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State Constitutions and the Basic Structure Doctrine

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STATE CONSTITUTIONS AND THE BASIC STRUCTURE DOCTRINE

Manoj Mate, Ph.D., J.D.

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STATE CONSTITUTIONS AND THE BASIC STRUCTURE DOCTRINE

Manoj Mate, Ph.D., J.D.*

Across the United States, voters in many states have enacted initiative constitutional amendments that abrogate protections for equality and fundamental rights. In most cases, state supreme courts have upheld the validity of these amendments, undermining protections for fundamental rights at the state level. This Article proposes a novel solution to this problem: it argues for the application of the basic structure doctrine in the review of constitutional amendments by state supreme courts. Under this doctrine, the Supreme Court of India (like constitutional courts in other nations) asserted the power to invalidate amendments that abrogate "basic features" of the Indian Constitution as defined by the Court. Drawing on this doctrine, this Article seeks to provide a methodological framework for articulating which foundational principles and rights should be entrenched within the constitutional framework. For instance, the application of the basic structure doctrine would help address several flaws in the California Supreme Court's revision-amendment standard applied in Strauss v. Horton. In Strauss, the majority upheld Proposition 8, the initiative measure banning same-sex marriage, as a constitutional amendment.

Constitutional review at the state level is likely to garner increased attention as a result of the U.S. Supreme Court's recent decisions in Hollingsworth v. Perry and U.S. v. Windsor. These decisions can arguably be read to stand for "rights federalism," the concept that state governments will have the final say in defining the range and scope of fundamental rights protections. Although the U.S. Supreme Court may define and set a "floor" of guaranteed federal

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constitutional rights, in light of the decisions in Perry and Windsor, state supreme courts will continue to play a key role on these issues.

This Article frames the potential application of the basic structure doctrine at the state level within theories of constitutional change, and the tension between conceptions of popular sovereignty and rights federalism. I argue that the basic structure doctrine would advance the cause of "rights federalism" by enabling state supreme courts to provide for stronger protections of fundamental rights than does the Federal Constitution. State constitutions are far more malleable than the federal Constitution and consequently, state supreme courts can play a crucial role in shielding rights from abrogation by popular majorities. The Article concludes by exploring the potential implications of adoption of a basic structure doctrine for democratic theory and theories of constitutional change, the tension between popular sovereignty and federalism.

I. INTRODUCTION 442
II. THE BASIC STRUCTURE DOCTRINE AND STATE CONSTITUTIONALISM: THEORETICAL CONSIDERATIONS 452
A. Conceptions of Entrenchment: Political Entrenchment versus Judicial Entrenchment 453
B. Popular Federalism v. Judicial (Rights) Federalism 456
III. THE REVISION-AMENDMENT STANDARD IN *STRAUSS V. HORTON* .. 458
IV. THE BASIC STRUCTURE DOCTRINE IN INDIA 464
A. Development of the Basic Structure Doctrine 465
1. *Golak Nath* (1967): Fundamental Rights and the Amending Power 466
2. *Kesavananda Bharati v. Kerala* (1973): The Assertion of the Basic Structure Doctrine 468
3. The *Election Case*: A Framework for Identifying Basic Features 473
B. Unpacking the Basic Structure Doctrine 482
V. APPLYING THE BASIC STRUCTURE DOCTRINE TO *STRAUSS* AND PROPOSITION 8 488
VI. CONCLUSION 494

I. INTRODUCTION

> "The expression 'amendment of this Constitution' does not enable Parliament to abrogate or take away, fundamental rights or to completely change the

> fundamental features of the Constitution so as to destroy its identity. Within these limits Parliament can amend every article."
>
> -Chief Justice Sikri, Kesavananda Bharati v. Union of India (1973)[1]

> "I conclude that requiring discrimination against a minority group on the basis of a suspect classification strikes at the core of the promise of equality that underlies our California Constitution and thus "represents such a *drastic and far-reaching change in the nature and operation of our governmental structure* that it must be considered a 'revision' of the state Constitution rather than a mere 'amendment' thereof" (citations omitted). The rule the majority crafts today not only allows same-sex couples to be stripped of the right to marry that this court recognized in the *Marriage Cases*, it places at risk the state constitutional rights of all disfavored minorities. It weakens the status of our state Constitution as a bulwark of fundamental rights for minorities protected from the will of the majority. I therefore dissent.
>
> -Justice Carlos Moreno, dissenting opinion in *Strauss v. Horton* (2009)[2]

Compare these statements to the following exchange during oral arguments in *Strauss v. Horton* (2009), discussing whether Proposition 8, the initiative constitutional amendment banning same-sex marriage in California, constituted an amendment or revision to the California Constitution:

> Chief Justice Ronald GEORGE: If Proposition 8 had explicitly stated that . . . the right to form a family relationship, and to associate and bring up children and so forth—virtually all the domestic partnership rights, if you will—were abolished. . . . Let's say Proposition 8 had gone that far, you're saying that that would be permissible as an amendment—it would not constitute a revision? . . .

1. Kesavananda Bharati v. State of Kerala, (1973) 4 S.C.C. 225 (India).
2. Strauss v. Horton, 207 P.3d 48 (Cal. 2009).

> Kenneth STARR: It still would not constitute a revision. . . . There must be a far-reaching change in the *basic structure* of government. All these hypothetical questions have to do with rights—very important rights, rights that will be protected through the Federal Constitution, even if people unwisely act through the initiative process.
>
> GEORGE: So, right to marriage, right to free speech, whatever, that can be removed by the simple amendment process?
>
> STARR: As long as it is, in fact, clear to the people what they are voting on.[3]

In defending the validity of Proposition 8, Starr proceeded to make an extraordinary argument for a broad conception of popular sovereignty that was based on decades of California precedent—that initiative constitutional amendments that infringed upon, or even entirely removed, fundamental rights from the California Constitution were permissible. The exchange illuminated deep flaws in the Court's existing revision-amendment jurisprudence, at least as applied by the majority in *Strauss* in upholding Proposition 8's validity. Article 18 of the California Constitution recognizes a distinction between amendments and revisions.[4] The electorate may amend the constitution through the initiative process, which requires the submission of a petition with the signatures of eight percent of the electorate to place the initiative on the statewide ballot, and approval of the initiative by majority vote of the electorate.[5] By contrast, revisions must be proposed either by constitutional convention or by two-thirds of both houses of the legislature for

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3. Proposition 8 Repeal Oral Arguments David Edwards & Stephen C. Webster, *Arguing for Prop. 8, Ken Starr says any right can be taken*, The Raw Story (Mar. 5, 2009), http://rawstory.com/news/2008/Ken_Starr_argues_for_Prop_8_0305.html; Proposition 8 Repeal Oral Arguments, http://www.c-span.org/video/?284455-1/proposition-8-repeal-oral-arguments

4. Cal. Const. Art. XVIII. Article 18 originally only allowed the legislature to propose amendments, but Article 18 was amended in 1962 through the enactment of the Proposition 7, to allow the legislature to propose revisions. *Strauss*, 207 P.3d at 87.

5. Cal. Const. art. II, § 8.

submission to the voters on the statewide ballot, and then be approved by a majority vote of the electorate.[6] Under California law, the state judiciary has the power to invalidate constitutional amendments on the grounds that they constitute impermissible revisions to the Constitution, if an amendment effects "far-reaching or substantial changes in the basic governmental plan or framework of the California Constitution."[7]

***

The U.S. Supreme Court's recent decisions in *Hollingsworth v. Perry* and *U.S. v. Windsor* have bolstered the movement for same-sex marriage rights in California and across the nation. In many ways, these decisions represented the culmination of an ongoing effort to legalize same-sex marriage in state legislatures and through initiatives,[8] as well as battles in state and federal courts over the constitutionality of measures banning same-sex marriage. Prior to these U.S. Supreme Court's decisions, state supreme courts in Massachusetts, Iowa, and California recognized a constitutional right to marriage for same-sex couples, and several states have recently legalized same-sex marriage.[9] In *Windsor*, the Court invalidated the Defense of Marriage Act on due process and equal protection grounds,

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6. Cal. Const. art. XVIII.

7. Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 583 P.2d 1281 (1978); Raven v. Deukmejian, 801 P.2d 1077, 1086–88 (Cal. 1990); Mcfadden v. Jordan, 196 P.2d 787, 788–89 (Cal. 1948)

8. Currently, seventeen states allow same sex marriage in the United States: California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Mexico, New Jersey, New York, Rhode Island, Vermont, Washington, and the District of Columbia. State supreme courts in the following state have legalized same-sex marriage: California (May 15, 2008 (overturned by Proposition 8, which was subsequently invalidated by the federal district court in *Perry v. Schwarzenegger* (2010))), Connecticut (Nov. 12, 2008), Iowa (Apr. 24, 2009), Massachusetts (May 17, 2003, New Mexico (December 19, 2013). The following states have legalized same-sex marriage via state legislation: New Hampshire (Jan. 1, 2010), Maine (2012), Maryland (2012), Minnesota (2013), New York (July 24, 2011), Vermont (Sept. 1, 2009), Washington (2012). The District of Columbia legalized same sex marriage on Mar. 10, 2012.

9. *See* Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009); Baker v. Vermont, 744 A.2d 864 (Vt. 1999); Lewis v. Harris, 908 A.2d 196 (N.J. 2006); *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008).

and in *Perry*, the Court ruled that petitioners did not have standing to appeal Judge Vaughn's decision at the district court in *Perry v. Schwarzenegger* (2010), in which the district court invalidated Proposition 8 on substantive due process and equal protection grounds.[10] Notwithstanding the U.S. Supreme Court's decisions in *Perry* and *Windsor*, federal courts have had a mixed track record on this issue: they have both invalidated and upheld state bans on same sex-marriage.[11] The U.S. Supreme Court appeared to adopt a strategic approach[12] to resolving each of these cases in order to avoid political backlash; neither decision affirmatively recognized a fundamental right to same-sex marriage.[13] Effectively, this means that state governments will continue to play a major role in regulating same-sex marriage, at least for the foreseeable future.

Consequently, state supreme courts will continue to play a key role on this issue, and in other controversies involving

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10. Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

11. *See* Jackson v. Abercrombie, 884 F. Supp. 2d 1065 (D. Haw. 2012) (upholding Hawaii's same sex marriage ban); Perry v. Schwarzenegger, No. C 09-02292 JW, 2011 U.S. Dist. LEXIS 105483 (N.D. Cal. Sept. 19, 2011) (invalidating Proposition 8's ban on same-sex marriage in California); Perry v. Schwarzenegger, 630 F.3d 909 (9th Cir. 2011) (affirming district court's decision); Gill v. Office of Personnel Management, 699 F. Supp. 2d 374 (D. Mass 2010) and Massachusetts v. U.S. Dep't of Health and Human Services, 698 F.Supp.2d. 234 (D. Mass. 2010) (invalidating Section 3 of Defense of Marriage Act); Gill et al. v. Office of Personnel Management, 682 F.3d 1 (1st Cir. 2012) (upholding district court decision); Windsor v. U.S., 699 F.3d 169 (2d Cir. 2012); Sevcik v. Sandoval, 911 F. Supp. 2d 996 (D. Nev. 2012).

12. Diana Richmond, *Hollingsworth v. Perry and U.S. v. Windsor: After Jubilation, What?*, Lexis Nexis Emerging Issues Analysis, July 2013, *available at* http://sideman.com/files/EIC7034-1.pdf.

13. The majority in *Windsor* invalidated the Defense of Marriage Act as violating both due process and equal protection principles under the Fifth Amendment, and suggested (but did not definitely rule) that DOMA impermissibly intruded upon state authority to regulate marriage. Consistent with the Court's earlier decision in *Romer v. Evans*, 517 U.S. 620 (1996), the Court did not recognize a federal constitutional right to same-sex marriage. United States v. Windsor, 133 S. Ct. 2675 (2013), 2689–96. *See* Neomi Rao, *The Trouble with Dignity and Rights of Recognition*, 99 Va. L. Rev. Online 29, (2013), *available at* http://ssrn.com/abstract=2313234 (arguing that *Windsor* recognized the dignity of same-sex marriage, not the right to same-sex marriage, in holding that the federal government must recognize existing same-sex marriages at the state level).

fundamental rights.[14] This is especially true in states that provide for amendment by popular initiative. In California and other states, state supreme courts have upheld the constitutionality of initiative constitutional amendments that sought to ban same-sex marriage by similarly refusing to construe them as revisions.[15] Under California law, the state judiciary has the power to invalidate constitutional amendments on the grounds that they constitute impermissible revisions to the Constitution if an amendment effects "far reaching" or "substantial changes in the basic governmental plan" or framework of the California Constitution.[16] This definition of revision has been construed narrowly in its application to subsequent cases to exclude amendments that curtail or abrogate fundamental rights, and other state supreme courts have construed revision narrowly, reducing state constitutional protections for fundamental rights.

This Article argues for state supreme court adoption of the basic structure doctrine for evaluating the constitutionality of amendments at the state level. The Article situates the proposed application of the basic structure doctrine by state courts within broader theoretical perspectives on constitutional change and normative arguments for applying the basic structure doctrine to state constitutional analysis. The Article also advances arguments for "judicial entrenchment" by courts and explores the implications of the basic structure doctrine for popular and judicial federalism.[17]

In arguing for the application of the basic structure doctrine at the state level, this Article revisits the California Supreme Court's decision in *Strauss v. Horton* (2009).[18] The majority in *Strauss* upheld the constitutionality of Proposition 8—the initiative-constitutional amendment enacted by California voters depriving same-sex couples of the right to marriage that had earlier been recognized in the *In re*

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14. *See* Emily Zackin, Looking for Rights in All the Wrong Places: Why State Constitutions Contain America's Positive Rights (2013) (illustrating how positive rights have been enshrined in state constitutions in the United States).

15. Strauss v. Horton, 207 P.3d 48 (Cal. 2009); Bess v. Ulmer, 985 P.2d 979 (Alaska 1999) (upholding initiative banning same sex marriage in Alaska); Martinez v. Kulongoski, 185 P.3d 498 (Or. Ct. App. 2008) (upholding initiative banning same-sex marriage in Oregon); *see also* Standhardt v. Superior Court, 77 P.3d 451, 457 (Ariz. Ct. App. 2003) (upholding ban on same-sex marriage in Arizona).

16. Raven v. Deukmejian, 801 P.2d 1077, 1086–88 (Cal. 1990).

17. *See* Bruce E. Cain & Roger G. Noll, *Malleable Constitutions: Reflections on State Constitutional Reform*, 87 Tex. L. Rev. 1517 (2009).

18. *Strauss*, 207 P.3d 48; *see* Cain & Noll, *supra* note 17.

Marriage Cases (2008).[19] Drawing on its earlier jurisprudence, the *Strauss* Court ruled that Proposition 8 did not constitute a revision to the constitution, because the amendment did not effect far-reaching or substantial changes in the basic governmental plan or framework of the California Constitution.[20] Under California law, while amendments may be enacted by majority popular vote through ballot initiatives, revisions must be initiated and be approved by a majority vote of the legislature or a constitutional convention, prior to being submitted to the voters via the initiative process for their approval by majority vote.[21]

Justice Carlos Moreno's dissenting opinion, and Justice Werdegar's concurring opinion, represented a significant departure from existing California precedent in articulating variants of an "entrenched provisions" doctrine.[22] Both of these opinions went far

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19. *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008).

