obstacle to the government's efforts to ensure equitable land distribution over the following decade.³² In response to the SCI's invalidation of two state land reform measures,³³ the government enacted the 17th Amendment in 1964. This amendment broadened the scope of Article 31(A) to include a broader range of land units, not just those previously owned by zamindars. It also incorporated forty-four laws into the Ninth Schedule. The 17th Amendment, along with the 1st and 4th Amendments, was brought into question in the 1964 case of *I.C. Golaknath and Ors. v. State of Punjab*.³⁴ In its decision, the SCI held that Parliament could not enact amendments that infringe upon the fundamental rights of which the right to property was a part. The court stated that altering such provisions would require convening a constituent assembly. It also held that amendments were subject to judicial review.

Golaknath represented the first bold assertion of judicial power in the context of constitutional amendments. Given that scholars engaged in the CPPT/CRRT discourse, by and large, support the judicial review of constitutional amendments to safeguard against abusive constitutionalism, the *Golaknath* ruling could be considered a reasonable exercise of judicial power.³⁵ Cognizant of the potential political repercussions of nullifying these amendments, the SCI in *Golaknath* employed the doctrine of 'prospective overruling'. This meant the decision would only affect future amendments, leaving the technically unconstitutional 1st, 4th, and 17th Amendments in place. Consequently, the petitioners did not achieve their desired outcome in the case. Despite the concessions made in *Golaknath*, the SCI continued to impede the state's attempt to correct the inequitable land distribution in the country. It advocated for the property rights of large landowners in subsequent rulings. In *R.C. Cooper v. UOI*³⁶ and *Madhav Rao Scindia v. UOI*,³⁷ the SCI invalidated laws it felt did not provide compensation at market value.³⁸

In 1971, in the background of the cases above and other political issues, such as a split within the INC, the Prime Minister, Indira Gandhi, recommended that the President dissolve the parliament and call early elections. Gandhi and the INC openly canvassed against the SCI during their campaigning.³⁹ Their election manifesto included amending

³¹R Dixon and D Landau, 'Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment,' (2015) 13 *International Journal of Constitutional Law* 606, 622.

³²See Sankari Prasad Deo v. UOI (1952) 1 SCR 89 and Sajjan Singh v. State of Rajasthan (1965) 1 SCR 933.

³³See Krishnaswami v. Madras AIR 1964 SC 1515 and Kunhikonom v. Kerala AIR 1962 SC 723.

³⁴*I.C. Golaknath v. State of Punjab* (1967) 2 SCR 762

³⁵See text body accompanying footnote 19.

³⁶AIR 1970 SC 564, 608.

³⁷AIR 1971 SC 530, 658.

³⁸M Mate, 'Two Paths to Judicial Power: The Basis Structure Doctrine and Public Interest Litigation in Comparative Perspective' (2010) 12(1) *San Diego International Law Journal* 175, 182.

³⁹SP Sathe, 'Supreme Court, Parliament, and the Constitution' (1971) 6 *Economic and Political Weekly* 1821, 1821.

the constitution to facilitate the enactment of social equality programs.⁴⁰ Following a decisive electoral victory in which it won sixty-eight percent of the total legislative seats, the INC government successfully enacted three significant amendments.

The first of these, the 24th Amendment, overruled the SCI's ruling in *Golaknath* by explicitly affirming Parliament's authority to amend any part of the Constitution, including sections related to fundamental rights. Further, the 25th Amendment was introduced, which brought about several fundamental changes: it rendered the compensation for property acquired under land acquisition laws non-justiciable. Additionally, it elevated the DSPS outlined in Article 39 above the fundamental rights, asserting that in the event of any conflict, Article 39 would take precedence. It also declared that no laws made by the central or state governments to implement the DPSPs could be contested in court. The third amendment, the 29th, incorporated two laws passed by the State of Kerala into the Ninth Schedule of the Constitution.

These three amendments were challenged in the 1973 case of *Kesavananda Bharati v. State of Kerala*.⁴¹ In this case, the SCI overruled *Golaknath*. It held that the Parliament had the authority to amend provisions related to fundamental rights but introduced a significant caveat: such amendments could not disturb the 'basic structure' of the Constitution.⁴² In doing so, the court upheld the 24th and 29th Amendments. Thus, similar to the case of *Golaknath*, the petitioners found no relief from the court. Nonetheless, it held invalid parts of the 25th Amendment that ousted the court's jurisdiction. It did so on the grounds that this provision violated the basic structure of the Constitution.⁴³ The decision in *Kesavananda* kept the doors open for courts to police constitutional amendments. Protecting its turf to be able to act in the future is an action that scholars engaged in the broader CPPT/CRRT discourse, like Dixon, Issacharoff, and Roznai, have considered an acceptable assertion of judicial power.⁴⁴

The rulings in *Kesavananda* and *Golaknath*, alongside the cases preceding these decisions that prompted the constitutional amendments assessed in both, provide three valuable takeaways for the CPPT/CRRT debate.

First, the SCI draws from its reservoirs of goodwill and boldly asserts judicial power largely to expand or safeguard its jurisdiction and powers. From a CPPT/CRRT perspective, this approach is not inherently negative. As discussed in this section, courts are required to do so periodically. Arguably, this was the case in both *Golaknath* and *Kesavananda Bharti*. At the same time, the context of these decisions raises profound

⁴⁰Indian National Congress Election Manifesto (1971).

⁴¹AIR 1973 SC 1461.

⁴²This was the first case that invoked the 'basic structure' doctrine as a grounds for invalidating constitutional amendments. However, in this case, the court did not provide any certainty on what comprised the basic structure.

⁴³Writing for the majority (which six other judges signed onto), Chief Justice Sikri held that the basic structure included five features: the supremacy of the constitution; republican and democratic form of government; separation of powers; federal character of the constitution; and secular character of the constitution. Judges who signed on to the majority opinion provided different lists of what might comprise the basic structure (some narrower, some broader). Thus, though the majority agreed that the part of the 25th Amendment that ousted the jurisdiction of the courts violated the basic structure, there was no unanimity on what precise element of the basic structure it violated. What precisely comprised the basic structure was only clarified in future cases. See footnote 24 to see how the basic structure doctrine is understood today.

⁴⁴See PJ Castillo Ortiz and Y Roznai, 'The Democratic Self-Defence of Constitutional Courts' (2024) 18(1) *ICL Journal* 1, 1–26; See also S Issacharoff and R Dixon, 'Living to Fight Another Day: Judicial Deferral in Defense of Democracy' (2016) *Wisconsin Law Review* 683.

questions for CPPT/CRRT scholars and their theorizing. Despite reservations about specific legislative measures, even those affecting constitutionally enshrined rights (such as the right to property in the cases at hand), the SCI made concessions to protect or extend its turf. The nature of the SCI's rulings in *Golaknath* and *Kesavananda* appear more conciliatory than indicative of its legal interpretation. This is evident from the SCI's use of prospective overruling in *Golaknath* and its attempts to moderate the impact of the 1st, 4th, and 17th Amendments before *Kesavananda*.

A staunch proponent of courts (including many self-identified CPPT/CRRT scholars) might argue that the SCI, in both *Kesavananda* and *Golaknath*, decided to conserve its 'reservoirs of goodwill' instead of protecting the constitutional rights of a handful of privileged individuals/groups. This possibly allowed it to preserve judicial capital to 'live to fight another day,'⁴⁵ especially in defense of more core CPPT/CRRT aims. Though, as illustrated in the subsequent sections, the SCI has rarely drawn from its 'reservoirs of goodwill' to tackle pressing issues, even those that implicate more core and universally acknowledged CPPT/CRRT concerns. The SCI has repeatedly conserved its judicial capital to safeguard or expand its authority and jurisdiction in the future.

