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Interpreting without bannisters? The abstraction problem afflicting the basic structure doctrine

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ABSTRACT

The Basic Structure Doctrine, developed by the Supreme Court of India to protect the Constitution of India 1950 from undesirable amendments by Parliament, has seen tremendous growth in its 51 years of existence. This paper argues that despite its evolving scope, the doctrine suffers from an abstraction problem: it insufficiently addresses the abstraction level at which basic features should be identified. The judicial techniques employed to identify these features also do not adequately address this problem. A review of the Supreme Court's application of the doctrine in cases involving a basic structure challenge to constitutional amendments reveals that basic features have been identified at varying abstraction levels. Consequently, this paper proposes a "stratification test" that categorizes the Constitution's basic features and the facets of these features as two distinct abstraction levels. It argues that recognizing and stratifying varying abstraction levels is essential for effective constitutional dialogue, experimentation, and governance.

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1. Introduction

On 24 April 1973, 13 judges of the Supreme Court of India ("Supreme Court" or "Court") pronounced their decision on the limits on Parliament's power to amend the Constitution of India 1950 ("the Constitution").¹ A divided bench (7:6) held that Parliament does not possess the power to amend the basic structure of the Constitution. While the judges were reticent in providing a list of what constitutes the basic structure, the 700 page judgement became the genesis of the Basic Structure Doctrine ("the doctrine"). In its 51 years of existence, the doctrine has undergone considerable development. It has not only grown in stature and expanded in scope within India but has also migrated to other jurisdictions.²

The doctrine responds to a fundamental dilemma in a constitutional democracy: if and how can a constitution be safeguarded against certain changes initiated by its

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¹Kesavananda Bharati v State of Kerala, (1973) 4 SCC 225.

²Yaniv Roznai, 'Unconstitutional Constitutional Amendments – The Migration and Success of a Constitutional Idea' (2013) 61 The American Journal of Comparative Law 657.

democratically elected government? However, when we examine its implementation in India, we find, as I will argue, that the doctrine has an inherent blind spot – it lacks a coherent theory to identify basic features. More specifically, it does not set out the abstraction level at which basic features should be identified.³ This blind spot becomes apparent when, on the one hand, the Court interprets certain basic features with increasing specificity (such as the primacy of the judiciary in making judicial appointments)⁴ while, on the other hand, it adheres to a more general interpretation of other features (such as the rule of law).⁵ At first glance, no constitutional interpretation rules or reasoning support such an interpretation.

This blind spot also results in a framing of the doctrine that appears strong in its form, prompting scholars to criticize it for being anti-democratic,⁶ but inconsistent in its utilization and application: while most constitutional amendments have been invalidated in whole or in part based on an increasingly specific interpretation of the principles of judicial review and independence, others such as equality have been upheld due to progressively general interpretations.⁷ This uneven use of the doctrine warrants an investigation into the techniques employed by the Court to identify basic features.

Of course, any development of the doctrine requires determining the appropriate method of interpretation that may assist the Court to identify basic features. The Court has devoted some attention to this task, albeit with little success.⁸ In this paper, I argue that the doctrine fails to offer guidance on the techniques to determine the abstraction level at which a basic feature should be identified. Consequently, it does not set out the specificity of intervention the judiciary can exercise through the doctrine. While an appropriate method of interpretation may help judges in the initial stages of identifying

³In *Kesavananda* (n 1), the judges formulated the doctrine in terms of ‘basic features’, ‘essential features’, and ‘the basic structure or framework’ of the Constitution. For a discussion, see *Minerva Mills v Union of India*, (1980) 3 SCC 625 [80] (Bhagwati J). While Raju Ramachandran argues that the formulation of the doctrine in terms of basic structure is conceptually different from that based on basic features, Sudhir Krishnaswamy provides a convincing rebuttal: any apparent distinction between the two is misplaced, as both versions of the doctrine aim to protect the unamendable identity of the Constitution. Raju Ramachandran, ‘The Supreme Court and the Basic Structure Doctrine’, in Bhupinder Nath Kirpal (ed), *Supreme but Not Infallible: Essays in Honour of the Supreme Court of India* (Oxford University Press 2000) 115; Sudhir Krishnaswamy, *Democracy and Constitutionalism in India* (Oxford University Press 2009) 135–137. In this paper, for linguistic ease, I use ‘basic features’ to refer to specific principles and ‘basic structure’ to refer to a broader conception of the unamendable core of the Constitution.

⁴*Supreme Courts Advocate on Records Association and others v Union of India*, (2016) 4 SCC 1. In this article, references to cases pertain to majority opinions unless specified otherwise.

⁵*Indira Gandhi v Raj Narain*, (1975) Supp SCC 1. The Court especially acknowledged the generality when it opines: ‘Rule of law is an expression to give reality to something which is not readily expressible’, *ibid* [336].

⁶Damini Nath, ‘Citing basic structure doctrine, Vice President Jagdeep Dhankhar asks “are we a democratic nation”’ (*The Indian Express*, 11 January 2023) <<https://indianexpress.com/article/india/citing-basic-structure-doctrine-vice-president-jagdeep-dhankhar-asks-are-we-a-democratic-nation-8375392/>> accessed 16 April 2024; Ramachandran (n 3) argues that the doctrine is ‘anti-democratic and unelected judges have assumed vast political power not given to them by the constitution’. See also Subhash Kashyap, ‘The “Doctrine” Verses the Sovereignty of the People’ in Pran Chopra (ed), *The Supreme Court Versus The Constitution: A Challenge to Federalism* (Sage Publications 2006); Rajeev Dhavan, *The Supreme Court of India and Parliamentary Sovereignty: A Critique of its Approach to the Recent Constitutional Crisis* (Sterling Publishers 1976). In support of the doctrine, see Upendra Baxi, *Courage, Craft, and Contention: The Indian Supreme Court in the Eighties* (NM Tripathi 1985); Ajit Mazoomdar, ‘The Supreme Court, Parliament and the Constitution’ in Chopra (n 6); and Satyaranjan Purushottam Sathe, *Judicial Activism in India* (Oxford University Press 2007).

⁷Scholars have noted the Court’s overzealous protection of judicial review. See Kirpal (n 3) 108. See also Madhav Khosla, ‘Constitutional Amendment’ in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *Oxford Handbook of the Indian Constitution* (Oxford University Press 2016) and Rehan Abeyratne, ‘Abusive Constitutional Borrowing: The Latest Legal Iteration of a Political Crisis’ (2021) 12(2) *Journal of Indian Law and Society* 104. However, such arguments do not assess the reasons behind such a shift in the working of the judiciary. The discourse often ends with identifying the appropriate method of discovering the Constitution’s identity or basic structure.

⁸Krishnaswamy (n 3).

a basic feature, without a principled theory regarding abstraction, such an interpretation leads to uncertainty about the abstraction level at which the Constitution possesses an unamendable basic structure.

To respond to the lacuna of a theory regarding abstraction, I propose a “stratification test”. This test recognizes that constitutional provisions operate at varying abstraction levels and argues that unpacking and stratifying these levels in the judicial identification of basic features is essential for effective constitutional reasoning and deliberation. I will argue that it facilitates constitutional innovation and experimentation. In contrast with discourses that focus on the appropriate method of interpretation for a basic structure review, my proposal involves a teleological reorientation of the method to identify basic features.⁹ I propose that actively acknowledging the abstraction levels at play in any given judicial determination of basic features allows the judiciary to identify and preserve the Constitution’s unamendable basic structure while maintaining a cooperative and respectful relationship among institutions in constitutional dialogues.

The rest of this paper proceeds as follows: [Section 2](#) traces the judicial techniques employed to identify the basic features in the formative cases associated with the development of the doctrine. It shows that the doctrine does not address the abstraction problem: the methods of interpretation laid down by the Court to identify basic features do not specify the level at which this should be done. [Section 3](#) shows that this results in a non-uniform application of the doctrine. Finally, [Section 4](#) presents the proposed stratification test. This test is based on the idea that the Constitution operates at different abstraction levels, and it requires judges to acknowledge these levels, especially in cases involving constitutional amendments.