20. *Strauss*, 207 P.3d at 48.

21. *See* Cain & Noll, *supra* note 17. California courts have previously upheld these amendments as valid. For example, one such amendment includes the 1982 initiative Proposition 8, commonly referred to as "The Victims' Bill of Rights," which sought to add constitutional provisions providing for "a bill of rights for victims of crime, including safeguards in the criminal justice system to fully protect those rights." Cal. Const. art. I, § 28(a)(2); *see* Brosnahan v. Brown 32 Cal.3d 236 (Cal. 1982). The courts have also upheld Proposition 13, a 1978 initiative that added Article XIIIA to the California Constitution that made significant changes to the system of property taxation and taxing powers throughout the state, "imposing important limitations upon the assessment and taxing powers of state and local governments." *Amador*, 583 P.2d at 1283. In contrast, the Supreme Court of California held that Proposition 115, a criminal justice initiative constitutional amendment that effected a significant number of changes to the California Constitution, constituted a revision and was therefore invalid. Proposition 115 added several new sections that effectively removed state protections for criminal defendants. *See Raven*, 801 P.2d at 1087–1089.

22. For a discussion of the concept of entrenched rights provisions and constitutional entrenchment, *see* Elai Katz, *On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment*, 29 Colum. J.L. & Soc. Probs. 251 (1996); Ran Hirschl, *The Political Origins of the New Constitutionalism*, 11 Ind. J. Global Legal Stud. 71 (2004); Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 Tex. L. Rev. 1895 (2004); Richard Fallon, *The Core of an Uneasy Case for Judicial Review*, 121 Harv. L. Rev. 1693 (2008) Ernest A. Young, *Constitutive and Entrenchment Functions of Constitutions: A Research Agenda*, 10 U. Pa. J. Const. L. 399 (2008); Jacob Levy, Paper presented at the annual meeting of the American Political Science Association: Federalism and Constitutional Entrenchment (June 24, 2012); Cass Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court (1999); Mark Tushnet, Taking the Constitution Away from the Courts (2000). For

beyond the limited "structural-organizational" conception of a constitutional revision articulated by the majority,[23] suggesting that amendments that abrogate foundational constitutional principles, including fundamental rights, could also constitute revisions.[24] Justice Moreno dissented and voted to invalidate Proposition 8 on the grounds that the initiative vitiated the equal protection clause and therefore constituted an impermissible revision under California law.[25]

Although Justice Werdegar ultimately concurred with the majority in *Strauss* in upholding the constitutionality of Proposition 8, he also argued for a broader definition of constitutional revision. Werdegar argued that initiatives that substantially alter the "foundational principles of social organization in free societies" could also be classified as revisions, and that an "amendment of sufficient scope to a foundational principle of individual liberty . . . such as equal protection" would constitute a revision.[26] But Werdegar ultimately concluded that Proposition 8 did not alter or abrogate a foundational constitutional principle, because the initiative merely limited access to the word "marriage" and thus reflected simple "disagreement over a single, newly recognized, contested application of a general principle."[27]

In invalidating Proposition 8, Moreno articulated an "entrenched rights provisions" argument that went far beyond existing precedent. He suggested that core features of the California Constitution, including fundamental rights provisions like equal

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critiques of judicial review and constitutional entrenchment more generally, *see* Larry Kramer, The People Themselves (2005); Jeremy Waldron, *A Right-Based Critique of Constitutional Rights*, 13 Oxford J. Legal Stud. 18, 18–51 (1993); Jeremy Waldron, Law and Disagreement (1999); Richard Fallon, *The Core of the Case Against Judicial Review*, 115 Yale L.J. 1346 (2006).

23. *See Strauss*, 207 P.3d at 124 (Werdegar, J., concurring), 207 P.3d at133 (Moreno, J., concurring and dissenting). I derive the term "structural-organizational" from Justice Werdegar's concurrence in which she observes: "The majority purports to find in this court's prior decisions a definition of the term "revision"—one focused on governmental structure and organization—that categorically excludes Proposition 8 and thus avoids the daunting task of reconciling with our constitutional tradition a voter initiative clearly motivated at least in part by group bias." *Id*. at 124.

24. *Id.*

25. *See Strauss*, 207 P.3d at 133 (Moreno, J., concurring and dissenting).

26. *Id.* at 124 (Werdegar, J., concurring).

27. *Id*. at 128.

protection, could only be restricted or changed through *revision*, not *amendment*. Using Justice Moreno's dissent as a window for the consideration of foreign and legal sources, this Article argues more generally for the consideration and application of the "basic structure doctrine"—developed by the Supreme Court of India [28] in *Kesavananda*—by state constitutional courts, as a doctrinal framework for the review of constitutional amendments. [29] According to this doctrine, constitutional courts may invalidate constitutional amendments that are held to violate the "basic structure" of a constitution.[30] The basic structure doctrine can provide guidance and insights for California and other state supreme courts, in altering, clarifying and improving upon the revision-amendment standard to make it a more coherent and workable test that allows for meaningful distinctions.

The opinions in *Strauss v. Horton* reflect a spectrum of divergent approaches to defining the scope of constitutional revision under California law. More globally, the *Strauss* decision raises fundamental questions about the nature of federalism, constitutionalism, and fundamental rights, suggesting that state

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28. Several recent works have explored the doctrinal and historical development of the Indian basic structure doctrine. *See* Sudhir Krishnaswamy, Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine in India (2009); Pratap Bhanu Mehta, *The Inner Conflict of Constitutionalism: Judicial Review and the Basic Structure, in* India's Living Constitution: Ideas, Practices, Controversies 178–206 (Zoya Hasan et al., eds., 2002); Raju Ramachandran, *The Supreme Court and the Basic Structure Doctrine, in* Supreme But Not Infallible: Essays in Honour of the Supreme Court of India 107–33 (B.N. Kirpal et al., eds., 2000); S.P. Sathe, Judicial Activism in India: Transgressing Borders and Enforcing Limits (2002).

29. Several articles have recently discussed the Indian basic structure doctrine and suggested its similarity to the Proposition 8 case and the revision-amendment distinction under California law. *See* Vicki Jackson, *Unconstitutional Amendments: A Window into Constitutional Theory and Transnational Constitutionalism* (draft article on file with author); Rosalind Dixon, *Transnational Constitutionalism and Unconstitutional Constitutional Amendments* (Chicago Public Law and Legal Theory Working Paper No. 349), *available at* http://ssrn.com/abstract=1840963.

30. India is not the only judiciary to have developed a basic structure doctrine. High courts in other countries, including Germany, South Africa, Turkey, Israel, Colombia, and Brazil have developed and applied similar doctrinal approaches allowing for judicial review of the constitutionality of amendments. *See* Kemal Gözler, Judicial Review of Constitutional Amendments: A Comparative Study 52–53 (2008); Jackson, *supra* note 29; Richard Albert, *Nonconstitutional Amendments*, 22 Can. J. L. & Jurisprudence 5 (2009).

supreme courts play a unique role in policing violations of fundamental rights by popular majorities at the state level. Indeed, as scholars like Cain and Noll have noted, state constitutions in the United States are far more malleable than the federal constitution. Because constitutional revision in California and other states is procedurally much more difficult, most coalitions seeking changes to the constitution have increasingly turned to amendments as the preferred strategy for seeking constitutional change.[31] As a result, the frequency of constitutional amendments has increased at the state level, while the frequency of constitutional revisions has declined over the past three decades.[32] Cain and Noll argue that this "emerging pattern of hyperamendability" has resulted in a "growing lack of constitutional coherence and flexibility" and a "majoritarian drift in rights policies" in states that heavily use the initiative process.[33]

California's revision-amendment jurisprudence is arguably the most well developed, and state courts in other jurisdictions, including Oregon and Alaska, have relied on California case law in deciding whether amendments rise to the level of constitutional revisions.[34] In *Raven v. Deukmeijian* (1990), the California Supreme Court for the first time invalidated an initiative constitutional amendment—Proposition 115—as a revision on the grounds that the initiative "contemplated such a far-reaching change in the state's governmental framework as to amount to a qualitative constitutional revision." [35] However, the standard for distinguishing between revisions and amendments has been applied unevenly and inconsistently, and in several other cases, amendments that seemingly effected broad qualitative changes to the Constitution were not held to be revisions.[36] The California Supreme Court's failure "to

31. *See* Cain & Noll, *supra* note 17, at 1521, 1530; Bruce E. Cain, *Constitutional Revision in California: The Triumph of Amendment over Revision*, *in* 1 State Constitutions for the Twenty-First Century 59, 59–60 (G. Alan Tarr & Robert F. Williams eds., 2006).

32. *See* Cain & Noll, *supra* note 17, at 1531 (citing G. Alan Tarr, *Introduction, in* 3 State Constitutions for the Twenty-first Century 1, 2 (G. Alan Tarr & Robert F. Williams eds., 2006)).

33. *See* Cain & Noll, *supra* note 17, at 1531–32.

34. *See, e.g.*, Bess v. Ulmer, 985 P.2d 979 (Alaska 1999) (upholding initiative banning same sex marriage in Alaska); Martinez v. Kulongoski, 185 P.3d 498 (Or. Ct. App. 2008) (upholding initiative banning same-sex marriage in Oregon).

35. Raven v. Deukmejian, 801 P.2d 1077, 1087–89 (Cal. 1990).

36. *See* Cain & Noll, *supra* note 17, at 5.

articulate a clear line between revision and amendment" and its record of "mostly deciding against revisions objections" has encouraged proponents of initiatives seeking to alter fundamental rights to take the risk of potential judicial invalidation.[37] This Article suggests that the Indian basic structure doctrine offers a framework state courts can use in evaluating the constitutionality of amendments.[38]

Part II of this article examines theoretical perspectives on constitutional change, and normative arguments and critiques of applying the basic structure doctrine to state constitutional analysis, and explores the implications of the basic structure doctrine for popular and judicial federalism. Part III of this article analyzes the application of the revision-amendment standard in *Strauss v. Horton*. Part IV provides an overview of the development of the Indian basic structure doctrine and explains why the basic structure doctrine would provide a superior approach for evaluating the constitutionality of amendments at the state level. Part V then illustrates how the California Supreme Court could have deployed the basic structure doctrine to review the constitutionality of Proposition 8, thereby improving the clarity and coherence of the revision-amendment framework and bolstering the case for a more robust conception of revisions under California law.

II. THE BASIC STRUCTURE DOCTRINE AND STATE CONSTITUTIONALISM: THEORETICAL CONSIDERATIONS

The basic structure doctrine poses obvious challenges to modern conceptions of the proper role of courts in democratic polities. In this Part, I analyze application of the basic structure doctrine at the state level in the United States from the multiple perspectives of theories of constitutional change and the role of courts in the amendment process and federalism.

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37. *Id.*

38 . The California Supreme Court may also review the validity of amendments based on whether they are in compliance with the "single-subject rule" as well as other procedural requirements. Although these other procedural requirements are important, I do not analyze them here as they are beyond the scope of this article. For an excellent treatment of the single-subject rule, *see* Michael Gilbert, *Single Subject Rules and the Legislative Process,* 61 U. Pitt. L. Rev 803 (2006).

A. Conceptions of Entrenchment: Political Entrenchment versus Judicial Entrenchment

Critics of the basic structure doctrine in India have suggested that the doctrine is anti-democratic and lacks legitimacy in that it allows judges to inject subjectivity into the process of identifying the basic features of the Constitution.[39] In addition, consideration of the basic structure doctrine also implicates broader tensions between popular sovereignty and judicial supremacy when considering the possibility of activist state supreme courts invalidating amendments on the grounds of a basic structure doctrine. Defenders of popular sovereignty could argue that the adoption of a basic structure doctrine would entail a move toward a model of judicial supremacy that is normatively undesirable because it undermines popular sovereignty.[40] Proponents of popular constitutionalism and popular sovereignty-based models of constitutional change suggest that the courts' role in the amending process must be limited and deferential to the political process.[41]

The processes by which the U.S. Constitution may be amended have also been the subject of extensive debate in the United States. Within the scholarship on constitutional law and politics,

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39. *See* Ramachandran, *supra* note 28, at 110. For an earlier criticism of the *Kesavananda* decision, *see* T.R. Andhyarujina, *Basic Structure of the Constitution Revisited*, The Hindu (May 21, 2007), http://www.thehindu.com/todays-paper/tp-opinion/basic-structure-of-the-constitution-revisited/article1845048.ece; 2 H.M. Seervai, Constitutional Law of India (2004); H.M. Seervai, *Fundamental Rights Case at the Cross Road,* 75 Bom. L.R. J. 47 (1973). It is worth noting that constitutional theorist Pratap Bhanu Mehta has defended the legitimacy of judicial review of constitutional amendments in India, but has criticized the manner in which the Supreme Court of India has articulated basic features and applied the doctrine. *See* Pratap Bhanu Mehta, *The Inner Conflict of Constitutionalism: Judicial Review and the Basic Structure, in* India's Living Constitution: Ideas, Practices, Controversies 179 (Zoya Hasan et al., eds., 2002).

40 *See* Richard Albert, *Nonconstitutional Amendments*, 22 Can. J. L. & Jurisprudence 5, 31–32 (2009).

41. *See* Mark Tushnet, Taking the Constitution Away from the Courts (1999); Larry D. Kramer, *"The Interest of the Man": James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy*, 41 Val. Univ. L. Rev. 697 (2006); Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review (2004). Larry D. Kramer, *Popular Constitutionalism, circa 2004*, 92 Cal. L. Rev. 959 (2004); Akhil R. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043 (1988).

scholars like Bruce Ackerman and Akhil Amar have argued for models allowing amendment of the U.S. Constitution outside of the formal process set forth in Article V.[42] Significantly, in discussing these less formal models of amendment, Ackerman highlights the primacy of politics and partisan change in affecting constitutional change and also recognizes the importance of democratic change and popular sovereignty in judicial decision-making.[43] For example, Ackerman's theory of a "constitutional moment" describes episodes of constitutional change and transition through "higher lawmaking" outside the constitutionally prescribed methods and rules of amendment. He asserts that transformational changes in the political system are translated into constitutional changes through the enactment of new policies, the appointment of judges, and shifts in constitutional doctrine.[44] Balkin and Levinson also suggest that constitutional change can be generated through the democratic process through "partisan entrenchment," either through the formal amendment procedures set forth in Article V of the U.S. Constitution, or through other processes.[45]

However, in arguing for the adoption of a variant of the basic structure doctrine in California and other states, I suggest that another phenomenon and concept—judicial entrenchment—merits consideration as a mechanism through which courts may serve as a counter-majoritarian check on the amendment process.[46] I define judicial entrenchment as efforts by judges and constitutional courts to entrench constitutional norms, principles, and provisions against change by political regimes and popular majorities. In contrast to the political entrenchment model, judicial entrenchment specifically involves judge-led efforts to entrench constitutional norms.

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42. *See* 1 Bruce Ackerman, We the People: Foundations (1991); 2 Bruce Ackerman, We the People: Transformations (1998); Amar, *supra* note 41.

43. Ackerman, We the People: Transformations, *supra* note 42.

44. *Id.*

45. Jack Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 Va. L. Rev. 1045, 1066–68 (2001); *see also* Jack Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 Fordham L. Rev. 489 (2006) (expanding upon their partisan entrenchment theory).