Second, while CPPT/CRRT scholars typically place great trust in the judiciary, these cases reveal that courts can inadvertently foster outcomes contrary to CPPT/CRRT ideals. For instance, the government's efforts to redistribute land align with the societal reforms envisioned by some CPPT/CRRT scholars.⁴⁶ As highlighted by the likes of Gargarella and Dixon, inequalities (such as those caused by circumstances like the concentration of land in the hands of a few) can hinder the ability of the broader populace to take an active and equal part in the community's political life.⁴⁷ Yet, the SCI's persistent conflicts with Parliament over property rights illustrate how courts can also hinder social equality. The extensive judicial involvement in these matters necessitated six constitutional amendments over twenty years and prolonged the land redistribution process well beyond its intended conclusion. While it's impossible to assert definitively, the property rights saga might have extended even further if the SCI had not retreated after the political attacks following its *Kesavananda* decision.⁴⁸

Third, the SCI's approach to balancing competing values in these cases underscores the inherent nature of judicial institutions as bodies dominated by societal elites.⁴⁹ Courts' tendencies to prioritize the protection of elite interests, sometimes at the expense of broader societal equality, challenge the values championed by many of those engaged in the CPPT/CRRT discourse. This tension highlights a vital disconnect between some of the ideals of the CPPT/CRRT agenda and the realities of judicial decision-making.

The emergency years and beyond (1973–1989): The SCI's non-action, anti-CPPT/CRRT action, and limited action

The previous section demonstrated that, although not inherently a net negative, the SCI, in its early years, drew from its reservoirs of goodwill to predominantly protect or extend

⁴⁵See generally Issacharoff and Dixon (n 44).

⁴⁶See e.g., Gargarella (n 6), Dixon (n 1).

⁴⁷*Ibid.*

⁴⁸Post the *Kesavanda* decision, in a break from established judicial norms, Indira Gandhi and her government bypassed three judges who were part of the majority in *Kesavanda* to appoint the next Chief Justice, opting instead to appoint a judge who had dissented.

⁴⁹For a more detailed and broader analysis of the same in the Indian context See, A Bhuwania, *Courting the People: Public Interest Litigation in Post-Emergency India* (Cambridge University Press, New Delhi, 2017).

its powers and jurisdiction. It also highlighted how courts like the SCI can, at times, even adversely impact elements of the CPPT/CRRT agenda. An important question remains since previously discussed cases touched on issues like societal equality that might be argued not to be universal to CPPT/CRRT scholars' theorization. This question concerns the SCI's approach to cases involving issues directly implicating the representative and political process and that almost all involved in the CPPT/CRRT discourse would find critical and appropriate for judicial intervention. Following the *Kesavananda* decision, events unfolded in India that provided insight into the SCI's handling of matters more directly related to core CPPT/CRRT concerns.

In the previously mentioned snap elections of 1971, Indira Gandhi contested from Rae Bareilly. In this election, she defeated the Socialist Party's Raj Narain. Narain accused Gandhi of bribing voters and exploiting government resources for an unfair electoral advantage. He then filed a case against her in the Allahabad HC, alleging a violation of the electoral code. While the precise intervening details are beyond the scope of this article, this petition lingered for several years. In the interim, the Gandhi government amended the electoral code and retrospectively made certain activities she was accused of in Narain's petition legal. Despite the retrospective changes, four years later, a single-judge bench of the Allahabad HC found enough evidence to convict Gandhi of electoral malpractices.⁵⁰ It nullified the election results in Rae Bareilly and imposed a six-year ban on Gandhi from holding any elected office. Gandhi challenged this ruling in the SCI. Pending appeal, Gandhi declared an emergency in the country, citing threats to national security.

Early in the emergency, the Gandhi government passed the 39th Amendment after only two hours of parliamentary debate, with most opposition members under preventive detention. This amendment was enacted to overrule the decision of the Allahabad HC and validate Gandhi's election retroactively. Among other changes, to prevent the SCI from repealing the retrospective modifications described above, the amendment immunized all election laws passed prior to the amendment. It was also removed from the purview of judicial review elections involving the Prime Minister and other central political offices. Such elections could only be challenged before a parliamentary committee per the amendment.

During the emergency, in the case of *Indira Gandhi v. Raj Narain*, the SCI heard an appeal from the Allahabad HC (including assessing the validity of the 39th Amendment). The petitioner, Narain, highlighted the rushed passage of the 39th Amendment, noting the lack of substantial deliberation and the absence of key opposition members during the process. This situation is particularly significant from a CPPT/CRRT perspective, as it directly involves potential disruptions to the political and representative process. The case also centers on amendments enacted with minimal debate and without the participation or oversight of the opposition, presenting a clear example of the challenges of democratic dysfunction and lack of democratic deliberation that many CPPT/CRRT scholars are concerned with.⁵¹ The SCI did not endorse the CPPT/CRRTian claim that the amendment was enacted with insufficient discussion and without the presence of crucial opposition members. It upheld the validity of Gandhi's election in 1971 and dismissed the charges against her. Nonetheless, by applying the basic structure doctrine, the SCI nullified portions of the 39th Amendment that stripped the court of its authority to review election-related legislation and outcomes.⁵²

⁵⁰The State of Uttar Pradesh v. Raj Narain 1975 AIR 865.

⁵¹See text body accompanying footnotes 9–11.

⁵²Like in *Kesavanda Bharti*, judges provided different rationales for the basic structure violation and the amendment's partial invalidity. These include ones such as democracy, equality, and the rule of law.

With the emergency declaration still in effect, Gandhi's government passed the 42nd Amendment. Like the 39th Amendment, this amendment's bill was barely debated, and many major opposition members were behind bars or in detention. The amendment stripped the SCI of many of its powers. It gave Parliament unrestrained power to amend any part of the Constitution without any possibility of constitutional review. It also transferred many powers from the state governments to the central government, thereby eroding India's federal structure. Further, it allowed the suspension of fundamental rights and their enforcement during an emergency. The Emergency was one of the darkest periods in Indian history wherein fundamental rights were curtailed, the press was censored, and opposition leaders were imprisoned.⁵³ Similar to the 39th Amendment, the 42nd Amendment presented a critical opportunity for judicial intervention from a CPPT/CRRT standpoint, given that it substantially 'dismembered' the Indian Constitution and stripped it of many of its democratic features. Throughout the Emergency, the SCI did not adjudicate on the validity of the 42nd Amendment. Moreover, in its ordinary decision-making, the SCI upheld numerous governmental actions undertaken using the enhanced powers granted by the 42nd Amendment.⁵⁴

The emergency era was highly unpopular with the public. Confident in maintaining her parliamentary majority, Indira Gandhi announced elections for 1977, a decision that proved to be a miscalculation.⁵⁵ In this context, the Janata Party was founded as a cross-ideological coalition to contest Gandhi.⁵⁶ The Janata Party promised to restore citizens' rights and the judiciary's place as they were before the Emergency.⁵⁷ The collective unity of the opposition against Gandhi saw it win the elections—the first time a non-INC government came into power in post-independence India and ending a two-plus decades of dominant party rule in India. The collective unity was short-lived, and within a few years, internal fragmentation saw the Janata Party disintegrating.⁵⁸ Despite this, the Janata government was able to pass the 43rd (1977) and 44th (1978) Amendments to restore the constitution to some extent to its pre-emergency position.⁵⁹ These amendments brought about various changes, including removing the right to property from the list of fundamental rights. Nevertheless, the Janata Party government collapsed in early 1980 and could not fully achieve its objectives of restoring the constitution.