2. The development of judicial techniques to identify basic features

Taken together, decisions by the Court in *Kesavananda Bharati v State of Kerala* (“*Kesavananda*”),¹⁰ *Indira Gandhi v Raj Narain* (“*Indira Gandhi*”),¹¹ *Minerva Mills Ltd v Union of India* (“*Minerva Mills*”),¹² *M Nagaraj v Union of India* (“*M Nagaraj*”),¹³ and *IR Coelho v State of Tamil Nadu* (“*IR Coelho*”)¹⁴ provide a succinct picture of the doctrine. The Court developed the doctrine to affirmatively answer two different and complex questions:

- (a) Is the Parliament’s power to amend the Constitution limited?; and
- (b) Can the judiciary substantially review constitutional amendments to determine whether the Parliament has breached these limits?

The limits correspond with a “basic structure” of the Constitution that Parliament’s amending power cannot breach, determined on a case-by-case basis. However, before engaging with the primary object of judicial review (i.e. determining whether

⁹This discourse is summarized in [Section 4](#).

¹⁰*Kesavananda* (n 1).

¹¹*Indira Gandhi* (n 5).

¹²*Minerva Mills* (n 3).

¹³*M Nagaraj v Union of India*, (2006) 8 SCC 212.

¹⁴*IR Coelho v State of Tamil Nadu*, (2007) 2 SCC 1.

a constitutional amendment amends the basic structure of the Constitution in breach of the limits of Parliament's constitution amending powers), the judiciary must address the secondary object of review (i.e. which basic feature of the Constitution is relevant for judging the amendment's constitutionality). Here, the protean nature of the grounds of review distinguishes the doctrine from other constitutional doctrines, which test laws on pre-established standards and principles.

Consequently, a third question emerges, i.e. how does the judiciary identify basic features? In this section, I assume that the Court has correctly decided and theorized the first two questions (regarding the basic structure limitations on the Parliament's power to amend and the judiciary's role in enforcing these limits), focusing solely on the judicial techniques to identify the Constitution's basic features. These techniques and the associated judicial power are incredibly relevant. Understanding them strengthens the judiciary's position and establishes a theoretical framework for the techniques used to identify basic features. Moreover, the judicial power to identify basic features represents the Court's role in developing India's constitutional identity, which, for this reason alone, deserves focused enquiry.¹⁵

2.1. Method of interpretation

The Court has primarily developed its approach to identifying basic features by discussing the most appropriate method of interpreting the Constitution when looking for its unamendable core.

Starting from the outset, *Kesavananda* did not say much about how future courts should identify the Constitution's basic features. The plurality of judgements in *Kesavananda* identified a disparate, enumerative list of features to protect India's democracy, sovereignty, and individual dignity.¹⁶ However, the judges provided no rationale for the "laundry list" of basic features they identified.¹⁷ Consequently, the task of developing this part of the doctrine fell squarely on the shoulders of future courts.

Following *Kesavananda*, *Indira Gandhi* marked the first indications of an enquiry into judicial techniques to identify basic features. Justice Mathew claimed that a conception of the basic structure as a "brooding omnipresence" would be "too vague and indefinite to provide a yardstick to determine the validity of an ordinary law".¹⁸ While he tied the existence of the basic structure to the text of the Constitution, he shied away from theorizing a more concrete and predictable method for identifying basic features.¹⁹ Similarly, Justice Chandrachud, both in *Indira Gandhi* and subsequently in *Minerva Mills*, employed constitutional history to determine the basic features relevant to the

¹⁵Aparna Chandra, 'A Precious Heritage?: The Construction of Constitutional Identity by Indian Courts' (2023) 1(1) *Comparative Constitutional Studies* 140.

¹⁶*Kesavananda* (n 1), Shelat and Grover JJ, Sikri CJ, and Hegde and Mukerjee JJ each listed, illustratively, only partially overlapping features that constitute the basic structure of the Constitution. The bench issued 11 separate judgements, agreeing on certain points and differing on others. Rajeev Dhavan notes that the plurality opinion comprised six majority opinions, four minority opinions, and three crossbench opinions: Dhavan (n 6). According to Nana Palkhivala, Justice Khanna and Chief Justice Sikri, who led the majority view on the implicit limitations of amending powers, authored the ratio that became "the law of the land"; Nani Palkhivala, "Fundamental Rights Case: Comment" (1973) 4 *SCC (Journal)* 57.

¹⁷Chandra (n 15) 5.

¹⁸*Indira Gandhi* (n 5) [357].

¹⁹*ibid.*

cases.²⁰ Nevertheless, he did not substantively develop any theoretical approach for using historical sources in basic structure review.

In both *Indira Gandhi* and *Minerva Mills*, the judges were concerned with the importance of the text and how it is interpreted to identify basic features. Justice Mathew, in *Indira Gandhi*, stressed the value of looking at the actual provisions of the Constitution to avoid the pitfall of using “vague” and contested concepts like “democracy”, which are present in the Preamble to the Constitution, as a standard for evaluating the constitutionality of laws.²¹ Justice Chandrachud, however, felt that the Preamble, read with constitutional history, may provide an appropriate starting point to identify constitutional principles central to the “integrity of the Constitution”.²² In both opinions, the choice of the locus and aid to interpretation was guided by introspection into the role of judges.²³ Considering the charged atmosphere surrounding the use of the doctrine at the time, it is evident why the judges were concerned with the legitimacy of the judicial techniques employed to identify basic features.²⁴

One of the clearest and boldest expositions of the appropriate judicial technique to identify basic features came from Justice Bhagwati’s proposal in *Minerva Mills* for a structuralist interpretation of the Constitution.²⁵ The proposal was clear because it did not conflate the power of judges to identify basic features with the legitimacy of such a review. Justice Bhagwati took forward Justice Mathew’s approach in *Indira Gandhi* when he held that the exercise to identify basic features of the Constitution must begin from the “specific provisions in the body of the Constitution” before considering any extra-textual sources such as constitutional history or its Preamble.²⁶ He held that these provisions, read “either separately or in combination”, form the appropriate foundation to identify such features. For Justice Bhagwati, looking at the provisions of the Constitution as a whole was essential to arrive at its “normative core”.²⁷ Subsequently, this approach was adopted by future courts with little amendment.²⁸

²⁰*ibid* [683]; *Minerva Mills* (n 3) [42], [53]–[57].

²¹*Indira Gandhi* (n 5) [341] and [345].

²²*ibid*.

²³Justice Chandrachud’s rationale behind tying the identification of basic features to each case’s facts and circumstances in *Indira Gandhi* (n 5) [671] was reiterated by Justice Bhagwati in *Minerva Mills* (n 3) [82]–[83].

²⁴Tensions between the judiciary and the government began with the *Golak Nath* judgement (*Golak Nath v State of Punjab*, 1967 SCR (2) 762), which declared fundamental rights inviolable by Parliament. This was followed by judgements against the government’s nationalization of banks (*RC Cooper v Union of India*, 1970 SCR (3) 530) and the abolition of privy purses for former princes (*HH Maharajadhiraja Madhavrao Scindia v Union of India*, 1971 SCR (3) 9). In response to the *Kesavananda* case, where the Supreme Court asserted its role as the guardian of the unamendable core of the Constitution, Prime Minister Indira Gandhi superseded three judges to appoint Justice AN Ray as the Chief Justice of the Supreme Court. For more on judicial deferral strategies in political turmoil, see Rosalind Dixon and David Landau, “Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment” (2015) 13 *International Journal of Constitutional Law* 606; Rosalind Dixon and Samuel Issacharoff, “Living to Fight Another Day: Judicial Deferral in Defense of Democracy” (2016) 4 *Wisconsin Law Review* 683.

²⁵*Minerva Mills* (n 3) [83].

²⁶*ibid*.

²⁷*ibid*.

²⁸Krishnaswamy (n 3) 157. See also Gautam Bhatia, ‘Textualism vs Structural Analysis – or why the Court ought to uphold Naz Foundation’ (*Indian Constitutional Law and Philosophy Blog*, 25 September 2013) <<https://indconlawphil.wordpress.com/2013/09/25/textualism-vs-structural-analysis-or-why-the-court-ought-to-uphold-naz-foundation/>> accessed 10 April 2024.