46. The term "constitutional entrenchment" has been defined loosely in the literature as encompassing judicial entrenchment among other forms of entrenchment. *See* Levy, *supra* note 22; *see* Miguel Schor, *Constitutionalism Through the Looking Glass of Latin America*, 41 Tex. Int'l L. J. 1, 6–7 (2006).

As illustrated in India, constitutional change can also be catalyzed by judges through decisions that reshape and redefine the contours of constitutional law. Constitutional change cannot and will not always wait for political change, and judges may act to entrench constitutional norms on their own. Judicial entrenchment may serve as a viable alternative approach to entrenching constitutional norms. I also argue here that judicial entrenchment may indeed be normatively desirable as well, as justices can act in the defense of constitutional norms that they fear may be destroyed without some judicial action. The Indian Supreme Court justices who asserted the basic structure doctrine in India were arguably "constitutionalists"—jurists who believed they had a duty to act in defense of the original constitutional framework.[47]

I argue here that judicial entrenchment can help serve a number of crucial functions. First, through judicial entrenchment courts can assert and defend the identity and integrity of constitutions against radical political change.[48] While judicial entrenchment may often be a part of a broader process of political entrenchment wherein political elites appoint justices who help effectuate a particular set of constitutional or policy goals,[49] it may also occur independently of—that is, not a direct result or translation of—political change. In India, the Court's decision in *Kesavananda* was not the *product* of the appointment of judges of a certain ideological worldview by a political regime, but rather represented the *reaction* by a group of justices' to Indira Gandhi's perceived flouting of the Indian constitution.[50] The *Kesavananda* decision was thus arguably on the leading edge of constitutional change—the decision helped galvanize support for the idea of a basic structure doctrine and limits on the amending power. Second, through the process of judicial entrenchment, courts can play a crucial role in policing the processes of constitutional change, by promoting and requiring greater levels of deliberation for proposed amendments and changes to constitutions.[51]

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47. I thank Professor Robert A. Kagan for this insight.

48. *See* Gary J. Jacobsohn, *Constitutional Identity*, 68 Rev. of Pol. 361 (2006).

49. *See supra* note 45; Hirschl, *supra* note 22.

50. *See* Mate, *infra* note 205.

51. *See* Cain & Noll, *supra* note 17, at 1518; *see also* John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 101–104 (1980) (discussing the role of the courts in checking the excesses of majority rule). On the contrast

Third, judicial entrenchment can help prevent the abrogation of fundamental rights, including the rights of minorities, by majorities at the national and state level. As illustrated by the exchange in *Strauss* between Chief Justice Ronald George and Kenneth Starr, the existing revision-amendment framework currently allows political majorities to eliminate core fundamental rights from the constitution by simple amendment.[52] The application of the basic structure doctrine in California would help address the shortcomings of the existing revision-amendment doctrine by potentially providing stronger safeguards and requiring a higher level of process for changes affecting fundamental rights provisions of the California Constitution.

B. Popular Federalism v. Judicial (Rights) Federalism

While arguments for judicial entrenchment can be used to (1) respond to arguments for popular sovereignty and partisan-entrenchment models of constitutional change, and (2) bolster the case for applying the basic structure doctrine in California and other states, a second critique of the basic structure doctrine may be that it has the potential to undermine the "laboratory of democracy" model of "popular federalism" or "political federalism."[53] According to this model, popular sovereignty is the basis for the legitimacy of state governments, and popular majorities within states should have the leeway to experiment with different models of governance. This may include the process of amendment and constitutional change.[54]

Juxtaposed against this model of political or popular federalism is the "rights federalism" or "judicial federalism" model.[55]

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between procedural versus substantive models of judicial review of constitutional amendment*, see, e.g.*, Jackson, *supra* note 29.

52. David Edwards & Stephen C. Webster, *Arguing for Prop. 8, Ken Starr says any right can be taken*, The Raw Story (Mar. 5, 2009), http://rawstory.com/news/2008/Ken_Starr_argues_for_Prop_8_0305.html.

53. *See* Cain & Noll, *supra* note 17, at 1534 (citing New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (touting the virtues of policy experimentation by states that occurs under federalism)).

54. *See* Cain & Noll, *supra* note 17 (discussing the process to change constitutions).

55. *See id.* at 1531 n. 82 (citing Robert F. Williams, *Rights*, *in* 3 State Constitutions for the Twenty-first Century, 7–35 (G. Alan Tarr & Robert F. Williams eds., 2006)); *see also* William J. Brennan, Jr., *State Constitutions and the*

According to this alternate conception of federalism, judges and courts can play a crucial role in expanding the bundle of rights available to citizens of certain states through judicial decision-making and constitutional interpretation, above the federal "floor" of constitutional rights.[56] As Cain and Noll suggest, rights federalism and the normative benefits of "credible commitments" both support a stronger judicial role in the review of amendments that affect rights.[57]

The case for judicial entrenchment at the state level is arguably stronger than at the federal level, given that state constitutions are more malleable and can be easily changed.[58] Indeed, one can draw on Madison's arguments in making the case for judicial entrenchment of norms by state constitutional courts. Madison's original constitutional design sought to create a structural framework to protect against the threat of usurpation of power and the tyranny of majority rule against minority rights through the division of powers between the federal and state governments and the creation of an independent federal and state judiciary.[59] Madison recognized the potential for the tyranny of the majorities at the state level, and suggested that a republican form of government at the state level would help serve as a check on majority rule and protect the rights of minorities.[60]

Significantly, the framers of the Constitution devised two checks on potential tyranny of the majority at the state level. First, the Constitution provided for an independent judiciary at both the federal and state level.[61] Second, the framers also added the Guarantee Clause to the Constitution, guaranteeing that each state would have a "Republican Form of Government."[62] Significantly, direct democracy innovations across states—including the initiative

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Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977) (arguing that litigants should start using state constitutional arguments rather than only relying on the U.S. Supreme Court because state constitutions have been interpreted to afford greater constitutional rights than the federal constitution by state courts).

56. *See* Cain & Noll, *supra* note 17, at 1531.

57. *Id.*

58. *Id.*; *see* Cain and Noll, *supra* note 17, at 1536.

59. *See* The Federalist No. 10 (James Madison).

60. *Id.*

61. *See* Kaitlyn Redfield-Ortiz, *Government by the People for the People? Representative Democracy, Direct Democracy, and the Unfinished Struggle for Gay Civil Rights*, 43 Ariz. St. L.J. 1367, 1374–1376 (2011).

62. *Id.* (citing U.S. Const. art. IV, § 4).

and referendum—run counter to the theoretical foundations and structural goals of an independent judiciary and republican system of government,[63] and threaten minority rights.[64]

One of the clearest examples of the threats direct democracy poses to fundamental rights is illustrated in the Proposition 8 saga in California. In the following section, I revisit the California Supreme Court's decision in *Strauss v. Horto*n upholding Proposition 8 as an amendment, not a revision, analyzing how the various opinions in that case construed the revision-amendment standard.

III. THE REVISION-AMENDMENT STANDARD IN *STRAUSS V. HORTON*

On November 4, 2008, a majority of voters in California approved Proposition 8, an amendment adding the following provision to Article I of the California Constitution: "Only marriage between a man and woman is valid or recognized in California."[65] Proposition 8 overturned the California Supreme Court's decision in *In re Marriage Cases*, in which the Court had held that "same-sex couples, as well as opposite-sex couples, enjoy the protection of the constitutional right to marry embodied in the privacy and due process provisions of the California Constitution.[66]

The petitioners in *Strauss* challenged the validity of Proposition 8 on the grounds that it effected a revision of the California Constitution. Under the California Constitution, revisions require approval by a two-thirds majority vote in each house of the legislature (or approval by a constitutional convention), followed by approval by a majority via the initiative process.[67] In contrast, amendments can be proposed by a two-thirds vote by the legislature[68] or by initiative petition[69], and must be approved by a simple majority

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63. *See id.* at 1377. (citing Julian N. Eule, *Judicial Review of Direct Democracy*, 99 Yale. L.J. 1503 (1990); Robin Charlow, *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79 Cornell L. Rev. 527, 534–36 (1994)).

64. *See* Redfield-Ortiz, *supra* note 61, at 1376 (citing Derek Bell, *The Referendum: Democracy's Barrier to Racial Equality*, 54 Wash. L. Rev. 1, 14–15 (1978)).

65. Strauss v. Horton, 207 P.3d 48, 59 (Cal. 2009).

66. *Id.*

67. Cal. Const. art. XVIII.

68. Cal. Const. art XVIII, § 1.

69. Cal. Const. art XII, § 8; art XVIII, § 3.

of the voters statewide.[70] In their briefs, petitioners, supported by several amici, argued that Proposition 8 violated the California Equal Protection Clause by denying the fundamental right of marriage to a suspect class of individuals, a right recognized by the Court in the *In re Marriage Cases*.[71] In their arguments, petitioners drew on earlier decisions of the Court in which the Court articulated a test for determining whether an amendment could be invalidated as a revision.[72]

Ultimately, the Court in *Strauss* upheld Proposition 8 as a valid amendment.[73] The majority relied on a line of earlier decisions that articulated the standard for determining whether a particular measure is an amendment or revision. In *Amador Valley Joint Union High School District v. State Board of Equalization*,[74] the Court first articulated the contours of its revision-amendment test in a challenge to Proposition 13, a measure that added Article XIII A to the California Constitution.[75] The Court in *Amador Valley* upheld the initiative and held that the Court was required to evaluate both the quantitative and qualitative effects of a particular measure on California's constitutional scheme in order to determine whether it was a revision or amendment.[76] Initiatives that effected a significant number of changes to multiple provisions and parts of the Constitution could be deemed to be revisions under the quantitative prong of the analysis.[77] According to the *Amador* Court, under this qualitative standard, measures that implemented "far reaching changes in the nature of our basic governmental plan" could also amount to a revision.[78] Because the *Strauss* Court found that

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70. Cal. Const. art XVIII, § 4.

71. *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008).

72. Strauss v. Horton, 207 P.3d 48, 61–64 (Cal. 2009).

73. *Id.* at 99–103, 105–11.

74. Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 583 P.2d 1281 (1978).

75. *Id.* It should be noted that the Court first articulated the distinction between an amendment and revision in McFadden v. Jordan, 196 P.2d 787, 788–89 (Cal. 1948) (noting that a purported amendment to the California Constitution that would repeal or substantially alter at least the majority of the constitution's articles could not be submitted to electors as an "amendment" but rather was a "revision," which must be proposed by convention). Cain & Noll, *supra* note 17, at 1521–22 n. 25.

76. *Amador Valley*, 583 P.2d at 1286

77. *Id.*

78. *Id.*

Proposition 8 did not have a significant quantitative effect in terms of the sheer number of constitutional provisions it affected or altered, the Court focused on the qualitative impact of the measure.[79] According to the *Strauss* majority, relatively simple enactments can amount to qualitative revisions of the California Constitution, where those enactments "accomplish such far reaching changes in the nature of [California's] basic governmental plan."[80]

In *Raven v. Deukmeijian*,[81] the Court clarified its revision-amendment test in invalidating Proposition 115, a criminal justice initiative that introduced a number of changes to the California Constitution.[82] Proposition 115 added several new sections that effectively removed protections for the accused independent of federal protections. For the first time in its history, the Court invalidated an initiative on qualitative grounds, ruling that the initiative altered the structure or organization of California's government, and the power of the judiciary to interpret the California Constitution as providing greater protections for defendants' rights than the U.S. Constitution as interpreted by the U.S. Supreme Court.[83] *Raven* also implicitly adopted a federalism-based argument in holding that a change to the California Constitution that prevented it from operating as a document of independent force and effect apart from the U.S. Constitution would also constitute a revision."[84]

Justice Werdegar and Justice Moreno's opinions in *Strauss* diverged from the majority and offered a much broader conception of what may constitute a revision under California law. Drawing on its earlier decisions in *Amador Valley* and *Raven*, the majority held that amendments that effect "far reaching changes in the nature *of our basic governmental plan*,"[85] or, "substantially alter[s] *the basic governmental framework set forth in our Constitution*" can constitute qualitative revisions to the Constitution.[86] The majority in *Strauss*, consistent with earlier decisions of the Court in *Amador* and *Raven*, held that "a change in the basic plan of California government" meant a "change in its fundamental structure or the foundational powers of

79. Strauss v. Horton, 207 P.3d 48, 62, 98–102 (Cal. 2009).
80. *Id.*
81. Raven v. Deukmejian, 801 P.2d 1077 (Cal. 1990).
82. *Id.* at 1080–1083.
83. *Id.* at 1085–1089.
84. *Id.* at 1087.
85. Strauss v. Horton, 207 P. 3d 48, 85 (Cal. 2009) (George, C.J.).
86. *Id.*

its branches."[87] The *Strauss* majority thus adopted the narrow definition of "basic governmental plan or framework" that focuses on structural or organizational change—changes to the foundational powers of the executive, legislative, and judicial branches.[88]

Justice Werdegar's concurrence and Moreno's dissent diverged from the majority in holding that the majority's definition of qualitative revision was far too narrow. Both justices drew on the Court's earlier decision in *Livermore v. Waite*, in which the Court observed that "the procedural requirements for constitutional revisions were intended to preserve both "the *substantial entirety of the instrument*" and "the *underlying principles upon which it rests*."[89] According to Justice Werdegar, an amendment effecting a change to a foundational principle of individual liberty such as equal protection could amount to a qualitative revision.[90] However, Justice Werdegar concurred with the majority in holding that Proposition 8 did not constitute a revision because its effect was only to limit access to the word or nomenclature "marriage" of marriage, and only constituted mere "[d]isagreement over a single, newly recognized, contested application of a general principle."[91]

Compared to Justice Werdegar's opinion, Justice Moreno's dissent offered a similar, albeit more robust conception of a qualitative revision. Moreno's dissenting opinion built on the Court's earlier decision in *Livermore* in arguing that equal protection constitutes an underlying principle upon which the constitution rests. Proposition 8 effectively abrogated that principle by denying the right of marriage recognized by the Court in the *In Re Marriage Cases*.[92] However, Moreno's opinion failed to outline a clear method for articulating and determining which provisions are fundamental or foundational provisions for the purposes of the amendment-revision distinction.

In supporting his argument, Justice Moreno held that Proposition 8 would have "requir[ed] discrimination against a minority group on the basis of a suspect classification" and thus

87. *Id*.
88. *Id.* at 99–106.
89. *See id.* at 126–128, 132–133 (Werdegar, J., concurring; Moreno, J., dissenting) (citing Livermore v. Waite, 102 Cal. 113, 118 (Cal. 1894)).
90. *See id.* at 127–128 (Werdegar, J., concurring).
91. *Id.* at 124–128.
92. *Id.* at 129–130 (Moreno, J., dissenting).

struck "at the core of the promise of equality that underlies our California Constitution."[93] In advancing this argument, Justice Moreno sought to establish that equal protection was a core or foundational principle underlying the California Constitution.[94]

Moreno advanced several arguments or rationales in support of his claim that equal protection should be recognized as a core or foundational principle of the California Constitution. First, Moreno offered historical and original-intent arguments in support of his claim that equal protection is a core or foundational principle of the California Constitution. Moreno cited to Professor Joseph Grodin's scholarship on the history and framing of the California Constitution in arguing, "equal protection principles lie at the core of the California Constitution and have been embodied in that document from its inception."[95] Additionally, Moreno noted that two provisions—former Section 11 and Section 21 of the 1849 Constitution—highlighted the importance of equality within the broader constitutional scheme.[96] Former Section 11 of Article I of the original 1849 Constitution stated, "All laws of a general nature shall have a uniform operation" and Section 21 of Article I of the 1879 Constitution added, "nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."[97] These provisions were "substantially the equivalent of the equal protection clause of the Fourteenth Amendment to the United States Constitution."[98] In 1974, an express equal protection clause was added to the California Constitution that mirrors the language of the Fourteenth Amendment.[99]

Second, Justice Moreno emphasized the unique counter majoritarian function of equal protection in protecting the fundamental rights of minorities. According to Justice Moreno, in light of this "inherently counter-majoritarian" nature of equal protection under the California Constitution, the majority's rule in *Strauss* "weakens the status of our state Constitution as a bulwark of

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93. *Id.*

94. *Id.* at 129–133.