The fall of the Janata Party allowed Gandhi to return to power in 1980. Given her previous overreach and its electoral consequences, Gandhi was cautious about returning to power. It is hard to predict whether she would have resorted to her old ways. Gandhi could not complete her term, as she was assassinated in 1984. Against this backdrop of

⁵³B Balraj, 'A Fuller View of the Emergency' (1995) 30(28) *Economic and Political Weekly* 1736, 1736–1744.

⁵⁴One of the notable cases wherein the Supreme Court did so was *ADM Jabalpur v. Shivkant Shukla* AIR 1976 SC 1207. In this case, the Supreme Court determined that during an emergency, an individual's right to protection from unlawful detention could be suspended. For a broader discussion of the SCI's decision-making during the emergency see C Jaffrelo and P Anil, 'Ambivalent to the Core: How the Judiciary Capitulated – or Resisted – During the Emergency' (*Scroll*, 8 February 2021) <<https://scroll.in/article/986204/ambivalent-to-the-core-how-the-judiciary-capitulated-or-resisted-during-the-emergency>>.

⁵⁵Austin (n 26) 396–405.

⁵⁶See generally, Madhu Limaye, *Janata Party Experiment: An Insider's Account of Opposition Politics 1975–77* (BR Corporation, New Delhi, 1994).

⁵⁷See KJ Azam, 'The Sixth General Elections : A Study of the Election Manifestos of the National Parties' (1977) 38 (3) *The Indian Journal of Political Science* 375, 378–380, 385–388.

⁵⁸J Heitzman and RL Worden, *India – A Country Study* (Library of Congress – Federal Research Division, Washington DC, 1995) 54–55.

⁵⁹*Ibid.*

declining INC dominance, in 1981, the SCI adjudicated *Waman Rao v. UOI*,⁶⁰ a case originally filed when the Janata Party was in power. This case was a 'review petition' of *Dattatraya Govind Mahajan v. State Of Maharashtra*,⁶¹ which the SCI had originally dismissed during the Emergency. The latter case arose out of state legislation that imposed a ceiling on how much land could be held by an individual. In *Dattatraya Govind Mahajan*, the petitioners contended that Articles 31(A) and 31(B), inserted by the 1st and 4th Amendments, made challenging laws that infringe fundamental rights impossible. This, they stated, violated the basic structure. In the review petition, alongside Article 31, the petitioners also contested the 40th Amendment, enacted during the Emergency in April 1976, technically a few months beyond the original term of the parliament.⁶² This amendment, among other things, placed certain additional laws into the Ninth Schedule. The petitioners inserted this contention to get the court to comment on the validity of the emergency itself. Considering that this amendment was passed after the parliamentary term was supposed to end, it implicated CPPT/CRRT concerns regarding the operation and sanctity of the political and representative process.

In its 1981 judgment, while agreeing that the 1st Amendment abrogates fundamental rights, the SCI upheld Article 31(A) and Article 31(B), added by the 1st and 4th Amendments. Moreover, it did not hold the 40th Amendment invalid and implicitly gave the declaration of emergency legal validity. Thus, In *Waman Rao*, the petitioners did not get any relief from the SCI. Nevertheless, in *Waman Rao*, the SCI stated that all amendments enacted after the *Kesavananda* decision, including laws added to the Ninth Schedule, were subject to judicial review.

In conjunction with the *Waman Rao* case, the SCI heard a sister case, i.e., *Minerva Mills v. UOI*.⁶³ In *Minerva Mills*, the SCI reviewed the constitutionality of the Sick Textiles Nationalization Act of 1974, which was incorporated into the Ninth Schedule by the 39th Amendment. The Act facilitated the takeover of textile mills in Karnataka by the National Textiles Corporation, citing mismanagement contrary to the public interest. Though not providing direct relief to the petitioners, in its 1986 decision, the SCI invalidated certain provisions of the 42nd Amendment, a contention not raised by the petitioners. These were some of the provisions that the Janata party was unable to restore via the 43rd or 44th Amendment. These provisions: (i) asserted that Parliament's authority to amend the Constitution was unrestricted, (ii) declared that the validity of any constitutional amendments passed after the 42nd Amendment could not be challenged in any court, and (iii) prioritized the DSPSs over the fundamental rights. Adjudicating upon a contention not raised by the petitioners was undoubtedly a bold assertion of judicial power by the SCI.⁶⁴

In addition to these two cases, in 1987, the SCI decided *P. Sambamurthy v. Andhra Pradesh*.⁶⁵ This case examined the 32nd Amendment passed by the Indira Gandhi government in 1973, which led to the introduction of Article 371D. This new article was designed to protect regional rights in the state of Andhra Pradesh and allowed the President to create state-specific administrative tribunals. A contentious aspect of this amendment was Article 371D(5), which required the state government's ratification of

⁶⁰(1981) 2 SCC 362

⁶¹(1977) 2 SCC 548.

⁶²Ibid.

⁶³(1986) 4 SCC 222.

⁶⁴TR Andhyarujina, *Judicial Activism and Constitutional Democracy* (NM Tripathi, Mumbai, 1992), 22.

⁶⁵(1987) 1 SCC 362.

tribunal decisions and permitted modification or annulment of these decisions without any possibility of appeal to the HCs or SCI. Considering that this amendment allowed the elected branches to remove checks and balances over them, it might be one that is understood to be relevant by several CPPT/CRRT scholars. In *P. Sambamurthy*, the SCI found that the absence of any mechanism allowing for tribunal decisions to be appealed compromised the principles of judicial independence and judicial review, thereby running afoul of the basic structure test.

The Emergency and post-emergency era cases reflect patterns seen in the earlier years. Throughout the Emergency, the SCI showed limited opposition to the Indira Gandhi government despite instances that CPPT/CRRT scholars would deem critical for judicial intervention. Notably, By reversing the HC's ruling in the *Raj Narain* case, the SCI potentially even played a role in obstructing the representative/political process. Additionally, its dismissal of the argument that the 39th Amendment lacked adequate legislative debate and opposition scrutiny starkly contradicts the expectations of courts by CPPT/CRRT scholars. Furthermore, the SCI's endorsement of the Emergency declaration in *Waman Rao*, through the affirmation of the 40th Amendment, indicates a reluctance to confront the government, even when it might have a larger 'tolerance interval'. In the *Waman Rao* case, despite the potential for substantial judicial intervention, the SCI limited itself to only extending its jurisdiction in manners that were not strictly required. These instances highlight how the SCI is just as likely (if not more) to advance goals that contradict CPPT/CRRT principles as it is to promote those aligned with CPPT/CRRT objectives. The SCI's only significant⁶⁶ countermeasure during the Emergency was invalidating parts of the 39th Amendment, primarily to safeguard its domain.

It was not until after Indira Gandhi died that substantial judicial actions concerning constitutional amendments were taken in 1986–1987. Nonetheless, despite addressing many areas deemed critical for judicial engagement by CPPT/CRRT scholars, these interventions do not embody the protective and proactive judicial engagement envisioned by CPPT/CRRT scholars. The rulings in *Minerva Mills* and *P. Sambamurthy* were delivered several years after the cause of action arose and when the issues in the cases were no longer politically sensitive. While serving crucial objectives, these decisions are more aptly viewed as instances of the Court promoting restorative constitutionalism⁶⁷ and upholding the Constitution's integrity. Moreover, apart from a small exception in *Minerva Mills*, where the SCI prevented the government from using the pretext of DSPSs to trump fundamental rights, the majority of SCI actions concerning constitutional amendments during this period were also aimed at protecting or expanding its jurisdiction.