2.2. The abstraction problem

An important insight emerges from the Court's adoption of Justice Bhagwati's structuralist method of interpretation. Justice Bhagwati's approach overlooks the abstraction problem that concerned Justice Mathew when he proposed stronger ties to the Constitution's text.

In *Indira Gandhi*, when addressing whether equality is a basic feature of the Constitution, Justice Mathew pointed at its abstract and "multi-coloured" nature.²⁹ He held that "nebulous concepts" cannot "provide a solid foundation to rear a basic structure".³⁰ He argued that while conceptions of equality find specific expression in Articles 14, 15, 16, 17 and 25 of the Constitution, a generalist value such as equality must be more concrete to be used as a ground for reviewing Parliament's actions. According to Justice Mathew, an "aspiration for an ideal" that is not "based on any down-to-earth analysis of practical problems with which a modern Government is confronted" is not specific enough to be called a basic feature of the Constitution.³¹

In contrast, Justice Bhagwati's structuralist method did not respond to this concern for specificity. At first glance, this claim might appear counterintuitive, considering that structuralism begins its enquiry from the Constitution's text and the premise that "specific provisions", not "abstract ideals" external to constitutional provisions, should be the basis for identifying basic features.³² This requirement of alignment with the text of the Constitution is so demanding that it even excludes the Preamble. Justice Bhagwati acknowledged that the Preamble "enumerates great concepts embodying the ideological aspirations of the people" but rejected it as relevant to identifying basic features.³³ He argued that only the "specific provisions" of the Constitution, whether considered separately or in combination, "determine the content of the great concepts set out in the Preamble" and, thus, can be used by judges to identify basic features.³⁴

However, this approach still encounters the abstraction problem: the locus of emphasis within a basic feature changes when provisions are read separately or in combination. For instance, when read separately, the protection of equality under Article 14 is much wider – but not necessarily deeper, in the sense of being more effective – than when it is read in conjunction with Articles 15, 16, 17, and 25. These Articles describe, in distinct ways, the specific contours of the protection of equality available to citizens.³⁵

More tellingly, the structuralist method does not provide the judges with adequate tools to deal with cases involving conflicting basic features of the Constitution. It is premised on and can only work if the Constitution is a harmonious whole and does not contain provisions that conflict with one another. Arguably, Justice Bhagwati was aware of this conundrum. In *Minerva Mills*, he discussed a potential conflict between Part III

²⁹*Indira Gandhi* (n 5) [334].

³⁰*ibid.*

³¹*ibid.*

³²*Minerva Mills* (n 3) [83].

³³*ibid.*

³⁴*ibid.*

³⁵When read singularly, Article 14 encompasses multiple and possibly conflicting dimensions of equality compared to the specific guarantees provided under Articles 15, 16, 17, and 25. A similar argument differentiating between Article 14 as a general principle and Article 16 as an enabling provision was advanced in *M Nagaraj* (n 13) [102]–[103] and [106]–[107]. The problematic confusion regarding the abstraction level at which equality as a basic structure operates is evident in the Court's judgement in *Janhit Abhiyan v Union of India*, discussed in [Section 3](#).

(Fundamental Rights) and Part IV (Directive Principles of State Policy) of the Constitution. He contended that, in the unlikely event of such a conflict, the Parliament's power to resolve it through an amendment would not be subject to the constraints imposed by the doctrine.³⁶

2.3. *The abstraction problem intensifies*

As it turned out, a conflict between Part III and Part IV of the Constitution was not remote. The confusion regarding the appropriate abstraction of basic features became apparent in cases where constitutional amendments, purportedly in pursuit of the directive principles of state policy, seemed to alter or destroy fundamental rights.

The structuralist method's inability to resolve clashes between competing constitutional mandates became obvious in *M Nagaraj* and *IR Coelho*. Relying solely on the structuralist method of interpretation did not adequately resolve the abstraction problem, leading the Court to develop more specific tests to determine the appropriate interventions judges may make in these cases.³⁷

In *M Nagaraj*, the Court was asked to adjudge the constitutionality of four amendments that introduced new constitutional provisions for reservations in public employment. These amendments were challenged for violating two basic features: judicial review and equality.³⁸ The Court came up with and employed the "width test" (which assesses the extent of the amendment's impact) and the "identity test" (which describes the essential elements of the Constitution that must not be damaged) and unanimously held that the amendments were constitutional as they did not alter the basic structure of the Constitution. It held that the "width" and "identity" tests lay down the condition for invalidating an amendment. The Court noted that destroying wider principles, such as democracy, secularism, equality, or republicanism, would compromise the Constitution's identity and thus be impermissible.³⁹ The Court also noted that a basic feature must be understood to be explicitly present in the constitutional text but may also emerge from a holistic reading of the Constitution; it encompasses features that provide coherence to the Constitution.⁴⁰

In terms of abstraction, the Court's reasoning suggests that basic features should be identified at a high abstraction level. This implies that for an amendment to be held *ultra vires*, it must cause far-reaching damage to and alter the Constitution's identity. In this context, Justice Kapadia's reasoning on the second ground of challenge – whether the amendments violated the basic feature of equality – is especially relevant. It illustrates the problems generated by an under theorization of the appropriate abstraction level at which basic features should be identified.

Justice Kapadia distinguished between equality as a fundamental right (a specific concept) and as a basic feature (a more general conception of equality).⁴¹ His judgement involved a two-pronged evaluation: first, he gave the amendment the widest possible

³⁶*Minerva Mills* (n 3) [112].

³⁷See *Chandra* (n 15) and *Ashoka Kumar Thakur v Union of India*, (2008) 6 SCC 1.

³⁸*M Nagaraj* (n 13) [2].

³⁹*ibid* [102]–[117].

⁴⁰*ibid* [36]–[38].

⁴¹*ibid* [106].

reading to determine if it violated any constitutional provision (width test), and second, he tested whether it compromised India's constitutional identity (identity test).⁴² Applying these tests, he held that the amendments were not unconstitutional, as they did not violate equality as a basic feature, even though they resulted in changes to equality as a fundamental right.

A few months after *M Nagaraj, IR Coelho* approved this line of thinking by expanding it in the form of the “rights” and the “essence of rights” test. The Court unanimously held that constitutional amendments must be evaluated by examining:

the nature and extent of infraction of a fundamental right by a statute . . . on the touchstone of the basic structure doctrine *as reflected in Article 21 read with Article 14 and Article 19* by the application of the “rights” test and the “essence of right” test. . .⁴³

Diverging from Justice Bhagwati's structuralism that was reticent in prioritizing any single Part of the Constitution over others, the Court in *IR Coelho* moved to the other end of the spectrum. It identified specific provisions to guide a basic structure review, albeit for the limited purposes of Part III. Adopting the principle of egalitarian equality as the distinguishing criterion,⁴⁴ the Court posited that while all fundamental rights have foundational value, only some (those provided in Articles 14, 15, 16, 19, and 21) could be construed as inviolable.⁴⁵

In doing so, the Court created an unnecessary division in standards corresponding to two different levels of abstraction. First, according to the “rights” test, a basic structure review involves scrutinizing laws for violating rights guaranteed under Articles 14, 15, 16, 19 and 21. Second, under the “essence of rights” test, a basic structure review involves scrutinizing laws for violating the essence of rights guaranteed under Part III.⁴⁶ This manoeuvre reflects a turn in the development of the doctrine: while earlier courts appeared hesitant to equate specific Articles with the Constitution's basic features, the Court in *IR Coelho* identified specific Articles within Part III as core values “which, if allowed to be abrogated, would change completely the nature of the Constitution”.⁴⁷

One wonders why other Articles, say Article 17, which abolishes untouchability; Article 25, which guarantees freedom of religion; and Article 29, which protects the interests of minorities, did not make it to this catalogue of core values. Arguably, the unevenness stems from under theorizing the abstraction level at which courts identify basic features. This lack of clarity leads to the uneasy conclusion that the doctrine creates an awkward and not particularly useful or principled hierarchy among constitutional values. The Court's indecisiveness regarding the appropriate abstraction level for

⁴² *ibid* [117] and [123].

⁴³ *IR Coelho* (n 14) [151] (emphasis supplied).