95. *See id.* at 129 (Moreno, J., dissenting) (citing Joseph Grodin et al., The California State Constitution: A Reference Guide 47 (1993)).

96. *See id.* at 129–130 (Moreno, J., dissenting).

97. *See id.* at 129 (Moreno, J., concurring in part and dissenting in part).

98. *Id.* (quoting Dept. of Mental Hygiene v. Kirchner, 62 Cal.2d 586, 588 (Cal. 1965); *see* Sail'er Inn, Inc. v. Kirby 5 Cal.3d 1, 15 n.13 (Cal. 1971).

99. *Strauss*, 207 P.3d at 130–31.

fundamental rights for minorities . . . ."[100] Justice Moreno concluded that none of the majority's cited precedents held "that a modification of the California Constitution constitutes a revision *only* if it alters the structure of government,"[101] and that the Court's decision in *Raven* actually adopted a broad conception of constitutional revisions:

> To the contrary, our recognition in *Raven* that altering fundamental rights embodied in the [state] Constitution could 'substantially alter the substance and integrity of the state Constitution as a document of independent force and effect' suggests just the opposite. (*Raven*, *supra*, 52 Cal. 3d at p. 352, 276 Cal.Rptr. 326, 801 P.2d 1077.) Proposition 8 would have a similar effect by emasculating the equal protection clause of the California Constitution as a provision of independent force and effect. Any protection of a minority group recognized by this court under the equal protection clause of our state Constitution that was not recognized by the United States Supreme Court under the federal Constitution could be abrogated through the initiative process by a simple majority of the voters.[102]

Third, Justice Moreno pointed to the broader importance of the equal protection principle as a foundational principle of the rule of law, given that equal protection serves as a crucial check on the arbitrary exercise of government power. Moreno cited to the incorporation of equal protection in earlier versions of the California Constitution, and highlighted the centrality of equal protection and its counter-majoritarian nature.[103] Moreno also drew on the Iowa Supreme Court's decision in *Varnum* for support for his argument for entrenching provisions of a constitution:

> Thus, it is not so much a discrete constitutional right as it is a basic constitutional principle that guides all legislation and compels the will of the majority to be tempered by justice. The Iowa Supreme Court, in affirming the constitutional right of gays and lesbians to marry, recently recognized the importance of this promise of equality, stating: "If gay and lesbian people must submit to different treatment without an

100. *Id.* at 129.
101. *Id.* at 138 (emphasis added).
102. *Id.* at 137.
103. *Id.* at 137–39.

> exceedingly persuasive justification, they are deprived of the benefits of the principle of equal protection *upon which the rule of law is founded."* (Varnum *v. Brien, supra,* 763 N.W.2d 862, 905, italics added.) . . . It is apparent, moreover, that limiting the definition of revision only to changes in the structure of government necessarily leads to the untenable conclusion that even the most drastic and far-reaching changes to basic principles of our government do not constitute revisions so long as they do not alter the governmental framework.
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> . . .
>
> The majority's holding essentially strips the state Constitution of its independent vitality in protecting the fundamental rights of suspect classes.[104]

While Moreno's opinion articulated compelling justifications for entrenching equal protection as a core constitutional principle—one that can only be altered or changed through the revision process—his opinion could have been strengthened by drawing on insights from the basic structure doctrine. Although Moreno discusses the history of equal protection and its addition as a provision to the California Constitution in the 1970s, his opinion provides little concrete guidance on how to assess whether particular provisions constitute "basic features" of the California Constitution. In the next section of this Article, I analyze the jurisprudence of the Supreme Court of India articulating a "basic structure doctrine" as a framework that could strengthen Moreno's argument and provide a stronger and more comprehensive framework for evaluating whether measures constitute a revision or amendment under the California Constitution.

IV. THE BASIC STRUCTURE DOCTRINE IN INDIA

In this section, I begin by tracing the development of the basic structure doctrine in India. I then seek to "unpack" the doctrine by distilling the methodological framework identified by the Supreme Court of India for identifying basic features in the Indian Constitution.

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104. *Id.* at 130, 138–39.

A. Development of the Basic Structure Doctrine

Because the basic structure doctrine has arguably been most developed in India, I focus my attention in this section on the development of that doctrine in Indian cases.[105]

Curiously, the Indian basic structure doctrine's intellectual origins can be at least in part traced to German constitutional traditions.[106] Dieter Conrad, a German scholar and head of the law department at the South Asia Institute of the University of Heidelberg, first introduced the concept of the basic structure to Indian jurists in a lecture on the "Implied Limitations of the Amending Power" to the Banaras Hindu University Law Faculty.[107] Conrad based his lecture on insights drawn from civil law and the German Constitution—the Basic Law of 1949.[108] The Basic Law contained certain "eternal clauses" which provided that the German Constitutional Court could invalidate constitutional amendments that altered or changed the Basic Law. Included in these clauses were Article 1 (human life) and Article 20 (basic principles of popular sovereignty).[109]

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105. This section draws on parts of an earlier book chapter I authored on the basic structure doctrine in India. *See* Manoj Mate, *Priests in the Temple of Justice: The Indian Legal Complex and the Basic Structure Doctrine*, in Fates of Political Liberalism in the British Post-Colony: The Politics of the Legal Complex (Halliday, Karpik, and Feeley, eds.. 2012).

Variants of the basic structure doctrine have also been developed and applied by high courts in South Africa, Turkey, and other polities. *See* Albert, *supra* note 30. The South African Constitutional Court invalidated several provisions of the original draft of the South African Constitution as contravening principles of equality. *Certification of the Constitution of The Republic of South Africa* 1996 (CCT 23/96) (S.Afr.) The Turkish Supreme Court has also developed its own version of the basic structure doctrine, and recently invalidated a constitutional amendment enacted by the Turkish Government that would have allowed women to wear headscarves in public. Ozan Varol, *The Origins and Limits of Originalism: A Comparative Study*, 44 Vand. J. Transnat'l L.1239 (2011). In South America, several high courts have also developed variants of the basic structure doctrine. *See, e.g.*, Miguel Schor, *Constitutionalism Through the Looking Glass of Latin America*, 41 Tex. Int'l L. J. 1, 6–7 (2006).

106. M.P., Singh, *Bridging Legal Traditions*, Frontline, Sept. 14, 2001.

107. *Id.*

108. *Id.*

109 . E. Spevack, *American Pressures on the German Constitutional Tradition: Basic Rights in the West German Constitution of 1949*, 10 Int'l J. Pol. Culture & Soc'y 411 (1999); Donald Kommers, *The Federal Constitutional Court in the German Political System*, 26 Comp. Pol. Stud. 470 (1994). *See* Albert, *supra*

At the time of Conrad's lecture, most Indian jurists were not familiar with the basic structure doctrine, in part because the doctrine was rooted in civil law. In his lecture, Conrad noted the need for imposing limitations on the amending power, particularly given Germany's experience with Nazi rule, and presciently suggested that India might need such a doctrine in the future to deal with proposed changes to norms of democratic government, fundamental rights, and constitutionalism. [110] Ultimately, Conrad's theoretical argument perspective would be adopted and deployed by Chief Justice K. Subba Rao in the landmark decision of *Golak Nath v. State of Punjab*, in which the Supreme Court of India, for the first time, asserted the power to invalidate constitutional amendments that abrogated the fundamental rights provisions of the Indian Constitution.[111]

1. *Golak Nath* (1967): Fundamental Rights and the Amending Power

In *Golak Nath*, the petitioners challenged the validity of the First, Fourth, and Seventeenth Amendments of the Indian Constitution, through which the Government had enacted the "Ninth Schedule," and added subsequent land reform provisions to the Schedule in order to immunize them from judicial review. In earlier decisions, the Indian Supreme Court held that Parliament's power to amend the Constitution under Article 368 (the constitutional provision governing amendment of the constitution) was unlimited.[112] Turning away from its earlier decisions in *Sankari Prasad* and *Sajjan Singh*, the majority in *Golak Nath* ruled that Parliament cannot enact constitutional amendments that violate the fundamental rights provisions of the Constitution. Chief Justice K. Subba Rao and the

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note 30 (explaining that the Federal Constitutional Court of Germany to have the power to review and invalidate the constitutionality of amendments that violate existing provisions of the Basic Law, based on principles of constitutional coherence and constitutional supremacy).

110. Abdul Gafoor Noorani, Public Law in India 278–79 (1982).

111. Golak Nath v. State of Punjab, (1967) 2 S.C.R. 762 (India).

112. In Sankari Prasad v. Union of India, A.I.R. 1951 S.C. 455 (India), the Court had rejected the argument that there were limitations on the amending power, and held that that "there was a clear distinction between ordinary law made in exercise of legislative power, and constitutional law made in exercise of constituent power." Similarly, in Sajjan Singh v. State of Rajasthan, A.I.R. 1965 S.C. 845 (India), the Court adjudicated a challenge to the constitutionality of the Seventeenth Amendment. In upholding the amendment, the Court reaffirmed its earlier decision in *Sankari Prasad*.

majority of the Court held that Article 368 set forth the procedures for amendment[113] and went on to hold that amendments enacted under Article 368 were ordinary "laws" under Article 13, and thus could be subject to judicial review.[114] The Court also ruled that it was within Parliament's power to convene a new Constituent Assembly for the purposes of amending the Constitution. Finally, in a strategic move, the Court invoked the doctrine of "prospective overruling," which meant that the ruling would only apply to future amendments (and that the First, Fourth and Seventeenth Amendments, though deemed to be unconstitutional, would remain in effect).[115] Writing in dissent, Justice Wanchoo, argued that the "argument of fear" advanced by Subba Rao and the majority constituted a political, and

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113. *Golak Nath*, (1967) 2 S.C.R. at 778–89. Article 368 of the Indian Constitution originally provided as follows:

> (1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.
> (2) An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President who shall give his assent to the Bill and thereupon the Constitution shall stand amended in accordance with the terms of the Bill:
>
> > Provided that if such amendment seeks to make any change in –
> > (a) article 54, article 55, article 73, article 162 or article 241, or
> > (b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or
> > (c) any of the Lists in the Seventh Schedule, or
> > (d) the representation of States in Parliament, or
> > (e) the provisions of this article,
> > The amendment shall also require to be ratified by the Legislatures of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.
>
> (3) Nothing in article 13 shall apply to any amendment made under this article.

114. *Golak Nath*, (1967) 2 S.C.R. at 777–79.

115. *Golak Nath*, (1967) 2 S.C.R. at 788–89; Sathe, *supra* note 28, at 17.

not legal argument.[116] In line with earlier precedent, Wanchoo and the other dissenting justices held that there could be no limitations on the power of amendment under Article 368.[117]

2. *Kesavananda Bharati v. Kerala* (1973): The Assertion of the Basic Structure Doctrine

In *Kesavananda*,[118] the Court heard a series of challenges to the Twenty-Fourth, Twenty-Fifth, and Twenty-Ninth Amendments. The case was based on the claims of Swami Kesavananda, the head of a monastery in Kerala, who had challenged the attempts of the Kerala state government to impose restrictions on the management of his property.[119] The Twenty-Fourth Amendment sought to overrule Golak Nath by reasserting Parliament's unlimited power to amend the Constitution under Article 368, and held that such amendments were not ordinary "laws" under Article 13, and could not be subject to judicial review by the Court. The Twenty-Fifth Amendment made compensation associated with land acquisition laws nonjusticiable, and stipulated that laws enacted to give effect to the Directive Principles could not be challenged in Court. The Twenty-Ninth Amendment had placed the 1969 Kerala Land Reform Act in the Ninth Schedule to immunize it from judicial review.[120] In a decision consisting of eleven separate opinions, a closely divided 7-6 bench overruled its earlier decision in *Golak Nath* and held that Parliament

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116. According to several senior advocates who argued before the court in *Golak Nath*, Chief Justice Subba Rao was influenced by Conrad's argument although the Court ultimately did not hold that there were implied limitations on the amending power. *See* Granville Austin, Working a Democratic Constitution: A History of the Indian Experience 200–02 (1994). In addition, Subba Rao's decision was also influenced by his own fear that the Congress Party government would continue to infringe upon the fundamental rights provisions, particularly property rights. *Id*. He noted that the emergency rule that had been declared in 1962 was still in force, and that the suspension of the rights contained in Articles 14, 19, 21, and 22 constituted a form of "constitutional despotism." *Id* at 200. Subba Rao was apprehensive about the Congress party's past record of enacting amendments that infringed the fundamental rights, and with the death of Nehru in 1964, Subba Rao feared future damage to the fundamental rights by the "brute majority" of the Congress party in the future under the leadership of Indira Gandhi. *Id*.

117. *Golak Nath*, 2 S.C.R. at 803–05, 852–58, 866–71 (Justices Wanchoo, Bachawat and Ramaswami).

118. Kesavananda Bharati v. State of Kerala, (1973) 4 S.C.C. 225 (India).

119. Austin, *supra* note 116, at 258–59.

120. Austin, *supra* note 116, at 266–67.

could amend the fundamental rights provisions.[121] However, the Court also found that under Article 368, Parliament could not enact constitutional amendments that altered the "basic structure" of the Indian Constitution.[122]

Seven justices upheld the Twenty-Fourth and Twenty-Ninth amendments in their entirety and the first part of the Twenty-Fifth Amendment. However, the Court held that the second part of the Twenty-Fifth Amendment was invalid and violated the basic structure of the Constitution.[123] The second part had added Article 31C to the Constitution, which provided that "no law containing a declaration that is for giving effect to" the directive principles under Articles 39(b) and (c) shall be reviewed by a Court to determine whether the law gives effect to the directive principles.[124]

The majority held that Article 368 barred Parliament from abrogating the fundamental rights because the Article contained "implied limitations" that did not allow Parliament to alter or destroy the "basic structure" of the Constitution.[125] In contrast, six other judges, led by Justice A.N. Ray, held that Article 368 did not contain any implied limitations on the power of constitutional amendment, and that Parliament could amend any provision of the Constitution.[126] The "swing" vote for the majority was Justice H.R. Khanna. While Khanna argued that Parliament, in exercising its constituent power of amendment, must leave "the basic structure or framework of the Constitution" intact,[127] he also agreed with the second bloc of six judges in voting to uphold Article 31C.[128]

Although there was not necessarily a clear majority consensus, nine justices of the Court signed a "summary" statement of the opinion of the Court. Chief Justice Sikri drafted the summary statement of the Court's opinion based on the statement of conclusions in Khanna's opinion, in which Justice Khanna recognized

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121. Ramachandran, *supra* note 28, at 113–14.

122. *Id.*

123. *Kesavananda*, (1973) 4 S.C.C. at 1007.