The later years (1991–present): different contexts, similar stories

Gandhi's death was followed by riots all over India. In this context, INC, under the leadership of Indira Gandhi's son, Rajiv Gandhi, managed to win the subsequent elections

⁶⁶For the importance of this decision, see Part 5.

⁶⁷Restorative constitutionalism is a term Dixon and Landau have used to describe a project to return to the prior constitutional status quo or reestablish some constitutional past. See R Dixon and D Landau, 'Healing Liberal Democracies: The Role of Restorative Constitutionalism' (2022) 36 (4) *Ethics & International Affairs* 427, 427–435. For more on this See Part 5.

with a convincing majority, securing 80% of the seats in the legislature. Towards the end of Gandhi's first term in 1989, his government was hit with a major corruption scandal. Akin to how the Janata Party was formed as a cross-amalgamation of parties opposed to Indira Gandhi, in the wake of the corruption scandals, the National Front was formed to contest against Rajiv Gandhi and the INC. The National Front Coalition defeated Gandhi in 1989.

The first National Front government lasted a little over a year before internal divisions appeared. This was followed by Rajiv Gandhi's assassination a few months later. Rajiv Gandhi's assassination marked the start of a phase of highly fragmented politics. In this period, no political party managed to secure a majority of the vote share in the national elections. Minority governments and cross-ideological coalitions became the standard during this time. In times of fragmented politics, as is frequently the case, the SCI wielded considerable power. This period persisted until the mid to late 2010s when the nationalist Bharatiya Janata Party (BJP) came into power, transforming India again into a dominant party system. Nevertheless, during both eras of fragmented politics and dominant party governance, the decision-making of the SCI exhibited recurring patterns consistent with those observed in earlier sections.

The first significant constitutional amendment case decided after the National Front's fall was *Kihoto Hollohan v. Zachillhu and Ors*⁶⁸ in 1992. In this case, the SCI heard a challenge to the 52nd Amendment passed by the Rajiv Gandhi government in 1985. In India, party defection was a major issue—often occurring against a backdrop of illegitimate political maneuvers. The 52nd Amendment, which introduced the Tenth Schedule to the Constitution, was designed to address this problem. The Tenth Schedule provided rules concerning the disqualification of members of parliament and state legislatures who defect. It also gave the speaker of the concerned house broad powers to adjudicate upon disqualifications. Further, the speaker's decision in these matters was considered final and not subject to challenge in any court.

Seven years after the amendment was passed and when politics was severely fragmented, the SCI in *Kihoto Hollohan* upheld the validity of the substantive part of the amendment. It concluded that the amendment is intended to handle unprincipled defections not protected by 'freedom of speech'. At the same time, it held the sections of the amendment that ousted the jurisdiction of the courts as invalid due to violating the basic structure. Nonetheless, it stated that the remainder of the amendment is salvageable and that the Speaker's decision barring an elected official from serving because of defection is subjected to judicial review.⁶⁹ Therefore, with this decision, the SCI assumed authority over parliamentary proceedings.

While proponents of a more conventional view of parliamentary sovereignty might critique this decision, it can definitely be justified from a CPPT/CRRT standpoint. Indeed, in light of recent abuses of the Speaker's powers, scholarly proposals have been made to rotate the Speaker's position between the ruling party and the opposition as a remedy.⁷⁰ Similar to the heightened power assumed in *Kesavananda*, which went unused during the

⁶⁸(1992) SCR (1) 686

⁶⁹Ibid.

⁷⁰A Sethi and P Dhawan, 'Abusing Parliamentary Procedures: Partisan Presiding Officers in India's Parliament and What Can be Done About Them' (*VerfBlog*, 9 October 2020) <<https://verfassungsblog.de/abusing-parliamentary-procedures/>>.

Emergency, in the future, the SCI has largely evaded directly adjudicating abusive exercise of power by Speakers despite numerous instances.⁷¹

The next case wherein the court invalidated constitutional amendments arose from the last remnants of the emergency period amendments. One of the changes introduced by the previously discussed 42nd Amendment was the introduction of Articles 323A and 323B of the Constitution, which allowed the government to create administrative tribunals to deal with the growing number of government service disputes. As stated by Mate, a closer look at certain provisions of this amendment showed how the Gandhi government sought to create a parallel system of courts with jurisdiction over crucial areas of public life such as land reform, labor disputes, and elections.⁷² Moreover, these newly inserted articles allowed the parliament to exclude the jurisdiction of all HCs (but not the SCI) from hearing appeals from administrative tribunals.⁷³

The power under this amendment was first put into play by the Rajiv Gandhi government in 1985 when they passed the Administrative Tribunal Act.⁷⁴ This act provided for executive control over appointments to members of tribunals constituted under the act. Initially, the Supreme Court, in *S.P. Sampath Kumar v. Union of India*,⁷⁵ upheld the validity of the relevant parts of the amendment and utilized statutory reinterpretation to preserve the implementing legislation. In its decision, it stated that future appointments would require consultation with the Chief Justice of India, whose recommendations were to be given significant consideration. However, by applying the doctrine of prospective overruling, the Court ruled that its decision would not impact existing appointments. Nonetheless, In 1997, when political circumstances were more conducive to exerting judicial power, the SCI in *L. Chandra Kumar v. Union of India* took a U-turn.⁷⁶ It overruled its ruling in *S.P. Sampath Kumar*. The SCI determined that a regime that ousted the jurisdiction of the High Courts infringed upon components of the Constitution's basic structure, such as judicial independence and judicial review. Given the chronic issue of case backlogs at all judicial levels in India, the act's moderated version, upheld in *S.P. Sampath Kumar*, served pragmatic functions while simultaneously mitigating the risk of potential future abuse. On the other hand, the SCI's stance in *L. Chandra Kumar* raises questions about the SCI's unwarranted self-aggrandizement and enhancing its own authority and that of the HCs under its direct purview.

In light of India's fragmented political environment, the 1990s and early 2000s saw a few highly contentious amendments, leading the SCI to assert its judicial power mainly through routine decision-making. The SCI seized numerous opportunities to adjudicate on the validity of regular legislation to broaden and clarify the scope of the basic structure doctrine, thereby expanding the grounds for reviewing amendments.⁷⁷ This period also

⁷¹See, e.g., The Hindu Bureau, 'Supreme Court Extends Deadline for Maharashtra Speaker Rahul Narwekar to Decide Disqualification Pleas Against NCP Breakaway MLAs To February 15' (*The Hindu*, 29 January 2024) <[⁷²Mate \(n 38\) 188–189.](https://www.thehindu.com/news/national/supreme-court-extends-deadline-for-maharashtra-speaker-rahul-narwekar-to-decide-disqualification-pleas-against-ncp-breakaway-mlas-to-february-15/article67788278.ece#:~:text=The%20Supreme%20Court%20on%20January,31%2C%202024%20to%20February%2015.>></p>
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⁷³See Articles 323(A)(2)(d) and 323(B)(3)(d), Constitution of India 1950.

⁷⁴*Ibid* 188.

⁷⁵(1987) 1 SCC 362.

⁷⁶(1997) 3 SCC 261.