⁴⁴ Kamala Sankaran, 'From Brooding Omnipresence to Concrete Textual Provisions: IR Coelho Judgment and Basic Structure Doctrine' [2007] 49(2) *Journal of the Indian Law Institute* 240.

⁴⁵ *IR Coelho* (n 14) [109] and [128]. Article 14 guarantees the right to equality; Article 15 prohibits discrimination based on religion, race, caste, sex and place of birth; Article 16 provides for the equality of opportunity in matters of public employment; Article 19 lists various rights to freedom; and Article 21 guarantees the right to life and personal liberty.

⁴⁶ For a critique of Justice Bhandari's approach, see Mahendra Pal Singh, 'Ashoka Thakur v Union of India: A Divided Verdict on Undivided Social Justice Measure' [2008] 1 *NUJS Law Review* 193. See also Gautam Bhatia, 'Reservations, Equality and the Constitution' (*Indian Constitutional Law and Philosophy Blog*, 4 April 2014) <<https://indconlawphil.wordpress.com/2014/04/06/reservations-equality-and-the-constitution-viii-ashoka-kumar-thakur-155-and-the-basic-structure>> accessed 10 April 2024.

⁴⁷ *IR Coelho* (n 14) [109].

identifying basic features raises concerns, particularly since the basic structure review sets a high threshold for declaring a constitutional amendment unconstitutional.

The tests developed in both the *M Nagaraj* and *IR Coelho* cases emerged in response to the distinct challenges faced by the Court: *M Nagaraj* dealt with a conflict among Articles under Part III, while *IR Coelho* addressed a clash between Parts III and IV.⁴⁸ Despite these differences, in both cases, the Court resolved conflicts by identifying basic features at a high abstraction level. However, this shift towards identifying basic features at a higher abstraction level was accompanied by the need to adhere closely to the constitutional text. The Court emphasized that assessing the impact of an amendment on wider principles (as in *M Nagaraj*) or determining if it violated the essence of rights (as in *IR Coelho*) still required consistent reference to the specific Articles of the Constitution.

While maintaining alignment with the Constitution's text results in identifying principles repeated across its various provisions, it does not resolve the abstraction problem. Instead, it results in the undesirable conclusion that the practice of the doctrine generates, as a by-product, a complex hierarchical system of constitutional norms parallel to the Constitution's text. This system places certain Articles identified by the Court on a pedestal without providing a rationale for this distinction. In the next section, I show how this has resulted in an uneven application of the doctrine.

3. Tracing the abstraction problem in unamendability cases

In dealing with constitutional amendments, the Court has employed the doctrine mostly with deference to Parliament. Of the 103 amendments to the Constitution, 22 have been challenged for breaching its basic structure, with only seven being struck down. Except for the 99th Amendment,⁴⁹ which was struck down as a whole, all other amendments were adjudged *ultra vires* in part. These challenges were based on substantive rights such as equality and liberty and political principles such as judicial review, democracy, and the rule of law. However, the only amendments, or parts thereof, that the Court struck down were those that, in one way or another, curtailed the jurisdiction or power of the courts. A survey of the invalidated amendments sheds light on the distorted use of the doctrine, primarily employed to protect one basic feature – judicial review – more than any other.

The doctrine traces its genesis to *Kesavananda*, where the Court invalidated part of the 25th Amendment, which shielded from judicial review laws enacted under the directive principles of state policy.⁵⁰ While in *Kesavananda*, the judges discussed the propriety of a judicially-led doctrine imposing limitations on Parliament's power to amend the Constitution⁵¹; subsequent decisions were primarily concerned with defining the doctrine's contours.

In *P Sambamurthy v State of Andhra Pradesh*,⁵² the Court adjudicated the constitutionality of Article 371-D, introduced by the 32nd Amendment.⁵³ The amendment transferred the jurisdiction of the High Courts in certain matters to Administrative

⁴⁸Krishnaswamy (n 3) 78–79.

⁴⁹The Constitution (Ninety-ninth Amendment) Act 2014.

⁵⁰The Constitution (Twenty-fifth Amendment) Act 1971.

⁵¹*Kesavananda* (n 1).

⁵²*P Sambamurthy v State of Andhra Pradesh*, (1987) 1 SCC 362.

⁵³The Constitution (Thirty-second Amendment) Act 1973.

Tribunals and allowed State governments to modify or annul the final order of these Tribunals.⁵⁴ The Court identified judicial review as a crucial component of the basic feature of the rule of law. It held that excluding the High Courts' jurisdiction does not breach the basic structure of the Constitution if the Amendment Act provides an alternative and effective judicial review mechanism. However, the Court held that the impugned Act rendered this alternative mechanism – in this case, the Administrative Tribunals – ineffective by allowing the State government to override its decisions, thereby violating the basic feature of the rule of law.⁵⁵

Similarly, in *L Chandra Kumar v Union of India*, the Court further expanded the meaning of judicial review as a basic feature.⁵⁶ The 42nd Amendment had inserted Articles 323-A and 323-B into the Constitution, establishing Administrative Tribunals. They excluded the jurisdiction of High Courts and the Supreme Court in service matters addressed by these Tribunals. However, appeals could still be filed before the Supreme Court if granted special leave under Article 136.⁵⁷ In contrast with *P Sambamurthy*, where the Court held that the basic feature of judicial review would not be violated if the Amendment Act provided an alternative review mechanism, the Court held that *any* exclusion of courts' jurisdiction would be impermissible under the doctrine.⁵⁸ This expanded the scope of judicial review as a basic feature, a move the Law Commission of India characterized as being based on an erroneous conflation of the Court's judicial review powers with those of High Courts.⁵⁹

The Court continued to define judicial review with increasing specificity in cases concerning judicial appointments. Over the span of four cases—*SP Gupta v Union of India* (“*First Judges case*”),⁶⁰ *Supreme Court AOR Association v Union of India*,⁶¹ *In Re Special Reference 1 of 1998*,⁶² and *Supreme Courts Advocate on Records v Union of India* (“*NJAC case*”)⁶³—the Court refined the concept of judicial independence, ensuring that the appointment of judges would remain entirely insulated from influence by any other branch of the state.

The *First Judges case* solidified the “independence of the judiciary” as an inviolable aspect of the basic feature of “judicial review”.⁶⁴ The question before the bench was not

⁵⁴*ibid.*

⁵⁵*P Sambamurthy v State of Andhra Pradesh* (n 52) [5].

⁵⁶*L Chandra Kumar v Union of India*, (1997) 3 SCC 261.

⁵⁷The Constitution (Forty-second Amendment) Act 1976.

⁵⁸*L Chandra Kumar v Union of India* (n 56) [99].

⁵⁹Law Commission of India, ‘L Chandra Kumar be revisited by a Larger bench of the Supreme Court of India’ (Report No 215, December 2008) < <https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081053-1.pdf>> accessed 10 April 2014. The report argues that Administrative Tribunals are an effective alternative to High Courts for handling service matters. It contended that allowing High Court reviews of cases adjudicated by these tribunals undermines their purpose and defeats the objective of streamlining the resolution process. It also advocates for a larger Supreme Court bench to reconsider *L Chandra Kumar v Union of India*.

⁶⁰*SP Gupta v Union of India*, (1981) Supp SCC 87.

⁶¹*Supreme Court AOR Association v Union of India*, (1993) 4 SCC 441.

⁶²*In Re Special Reference 1 of 1998*, (1998) 7 SCC 739.

⁶³*Supreme Courts Advocate on Records v Union of India*, (2016) 5 SCC 1.