124. *Kesavananda*, (1973) 4 S.C.C. at 392.

125. A. G. Noorani, *Behind the Basic Structure Doctrine*, Frontline, May 11, 2001, at 95; *see* Sathe, *supra* note 28.

126. Noorani, *supra* note 125.

127. *See* Andhyarujina, *supra* note 39.

128. *Kesavananda*, (1973) 4 S.C.C. at 739, 767–69; Krishnaswamy, *supra* note 28, at 27 (citing N.A. Palkhivala, "Fundamental Rights Case: Comment," (1973) 4 SCC (Jour.) 57).

that there were limits on the amending power.[129] The *Kesavananda* Court's central holding was that under Article 368, Parliament could not enact constitutional amendments that altered or destroyed the "basic structure" or essential elements of the Indian Constitution.[130] Significantly, although there was a consensus in the decision on the recognition of a basic structure doctrine, the justices diverged on what features might constitute basic features.[131]

Chief Justice Sikri's opinion provided arguably the most detailed analysis in establishing textual and structural support for the basic structure doctrine, as well as guidance for determining what features were part of the basic structure of the constitution. Sikri held that there were implied limitations on the amending power as set forth in Article 368, and that this provision must be interpreted in light of the entire structure of the Indian Constitution, as well as the original intent of the framers.[132] Article 368 provided that most sections of the Indian Constitution could be amended by a majority vote of both houses of Parliament (the Lok Sabha and Rajya Sabha) and the assent of the President. However, as Sikri noted, Article 368 required an additional level of process for the amendment of certain provisions—ratification by at least half of the state legislatures of the states specified in Parts A and B of the First Schedule of the Constitution.[133] These provisions included:

> (a) Article 54, Article 55, Article 73, Article 162 or Article 241, or
> (b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or
> (c) any of the Lists in the Seventh Schedule, or
> (d) the representation of States in Parliament, or
> (e) the provisions of this article.

Sikri argued that the omission of certain Articles from this proviso illustrated that the framers intended to have certain implied limitations on the amending power.[134] For example, Article 54

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129. *Kesavananda*, (1973) 4 S.C.C. at 1007; Krishnaswamy, *supra* note 28, at 27.

130. *Kesavananda*, (1973) 4 S.C.C. at 1007.

131. *Id.* at 366 (Sikri, J.), 454 (Shelat,J., Grover, J.), 483–85 (Hegde, J. , Mukherjea, J.), 637–39 (Reddy). *See id.* at 26–37.

132. *Id.* at 315–20.

133. *Id.* at 313–15.

134. Krishnaswamy, *supra* note 28, at 31–35 (citing *Kesavananda*, (1973) 4 S.C.C. at 313–329).

provided for the procedure and manner of election of the President of India by an electoral college consisting of (a) the elected members of both Houses of Parliament; and (b) the elected members of the Legislative Assemblies of the States. Article 55 prescribes the manner of election of the President. And yet, as Sikri observed, Article 52 (stipulating that there shall be a President of India), and Article 53 (vesting the executive power of the Union in the President of India and directing the exercise of that power), were omitted from the proviso.[135] According to Sikri, this illustrated the framers' intent that these provisions could not be amended or altered.[136]

Sikri also argued that Article 368 of the Constitution must be interpreted using a structural mode of interpretation that took account of the Preamble, the Directive Principles, and the non-inclusion of certain provisions.[137] According to this approach, Sikri argued for a limited conception of the amending power:

> It seems to me that reading the Preamble, the fundamental importance of the freedom of the individual, indeed its inalienability, and the importance of the economic, social and political justice mentioned in the Preamble, the importance of directive principles, the non-inclusion in Article 368 of provisions like Articles 52, 53 and various other provisions to which reference has already been made an irresistible conclusion emerges that it was not the intention to use the word "amendment" in the widest sense.[138]

Chief Justice Sikri held that the basic structure included:

> (i) Supremacy of the Constitution, (ii) Republican and democratic form of government, (iii) Secular character of the Constitution, (iv) Separation of powers between the legislature, the executive and the judiciary, (v) Federal character of the Constitution. The above structure is built on the basic foundation, i.e. the dignity and freedom of the individual. This is

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135. *See Kesavananda*, (1973) 4 S.C.C. at 313–315.

136. *See id.* at 314–16, 338–42, 345–46, 405.

137. *See* Krishnaswamy, *supra* note 28, at 28–38 (citing *Kesavananda*, (1973) 4 S.C.C. at 335).

138. Ramachandran, *supra* note 28, at 114 (citing *Kesavananda*, (1973) 4 S.C.C. at 405).

> of supreme importance. This cannot by any form of amendment be destroyed."[139]

Sikri's opinion thus suggested a hierarchy of constitutional provisions in the Indian Constitution—that there were effectively three categories of constitutional provisions in the Indian Constitution in terms of their status as entrenched provisions.[140] One category or subset of provisions can be amended by the normal process requiring ratification by a majority vote in both houses of Parliament and the assent of the President.[141] A second category of provisions—listed in Article 368—requires parliamentary and presidential ratification and ratification by at least half the states.[142] A third category of provisions or principles—those listed by Sikri as basic features—cannot be amended by normal constitutional processes, and presumably can only be altered or changed by a new Constituent Assembly with the power to create a new or modified Constitution.[143]

Other justices articulated a more expansive conception of the basic structure doctrine. In addition to the foregoing features identified by Justice Sikri, Justice Shelat held that "the unity and integrity of the nation," and the mandate to build a welfare state were also basic features of the Constitution.[144] Justices Hegde and Mukherjea held that the sovereignty of India was also a fundamental feature of the Constitution, and Justice Reddy held that as a sovereign democratic republic, Parliamentary democracy and the three organs of the State form the basic structure of the Constitution.[145] In terms of its historic importance, most scholars of Indian constitutional law today have recognized and noted the significance of this moment in India's political and constitutional history, though the immediate reaction to the decision was more hostile.[146]

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139. *Id.*

140. *Kesavananda*, (1973) 4 S.C.C. at 313–329.

141. *Id.*

142. *Id.*

143. *Id.*

144. Ramachandran, *supra* note 28, at 114 (citing *Kesavananda*, (1973) 4 S.C.C. at 406–63 (Shelat & Grover, JJ. concurring)).

145. *Id.* at 115.

146. *See, e.g.*, Upendra Baxi, *The Constitutional Quicksands of Kesavananda Bharati and the Twenty-Fifth Amendment*, (1974) 1 S.C.C. (Jour.) 45 (noting that the decision represented the "constitution of the future"); P.K. Tripathi,

3. The *Election Case*: A Framework for Identifying Basic Features

The basic structure doctrine was invoked by the Court during the Emergency rule regime of Indira Gandhi (1975-1977) in the case of *Smt. Indira Nehru Gandhi v. Raj Narain*,[147] which dealt with a challenge to the Thirty-Ninth Amendment. This amendment was passed in response to a decision of the Allahabad High Court setting aside Prime Minister Indira Gandhi's election on the grounds that her campaign had committed a "corrupt practice."[148] The amendment was enacted to retroactively validate Gandhi's election by superseding the applicability of all previous election laws and immunizing all elections involving the Prime Minister or Speaker of the Lok Sabha from judicial review.[149] Gandhi appealed to the Supreme Court and requested an unconditional stay of the High Court's decision. A bench led by Justice V.R. Krishna Iyer denied Gandhi's request for a stay, and held that while Gandhi could continue to hold office, she would not be able to participate in parliamentary debate or have voting power.[150]

One day later, on June 25, 1975, Gandhi declared Emergency Rule.[151] During the Emergency, the Indian Supreme Court acquiesced to the regime's suspension of democratic rule and fundamental rights, including the suspension of habeas corpus for detainees under the Maintenance of Internal Security Act[152] and to the regime's attacks on

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Kesavananda Bharati v. State of Kerala—Who Wins?, (1974) 1 S.C.C. (Jour.) 3; H.M. Seervai, *The Fundamental Rights Case at the Crossroads*, LXXV Bombay Law Reporter (Jour.) 47 (1973); Andhyarujina, *supra* note 39.

147. Ramachandran, *supra* note 28, at 115; Indira Nehru Gandhi v. Raj Narain, 1975 Supp. S.C.C. 1 (India).

148. Ramachandran, *supra* note 28, at 115.

149. *Id.* at 116.

150. *See id.* at 116–17.

151. *Id.* at 115.

152. *See* Additional Dist. Magistrate Jabalpur v. Shivakant Shukla, A.I.R. 1976 S.C. 1207 (India) (upholding the government's suspension of habeas corpus under MISA, and ruling that no individual had locus standi to file a writ petition under Article 226 (for habeas corpus or any other writ or order) to challenge the legality of an order of detention on the grounds of illegality or mala fides); Union of India v. Bhanudas, A.I.R. 1977 S.C. 1027 (India) (holding that the Supreme Court cannot examine whether conditions of detention were in compliance with prison legislation and legal and constitutional requirements during a period of Emergency rule).

the Court's jurisdiction and power.[153] Moreover, the Supreme Court upheld the regime's suspension of habeas corpus and preventive detention regime in the Shiva Kant Shukla and Bhanudas decisions.[154]

However, the five-bench panel in Indira Nehru Gandhi v. Raj Narain (hereinafter the "*Election Case*") ultimately accepted and applied the basic structure doctrine to invalidate clauses 4 and 5 of Article 329A,[155] added by the Thirty-Ninth Amendment.[156] The justices in the majority went beyond the *Kesavananda* decision in articulating conceptions of what was included within the basic structure doctrine. Justice Khanna asserted that the clause violated the basic structure of the Indian Constitution, by contravening the "democratic set-up" of the Constitution and the "rule of law," because democracy requires that "elections should be free and fair."[157] Justice Chandrachud invalidated the clause on the grounds that it violated the basic structure in that it represented "an outright negation of the right to equality," and was "arbitrary, and calculated to damage or destroy the rule of law."[158] Justice Matthew held that Article 329A was invalid "because constituent power cannot be employed to exercise judicial power."[159]

Justice Chandrachud's decision offered perhaps the most comprehensive and concrete approach for determining which rights were part of the basic structure doctrine. According to Justice Chandrachud, in identifying whether a feature is part of the basic structure, "one has perforce to examine in each individual case the place of the particular feature in the scheme of our Constitution, its object and purpose, and the consequences of its denial on the integrity of the Constitution as a fundamental instrument of country's governance."[160] Applying this standard, Justice Chandrachud held

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153. *Bhanudas*, A.I.R. 1977 S.C. at 1027 (India); *see* Sathe, *supra* note 28, at 73–76.

154 *Shukla*, A.I.R. 1976 S.C. at 1207; *Bhanudas*, A.I.R. 1977 S.C. at 1044–49.

155. Indira Gandhi v. Raj Narain (1975) Supp S.C.C. 1, 88–94, 114–115 (India) (Khanna, J.); *id.* at 245–50, 258–62 (Chandrachud, J.).

156. Baxi, *supra* note 4, at 57–58 (citing *Indira Nehru Gandhi*, (1975) Supp. S.C.C. at 90–92).

157. *Indira Nehru Gandhi*, (1975) Supp. S.C.C. at 90–92.

158. *Id.* at 257–58.

159. *Id.* at 120–129.

160. *Id*. at 664.

that the following features formed a part of the basic structure: "(i) India is a Sovereign Democratic Republic; (ii) Equality of status and opportunity shall be secured to all its citizens; (iii) The State shall have no religion of its own and all persons shall be equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion and that (iv) the Nation shall be governed by a Government of laws not of men."[161]

4. *Minerva Mills* (1980): Entrenching Constitutionalism as Basic Structure

While the *Kesavananda* decision may have represented one of the boldest assertions of judicial authority, it ultimately imperiled judicial independence and power, by leading to the Gandhi government's supersession of the three senior-most justices and elevation of the pro-government justice A.N. Ray to chief justice. The decision also indirectly led to the declaration of Emergency Rule by Indira Gandhi's regime in 1975, during which the government enacted the Thirty-Ninth and Forty-Second Amendments. These amendments dramatically curbed judicial review and effectively overrode the Court's decision in *Kesavananda*. However, in the election of 1977, the Congress Party was defeated by the Janata Party coalition. The mandate of the elections was a clear one: the Indian electorate had rejected the excesses of Indira Gandhi's Emergency regime.[162] The Janata Party coalition had campaigned on an agenda calling for the lifting of the Emergency and repeal of the draconian MISA, the rescinding of the constitutional amendments enacted by the Emergency regime,[163] and the restoration of democracy, fundamental freedoms, and constitutionalism.[164]

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161. *Id.* at 665–66.

162. *See* Austin, *supra* note 116, at 391–394, 1999 (discussing the political implications of the 1977 elections for the constitutional reforms of the Gandhi regime).

163. The Maintenance of Internal Security Act (MISA) had originally been enacted in 1971 by the Gandhi Congress regime in order to deal with Naxalite agitation in the northeastern states, but was renewed to deal with agitation by opposition leaders prior to and during the Emergency.

164. *See* Madhu Limaye, Janata Party Experiment: An Insider's Account of Opposition Politics: 1975–1977 (1994); Austin, *supra* note 116, at 1999. The Emergency regime passed a series of amendments that sought to restore parliamentary supremacy, and restrict individual rights: the 38th, 39th, 40th, and

In *Minerva Mills v. Union of India*,[165] the Court heard a challenge from the owners of the Minerva Mills to the Sick Textiles Nationalization Act of 1974, which had been added to the Ninth Schedule of the Constitution through the Thirty-Ninth Amendment, thus immunizing the Act from judicial review.[166] Pursuant to the Act, the National Textiles Corporation had taken over textiles mills in Karnataka, on the grounds that these mills were being "managed in a manner highly detrimental to the public interest."[167]

The majority in *Minerva Mills* ultimately invalidated Sections 4 and 55 of the Forty-Second Amendment as violative of the basic structure of the Indian constitution.[168] Section 4 had amended Article 368 so as to subordinate the fundamental rights in Articles 14 and 19 to the directive principles. And Section 55 had amended Article 31-C to provide that no law enacted to advance the Directive Principles could be challenged as violative of the fundamental rights in Articles

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42nd amendments. The 42nd Amendment was arguably the most controversial of the four amendments. The amendment fortified Central government power by authorizing the government to dissolve state governments under certain conditions, and attacked judicial power, by barring judicial review of the 1971 elections (including Gandhi's), overturning the Court's landmark decision in *Kesavananda* by stripping the Court's power to review the validity of constitutional amendments, and requiring two-thirds majorities of Court benches to invalidate statutes. In addition, the amendment barred the Supreme Court from reviewing the validity of state laws (and state courts from reviewing the validity of central laws); stipulated that implementation of the Directive Principles would take precedence over enforcement of the Fundamental Rights; mandated seven-judge benches for cases dealing with constitutional issues; and stipulated that certain types of anti-national activities would not be protected by Article 19's provisions for free speech and expression. Burt Neuborne, *The Supreme Court of India*, 1 Int'l. J. Const. L. 476, 494–495 (2003).

165. 1981 S.C.R (1) 206 (India).

166. *Id.* at 639.

167. Ramachandran, *supra* note 28, at 118. This was in part a result of a fundamental shift that had occurred in the post-Emergency period. Previous political divisions were ameliorated by both the Senior Advocates and Court's reframing of the core issue in *Minerva Mills* as one involving the validity of the Emergency regime's enactment of controversial constitutional amendments that had suspended fundamental rights and curbed judicial power. In addition, the previously divisive issue of land reform and property rights was effectively neutralized by the Janata Government's removal of the right to property as a fundamental right in the Constitution in the 44th Amendment.