⁷⁷See, e.g., *S.R Bommai v. UOI* (1994) SCC 1 (stating that democracy, federalism, and secularism is a part of the basic structure); *G.C. Kanungo v State of Orrisa* (1995) 5 SCC 96 (stating that the rule of law is part of the basic structure).

saw the SCI using standard cases to strengthen its position within the political framework. A key example of this was a series of three cases wherein the SCI capitalized on the ambiguity surrounding constitutional provisions related to judicial appointments to the HCs and the SCI itself.⁷⁸ Through these cases, the court transferred all the powers of appointing judges to a committee comprising the Chief Justice and four senior-most judges of the SCI (and in the cases of appointments to HC, the chief justice of the respective high court). In doing so, it pushed all other political actors out of the formal appointment process—a system unique on the global stage.

In 2014, when the political landscape was no longer fragmented, the BJP government under Narendra Modi aimed to overhaul this appointment system to align with international norms. Garnering broad cross-party support—involving no votes against the amendment in both houses of the parliament—they enacted the 99th Amendment, establishing a judicial appointments commission. This body was to include the Chief Justice of India (Chairperson), two senior SCI judges, the Union Minister of Law and Justice, and two qualified individuals selected by a panel composed of the Chief Justice of India, the Prime Minister, and the Leader of the Opposition in the Lok Sabha. Though the precise composition of this commission could be reasonably debated,⁷⁹ it nonetheless met the requirements for international best practices regarding the composition of judicial councils.⁸⁰ Yet, in the *Supreme Court Advocates-on-Record Association and others v. UOI* (NJAC case),⁸¹ the SCI deemed the amendment and the establishment of the Judicial Appointments Commission unconstitutional, citing a compromise to judicial independence and a breach of the basic structure. Thus, it retained its exclusive control over judicial appointments.

CPPT/CRRT scholars uphold judicial independence as a critical value for courts⁸² and strongly support courts pushing back when judicial independence is threatened. However, few CPPT/CRRT scholars would agree with the version of judicial independence pushed by the SCI, wherein political actors must be removed entirely from the appointment system.⁸³ The proposed new system of appointments had the potential to introduce more representativeness and transparency into the Indian judiciary, which has often been criticized for its elitism, opacity, and nepotism.⁸⁴

The NJAC case marked the most recent instance where the SCI invalidated a constitutional amendment. However, the SCI's engagement with constitutional amendments (including those implicating core CPPT/CRRT concerns) has persisted into the

⁷⁸See *SP Gupta v. Union of India* (1981) SUPP SCC 87; *Supreme Court Advocates-on-Record Association v. Union of India* (1993) 3 SCC 441; Special Reference No. 1 (1998) 7 SCC 739.

⁷⁹For an explanation regarding debates on the composition of the NJAC, See generally PB Mehta, 'A Plague on Both Your Houses NJAC and the Crisis of Trust' in A Sengupta and R Sharma (eds), *Appointment of Judges to the Supreme Court of India* (OUP, Delhi, 2018) 57–s83.

⁸⁰See generally, E Bulmer, *Judicial Appointments* (International IDEA, Stockholm, 2014), 14–16.

⁸¹(2016) 5 SCC 1.

⁸²See Dixon (n 1).

⁸³Though, in hindsight, an argument can be made in the Indian context that given the attack on independent institutions in India by the BJP government, excluding political actors in any way or form was a prudent decision on the part of the SCI. However, the closed-door system retained by the SCI for judicial appointments actually made it easier (and without much fanfare) for the Modi-led BJP government to capture the judiciary. See A. Sethi, 'The Difference Constitutional Literacy Can Make: Critical Insights from Crisis-Ridden India' 10 *Constitutional Studies* 63, 78.

⁸⁴See e.g., A Jaitley, 'The Judicial Collegium: Issues, Controversies, and the Road Ahead' in Sengupta and Sharma (n 79) 47–49.

current era, primarily concentrating on amendments concerning Articles 14 to 16 of the Indian Constitution. These articles enshrine the right to equality and include various stipulations and exceptions. Notably, the exceptions allow the state to provide 'reservations' in government jobs, educational institutions, and legislative bodies for historically marginalized castes, classes, and tribes. Despite these groups making up approximately 75% of India's population (and more than 80% in some federal states), they are markedly underrepresented in almost all spheres of life. Reservations have always been a major political issue in India, with as many as 19 amendments to the Constitution relating to this topic.

The SCI has engaged with nearly all these amendments without invalidating any reservation. Many of these amendments were technical and aimed at extending existing reservation policies. A few were responses to SCI rulings that struck down reservation-related legislation. Unlike cases related to property rights, the SCI has not resisted legislative actions that override its rulings on reservation matters. Nevertheless, in deliberating about these amendments—especially through decisions in the 1990s and 2000s—the SCI has significantly influenced India's current legal landscape surrounding reservations.

One of the court's most significant interventions was the establishment of a 50% ceiling on total reservations in any given space.⁸⁵ This limit, lacking a textual basis in the constitution, has been criticized for being arbitrary, favoring upper-caste interests, and acting as an impediment to achieving substantive equality.⁸⁶ Other judgments by the SCI regarding reservation policies have been less contentious and, in some instances, have arguably prevented various administrations' misuse of reservations as a tool for political pandering. For instance, the SCI has stressed the necessity for clear evidence of backwardness and underrepresentation before assigning reservations to any group.⁸⁷ It has also clarified that economic hardship alone does not justify reservations, which should be based on historical injustices faced by a group.⁸⁸ Reservations, according to the SCI, should be granted only under exceptional circumstances. Furthermore, the SCI introduced the 'creamy layer' concept, excluding the relatively well-off members of backward groups from reservation benefits.⁸⁹

Two recent SCI cases stand out within the context of reservations and from the CPPT/CRRT perspective. The first is the 2020 case of *Dr. Jaishri Laxmanrao Patil v. Chief Minister*,⁹⁰ which addressed reservations provided by the state of Maharashtra to a group not traditionally considered historically oppressed. This case revisited previous SCI stances, including the 50% cap on reservations and the requirement for empirical evidence to support reservations. While delving into the specifics of this case is beyond this article's scope, the case indirectly questioned the 102nd Amendment's establishment of the National Commission for Backward Classes. This body was tasked with advising on the socio-economic development of socially backward classes and assessing their

⁸⁵ *Indra Sawhney v. UOI* (1992) Supp (3) SCC 217

⁸⁶ See e.g., P Vasanth, 'Should the 50% Legal Ceiling on Reservation be Reconsidered?' (*The Hindu*, 13 October 2023) <<https://www.thehindu.com/opinion/op-ed/should-the-50-legal-ceiling-on-reservation-be-reconsidered/article67413516.ece>; <https://indianexpress.com/article/opinion/columns/sc-verdict-on-ews-pushing-upper-caste-interests-8256482/>>.

⁸⁷ *Indra Sawhney* (n 85).

⁸⁸ *Ibid.*

⁸⁹ See *M. Nagaraj v UOI* (2006) 8 SCC 212; See also *Ashok Kumar Thakur v UOI* (2008) 6 SCC 1.

⁹⁰ (2021) 8 SCC 111.

development progress. Despite not needing to do so in the case (or being asked to do so), the SCI declared that identifying backward classes is a central government prerogative, not a state government one. In this manner, it subtly undermined India's federal structure, a key component of its constitutional democracy and basic structure. Thus, it can be contended that the SCI, even if in a small way, engaged in 'abusive judicial review',⁹¹ leading to an outcome contradicting the goals of CPPT/CRRT.