⁶⁴See also, *Shamsher Singh v State of Punjab*, (1974) 2 SCC 831, where the Court held that by mandating consultation with the Chief Justice of India before appointing judges, the Constitution guarantees the independence of the judiciary; *Union of India v Sankalchand Himatlal Sheth*, (1977) 4 SCC 193, where the Court took the formulation of independence of judiciary being part of the basic structure to be *a priori*. AK Ganguly provides a detailed account of the jurisprudence in AK Ganguly, ‘Recovering Lost Ground: The Case of the Curious Eighties’ in Arghya Sengupta and Ritwika Sharma (eds), *Appointment of Judges to the Supreme Court of India: Transparency, Accountability, and Independence* (Oxford University Press 2018) 33–36.

whether judicial independence is a basic feature of the Constitution but rather how this independence should be interpreted for the power tussle between the executive and the judiciary. The Court upheld the executive's primacy in appointing judges while acknowledging the importance of the Chief Justice of India's opinion.⁶⁵

However, in subsequent cases, the Court strengthened judicial primacy in appointments, granting the judiciary exclusive authority in this regard.⁶⁶ In 2014, 35 years after the *First Judges* case, when the 99th Amendment established a National Judicial Appointment Commission ("NJAC"), judicial independence evolved to symbolize an insular institution based on rules of convention, hidden behind the veil of administrative decisions, without accountability regarding matters of appointment.⁶⁷ In the *NJAC* case, the principle of judicial independence was interpreted as relying entirely on the judiciary's primacy in the appointment process.⁶⁸ Since only three of the six members of the NJAC were to be from the judicial community, NJAC was held to breach the Constitution's basic structure.⁶⁹ However, the judgement did not find a constitutional basis for the judiciary's primacy in the appointment process and did not clarify why this expansion forms part of the unamendable basic structure.

It has been argued that the judgement in the *NJAC* case represents the Indian judiciary's reluctance to cede its supremacy to the executive and legislative branches. According to Ramachandran and Thallam, the judgement heralds the jurisprudence of "derived basic structure", whereby a component of a previously identified basic feature is elevated to the basic structure level.⁷⁰ They contend that this expands judicial power and liberalizes the doctrine, allowing for excessive legal creativity, particularly in judiciary-related matters.⁷¹ However, when examined exclusively from the point of view of identifying basic features, the issue seems less about the extent of judicial creativity that the development heralds and more about the inadequacy of the jurisprudential underpinnings of the exercise. In other words, a disproportionate focus on judicial review is less a consequence of judicial supremacy and more a symptom of the doctrine's inherently confusing trajectory.

Here, two cases in which the Court proceeded to invalidate parts of the challenged amendments on the grounds of judicial review while simultaneously upholding equally egregious violations merit attention for their illustrative value in understanding the selective application of judicial review.

In *Indira Gandhi*, despite identifying other, equally reasonably placed, basic features, the Court relied on judicial review and its increasingly specific application to declare the amendment *ultra vires* while permitting other activities that could be considered more

⁶⁵*First Judges case* (n 60) [1014], [1019], and [1031].

⁶⁶Gautam Bhatia, 'The Sole Route to an Independent Judiciary? The Primacy of Judges in Appointment' in Sengupta and Sharma (n 64) 135–137.

⁶⁷The Constitution (Ninety-ninth Amendment) Act 2014. The government aimed to replace the existing Collegium system with the NJAC, which included the Chief Justice of India (as Chairperson, ex-officio), two other senior Supreme Court judges, the Union Minister of Law and Justice (ex-officio), and two distinguished individuals appointed jointly by the Chief Justice of India, Prime Minister of India, and Leader of the Opposition in the Lok Sabha (the Lower House of India's Parliament).

⁶⁸Gautam Bhatia, 'The Sole Route to an Independent Judiciary? The Primacy of Judges in Appointment' in Sengupta and Sharma (n 64) 138.

⁶⁹*NJAC case* (n 63).

⁷⁰Raju Ramachandran and Mythili Vijay Kumar Thallam, 'The Obvious Foundation Test: Re-Inventing the Basic Structure Doctrine' in Sengupta and Sharma (n 64) 109, 118.

⁷¹*ibid.*

undemocratic.⁷² The case involved the 39th Amendment, which excluded the Court's jurisdiction over disputes regarding the election of the President, Vice President, Prime Minister, and the Speaker of the House of People.⁷³ The amendment also incorporated ordinary legislation into Schedule IX of the Constitution. This retroactively modified definitions to shield Prime Minister Indira Gandhi, as she then was, from scrutiny over alleged corrupt electoral practices. These changes were brought when a substantial portion of the opposition was under preventive detention in jail. Despite the availability of the rule of law as a basic feature, the Court upheld the constitutionality of both these aspects of the amendment.⁷⁴ While it held that the rule of law, judicial review, democracy, separation of powers, equality before law, and political justice were basic features of the Constitution, the Court concluded that only removing its jurisdiction over electoral disputes would be considered unconstitutional under a basic structure review.⁷⁵

Once again, in *Kihoto Hollohan v Zachillhu* (“*Kihoto Hollohan*”)⁷⁶ the Court's reasoning centred on judicial review when addressing a challenge to the anti-defection constitutional provisions added through the 52nd Amendment.⁷⁷ The new constitutional framework, incorporated through the addition of the Xth Schedule to the Constitution, mandated the disqualification of legislators who either defected from their political party or disobeyed party directives on voting.⁷⁸ While studies have noted how nascent democracies such as India often enforce anti-defection laws to ensure stable governments – in India, between 1967 and 1968, “out of 210 legislators who defected from various states, 116 were appointed to the Councils of Ministers they helped to form through defections”⁷⁹—the 52nd Amendment was peculiar because it disincentivized dissent within a party. The Court identified democracy as a basic feature at a high abstraction level and upheld the amendment.⁸⁰ When presented with arguments challenging the law for impinging upon political dissent, freedom of speech, and parliamentary democracy, the Court declared the amendment *ultra vires* only insofar as it precluded judicial review in cases of disqualified “unethical legislators”.⁸¹

While the development of judicial review shows the doctrine's uneven application in identifying and utilizing basic features, the Court's identification and development of the basic feature of equality, in response to its affirmative action jurisprudence, illustrates the abstraction problem in more concrete terms.

The structuralist method suggests that while basic features should be drawn from the Constitution's text and not from abstract principles outside the written text, it should not be confined to a single provision of the Constitution.⁸² For equality, this implies that it is

⁷²The judges refused to consider the widespread arrests of political opposition members and their consequent absence from the Parliament when the impugned amendments were passed as grounds for invalidating the laws. *Indira Gandhi* (n 5) [376].

⁷³The Constitution (Thirty-ninth Amendment) Act 1975.

⁷⁴*Indira Gandhi* (n 5) [38].

⁷⁵*ibid.*

⁷⁶*Kihoto Hollohan v Zachillhu*, (1992) 2 Supp SCC 651.

⁷⁷The Constitution (Fifty-second Amendment) Act 1985.

⁷⁸*ibid.*

⁷⁹GC Malhotra, *Anti-defection Law in India and the Commonwealth* (Metropolitan Book Co Pvt Ltd 2006) 5.

⁸⁰The Court noted that while democracy is a basic feature, ‘as long as the essential characteristics that entitle a system of government to be called democratic are otherwise satisfied’, it is unnecessary to enter into an in-depth discussion about what it entails. *Kihoto Hollohan* (n 76) [42]–[53].

⁸¹Malhotra (n 79).

⁸²Krishnaswamy (n 3) 158–159.

not Article 14 *per se* but a broader principle of equality that would constitute the contours of equality as a basic feature. In other words, equality must be derived from a broad-based and combined reading of Articles establishing an equality framework in the Constitution.

However, in cases challenging reservations based on equality, the focus has not been on the general principle of equality as a basic feature. Instead, it has centred on the substantive content of equality as a basic feature and its implications for the amendability of equality-related provisions. Thus, as discussed in the previous section, the Court has devised multiple tests – “width”, “identity”, “right”, and “essence of rights” – to address how Parliament can amend Articles guaranteeing equality without infringing upon the basic structure of the Constitution. Like with the identification of “judicial review” and “independence of the judiciary”, the Court has oscillated between various abstraction levels in its decisions.⁸³ Its confusion regarding the appropriate abstraction of equality as a basic feature has resulted in an unamendable equality code that overlooks the socio-political context of the right against caste-based discrimination.