168. This represented a bold assertion of judicial power, given that the petitioner had not challenged the validity of Forty-Second Amendment in this matter. Andhyarujina, *supra* note 39, at 22.

14, 19, or 31.[169] Writing for the majority, Chief Justice Chandrachud reaffirmed the basic structure doctrine as set forth in *Kesavananda* and applied in the *Indira Gandhi* case, and found that both Sections were unconstitutional in that they sought to expand the amending power to enable the Government to repeal or abrogate the Constitution or destroy its basic features, given that "a limited amending power is one of the basic features of our Constitution."[170] The *Minerva Mills* decision thus swept away the final remnants of Gandhi's emergency rule regime.

In addition to identifying a limited amending power as one of the basic features of the Indian Constitution, Justice Chandrachud built on his earlier opinion in the *Election Case* and proceeded to articulate which constitutional rights and provisions were included in the basic structure doctrine. Chandrachud further held that the fundamental rights protections in Articles 14 (equality), 19 (the seven freedoms), and 21 (due process, life and liberty) formed a "golden triangle" that was basic to the Indian Constitution, along with the Directive Principles of State Policy decision in Minerva Mills. While observing that this golden triangle of fundamental rights was a core part of the basic structure, Chandrachud's decision also carefully struck a delicate balance between the Directive Principles and the fundamental rights provisions of the Constitution.[171] Thus, Chandrachud noted that

> the Indian Constitution is founded on the bedrock of the balance between Parts III and IV. To give absolute primacy to one over the other is to disturb the harmony of the Constitution. This harmony. . . between fundamental rights and directive principles is an essential feature of the basic structure of the constitution.[172]

Additionally, Justice Chandrachud advanced an identity-based argument for defining what features were part of the basic structure doctrine.[173] Justice P.N. Bhagwati, in his separate opinion concurred with the majority that a limited amending power and

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169. Sathe, *supra* note 28, at 87.
170. *Minerva Mills*, 1981 S.C.R, (1) at 240.
171. *See* Upendra Baxi, Courage, Craft and Contention: The Indian Supreme Court in the Eighties (1985).
172. *Minerva Mills*, 1981 S.C.R. (1) at 255.
173. *Id.* at 253–55.

judicial review were part of the basic structure.[174] However, Bhagwati differed from the majority in holding that the amended Article 31C did not violate the basic structure of the Indian Constitution.[175]

In *Waman Rao v. Union of India*, (the companion case to *Minerva Mills*), the Court reaffirmed the basic structure doctrine and held that all amendments enacted after the *Kesavananda* decision of April 24, 1973, including laws added to the Ninth Schedule, were subject to judicial review under the basic structure doctrine.[176] Applying the basic structure doctrine, instead of relying solely on precedent, the Court upheld Articles 31A and 31C, added by the First and Fourth Amendments, on the grounds that these amendments were enacted to effectuate the Directive Principles contained in Articles 39(b) and (c).[177] The Court also upheld the unamended portion of Article 31C (the amended version had been struck down in *Minerva Mills* as consistent with the basic structure doctrine, ruling that "laws passed truly and bona fide for giving effect to directive principles contained in clauses (b) and (c) of Article 39" would fortify, not damage, the basic structure.

5. From *Bommai* to *Coelho*: Expanding and Reinforcing the Basic Structure Doctrine

In subsequent decisions, the Indian Supreme Court built on the basic structure doctrine in articulating new principles that were deemed to be "basic features" of the Indian Constitution. At the same time, the Indian Supreme Court also further developed the methodology for identifying basic features and for identifying how to assess the impact of amendments on principles or rights provisions.

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174. *Id.*

175. *Minerva Mills*, 1981 S.C.R. (1) at 264–80.

176. Waman Rao v. Union of India, (1981) 2 SCC 362 (India).

177. *Id*. at ¶ 58; Ramachandran, *supra* note 28, at 121. Sections (b) and (c) of Article 39 (Directive Principles) provide that:

> Article 39. Certain Principles of Policy to be Followed by the State—The State shall, in particular, direct its policy towards securing—
> (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;
> (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

In the *Bommai* decision, the Court adjudicated a controversy involving secularism, federalism and the basic structure doctrine. In 1992, a coalition of Hindu right forces launched a campaign that ultimately resulted in the demolition of the Babri Masjid, a mosque that was alleged to have been built on the site of an ancient Hindu temple, with the acquiescence and support of the BJP government in Uttar Pradesh, which led to heightened communal violence throughout India.[178] In response, exercising the emergency powers of President's rule under Article 356, the President dismissed the BJP governments and dissolved legislative assemblies in six states.[179]

In *Bommai*, the Court proceeded to uphold the dismissals of three state governments under Article 356 of the Constitution on the grounds that the President's actions were necessary to save the basic structure of the Constitution. Since the state governments were not functioning in accordance with secularism, which the Court ruled to be part of the basic structure of the Constitution, the President acted within his authority.[180] At the same time, the Court also held that both democracy and federalism were basic features of the constitution, and that the Court could review the constitutionality of Presidential proclamations under the emergency powers of Article 356 to ensure that these basic features were not subverted.[181]

The *Bommai* decision was unique in that it justified and upheld the exercise of government power, rather than invalidating an amendment, under the basic structure doctrine. The Court thus expanded its power to include the review and scrutiny of political

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178. S.R. Bommai v. Union of India, (1994) 3 S.C.C. 1 (India). See Gary Jacobsohn, The Wheel of Law: India's Secularism in Comparative Constitutional Context (2003).

179. Krishnaswamy, *supra* note 28, at 50 (citing *S.R. Bommai*, (1994) 3 S.C.C. at 149).

180. *See* Sathe, *supra* note 28, at 96–98; Gary Jacobsohn, The Wheel of Law: India's Secularism in Comparative Constitutional Context 130–41, 146–56 (2003).

181. Krishnaswamy, *supra* note 28, at 50. The Court's ruling in *Bommai* effectively turned away from its earlier decision in *State of Rajasthan v. Union of India* (upholding the Janata party central government's dismissal of several state governments following the 1977 elections) in which the Court had held that a variant of the political question doctrine should apply to cases involving challenges to presidential proclamations under Article 356 given that presidential proclamations were beyond the scope of judicially discoverable and manageable standards. *Id.* (citations omitted).

decisions relating to state elections and politics.[182] According to S.P. Sathe, *Bommai* was "the most important and politically significant decision of the Court since *Kesavananda Bharati*" because the Court extended the doctrine of review under the basic structure doctrine to "the exercise of power by the President under Article 356 of the Constitution."[183]

The Court also further defined the contours of the basic structure doctrine in *M. Nagaraj v. Union of India*, which involved a challenge to the constitutionality of amendments that overturned earlier Supreme Court decisions challenging and invalidating affirmative action laws. Commenting on the basic structure doctrine, the Court in *Nagaraj* noted that "it is only by linking provisions to such overarching principles that one would be able to distinguish essential from less essential features of the Constitution. The point which is important to be noted is that principles of federalism, secularism, reasonableness and socialism etc. are beyond the words of a particular provision. They are systematic and structural principles underlying and connecting various provisions of the Constitution."[184] The broader test articulated in decisions like *Bommai* and *Nagaraj* examined whether there are overarching principles that permeate multiple provisions of the Constitution. As the Court in *Nagaraj* observed:

> It is important to note that the recognition of a basic structure in the context of amendment provides an insight that there are, beyond the words of particular provisions, systematic principles underlying and connecting the provisions of the Constitution. These principles give coherence to the Constitution and make it an organic whole. An instance is the principle of reasonableness which connects Articles 14, 19 and 21. Some of these principles may be so important and fundamental, as to qualify as 'essential features' or part of the 'basic structure' of the Constitution, that is

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182. *Id.* at 152. The Court in *Bommai* examined the manifesto and political ideology of the BJP party in determining that the BJP governments would not act in accordance with "the principle of secularism." *Id.* at 176; *S.R. Bommai*, (1994) 3 S.C.C. at 137–138, 147, 151–153, 172–175, 290–293. *But see* Justice Verma's opinion in *S.R. Bommai*, (1994) 3 S.C.C. at 85–87 (asserting that there are no "judicially manageable standards" for scrutinizing Presidential actions under Article 356, and that such controversies "cannot be justiciable").

183. *See* Sathe, *supra* note 28, at 152.

184. M. Nagaraj v. Union of India, (2006) A.I.R. 2007 S.C. 71 (India).

> to say, they are not open to amendment. However, it is only by linking provisions to such overarching principles that one would be able to distinguish essential from less essential features of the Constitution.

According to the Court in *Nagaraj*, Part III of the Constitution—the Fundamental Rights provisions—contained three sets of "codes"—the equality code (Article 14, 15, and 16), the freedom code (Articles 19, 20, 21, and 22), and the right to access the courts code (Articles 30–32), with each code mapping on to different sets of rights provisions. Significantly, the Court in *Nagaraj* also suggested the need to analyze prior doctrine to identify basic features:

> For a constitutional principle to qualify as an essential feature, it must be established that the said principle is a part of the constitutional law binding on the legislature. Only thereafter, the second step is to be taken, namely, whether the principle is so fundamental as to bind even the amending power of the Parliament, i.e. to form a part of the basic structure. The basic structure concept accordingly limits the amending power of the Parliament. ...This is the standard of judicial review of constitutional amendments in the context of the doctrine of basic structure.[185]

More recently, a nine-judge bench of the Court in *I.R. Coelho v. State of Tamil Nadu* (2007) reaffirmed the basic structure doctrine and the Court's earlier decisions in *Minerva Mills* (1980) and *Waman Rao* (1981). In 1999, an earlier five judge bench in *Coelho* dealt with a challenge to the validity of two state laws—the Tamil Nadu Janmam Act of 1969, and the West Bengal Land Holding Revenue Act of 1979—that had been added to the Ninth Schedule *after* they had been invalidated in courts.[186] These laws had been added to the Schedule by the 34th and 66th Amendments. In order to decide the issue, the

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185. *Nagaraj*, (2006) A.I.R. 2007 S.C. at 102.

186. In 1972, the Supreme Court invalidated the State of Tamil Nadu's Janmam Act, "insofar as it vested forest lands in the Janmam estates in the State of Tamil Nadu," on the grounds that it "was not found to be a measure of agrarian reform protected by Article 31-A of the Constitution." I.R. Coelho v. State of T.N. (1999) 7 S.C.C. 580, 581 (India) (citing Balmadies Plantations Ltd. v. State of T.N. (1972) 2 S.C.C. 133 (India)). And in 1979, Section 2(c) of the West Bengal Land Holding Revenue Act, 1979 was struck down by the Calcutta High Court as being arbitrary and, therefore, unconstitutional. *Id.*

five-judge bench held that the Court's earlier judgment in *Waman Rao* needed to be reconsidered in order to determine whether a law invalidated by the Courts for infringing the fundamental rights could subsequently be included in the Ninth Schedule.[187] In *Waman Rao*, the Supreme Court had held that any laws added to the Ninth Schedule after April 24, 1973 could be challenged in Court.[188] (The Court had set this cutoff date on the grounds that most laws added to the Ninth Schedule before this date dealt with agrarian reforms.) In order to decide the issue in the case, the five-judge bench referred to a larger bench the question of whether laws declared invalid by courts could subsequently be added to the Ninth Schedule.

In *Coelho* (2007), the larger nine-judge bench held that any law (including laws added to the Ninth Schedule after April 4, 1973) infringing upon the fundamental rights that was found to have violated the basic structure doctrine, must be invalidated by the Court.[189] The majority also expressed concern about what they perceived was abuse of the Ninth Schedule to protect a wide array of laws unrelated to agrarian reform.[190] Finally, the decision reaffirmed the Court's earlier holding in *Minerva Mills* that the "golden triangle" of Articles 14, 19 and 21 was part of the "touchstone" of the basic structure of the Constitution.[191] Although the Court's decision was an activist one, the bench did not actually strike any laws down. Rather, the decision prospectively asserted the power of the Court to invalidate laws added to the Ninth Schedule that infringed upon the fundamental rights and the basic structure of the Constitution.

B. Unpacking the Basic Structure Doctrine

The Court in *Kesavananda* asserted the basic structure doctrine for the first time in holding that there were implied limitations on the amending power grounded in Article 368 of the Constitution.[192] In *Kesavananda*, the Court inferred an implied limitation on the amending power based on textual and structural readings of the Constitution, including Article 368, the preamble, and

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187. *I.R. Coelho*, (1999) 7 S.C.C. at 581–583.
188. Waman Rao v. Union of India, (1981) 2 S.C.C. 362 (India).
189. *I.R. Coelho*, (1999) 7 S.C.C. 580.
190. *Id.*
191. *Id.*
192. *See* Ramachandran *supra* note 28; Kesavananda Bharati v. State of Kerala, (1973) 4 S.C.C. 225 (India).

based on original intent arguments from the Constituent Assembly debates.[193] However, the majority did not reach a consensus on which features were part of the basic structure doctrine.[194] Much of the Court's jurisprudence, beginning in the *Election Case*, focused on articulating an *approach* for discerning what features constitute "basic features" that should be entrenched. In the *Election Case*, the Court articulated a clear approach for determining whether a particular feature of the Constitution is a part of the basic structure.[195] The Court held that it must analyze in each case:

> the place of the particular feature in the scheme of our Constitution;
> its object and purpose, and;
> the consequences of its denial on the *integrity of the Constitution* as a fundamental instrument of the country's governance.[196]

The Court in the *Election Case* thus outlined a structural and original/historical intent approach for ascertaining what provisions constitute basic features. Specifically, the first part of the *Election Case* framework suggests a structural-textual method of interpretation, while the second part envisions an original intent analysis (for determining the object and purpose of a feature) for situating particular features within the broader constitutional framework.[197] Finally, the third part of the test suggests a concern with the identity of the Indian Constitution that may require both structural as well as doctrinal approaches to ascertain the relative importance of constitutional principles and provisions.[198]

Based on his analysis of the doctrine, Sudhir Krishnaswamy posits that the "correct" application of this doctrine requires the identification of "basic features" as distinguished from core or integral *provisions* of the Constitution.[199] Krishaswamy suggests that the

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193. *See Kesavananda Bharati*, (1973) 4 S.C.C. at 316–27 (India).

194 . Krishnaswamy, *supra* note 28, at 27 (citing Rajeev Dhavan, Parliamentary Sovereignty and the Supreme Court 141 (1978)); *see* Ramachandran, *supra* note 28.

195. Gandhi v. Narain (1976) 2 S.C.R. 347, 658 (1975).

196. *Id.* (emphasis added).