The second pivotal case is the 2022 decision in *Janhit Abhiyan v. UOI*,⁹² where the SCI assessed the 103rd Amendment. This amendment was passed swiftly within four days of its introduction in the legislature with minimal debate. It introduced a 10% reservation for Economically Weaker Sections (EWS) in education and central government jobs, excluding backward castes, tribes, and classes, even if they fell into the economically weaker category. This addition would result in breaching the existing 50% reservation cap that the SCI had previously held was inviolable and integral to the 'right to equality'.⁹³ Critics argue that this amendment, seen as catering to the upper-caste voter base of the Modi government, could alter the foundational intent of reservations from rectifying historical injustices to serving political ends.⁹⁴ This could, in turn, undermine the fabric of equality in India.⁹⁵

Contrary to its prior rigorous standards for reservations, the SCI upheld the 103rd Amendment with seemingly convoluted and contradictory reasoning. Yadav and Dhawan have pointed out that SCI's reversal from decades-long precedents in a case involving reservations for the upper-caste is not entirely surprising, given that the SCI predominantly consists of individuals from upper-caste backgrounds.⁹⁶ This ruling departed from the longstanding 50% reservation cap and diluted the stringent criteria previously applied to reservations for historically marginalized groups—including not permitting reservation solely on economic grounds.⁹⁷

It's plausible to argue that in 2022, given the BJP's dominant position, the SCI had a very small 'tolerance interval'. Therefore, overturning the amendment might have been challenging, whether on the grounds of violating the right to equality or due to other concerns central to CPPT/CRRT scholars, such as the non-deliberativeness of the amendment. Yet, the SCI could have opted for narrowly interpreting the 103rd Amendment, employed statutory reinterpretation to uphold it, or prescribed a set of constraints within which the amendment was to operate.⁹⁸ This approach would not have been

⁹¹For more on this, See D Landau and R Dixon, 'Abusive Judicial Review: Courts against Democracy' (2020) 53 *University of California Davis Law Review* 1313.

⁹²(2023) 5 SCC 1

⁹³Dr. Jaishri Laxmanrao Patil (n 90).

⁹⁴See AVS Namboodiri, 'The EWS Judgement Needs to be Reviewed' (*Deccan Herald*, 24 November 2022) <<https://www.deccanherald.com/opinion/panorama/the-ews-judgement-needs-to-be-reviewed-1165298.html>>. See also M Shunmugasundaram, 'EWS Judgment Is a Setback to Social Justice, India's Constitutional Scheme' (*Indian Express*, 11 November 2022) <<https://indianexpress.com/article/opinion/columns/dmk-manuraj-shunmugasundaram-supreme-court-ews-judgment-8260544/>>.

⁹⁵Shunmugasundaram (n 94).

⁹⁶Y Yadav and P Dhawan, 'EWS Verdict Shows Merit Matters Only When it's 'Their' Children, Not 'Our' Kids' (*The Print*, 8 November 2022) <<https://theprint.in/opinion/ews-verdict-shows-merit-matters-only-when-its-their-children-not-our-kids/1206345/>>.

⁹⁷*Ibid.*

⁹⁸K Kalra, 'Escaping the Basic Structure Dilemma – On the Majority Judgement(s) in the EWS Reservations Case' (*IndConLawPhil*, 10 November 2022) <<https://indconlawphil.wordpress.com/2022/11/10/guest-post-escaping-the-basic-structure-dilemma-on-the-majority-judgment-in-the-ews-reservations-case/>>.

unprecedented, as the SCI has taken similar steps in several past cases dealing with amendments. Indeed, much of the SCI's jurisprudence regarding reservations has evolved from such judicial actions.

An examination of the SCI's decision-making from the 1990s to the contemporary period reveals consistent trends with those observed in earlier sections. These include a reluctance to challenge governmental actions, the realization of only moderate net-positive outcomes for the constitutional framework, and instances of institutional self-aggrandizement that fail to yield benefits from a CPPT/CRRT or broader constitutional democratic perspectives. Additionally, the patterns of elite-oriented decision-making and, at times, the employment of abusive judicial review practices have also been observed during this period.

CPPT/CRRT and the court's role in a society

India is frequently referenced as a prototype case in discussions on the judiciary's positive role, both by CPPT/CRRT scholars and in broader discussions on judicial role. Within the context of courts and constitutional amendments, decisions such as *Kesavananda Bharati*, *Raj Narain*, and *Minerva Mills* frequently appear as examples of how courts can play a role in forwarding CPPT/CRRT and allied aims. Yet, as the previous sections demonstrated, a detailed examination of these cases and the broader SCI jurisprudence regarding constitutional amendments reveals a more complicated picture.

Beyond protecting its own turf, in scenarios where many proponents of CPPT/CRRT might prefer judicial intervention, the SCI has often tended to either defer to the government or explicitly support its measures. This trend was particularly evident during the Emergency period from 1975 to 1977. Despite the *Kesavananda Bharati* verdict in 1973, which affirmed the judiciary's power to review constitutional amendments, the SCI refrained from invalidating the government's authoritarian amendments, notably the substantial portions of the 39th and the 42nd Amendments. Such inaction facilitated Indira Gandhi's government's imposition of various repressive measures during the Emergency.

Moreover, the SCI's decisions have sometimes explicitly contravened goals pushed by various proponents of CPPT/CRRT. For example, the ruling in *Jaishri Laxmanrao Patil* weakened the federal structure of the Indian Constitution. Additionally, while in some instances the SCI had to act to preserve their independence, many of the cases focusing on the court's jurisdiction and authority, such as *Waman Rao*, *L Chandra Kumar*, and the *NJAC* case, arguably have had a negative impact on India's constitutional democracy by constricting the avenues for representative and political governance.

Further, the SCI has often leveraged its extensive powers to safeguard and/or forward elite interests, frequently to the detriment of broader societal equality—another goal that certain CPPT/CRRT scholars envision courts to help actualize in order to facilitate better access to channels of political participation. This inclination to protect elite interests was evident in the land redistribution cases, where the SCI's persistent defense of affluent landowners' rights significantly hindered efforts to address India's unequal land distribution. Similarly, the *Janhit Abhiyan* verdict, wherein the SCI upheld the controversial 103rd Amendment, was another case with potential negative connotations for social equality in India. As previously described, in this case, the SCI's backtracked on its own stringent past precedents on equality and reservations, the moment elite concerns were implicated.

Nevertheless, it would be disingenuous to state that the SCI has been entirely ineffective in reviewing constitutional amendments. However, beyond ensuring its own independence is intact, its positive role in reviewing constitutional amendments has been sporadic and not in the ways CPPT/CRRT scholars envision. For instance, in *Golaknath*, while conceding to the government, the SCI stated via *obiter* that Parliament's power to amend the Constitution is not absolute. Despite overruling *Golaknath*, a similar pattern was observed in *Kesavananda Bharati*. Many have argued that *Kesavananda Bharti* was the case that saved Indian democracy.⁹⁹ This is undoubtedly an exaggeration. Notwithstanding conceding to the government, it is definitely a case that underlined the Constitution's inviolability and the principle of the rule of law by emphasizing that Parliament cannot employ its amending powers to 'dismember' the Constitution. Preserving the sanctity of the Constitution and upholding the rule of the law are moderated outcomes, yet important. If elected officials are permitted to unilaterally amend the Constitution without limits, they can reduce it to mere rhetoric. This is particularly problematic in a Global South country such as India, which has a low constitutional culture.