In *Janhit Abhiyan v Union of India*,⁸⁴ when asked to evaluate the constitutionality of the 103rd Amendment that provided for reservations for the economically weaker sections of Indian society, the Court faced arguments regarding the mismatch between reservations based solely on economic criteria and the socio-economic intent behind affirmative action.⁸⁵ The Court reiterated that “mere violation of the rule of equality does not breach the basic structure of the Constitution unless the violation is a shocking, unconscionable or unscrupulous travesty of the quintessence of equal justice”.⁸⁶ It determined that exclusion – in this case of candidates from scheduled castes, scheduled tribes, and other backward classes or otherwise economically weaker sections – was a “vital requisite to provide benefit to the target group”.⁸⁷ The result was that the equality code, generalized beyond the socio-economic context, was now devoid of any specific substantive content and could not be used as a ground to challenge caste-based exclusion under a basic structure review.

The variability in the abstraction level at which basic features are identified is problematic. On the one hand, the judicial endeavour to maintain alignment with constitutional text has created a hierarchy of constitutional provisions. On the other hand, identifying basic features at a higher abstraction level risks losing the socio-political and historical contexts that enrich constitutional guarantees. In the next section, I propose reorienting the doctrine by stratifying the abstraction levels at which basic features may be identified.

⁸³The Court, for instance, has identified equality as more general than any specific provision of the Constitution but specific enough to mandate a 50% cap on quota-based public education and employment reservations. *M Nagaraj* (n 13).

⁸⁴*Janhit Abhiyan v Union of India*, (2023) 5 SCC 1.

⁸⁵The Constitution (One Hundred and Third Amendment) Act 2019.

⁸⁶*Janhit Abhiyan v Union of India* (n 84) [79.7] (Justice Maheshwari with Justice Trivedi and Justice Pardiwala concurring).

⁸⁷*ibid* [142].

4. Theorizing the need to reorient the doctrine

My proposal for reorienting the doctrine begins with a typology of three abstraction levels at which basic features may be identified: basic features of constitutionalism, basic features of the Constitution, and the facets of basic features.

Recent discourse on identifying “sham constitutions” and perverse usage of the rule of law has brought to the fore the ideals intrinsic to constitutionalism.⁸⁸ Jacobsohn describes them as the “common stock aspirations we have come to associate more generally with the enterprise of constitutionalism”.⁸⁹ While a country may choose varying conceptions of moral and political ideals of individual liberty and equality, their claim to legitimacy springs from this “enterprise of constitutionalism”.⁹⁰ This first abstraction level corresponds to general constitutional principles such as democracy, the rule of law, and equality, which can be understood as basic features of constitutionalism. These are the values that can be argued to be essential for the survival of *any* constitution.

Comparative constitutional scholars have utilized these principles to respond to autocratic legalism and forms of authoritarianism that maintain a façade of constitutionalism while injuring their democratic constitutional orders.⁹¹ Recognizing the need for a judicially spearheaded response to unconstitutional constitutional amendments, Dixon and Landau advocate for a broad yet restrained judicial review. They argue for a broader doctrine equipped to deal with new forms of authoritarianism while acknowledging the perils of judicial overuse of the doctrine. They suggest limiting its use to amendments that pose a “substantial threat to core democratic values”.⁹² Furthermore, they recommend drawing upon transnational constitutional norms to prevent the doctrine from becoming overly disputed and propose that comparative experiences can enrich judicial review.⁹³

While any amendment that destroys the core normative values of constitutionalism should be invalidated for breaching its basic structure, general constitutional principles only provide judges with weak tools in practice.⁹⁴ The inadequacy of the first abstraction level necessitates a second, more specific level of constitutional principles. This second abstraction level aligns more closely with the basic structure of a specific constitution. The socio-political conditions specific to a country shape the contours of its constitutional principles, providing meaning and context to its provisions. The principles at this second abstraction level operate at a lower level of generality because this second level corresponds to the socio-political context that differentiates one constitution from another.

Closer to home, judges employing the basic structure review have recognized the difference between general principles and the more specific demands of the Indian Constitution. In *Indira Gandhi*, Justice Mathew emphasized that it is not the “abstract

⁸⁸David S Law and Mila Versteeg, ‘Sham Constitutions’ (2013) 101(4) *California Law Review* 863. See also András Sajó and Renáta Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (Oxford University Press 2017).

⁸⁹Gary Jeffrey Jacobsohn, ‘Constitutional Identity’ in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (Oxford University Press 2017) 115.

⁹⁰*ibid.*

⁹¹Kim Lane Scheppele, ‘Autocratic Legalism’ (2018) 85 *The University of Chicago Law Review* 545; Dixon and Landau (n 23).

⁹²Dixon and Landau (n 23) 608.

⁹³*ibid.*

⁹⁴Silvia Suteu, *Eternity Clauses in Democratic Constitutionalism* (Oxford University Press 2021) 125–168.

ideals . . . found outside the provisions of the Constitution”, but the “specific provisions of the Constitution are the stuff from which the basic structure has to be woven”.⁹⁵ Similarly, in *M Nagaraj*, the Court distinguished between equality as a general principle and the equality code established through the provisions of the Constitution.⁹⁶

While the first abstraction level could be identified at a general, transnational level, this second, more localized level corresponds to the cultural, historical, and social context relevant to the constitutional provision proposed to be amended. For instance, while equality is central to any understanding of constitutional democracy, in the Indian context, equality – especially concerning the inclusion of affirmative action in the Constitution – takes on a more specific form and justification: India’s unique socio-political history has made caste-based affirmative action an intrinsic aspect of its constitutional identity.⁹⁷

While the Court has utilized the concept of “constitutional identity” in developing the foundations of the doctrine,⁹⁸ the current method for identifying basic features does not employ history in any systematic manner. Notably, in his defence of the doctrine, Krishnaswamy illustrates two methods from *Minerva Mills* to identify basic features. He notes that as per Justice Chandrachud’s approach, the Court must evaluate the amendment’s alignment with the intentions of the Constituent Assembly.⁹⁹ Conversely, he notes that Justice Bhagwati advocates evaluating the amendment based on its potential to damage the basic features to the extent that it may damage constitutional identity, understood as a structural notion distinct from and beyond the Constitution’s historical identity.¹⁰⁰ According to him, Justice Bhagwati’s approach has been correctly upheld in subsequent cases. He argues:

The court may analyse the policy objectives or historical background of the challenged constitutional amendments, or the constitutional provisions sought to be amended. However, the overriding concern in basic structure review is to preserve the integrity of the constitution as a statement of key constitutional principles.¹⁰¹

Roznai similarly defends the doctrine, albeit with a limited scope.¹⁰² He asserts that substantive judicial review necessitates a structuralist method of constitutional interpretation, which allows judges to understand the constitutional principles underpinning the Constitution.¹⁰³

However, a conception of a Constitution’s integrity not based on a country’s cultural and political history risks becoming a floating concept capable of judicial manipulation. Using constitutional history in interpretive techniques prevents judges from importing personal moral or political considerations into their judgements. Moreover, paying

⁹⁵*Indira Gandhi* (n 5) [345].

⁹⁶*M Nagaraj* (n 13).

⁹⁷India’s socio-political history was employed as an aid to interpretation in a non-unamendability case, *Indian Young Lawyers Association v The State of Kerala*, (2017) 10 SCC 689. Justice Chandrachud addressed a conflict between the right to equality guaranteed in Articles 14 and 15 and the right of religious institutions to administer their affairs under Article 26. He referred to Constituent Assembly Debates to argue that a gender-based exclusion goes against the anti-discrimination framework established by the Article 17 prohibition of untouchability.

⁹⁸Chandra (n 15).

⁹⁹Krishnaswamy (n 3) 154.

¹⁰⁰*ibid* 155.

¹⁰¹*ibid* 86.

¹⁰²Yaniv Roznai, *Unconstitutional Constitutional Amendments* (Oxford University Press 2016) 197–225.