197. *Id.*

198. *Id.*

199. Krishnaswamy, *supra* note 28, at 132. Krishnaswamy critiques Justice Chandrachud's opinion in the *Election Case* as flawed because it identified key articles—including Article 14 (equality)—as basic features, while suggesting that Justice Mathew's structural approach in the same case was superior, in that it

doctrine seeks to identify overarching principles or rules that pervade the entire Constitution, as opposed to identifying the hierarchy of importance of particular provisions in the text of the Constitution itself.[200] The doctrine thus seeks to identify basic features that are "general constitutional rules . . . foundational to the identity and character of the Indian Constitution and include principles of institutional design as well as substantive values which together frame decision-making under it."[201] Furthermore, Krishnaswamy acknowledges that the basic structure doctrine must proceed through a case-by-case approach to identifying the basic features of the Indian Constitution.[202]

Krishnaswamy argues that the Court's basic structure approach following the *Election Case* has been flawed in two respects. First, he argues that the Court in subsequent cases failed to adhere to the *Election Case* basic feature framework and appeared to go far beyond the limited textual-structural approach in that case.[203] Second, Krishnaswamy argues that the Court has erroneously conflated "ordinary" Article 13 judicial review—which applies to ordinary legislation—with basic structure review of constitutional amendments.[204] Thus, Krishnaswamy suggests that the Court's decisions— recognizing that key articles/provisions and not just broader principles are part of the basic structure—are inherently flawed. He argues that only broader structural principles, not particular constitutional provisions, should be basic features.

Significantly, Krishnaswamy endorses Justice Pandian's approach in *R. Ganpatrao v. Union of India* to identifying basic features as "those political, moral, and legal principles, which are reflected in several articles in the Constitution, which together make the core normative identity of the Constitution."[205] In advancing this critique, Krishnaswamy argues that excessive reliance and focus on constitutional history in identifying basic features is problematic, and that the Court should focus on interpreting the constitutional text

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focused on features that encompass, or can be gleaned from, a reading of multiple provisions of the Constitution at a broader level.

200. *Id*.

201. *Id.*

202. *Id.*

203. *Id.* at 150–54.

204. *Id.* at 76–80.

205. *Id.* at 146 (citing R. Ganpatrao v. Union of India, A.I.R. 1993 S.C. 1267 (India)).

itself in order to ascertain those principles that are part of the "normative core of the constitution."[206]

Krishnaswamy suggests that Justice Chandrachud's historical approach to identifying basic features in the *Minerva Mills* case is problematic in that it was overly reliant upon historical texts, including Granville Austin's *The Indian Constitution*, in concluding that the harmony between the directive principles in Part IV of the Constitution, and the fundamental rights in Part III was a basic feature of the Constitution.[207] Instead Krishnaswamy endorses Justice Bhagwati's approach in *Minerva Mills*, which identified judicial review and a limited amending power as basic features based on a textual analysis of the Constitution, as a superior approach to identifying basic features, and one that is similar to Justice Mathew's approach in the *Election Case*.[208]

I suggest a more nuanced approach toward analyzing the Indian Court's competing frameworks for identifying basic features. While Chandrachud's opinion may have relied excessively on Granville Austin's characterization of the status of the directive principles and fundamental rights in the Constitution, Krishnaswamy's critique of Chandrachud's opinion in *Minerva Mills* is also problematic. First, it does not recognize that the Minerva Mills majority did correctly apply the basic features framework as set forth in the *Election Case*. Second, it fails to fully weigh the Minerva Mills decision's consideration of a series of activist decisions in the late 1970s by the Indian Court that had significantly expanded the scope of fundamental rights contained in Articles 14, 19 and 21.

Chandrachud's approach to identifying basic features, as set forth in *Minerva Mills*, is consistent with the three-part framework set forth in the *Election Case*. Part II of the *Election Case* framework suggests that the Court will have to rely on and analyze evidence of original and historical intent to identify the object and purpose of particular provisions. In *Minerva Mills*, Justice Chandrachud's majority opinion relied on historical and original intent analysis for ascertaining the basic features of the Indian Constitution.[209] Part III of the framework requires that a Court must engage in both structural and doctrinal modes of analysis to determine whether the

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206. *Id.* at 157.
207. *See* Granville Austin, The Indian Constitution (1966).
208. Krishnaswamy, *supra* note 28, at 152, 156.
209. *Id.* at 154–156.

denial of a particular feature would fundamentally affect the integrity or identity of the constitution. Krishnaswamy's suggested approach thus appears to fail to allow for consideration of significant doctrinal changes in the Court's jurisprudence, including decisions interpreting the fundamental rights provisions of the Constitution, in identifying basic features of the Constitution.

I suggest that Justice Chandrachud's analysis in *Minerva Mills* of the Court's earlier jurisprudence regarding the importance of key provisions such as the fundamental rights and directive principles is consistent with a case-by-case approach that accounts for dynamic changes in India's constitutional framework and transformational "constitutional moments."[210] Significantly, Justice Chandrachud's decision in *Minerva Mills* also recognized a shift in the Court's fundamental rights jurisprudence in the post-Emergency period, and in so doing, also recognized the historic importance of the Janata government's victory in the 1977 elections. In a series of landmark decisions in the late 1970s, the Court expanded the scope of the rights contained in Articles 14, 19, and 21, and also began to develop a new jurisprudence of public interest litigation based on expanding standing doctrine for public interest litigation. *Minerva Mills* thus codified a new conception of judicial supremacy that built on the Court's earlier decisions in the *Election Case* (Article 14 equality) and in *Maneka Gandhi* (Article 14, 19, and 21), which greatly enlarged the scope of these rights as limits on the exercise of arbitrary power.

Chandrachud's opinion thus took stock of a series of activist decisions responding to the excesses of Indira Gandhi's emergency rule regime, and in reasserting the basic structure doctrine helped to restore constitutionalism, limited government, and the rule of law. Additionally, the Court in *Minerva Mills* solidified the basic structure doctrine by identifying a core set of rights—Articles 14, 19, and 21—as forming a "golden triangle" that was foundational to the Indian Constitution.[211] Chandrachud's approach thus recognized that

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210. *See* 1 Bruce Ackerman, We the People: Foundations (1993); 2 Bruce Ackerman, We the People: Transformations (2000) ("constitutional moments" occur when a major shift in constitutional structure is brought about by a coalition who take above-average interest to some important constitutional question at issue in an election).

211. *Minerva Mills*, 1981 S.C.R. (1) at 263–64 (India); India Const. art. 14 (equality); India Const. art. 19 (seven freedoms); India Const. art. 21 (life and personal liberty; procedural due process). In Maneka Gandhi v. Union of India,

broader structural principles *and* particular provisions of the Constitution—including fundamental rights provisions—can constitute basic features of the constitution.

In doing so, the *Minerva Mills* majority effectively built on and consolidated earlier decisions that had expanded the scope of each of the rights in these Articles. The Court's subsequent decisions have confirmed that the Court must also look at the Court's own prior constitutional doctrine in ascertaining which principles or constitutional provisions are basic features.[212] Thus, in *Nagaraj*, the Court recognized that the basic features inquiry is a two-part test requiring the Court to discern whether a particular principle has been recognized in the Court's prior jurisprudence before determining whether it is a basic feature.[213] While Krishnaswamy argues that there needs to be textual/structural limits on identifying what features are part of the basic structure doctrine in line with Mathew's and Bhagwati's arguments in the *Election* and *Minerva Mills* cases, I suggest that original and historical intent, and doctrinal approaches, while more dynamic, still place limits on the Court's identification of basic features.

In addition, Chandrachud's lead opinion in *Minerva Mills* recognized the importance of the judicial role in articulating, reinterpreting, and redefining the scope and importance of key provisions of the Constitution. Thus, a Court can, through its jurisprudence, dramatically re-alter the scope of particular principles and rights provisions and effectively "re-weigh" the importance of certain features. Thus, following the *Election Case* and *Maneka Gandhi* cases, the Court effectively reinterpreted the rights contained in Articles 14, 19, and 21 as conferring much broader rights and much more robust and extensive limitations on the scope of

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(1978) 2 S.C.C. 621, 629 (India), the Court expansively interpreted the right to life and personal liberty in Article 21, creating a new standard of "non-arbitrariness" review, and effectively creating a doctrine of substantive due process. *See* Manoj Mate, *The Origins of Due Process in India: The Role of Borrowing in Personal Liberty and Preventive Detention Cases*, 28 Berkeley J. Int'l L. 216, 218 (2010) (arguing that the move toward substantive due process was a gradual one that developed over multiple cases and culminated in *Maneka Gandhi*).

212. Krishnaswamy, *supra* note 28, at 76–80.

213. M. Nagaraj v. Union of India, (2006) 8 S.C.C. 212, 268 (India).

government power.[214]The Court's reinterpretation and expansion of the scope of these rights can provide guidance to subsequent judges in evaluating the "object and purpose" of particular features in the Constitution.[215]

What is interesting about the articulation of the basic structure doctrine in *Nagaraj* is that it seemingly allows the Court to rely on and build on earlier jurisprudence that "establishes" key constitutional principles, and then to "elevate" those principles to the status of a basic feature of the Constitution. This suggests that U.S. state courts may have to develop their own corpora of constitutional law to reference in determining whether certain key principles are recognized as "established" principles of law that bind the Government or Legislature, and then ascertain whether those principles are indeed part of the basic structure doctrine.

V. APPLYING THE BASIC STRUCTURE DOCTRINE TO *STRAUSS* AND PROPOSITION 8

The majority in *Strauss* interpreted the Court's earlier decisions, including *Raven*, as standing for the proposition that "in deciding whether or not a constitutional change constitutes a qualitative revision, a court must determine whether the change effects a substantial change in the governmental plan or structure established by the Constitution."[216] In this section, I argue that the *Strauss* majority's application of the *Raven* revision-amendment standard was inherently problematic in that it failed to provide a clear and coherent approach to identifying what are the basic features of the California Constitution. In *Raven*, the Court invalidated Proposition 115, ruling that it constituted a revision, not an amendment, on the grounds that it would have subordinated the

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214. *See* Mate, *supra* note 205 (arguing that the move toward substantive due process was a gradual one that developed over multiple cases and culminated in *Maneka Gandhi*).

215. As suggested in Justice Chandrachud's decision in *Minerva Mills*, courts can play a significant role in redefining the scope and weight of key constitutional provisions through a process of judicial entrenchment. In the post-Emergency period, the Court redefined the scope of the fundamental rights provisions in a series of activist decisions. Through its basic structure decisions, the Court built on these earlier decisions in asserting its role as a guardian of the constitution in entrenching fundamental rights and principles of limited government and constitutionalism (including a limited amending power).

216. Strauss v. Horton, 207 P.3d at 85, 88 (Cal. 2009).

role of the California judiciary to the federal courts, in requiring California courts to interpret state provisions governing criminal procedure in line with federal courts' interpretations of parallel provisions in the federal constitution.[217]

As Cain and Noll argue, the *Raven* revision-amendment standard, as applied in *Strauss,* is problematic because it fails to provide a workable bright-line test that meaningfully distinguishes between revisions and amendments that abrogate or infringe fundamental rights.[218] The *Raven* Court sought to distinguish two cases—*In re Lance W* (1985) and *People v. Frierson* (1979)—in which the Court upheld two amendments that sought to restrict fundamental rights. In *In re Lance W*, the Court upheld a measure that sought to limit the exclusionary remedy for search and seizure violations to the protections of the federal Constitution, while in *Frierson*, the Court overturned the Court's earlier decision holding the death penalty unconstitutional under the California Constitution.[219] The Court in *Raven* sought to distinguish the relatively limited scope of the changes effected by the initiatives in these earlier cases in holding that the provisions in *Raven* involved a "broad attack on state court authority to exercise independent judgment in construing a wide spectrum of important rights under the state Constitution."[220] As Grodin notes, the challengers in *Strauss* argued that Proposition 8 could be distinguished from *In re Lance W* and *Frierson* on the ground that Proposition 8 abrogated the rights of a suspect class.[221] The Court in *Raven* held that only measures that abrogate the Court's authority to exercise independent judgment in constructing a wide spectrum of rights under the state constitution would constitute a revision. The *Raven* court thus invalidated Proposition 115 because it

> would *substantially alter the substance and integrity of the state Constitution as a document of independent force and effect*. . . . Thus, Proposition 115 not only unduly restricts judicial power, but it does so in a way which severely limits the independent force and effect of the California Constitution. . . . Proposition

217. Raven v. Deukmeijian, 801 P.2d 1077, 1088–90 (Cal. 1990).

218. Cain & Noll, *supra* note 17, at 1518–22, 1530–32.

219. Joseph R. Grodin, *On Amending and Revising the Constitution: The Issues behind the Challenge to Proposition 8*, 1 Cal. J. Pol. & Pol'y 1 (2009).

220. *Id*. at 47 (citing *Raven*, 801 P.2d at 1089).

221. *Id.*

> 115 . . . substantially alters the preexisting constitutional scheme or framework heretofore extensively and repeatedly used by courts in interpreting and enforcing state constitutional protections. It directly contradicts the well-established judicial principle that, "The judiciary, from the very nature of its powers and means given it by the Constitution, must possess the right to construe the Constitution in the last resort . . . ."[222]

Thus, the *Raven* standard directly entrenches a conception of judicial federalism and suggests that measures that "substantially alter the substance and integrity of the state constitution as a document of independent force and effect," and affect the Court's ability to interpret the state constitution independently of the federal constitution, constitute revisions to the constitution.[223] Although *Raven* explicitly acknowledged that principles of judicial federalism may be sacrosanct, the Court in *Strauss* ultimately held that the scope of Proposition 8 did not rise to the level of a revision in terms of Proposition 8's impact on the scope and breadth of rights in the state constitution.[224] But the *Strauss* majority's application of *Raven* was flawed in at least three ways.

First, the Court's efforts to try to distinguish the *In re Lance W* and *Frierson* cases from *Raven* have resulted in an ambiguous and incoherent framework for determining whether particular measures that abrogate fundamental rights rise to the level of a revision under constitutional law.[225] Second, the *Strauss* Court failed to fully address the broader impact of Proposition 8 on the California Supreme Court's role in interpreting the California constitution as a document of independent force and effect, and in doing so, greatly underestimated the impact of the measure on judicial federalism in California.

Third, the *Strauss* majority acknowledged its own failure to articulate an approach or method for ascertaining whether particular principles or rights are "basic features":

> Nonetheless, in each case this court did not undertake an evaluation of the relative importance of the

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222. Strauss v. Horton, 207 P.3d 48, 95–96 (Cal. 2009) (citing *Raven*, 801 P.2d at 1087–88) (emphasis added).

223. *Raven*, 801 P.2d at 1087–88.

224. *Strauss*, 207 P.3d at 98–101, 103–110.

225. *See* Cain & Noll, *supra* note 17.

> constitutional right at issue or the degree to which the protection of that right had been diminished, but instead held that the measure did not amount to a qualitative revision because it did not make a fundamental change in the nature of the governmental plan or framework established by the Constitution.[226]

India's basic structure doctrine addresses each of these problems and provides a superior framework for identifying the basic features of a constitution. At the same time the Indian approach anticipates the concerns of scholars concerned about unconstrained judicial subjectivity,[227] and also provides for constraints on the potential problem of judicial subjectivity or judges' injecting their own policy values into determinations of what are basic features. Thus, as Krishnaswamy observes, various justices on the Supreme Court of India have advanced different approaches that emphasize the use of constitutional text, structure and history in order to ascertain the normative core of the Constitution. Finally, the basic structure doctrine provides a neutral framework or methodology for how the California Supreme Court may identify which principles or rights should be deemed to be basic features.

Proposition 8 abrogated several potential "basic features" of the California Constitution, including equality and the equal protection clause, and the California judiciary's role in interpreting the California Constitution independently of the federal constitution and courts. In *Raven*, the Court arguably recognized that the scope and nature of judicial power was a basic feature as it was part of the structure or governmental plan.[228] In addition, applying the basic structure doctrine to California, one could argue that the California Court's power to interpret the California Constitution independently from the federal constitution is a basic feature of the California Constitution, as well as a core feature of federalism (which is arguably a basic feature of the federal constitution).[229]

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226. *Strauss*, 207 P.3d at 100.