Indira Gandhi v. Raj Narain was another critical pronouncement of the SCI when preserving the sanctity of the Constitution and the rule of law. Arguably, the SCI could not have halted Gandhi in those circumstances. Upholding the ruling of the Allahabad HC might have resulted in even more attacks on it than were carried out during the Emergency.¹⁰⁰ Given this reality, the fact that it upheld Gandhi's election while preventing future elections from being removed from any judicial scrutiny was somewhat praiseworthy. Though there are disagreements on this point,¹⁰¹ scholars have argued that the possibility of her actions being subjected to judicial scrutiny was a contributing factor to her cautious positions (atleast as it pertains to conducting free and fair elections) after the emergency.¹⁰²

Moreover, regarding the positive effects of the SCI's engagement with constitutional amendments, another beneficial impact has been the SCI's application of its amendment review power as a tool for restorative constitutionalism. Much attention is paid to preventing abuse by authoritarians but relatively little to undoing remnants of authoritarian or anti-democratic periods that impact most modern democracies today. During such periods, would-be-autocrats try to concentrate power and remove checks on it. Moreover, socially popular autocrats can easily make such changes by any means. What is at times harder is for democratic-leaning leaders in the future to undo remnants of the authoritarian past. This is sometimes because of the lack of electoral thresholds to pass amendments. In other cases, it is because of their own desire to want to play by the book—in contrast with autocrats who are ready to bend the rules. Left alone, these remnants can make a polity more prone to falling back into the authoritarian trap.

India's example itself helps illustrate a lot of these points. In the 1970s, under Indira Gandhi, India underwent a temporary authoritarian period where sweeping changes were brought about, including by constitutionally suspect means. Fragmented politics followed

⁹⁹See e.g., A Datar, 'The Case that Saved Indian Democracy' (*The Hindu*, 24 April 2013) <<https://www.thehindu.com/opinion/op-ed/the-case-that-saved-indian-democracy/article62107496.ece>>.

¹⁰⁰For a description of the attacks on the judiciary during the emergency, See A Mandhani, 'Can Judiciary Stand up to All-Powerful Executive? How Judges did it during Emergency' (*The Print*, 15 July 2022) <<https://theprint.in/india/governance/can-judiciary-stand-up-to-all-powerful-executive-how-judges-did-it-during-emergency/1027493/>>

¹⁰¹Austin (n 26) 396–405.

¹⁰²Dixon and Landau (n 31) 619; Issacharoff and Dixon (n 44) 715.

this period. Today, India is again facing a decline in democratic quality. Such cyclic periods are routine in many Global South countries. However, India might have faced an authoritarian period even sooner if the constitutional changes made during the Emergency were left as they were—simply because they provided the keys to an autocratic empire. India's case also shows how hard it is to undo changes made by autocrats. The internal divides and the post-election infighting in the Janata Party made it hard to complete even a term. It is an achievement that they could still undo some of Indira Gandhi's abusive moves by passing the 43rd and 44th Amendments. The reality is that they were unable to undo some of the changes. It was in this context that the SCI's role became pivotal. The SCI was able to step in and finish the job left by the Janata Party.

The SCI's judgments in cases such as *Minerva Mills*, *P. Sambamurthy*, *Kihoto Hollohan*, and *Sampath Kumar* helped remove or temper provisions (which were largely emergency-era remnants) that could be creatively used for a wide array of abusive actions or use the judiciary to forward authoritarian agendas or provide legal legitimacy to abusive actions. For instance, in *Minerva Mills*, the SCI invalidated an emergency-era provision that allowed the legislature to use the pretext of DPSP to override fundamental rights.¹⁰³ This judgment, albeit delayed and lacking bite, is pivotal given the broad scope of the DPSPs. The DPSPs, if interpreted expansively, could potentially justify a wide array of abusive constitutional changes. Consider these two directive principles: Article 38 states, "The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life". Article 39A states, "The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid". Creatively interpreted, would-be-autocrats can use these articles to centralize power or pack the court system. These hypotheticals are not even extreme ones. These are precisely the arguments would-be-autocrats have made in the comparative context.

The aforementioned reflects the realities of one of the most prototype jurisdictions in the theoretical discourse on courts. Even for other prototype jurisdictions such as Colombia, scholars like Benetiz have pointed out the possibility of analogous tendencies in the context of the review of constitutional amendments.¹⁰⁴ While the case in which the Colombian Constitutional Court (CCC) halted President Uribe from bypassing term limits is occasionally cited by scholars (including CPPT/CRRT ones) for their theoretical analysis, the CCC, much like the SCI, has more systematically exercised its review authority to unduly self-aggrandize or in ways that potentially contravene the objectives of CPPT/CRRT.¹⁰⁵ If leading jurisdictions, such as India and Colombia, exhibit these tendencies, the results from other legal systems could be even more concerning.¹⁰⁶

A criticism can certainly be raised that this article's focus on constitutional amendments does not encompass the entire spectrum of judicial decision-making, and a more

¹⁰³See textbody accompanying footnote 63.

¹⁰⁴See generally VF Benítez-R, 'Petrificando La Rama Judicial En Colombia: Autointerés Judicial Y Control De Constitucionalidad Inapropiado De Reformas Constitucionales A La Justicia' (2022) 20 (4) *International Journal of Constitutional Law* 1618, 1618–1646.

¹⁰⁵*Ibid.*

¹⁰⁶In fact, with respect to constitutional amendments, numerous comparative instances exist where courts have reviewed amendments in a manner starkly opposing the principles of CPPT/CRRT or in what might be characterized as instances of abusive judicial review. See A Sethi, 'When Should Court's Invalidate Constitutional Amendments' (2024) 18(1) *ICL Journal* 25, 30–36.

detailed evaluation of the broader decision-making of the SCI or other courts might reveal different pictures. Although a more in-depth analysis is essential for drawing firm conclusions, preliminary findings within the Indian context suggest a similar pattern across the broader legal landscape. In its ordinary decision-making, the SCI has seldom confronted the government in ways CPPT/CRRT scholars would hope for during times of authoritarian stress. This was evident during the 1970s Emergency¹⁰⁷ and the ongoing Modi administration¹⁰⁸. Bar isolated instances,¹⁰⁹ its decision-making has been characterized by significant deferrals and concessions.¹¹⁰ In fact, in both scenarios, strong cases can be made that the SCI appears to have contributed to democratic erosion in India.¹¹¹

Even during the fragmented political era from the 1990s to the early 2010s, when the court was acclaimed for its activist Public Interest decisions, a detailed examination reveals that its decisions provided relatively muted benefits. The court often recognized the constitutional basis for various new rights without providing redress for grievances.¹¹² While these decisions were not entirely inconsequential, their overall benefits were relatively modest. For example, while the bulk of the human rights jurisprudence might not have directly altered realities on the ground, it afforded various groups, including civil society, the time to organize and devise strategies.¹¹³ It also arguably helped overcome coordination challenges and provided focal points for mobilization.¹¹⁴ Nevertheless, in most instances where the SCI more assertively exercised its judicial authority in its regular decision-making, the outcomes frequently favored India's elite to the detriment of the wider public¹¹⁵ or aimed at enhancing its powers in ways that neither aligned with CPPT/CRRT objectives nor substantially advanced Indian constitutionalism.¹¹⁶

As the introduction outlines, the judiciary derives its power from public support and relies on the legislative and executive branches to implement its rulings. Confronted with controversial or abusive actions (especially those with significant public backing), the judiciary's capacity to act is inherently constrained. Typically, the courts' most feasible course of action involves securing minor adjustments through constitutional reinterpretation or adopting deferral tactics and refraining from explicit approval of contentious laws and amendments. This approach has been characteristic of the SCI's handling of several cases, positioning its role as more moderated than the proactive, protective stance envisioned by CPPT/CRRT theorists.