¹⁰³*ibid*.

attention to constitutional history finds support in the genesis of the doctrine in *Kesavananda*, where the Court used a purposive interpretation of socio-political history, constituent assembly debates, and societal context to support substantive limits on Parliament's powers to amend the Constitution.¹⁰⁴

Further, Krishnaswamy's support for Justice Bhagwati's structuralist method is premised on a harmonious and internally consistent identity of the Constitution ascertainable through its text. This premise, however, appears untenable upon reading the constitutional text.¹⁰⁵ De and Shani suggest that the Constitution "emerged from competing constitutionalisms at different places and orders of power that involved large and distinct publics".¹⁰⁶ While further work is needed to understand and uncover the competing ideologies embedded in the Constitution's text, it would be trite to continue treating it as containing and coming from a self-contained harmonious constitutional arrangement. Dhingra identifies one such tension. In examining gender discourses during the constituent assembly debates, particularly when women members advocated for complete gender equality, she highlights how the discussions on "the woman question" failed to materialize from the freedom struggle.¹⁰⁷ Despite women's prominent participation in the debates, the centrality of women's issues was not acknowledged. Consequently, the final text includes gender progressive provisions that garnered consensus during the nationalist movement but also reflected entrenched ideas "of 'domesticity' that place high value on women's role in the home".¹⁰⁸

Proponents of the structural method fail to justify why and how judges should navigate instances when the constitutional text contains contradictory or contested principles. This is not to say that it is always impossible to identify basic features.¹⁰⁹ However, if one were to concur with Krishnaswamy's view that the doctrine is best viewed and applied through a structuralist method of interpretation, it would leave us with numerous basic features open to a wide range of interpretations. For example, the Court has identified both "democracy"¹¹⁰ and "parliamentary democracy"¹¹¹ as basic features of the Constitution,¹¹² allowing judges to choose the abstraction level that suits their moral or political viewpoints.¹¹³ Ramachandran's concerns about the Court's initial jurisprudence on secularism suggest that selective resort to the doctrine may lead to absurd results.¹¹⁴ Similarly, Mehta claims that by not identifying basic features, the Court has propelled Indian constitutional law towards an untenable and uncertain trajectory.¹¹⁵

¹⁰⁴The Court used Heydon's mischief rule, allowing judges to examine the mischief sought to be corrected by the legislation. *Kesavananda* (n 1) [644].

¹⁰⁵See Gautam Bhatia and Rahul Narayan, 'Constitutional Blackholes' in *Cambridge Handbook of the Indian Constitution* (forthcoming).

¹⁰⁶Rohit De and Ornit Shani, 'Assembling India's Constitution: Towards a New History'. [2024] 263(1) Past & Present 205, 211.

¹⁰⁷Alisha Dhingra, 'Gender Discourses and the Making of the Indian Constitution' [2022] 29(1) Indian Journal of Gender Studies 33.

¹⁰⁸*ibid* 41.

¹⁰⁹Rajeev Dhavan, *The Constitution of India: Miracle, Surrender, Hope* (Lexis Nexis 2017) 23; Ramesh D Garg, 'Phantom of the Basic Structure of the Indian Constitution' [1974] 16 Journal of the Indian Law Institute 243.

¹¹⁰*Kihoto Hollohan* (n 76).

¹¹¹*PV Narsimha Rao v State*, AIR 1998 SC 2120.

¹¹²Krishnaswamy (n 3) 137–142.

¹¹³*ibid*.

¹¹⁴Ramachandran (n 3) 123–127.

¹¹⁵Pratap Bhanu Mehta, 'India's Judiciary: The Promise of Uncertainty' in Chopra (n 6).

The Court's increasingly specific reading of judicial independence further supports this conclusion. As demonstrated in the previous section, the judicial exercise of distinguishing between a general principle and a basic feature of the Constitution has already encountered the abstraction problem. Similarly, equality as a basic feature has been identified as congruent with specific Articles of the Constitution as well as a general principle extending beyond the constitutional text. It has been read as abstract enough to allow Parliament to exclude socially backward classes from reservations yet specific enough to impose a duty on the state to undertake affirmative action for "egalitarian" or "proportional" equality.¹¹⁶

Consequently, I propose that it is necessary to establish a distinction between the basic features of the Indian Constitution and the facets of these basic features. Notably, there have been scholarly and judicial efforts to distinguish between basic features and their more specific operational dimensions, albeit only cursorily. Krishnaswamy distinguishes between the basic features of the Constitution and the "subordinate" or "derivative principles" that flow from any particular feature.¹¹⁷ In *Ashoka Kumar Thakur v Union of India*, Justice Bhandari used "basic features" and "facets of basic features" to differentiate the two abstraction levels at which equality operates.¹¹⁸ Similarly, Justice Chelameswar, in the *NJAC* case, distinguished between the "basic structure" and "basic features", dissenting from the majority judgement, which equated judicial primacy with judicial independence.¹¹⁹ These efforts highlight a distinction between the general principles that form the unamendable core of the Constitution and a third abstraction level. The third abstraction level directly addresses the specific aspects of these general principles, often reflected in the institutional and structural safeguards outlined in the Constitution.

Taking the example of equality, at the second abstraction level, equality as a basic feature reflects the historical inequalities that the Constitution seeks to rectify. At the third level, the facets of equality correspond with the mechanisms that safeguard it. Thus, the Articles prohibiting specific forms of discrimination – abolition of untouchability under Article 17, abolition of titles under Article 18, and prohibition of human trafficking and forced labour under Article 23—along with the unwritten institutional arrangements that enforce guarantees provided by the basic feature of equality, operate at the third abstraction level because they constitute facets of equality. They institutionalize equality as a foundational element of the Constitution.

Understanding the abstraction levels to identify basic features will enable judges to refrain from encroaching on the Parliament's right to experiment while allowing ample room for the judiciary to address constitutional erosion. A clearer distinction between the abstraction levels at which basic features operate also clarifies the flaws in rulings such as the *NJAC* case: while judicial independence is situated at the second abstraction level, judicial primacy in appointments is a facet of judicial independence and, thus, more appropriately belongs at the third abstraction level.

A reorientation of the doctrine must begin by situating the identification of basic features at the second and third abstraction levels. In identifying basic features, courts

¹¹⁶*IR Coelho* (n 14).

¹¹⁷*Krishnaswamy* (n 3) 142.

¹¹⁸*Ashoka Kumar Thakur v Union of India* (n 37) [114].

¹¹⁹*NJAC case* (n 63) [1185].

should acknowledge the distinction between these two levels and provide more substantial reasoning when relying on a facet of a basic feature to declare a constitutional amendment *ultra vires*. This requirement stems from the fact that violating a facet of a basic feature of the Constitution, which operates at a lower abstraction level, is an easier threshold to violate. However, such a violation on its own, might not constitute an undesirable constitutional change.

It is important to note that a thin – often hard-to-determine – line separates legitimate constitutional change and illegitimate constitutional erosion. Distinguishing the abstraction level at which constitutional principles operate is crucial to maintaining a balance between preserving the constitutional core and allowing for constitutional experimentation. The normative strength of my proposal to stratify the levels at which basic features are identified is twofold: it enables constitutional experimentation and facilitates a collaborative approach to the separation of powers.

Constitutional experimentation was an interesting entry into Indian constitutional law via *Kihoto Hollohan*.¹²⁰ It demands that all institutions respect and defer to democratic processes. It is founded on the understanding that in a constitutional democracy, courts should not hold complete and final authority over the interpretation and development of constitutional principles. Although it must be treated and applied cautiously during democratic erosion and institutional capture, constitutional experimentation provides an important teleological basis for reorienting the doctrine in a democratic constitutional framework.

This approach aligns with the arguments by Krishnaswamy and Roznai, who advocate for the doctrine to accommodate significant constitutional changes initiated by the populace. Roznai, in particular, suggests that the intensity of the basic structure review should vary based on the deliberative and participatory nature of the amendment process.¹²¹ While the Constitution delineates explicit procedures for formal amendments, Roznai's proposal serves as a crucial reminder: in a constitutional democracy, institutions must balance constitutional change and innovation with constitutional resilience and durability.

Dr Justice DY Chandrachud's jurisprudence,¹²² particularly in *Kalpna Mehta v Union of India* (“*Kalpna Mehta*”)¹²³ and *Government of NCT Delhi v Union of India*,¹²⁴ exemplified a nuanced notion of separation of powers, edging towards using the doctrine to promote the features it aims to safeguard. In *Kalpna Mehta*, he advanced a novel conception of the doctrine, suggesting that governance evolution requires a shift from a rigid separation of powers to a model that embraces “inter-institutional relationships between the three branches when carrying out their distinct roles as part of a joint enterprise”.¹²⁵ Citing Waldron, Justice DY Chandrachud argued that inter-institutional comity, the mutual respect between government branches, is crucial. This respect calls for collaboration among these branches to protect and advance public values such as welfare,

¹²⁰*Kihoto Hollohan* (n 76).