227. *See* Gary Jacobsohn, *The Permeability of Constitutional Borders*, 82 Tex. L. Rev. 1763 (2004) (analyzing various critiques of the use of foreign legal sources in the U.S.).*see* Sujit Choudhry, *Globalization in Search of a Justification*, 74 Ind. L. J. 819 (1999).

228. *Raven*, 801 P.2d at 1089.

229. *See* Grodin, *supra* note 213.

First, Proposition 8, in line with the Court's earlier decision in *Raven*, did fundamentally alter the role of the California Supreme Court, and the place of the California Constitution in the federal system as a document of independent force and effect. The California court's role in policing amendments and to protect the Constitution's "above the floor" protections vis-à-vis federal constitutionalism can thus be viewed as a basic feature.[230] Additionally, Article I, section 24 of the constitution states that "rights guaranteed by this Constitution are not dependent on those guaranteed by the United States."[231] And as Grodin observes, the California Constitution was originally adopted in an era in the 1840s in which the protections set forth in the Bill of Rights of the U.S. Constitution were held not to apply to the states by the U.S. Supreme Court in *Barron v. Baltimore*. As a result, the California Constitution was understood as a charter that would provide for an independent guarantee of and protection for rights distinct from those set forth in the federal constitution.

Drawing on the *Election case's three-part* basic features framework, the California Supreme Court could have first analyzed the unique place and role of equal protection within the fundamental rights section of the California Constitution, by applying principles of structural analysis, and second, examined the original and historical intent of the California constitution provisions in order to determine the object and purpose of the equal protection clause.[232] Third, the Court could have focused on the impact of Proposition 8 on the "integrity" of the California Constitution, by examining the extent to which the initiative altered the "identity" of the California Constitution. One aspect of this unique identity was the state constitution's own delineation of fundamental rights as distinct from the federal constitution. Arguably, the identity of the California Constitution would be fundamentally altered if it was allowed to be subordinated as an instrument for protecting rights vis-à-vis the federal constitution.[233]

Additionally, the California Supreme Court could go much further in recognizing that Article I, Section 7's equal protection

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230. *See* Cain & Noll, *supra* note 17, at 1519–22.

231. *See* David B. Cruz, *Equality's Centrality: Proposition 8 and the California Constitution*, 19 S. Cal. Rev. L. & Soc. Just. 45, 60 (2010) (citing Cal. Const. art. I, § 24).

232. *See* Grodin, *supra* note 213, at 47; Cruz, *supra* note 213.

233. *See* Strauss v. Horton, 207 P.3d 48, 132 (Cal. 2009) (Moreno, J., dissenting); Grodin *supra* note 213, at 47; Cruz, *supra* note 213.

clause is now a basic feature, given the California Court's robust interpretation of the right to equality in the *Serrano v. Priest*[234] cases and subsequent decisions.[235] Professor David Cruz, in his article *Equality's Centrality*, examines how equality was a central part of the California Constitution, and how through subsequent jurisprudence of the California Supreme Court, has become established as a key principle in constitutional law (through equal protection jurisprudence).[236] Justice Moreno's opinion also articulated the object and purpose of the equality provisions—identifying how equality and equal protection was well-developed as a doctrine in California law, and how the principle was foundational to the counter-majoritarian function of courts. The consequence of denial is clear—the Court can no longer interpret the California Constitution as a document of independent force and effect, thus undermining rights of federalism.

Critics of the use of foreign legal sources in U.S. domestic law may argue that state supreme court reliance on the basic structure doctrine may be problematic.[237] However, I suggest that the Indian basic structure doctrine provides a "neutral" framework or test for identifying basic features in any constitution[238] and thus avoids potential subjectivity that might result from a more open-ended approach to identifying basic features that is suggested in Moreno's dissent, as well as the legitimacy concerns raised by Werdegar's approach. In this way, the use of the Indian framework would be consistent with a dialogical or contextual approach to judicial borrowing.[239]

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234. *See* Cruz, *supra* note 222, at 59–60 (identifying differences in California and federal standards regarding equality in the area of school financing (citing Serrano v. Priest (*Serrano II*), 557 P.2d 929, 951–52 (Cal. 1976))).

235. Cruz, *supra* note 213, at 59–61 (arguing that equality has long been a central feature of California's jurisprudence and that the Serrano I and II decisions illustrate how the Court has interpreted California's equal protection clause independently of the federal constitution, interpreting the provision to have greater strength than its federal counterpart).

236. *Id.*

237. *See generally* Gary Jacobsohn, *The Permeability of Constitutional Borders*, 82 Tex. L. Rev. 1763 (2004) (analyzing various critiques of the use of foreign legal sources in the U.S.).

238. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 15 (1959); David Law, *Generic Constitutional Law*, 89 Minn. L. Rev. 652 (2005) (exploring convergence in constitutional principles and frameworks globally).

239. *See* Mate, *supra* note 205, at 229–30 (reviewing various approaches to judicial borrowing); Sujit Choudhry, *Globalization in Search of a Justification*, 74

Thus, instead of importing the "laundry list" of basic features that has been developed over time in various basic structure decisions in India, California courts could instead apply a methodology for identifying such features in its own constitution. The California judiciary could thus develop its own framework for identifying basic features that could only be changed via revision by relying on and importing "best practices" from another country's jurisprudence, without necessarily redefining the *substantive* content and framework of California's constitution. Additionally, California courts could look to California's own constitutional text, structure, history, and the development of California's own constitutional jurisprudence in identifying what features were so basic as to require resort to the revision process for altering those features.

VI. CONCLUSION

As this Article illustrates, judicial entrenchment can actively serve to bolster the original normative goals of the U.S. Constitution. In California, application of the Indian basic structure doctrine could help bolster principles of federalism by enhancing the power of state courts to interpret state constitutions as documents of "independent force and effect."[240] Application of the basic structure doctrine could also advance the goals of rights federalism by enabling state judiciaries to build on the federal "floor" of rights and provide their citizens with greater rights protections than the federal constitution.[241] As the number of amendments that impinge upon fundamental rights increase, the exercise of popular sovereignty, without checks, threatens to undermine rights federalism, by allowing popular majorities to gradually erode the original commitments and foundations of state constitutions.

Defenders of the narrow definition of a revision applied in *Strauss* may argue that the "federal backstop" of the federal

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Ind. L. J. 819, 835–36 (1999) (discussing "dialogical" approaches as a middle-range alternative to universalist and particularist approaches); Jacobsohn, *supra* note 138, at 1767. As Jacobsohn, Choudhry, Jackson, and other scholars have suggested, looking to foreign legal sources for insights on a country's (or state's) own unique domestic constitutional structure can illuminate constitutional problems in a novel light.

240. *See* Raven v. Deukmejian, 801 P.2d 1077 (Cal. 1990).

241. Cain & Noll, *supra* note 17, at 1520–22.

constitution serves as a secondary check on the ability of political majorities at the state level to abrogate minority rights.[242] These scholars or advocates might point to the Ninth Circuit's decision invalidating *Perry v. Schwarzenegger* in which the opponents of Proposition 8 were vindicated, as evidence that federal courts can provide the needed safeguard that helps guard against violation of fundamental rights by majorities of a state's electorate, obviating the need for a basic structure doctrine or entrenched rights doctrine at the state level.[243] Although the federal courts have in some cases invalidated state constitutional amendments like Proposition 8, in other cases, federal courts have upheld bans on same-sex marriage in Nevada and Hawaii.[244]

In *Windsor*, the U.S. Supreme Court invalidated DOMA based on equal protection and federalism grounds without recognizing a fundamental right to same-sex marriage.[245] And the Court refused to rule on the underlying substantive constitutional issues in *Hollingsworth v. Perry*, finding that petitioners lacked standing to defend Proposition 8 on appeal. While the California district court in *Perry v. Schwarzenegger* issued a favorable decision recognizing same-sex marriage rights, other federal district courts have not followed suit. Thus, there are no guarantees that federal

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242. *Id.* at 1521–22.

243. The Court in *Perry* applied the Court's earlier decision in *Romer* and held that once California granted the right of marriage to all Californians in the *In re Marriage Cases*, it could not arbitrarily take away that right from a suspect class of individuals without at least offering a rational basis for doing so. This concept of the "one way ratchet" has been explored in the literature by several scholars. *See* Akhil Reed Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 Mich. L. Rev. 203, 206 (1996); John Eastman, *Stare Decisis: Conservatism's One-Way Ratchet Problem*, *in* The Court and the Culture Wars 127, 130 (Bradley Watson ed., 2002); Steven Vladeck, *The Riddle of the One-Way Ratchet: Habeas Corpus and the District of Columbia*, 12 Green Bag 71, 74 (2008). Interestingly, the basic structure doctrine may also serve as a one-way ratchet in allowing for rights to be added, but not removed from constitutions, though a full discussion of this point is beyond the scope of this article.

244. *See* Jackson v. Abercrombie, 884 F. Supp. 2d 1065 (D. Haw. 2012) (upholding Hawaii's same sex marriage ban); Sevcik v. Sandoval, 911 F. Supp. 2d 996 (D. Nev. 2012) (holding that Nevada's ban on same sex marriage does not violate equal protection)

245. U.S. v. Windsor, 33 S.Ct. 2675, 2684–2690, 2693–2695 (2013); s*ee* Neomi Rao, *supra* note 13(arguing that *Windsor* recognized the dignity of same-sex marriage, not the right to same-sex marriage, in holding that the federal government must recognize existing same-sex marriages at the state level).

courts can serve as an effective federal "backstop" to vindicate individual rights at the state level in all contexts. This alternative "substantive model" of federal review provides incomplete protection for fundamental rights. Even under the federal constitutional standard for equal protection articulated in *Romer*, a state can infringe upon the fundamental rights of a suspect class provided that the state has a rational basis for doing so.[246] In light of these weaknesses, this article argues for a stronger, more robust form of substantive review of constitutional amendments based on independent state grounds.[247]

At least in the context of California and other states that allow for initiative constitutional amendments, federalism poses challenges for the popular constitutionalism model. Because Article IV, Section 4 of the U.S. Constitution guarantees a republican form of government to state constitutions, the initiative process in states presents serious difficulties to preserving and protecting federalism in at least partly subordinating representative government to popular democracy. The advent of the initiative process effectively brought popular federalism and rights federalism into direct conflict. Because federalism was incorporated into the U.S. Constitution as a mechanism for protecting individual rights and liberties against usurpation and tyranny and the excesses of majoritarian rule, it can be argued that state courts must assert a more robust role in protecting republicanism at the state level through more robust review of initiative constitutional amendments, that in the end helps advance the broader goals of federalism.

And because the U.S. Supreme Court and federal courts effectively shut off potential challenges to the form of state governments on the basis of the guarantee clause in *Coleman v. Miller* and *Luther v. Borden*[248] based on the political question doctrine, the only mechanism currently available for protecting the

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246. Romer v Evans, 517 U.S. 620 (1996) (applying rational basis review to Colorado's Amendment 2, which barred state and local government officials from taking any legislative, executive, or judicial action to recognize gay and lesbian individuals as a protected class).

247. *See id.*

248. *See* Gary Jacobsohn, *An Unconstitutional Constitution?: A Comparative Perspective*, 4 Int'l J. Const. L. 460, 479 n. 67–68 (2006) (citing Coleman v. Miller, 307 U.S. 433, 459 (1939); Luther v. Borden, 48 U.S. 1 (1849)).

identity of state constitutions is through state constitutional law.[249] Thus, while federal courts can play a role in invalidating state constitutional amendments that violate the federal constitution, states should have the final say as arbiters of state constitutional law; federal courts cannot necessarily be relied upon to play a role in policing and protecting the identity of state constitutions. As a result, then, the constitutional blind spot of American federalism suggests the need for the adoption of basic structure doctrine frameworks in states that have the initiative process.

In allowing for a great degree of flexibility in the establishment of state constitutions, the unique structure of American federalism actually ended up creating new opportunities for political majorities to restrict minority rights, particularly in states that created mechanisms for constitutional amendment and lawmaking through the initiative process. This in part can be traced to a fundamental duality within the American constitutional system—while the U.S. Constitution is difficult to amend, state constitutions are more malleable and can be amended through the initiative process.[250] The innovation of direct democracy in many states has arguably created a federalism "blind spot," allowing state majorities to abrogate fundamental rights through popular initiatives.

The California Supreme Court, and other state supreme courts, should consider and apply insights from the Indian basic structure doctrine in the review of constitutional amendments. More broadly, state Supreme Courts should protect the identity and uniqueness of state constitutions vis-à-vis the federal constitution to preserve a republican system of government and protect against the tyranny of the majority at the state level. As the final arbiters and

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249. The U.S. Supreme Court has not recognized the power to invalidate federal constitutional amendments and has not asserted the basic structure doctrine. Although beyond the scope of this article, one might note that the U.S. Supreme Court has effectively weakened or undermined earlier amendments through constitutional interpretation. For example, the Court significantly narrowed and weakened the scope of the privileges and immunities clause of the Fourteenth Amendment in *The Slaughterhouse Cases*, and weakened and narrowed the equal protection clause of the Fourteenth Amendment in the *Civil Rights Cases. See* Slaughter-House Cases, 83 U.S. 36, 78 (1872); see Kermit Roosevelt, *Forget the Fundamentals, Fixing Substantive Due Process*, 8. U. Penn. J. of Constit. L. 983 at 999, n. 63; Manoj Mate, *Two Paths to Judicial Power*, 12 San Diego Int'l L.J. 175 at 212.

250. *See* Cain & Noll, *supra* note 17, at 1518–1520.

interpreters of "malleable state constitutions,"[251] I argue in this Article that state supreme courts must play a key role as institutions of judicial entrenchment, in determining which provisions and aspects of state constitutions cannot be altered through the initiative process.[252] In performing this role, state supreme courts in the United States play a crucial role in defining and preserving the unique "constitutional identity" of state constitutions.[253] The exercise of popular sovereignty, without checks, threatens to undermine rights federalism, by allowing popular majorities to gradually erode the original commitments and foundations of state constitutions. Adoption of the basic structure doctrine could thus aid state supreme courts in protecting the integrity of state constitutions, and bolstering protections for fundamental rights.

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251. *See generally* Cain & Noll, *supra* note 17 (exploring the consequences of malleable state constitutions on policy outcomes, government efficiency, and effective protection of individual rights).

252. In light of the recent history of activism and initiative politics, it is worth sounding a cautionary note regarding application of the basic structure doctrine in California. In response to the activism of Chief Justice Rose Bird and the California Court in the 1980s, the voters of California ultimately voted not to approve the retention of Bird and two other judges. *See* Peter Galie, *State Supreme Courts, Judicial Federalism and the Other Constitutions*, 71 Judicature 100, 103, 109 (1987). Since that period, this "political backlash" to judicial activism on the Court has arguably tempered the extent to which the Court is willing to take on and challenge the constitutionality of laws and initiatives enacted by the California voters. However, this should not necessarily foreclose consideration of the basic structure doctrine in California and other courts. The court could heed the lessons of *Marbury v. Madison*, 5 U.S. 137 (1803), by strategically asserting and adopting the doctrine in less controversial and lower-salience cases.

253. *See* Jacobsohn, *supra* note 48, at 361.