Thus, it is essential to understand that while courts can provide benefits, these benefits are frequently not as ambitious as the ones envisioned by a large segment of CPPT/CRRT scholars. The reality of judicial politics is that courts cannot be wholly banked upon in challenging times or times when their tolerance interval is small to act against democratic

¹⁰⁷Jaffrelot and Anil (n 54).

¹⁰⁸AP Shah, 'The Only Institution Capable of Stopping the Death of Democracy Is Aiding it' (*The Wire*, 18 September 2020) <<https://thewire.in/law/supreme-court-rights-uapa-bjp-nda-master-of-roster>>.

¹⁰⁹PB Mehta, 'PB Mehta Writes: SC Was Never Perfect, But the Signs Are that it is Slipping into Judicial Barbarism' (*Indian Express*, 18 November 2022) <<https://indianexpress.com/article/opinion/columns/supreme-court-arnab-goswami-bail-article-32-pratap-bhanu-mehta-7055067/>>.

¹¹⁰See e.g., G Bhatia, 'Judicial Evasion and the Status Quo: On SC Judgments' (*The Hindu*, 10 January 2019) <<https://www.thehindu.com/opinion/lead/judicial-evasion-and-the-status-quo/article25953052.ece>>.

¹¹¹Mehta (n 109).

¹¹²See Sethi (n 18) 27–28.

¹¹³Ibid 6–7.

¹¹⁴Ibid 27–28.

¹¹⁵See generally Bhuwania (n 49).

¹¹⁶See textbody accompanying footnote 78.

excesses and/or the failure of the representative/political process. At other times, courts and their judge's good faith cannot be taken at face value. Courts show a propensity for elite decision-making at odds with CPPT/CRRT values or use their institutional capital to aggrandize power in ways that might negatively affect constitutional governance.

The question then arises is what this means for the future of the CPPT/CRRT discourse. Kavanaugh argues that constitutional theory must certainly rest on descriptively plausible foundations, absent which they risk being reduced to fiction.¹¹⁷ Future CPPT/CRRT research must consider and confront these realities of judicial politics and confront them head-on. Merely advocating for expanding judicial powers may inadvertently foster outcomes contradicting CPPT/CRRT principles. CPPT/CRRT scholars like Dixon have stated that courts must be mindful of their institutional constraints and democratic backlashes and, accordingly, exercise restraint.¹¹⁸ Yet, things might not be so straightforward. If courts are allowed to play expansive roles in a political system, relying simply on courts understanding their limits and exercising restraint might not be sufficient.

CPPT/CRRT scholars will need to weigh the various costs and benefits of courts exercising any expansive power and decide how to proceed. They might need to devise theories of judicial roles that limit the room for courts to act but still leave open the possibility of allowing courts to provide some of the modest benefits akin to those discussed above. For example, in the context of judicial invalidation of constitutional amendments, some preliminary works have started to appear that help provide guidance on this topic.¹¹⁹ These works acknowledge that invalidation of constitutional amendments based on tests such as the basic structure doctrine (or similar standards) has tremendous potential for courts to misuse their powers. Even when that is not the case, the ordinary usage of such expansive power can incur democratic costs. Thus, scholars have presented solutions for theories of review that substantially limit the circumstances in which courts can hold amendments invalid¹²⁰ or provide pathways for the elected branches to overrule¹²¹ judicial decisions concerning overruling amendments. Similar theories need to be thought about in other realms of judicial intervention. This can ensure that courts are still present as valuable veto points without them existing as institutions that lead to anti-CPT/CRRT outcomes.

Such an understanding of judicial roles offers practical benefits as well. It addresses a critical issue prevalent in jurisdictions like India, where advocates of constitutional democracy tend to overly depend on the judiciary for protection and enforcement.¹²² By reimagining the role of courts, scholars, and practitioners can mitigate the risk of over-reliance on judicial interventions. This recalibration can enable a more balanced approach to safeguarding and/or advancing constitutional democracy. It can do so by encouraging a diversified strategy that does not singularly hinge on judicial outcomes.

¹¹⁷A Kavanagh, 'Keeping it Real in Constitutional Theory' (2023) 1(2) *Comparative Constitutional Studies* 244, 244–266.

¹¹⁸Dixon (n 4) 1496.

¹¹⁹See e.g., PJ Yap, 'The Conundrum of Unconstitutional Constitutional Amendments' (2015) 4(1) *Global Constitutionalism* 114, 114–125; C Torres-Artunduaga and S García-Jaramillo, 'Democratizing the Doctrine of Unconstitutional Constitutional Amendments: The Puzzle of Amending the Judiciary Branch' (2020) 14 (1) *ICL Journal* 1, 1–42; Sethi (n 106) 25–57; Dixon and Landau (n 31)

¹²⁰See Yap (n 119) 125.

¹²¹See Sethi (n 106); See Torres-Artunduaga and García-Jaramillo (n 119) 38–42.

¹²²See Sethi (n 18) 1–3.

This ensures that efforts to protect and bolster constitutional democracy are multifaceted and resilient against the challenges of judicial overreach or underperformance.

Conclusion

This article's examination of the judicial review of constitutional amendments in India highlights the complexities that courts, including allegedly powerful ones like the SCI, face in performing the roles envisioned by CPPT/CRRT scholars. The inherent institutional limitations of courts present significant obstacles to their efficacy. Furthermore, even when political situations might be conducive to exercising judicial power and courts operate in good faith, institutions like the SCI may inadvertently cause net negatives for the constitutional system. This can arise from a propensity for institutional self-aggrandizement or decisions that resonate more with elite preferences. At the same time, this does not imply that courts cannot positively influence the constitutional fabric. Nevertheless, their positive contributions are more moderated than the proactive protectionist judicial engagement CPPT/CRRT scholars expect.

Based on these insights, this article argued how future CPPT/CRRT research would need to confront the realities of judicial politics head-on. The potential for courts to play expansive roles within political systems warrants careful consideration. A simplistic push for the same could result in outcomes that contravene CPPT/CRRT's very goals. Future research by CPPT/CRRT scholars must evaluate the trade-offs of judicial expansiveness and formulate theories that articulate judicial roles in a manner that capitalizes on the modest benefits discussed herein while minimizing adverse impacts.

This article only focused on judicial review of constitutional amendments in India. Though, through ancillary discussions, it did mention how its findings might be similar not only in areas beyond judicial review of constitutional amendments in India but also in the broader comparative context. However, those ancillary examples are insufficient to draw firm conclusions. It is undoubtedly possible that this article's findings are an outlier or that several jurisdictions stand out as exceptions and require special consideration.

Scholars engaged in the CPPT/CRRT discourse certainly need to undertake more exercises, such as the one in this article, in different contexts and using diverse lenses. Additionally, in conducting such research, it is vital for scholars to focus on the entire range of a court's activities (encompassing the judiciary's positive, negative, and controversial actions) to avoid selection bias and incomplete narratives. Partial analysis and the resultant half-truths can misinform our understanding of judicial roles in democratic societies. For instance, the examination of judicial review of constitutional amendments in India could easily be narrowed to a few landmark cases, using them to argue that the judiciary's amendment invalidation powers have either safeguarded or undermined the Indian political framework. Such arguments have been made, but as this article demonstrates, the reality is invariably more complex and layered.

Ultimately, this article aims to encourage CPPT/CRRT scholars to pay greater attention to the institutional constraints and characteristics of courts and foster a more grounded discourse on judicial power and role.

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