¹²¹Roznai (n 102) 201.

¹²²Justice DY Chandrachud, the Chief Justice of the Supreme Court since November 2022, is different from the Justice Chandrachud referred to earlier, who was the Chief Justice of the Supreme Court from February 1978 to July 1985.

¹²³*Kalpna Mehta v Union of India*, (2017) 7 SCC 1.

¹²⁴*Government of NCT Delhi v Union of India*, 2018 SCC Online SC 66.

¹²⁵*Kalpna Mehta* (n 123) [237]. See also Aileen Kavanagh, *The Collaborative Constitution* (Cambridge University Press 2023).

autonomy, transparency, efficiency, and fairness for citizens' benefit.¹²⁶ Per Justice DY Chandrachud, the doctrine can be evolved to strengthen this conception.

Respecting the collaborative approach advanced by Justice DY Chandrachud implies that the judicial techniques to identify basic features should allow room for constitutional experimentation initiated by Parliament. Simultaneously, to prevent the Constitution from being completely overridden in the name of experimentation, applying the doctrine must ensure that such changes align with the Constitution's unamendable core. The stratification of abstraction levels facilitates this balancing act.

The stratification test addresses the abstraction problem in two steps. First, the Court must begin by considering the consequences of the amendment to determine the abstraction level at which it operates. Such an exercise requires determining whether the constitutional change corresponds to a basic feature (second abstraction level) or a facet of a basic feature (third abstraction level) of the Constitution. Second, if the amendment operates at the third abstraction level, the Court must test whether any disturbance or change to a basic facet of a basic feature destroys any basic feature of the Constitution. In executing the second step, I propose that the Court move beyond just a structuralist method of interpretation and use constitutional history to determine the substantive content of the basic feature at the second abstraction level. A purposive interpretation that accommodates constitutional history empowers judges to understand the basic features designed to address the socio-political context behind the Constitution's provisions, thereby enhancing the use of the doctrine.

Employing constitutional history creatively and logically can aid the structuralist method by providing a standard to balance constitutional change and durability. Judges can infuse substantive content into the provisions using constitutional history, such as socio-economic equality understood in light of the historical caste and gender-based inequalities. In essence, a purposive interpretation that gives equal weight to constitutional history would allow judges to capture the basic features of the Constitution that are specifically designed to respond to the socio-political context underlying the provisions.

To illustrate, consider a constitutional amendment affecting the position of opposition parties is challenged on grounds of violating the principle of parliamentary democracy. In such a case, the Court must do more than identify parliamentary democracy at the first abstraction level. It would also need to determine the second abstraction level, requiring the Court to examine how parliamentary democracy has been conceived and understood within India's socio-political history.¹²⁷ Finally, at the third abstraction level, the Court would analyse institutional arrangements such as the multi-party system, the position of national and local parties, and the election method that operationalizes the second-level conception of parliamentary democracy. Applying the stratification test would enable judges to argue that changes to the third abstraction level must align with the second-level basic features, corresponding to the socio-political history shaping India's institutional frameworks. Thus, any amendment affecting the position of regional or opposition

¹²⁶Kalpna Mehta (n 123).

¹²⁷As an academic exercise, employing constitutional history (especially the reason behind the First Constitutional Amendment, which inserted Schedule IX) could have supported the judges in *Indira Gandhi* in invalidating Gandhi's use of Schedule IX to retrospectively amend laws, casting a shadow on her election victory.

parties would need to meet the standards set by the specific roles and functions these parties are expected to play within India's constitutional democracy.

The judicial process necessitates judges to harmonize and make sense of potentially contradictory constitutional provisions. However, in adjudicating unamendability cases, it is important to acknowledge the tensions within the provisions and highlight the negotiations on which the Constitution is based. Presenting the Constitution as a coherent whole may inadvertently erase the political discussions and compromises that are, arguably, central to India's constitutional identity. Resolving conflicts between equally well-placed provisions should involve examining constitutional history, focusing on the negotiations and contestations that included contradictory provisions within the Constitution's text.¹²⁸ A modified structuralist method, which creates the space for constitutional history to find the specific purposes behind constitutional provisions, equips judges with the tools to identify basic features at an abstraction level corresponding to a constitutional amendment's specificity.

A clarification is due here: constitutional history refers to the foundational history and the socio-political developments that preceded and influenced the development of Indian constitutional law.¹²⁹ As Bhatia notes, the basic structure of the Constitution is paradoxically both unamendable and constantly evolving:

The Constitution may be changed by slow degrees, provision by provision, new elements added and old provisions removed. While no single amendment would alter the basic structure, over time, we could have a rather different-looking Constitution, with a shift in the balance of the elements which currently constitute the basic features and those that do not.¹³⁰

The use of constitutional history allows the Court to acknowledge the informal changes to the Constitution and its development in response to specific socio-political contexts. Moreover, incorporating constitutional history as an aid to interpretation in the stratification test enables judges to trace constitutional amendments across abstraction levels, leading to a more robust system of constitutional deliberation amongst institutions.

5. Conclusion

Disagreements over what constitutes the Constitution's basic structure are inevitable. However, this does not make the Constitution "an empty vessel whose users may pour into it whatever they will".¹³¹ In this paper, I have scrutinized the judicial techniques used to identify basic features, highlighting a gap in addressing

¹²⁸For instance, an amendment that seeks to remove English as the nation's official language must be evaluated in light of the negotiations in the Constituent Assembly. The extensive negotiations on this topic attest to the peculiar socio-political context behind choosing English as the official language, which cannot be fully understood through a purely structuralist interpretation of the Constitution.

¹²⁹Anurag Bhaskar shows that Dr Ambedkar's influence on the Indian constitutional discussion started in 1919 when he entered public life, continuing through the drafting of the Constitution and beyond. Anurag Bhaskar, *The Foresighted Ambedkar* (Penguin Random House 2024).

¹³⁰Gautam Bhatia, 'Basic Structure – V: Why are the Basic Features Abstract and Illustrative' (*Indian Constitutional Law and Philosophy Blog*, 12 November 2013) <<https://indconlawphil.wordpress.com/2013/11/12/basic-structure-v-why-are-the-basic-features-abstract-and-illustrative/#:~:text=In%20sum%3A%20what%20we%20have,may%20adequately%20respond%20to%20far%2D>> accessed 10 April 2024.

¹³¹Laurence H Tribe, 'A Constitution We Are Amending: In Defense of a Restrained Judicial Role' [1983] 97 *Harvard Law Review* 440.

the abstraction problem. I argued that the interpretative methods and tests advanced so far lack clarity on the appropriate abstraction level to identify basic features, leading to inconsistent application of the doctrine in cases challenging constitutional amendments.

As a resolution, I propose a stratification test. This test is grounded in the understanding that the Constitution operates at different abstraction levels. It encourages judges to acknowledge these levels, especially in cases involving a challenge to constitutional amendments. A stratification test can offer a more nuanced and systematic approach to identifying basic features. The test addresses the current limitations in the doctrine's application while providing the bannisters for judges as they undertake an interpretative exercise in amendability cases. The theoretical distinction between second- and third-level abstractions would permit the judiciary to accommodate constitutional experimentation while ensuring these changes are connected to the Constitution's unamendable core.

There are risks in asking the judiciary to restrict the scope of such an important doctrine. However, identifying and acknowledging the abstraction level at which the Court will determine the unamendable core of the Constitution does not equate to restricting the doctrine. Rather, it introduces another step in the Court's reasoning to ensure a robust constitutional discourse. At the very least, this paper seeks to initiate a discussion on the varying abstraction levels in the different Articles of the Constitution. It emphasizes the necessity, for sound constitutional reasoning, of differentiating between the varying abstraction levels at which the Constitution operates, especially in determining the unamendable core of the Constitution. The hope is that a clearer differentiation would allow constitutional actors to recognize the basic features that correspond to India's socio-political history more clearly.

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