

ELITE INSTITUTIONALISM AND JUDICIAL ASSERTIVENESS IN THE SUPREME COURT OF INDIA

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“In some matters I have taken activist positions, in some cases restraint, and rely on my gut feelings—judicial conscience. I’m neither a leftist or rightist, I’m a centrist. I compare this to a four lane highway—sometimes you drive in the fast lane, sometimes in the middle, sometimes in the slow lane, but you don’t want to drive off the highway. . . what view a judge takes of a particular legislation is his privilege, and is colored by inputs he has had in life—and to a certain extent, it may be tempered by the dominant discourse in the country.”

— A former justice of the Supreme Court of India in an interview for this project¹

I. INTRODUCTION

In the 1970s and 1980s, the Supreme Court of India drew scholarly attention globally for its burgeoning jurisprudence of rights and its activism in public interest litigation (PIL) cases, through which the court expanded its jurisdiction. In this early period, the court sought to bolster its legitimacy in the wake of its acquiescence to the Emergency regime of Indira Gandhi and positioned itself at the forefront of reforms in the areas of human rights, labor rights, prison justice, and environmental law. That trend continued in the post-1990 era as the court continued to play a key role in expanding rights, fighting corruption, and serving as a catalyst for new government policies through its decisions recognizing the rights to education, food, and information. However, a closer look at key fundamental rights decisions of the court reveals a more complex narrative and portrait of the court’s decision-making in fundamental rights cases. It reveals that the court has been only *selectively* activist and assertive in challenging central government power in the domain of fundamental rights.

This article examines judicial challenges to central government power in the Supreme Court of India by analyzing activism and assertiveness in fundamental rights decisions from 1977 to 2007. Based on field research and contextual analysis of politically significant decisions as part of a larger project,² this article

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1. Interview with former Supreme Court justice, New Delhi, India, February 2007.

2. This article draws heavily from Chapter 3 of the author’s doctoral dissertation, Manoj Mate, *The Variable Power of Courts: The Expansion of the Power of the Supreme Court of India in Fundamental Rights and Governance Decisions* (Fall 2010) (unpublished Ph.D. dissertation,

traces patterns of judicial assertiveness in politically significant fundamental rights decisions.³ The court in the 1977–1989 era launched a new activism and gradually expanded its governance role in PIL decisions, while avoiding direct challenges to the central government.⁴ In the post-1991 era, the court dramatically expanded its assertiveness in challenging the central government in certain domains.⁵

In the area of fundamental rights, the court asserted a new activist approach in the immediate post-Emergency era,⁶ but was both selectively activist and assertive in politically significant decisions across both the 1977–1989 and 1990–2007 periods.⁷ Significantly, while the court was active in expanding the scope of rights in some assertive decisions in certain areas, the court limited or restricted the scope of fundamental rights provisions in many of its non-assertive, deferential decisions. Although the Supreme Court of India has gained worldwide acclaim for some of its activist rights decisions over the past four decades,⁸ when confronted with challenges to central government power, the court has in many contexts constrained rights.⁹

University of California, Berkley) [hereinafter Mate, *The Variable Power of Courts*]. Special thanks to Seval Yildirim for her feedback, insights, and support during field research for this project, which was conducted in 2006 and 2007 in Delhi, Mumbai, and Kochi, India. It consisted of interviews with former Supreme Court justices, high court judges, Supreme Court advocates, and other experts including journalists, advocates, and former government officials.

3. Fundamental rights decisions are defined as politically significant decisions involving fundamental rights-based challenges to the central government policies or the exercise or scope of central government power. By contrast, governance decisions are defined as politically significant decisions wherein the court was engaging in policy making, assumed governmental functions, and/or compelled governmental action at the central government level. The court's activism and assertiveness in governance is analyzed in Manoj Mate, *The Rise of Judicial Governance*, 33 B.U. INT'L L.J. 169 (2015) [hereinafter Mate, *The Rise of Judicial Governance*].

4. *Id.* See generally UPENDRA BAXI, *THE INDIAN SUPREME COURT AND POLITICS* (1980) [hereinafter BAXI, *INDIAN SUPREME COURT*]; Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 4 THIRD WORLD LEGAL STUD. 107, 115–16 (1985) [hereinafter Baxi, *Taking Suffering Seriously*].

5. See *infra* notes 54–75 and accompanying text discussing the Supreme Court's expansion of fundamental rights.

6. The Emergency refers to the period from June 1975 to March 1977 under Indira Gandhi's declaration of emergency. The central government used its authority to proclaim national emergencies at multiple times, but “Mrs. Gandhi's Emergency was in its own category,” in that it had no basis in a national threat and was based on the self-serving nature of excessive denials of personal liberties. GRANVILLE AUSTIN, *WORKING A DEMOCRATIC CONSTITUTION: THE INDIAN EXPERIENCE* 595–96 (1999).

7. This article does not analyze the court's activism and assertiveness in federalism, secularism and religion, or affirmative action cases.

8. *E.g.*, *Batra v. Delhi Admin.*, A.I.R. 1980 S.C. 1579; *Tellis v. Bombay Mun. Corp.*, (1985) 3 S.C.C. 545; *Jain v. Karnataka*, (1992) 3 S.C.C. 666. It should be noted that even in the social rights context, the enforcement of social rights has been uneven and limited in PIL. See Varun Gauri, *Fundamental Rights and Public Interest Litigation in India: Overreaching or Underachieving?*, 1 INDIAN J.L. & ECON. 71, 80 (2010) (identifying some criticism of recent PIL decisions); Madhav Khosla, *Making Social Rights Conditional: Lessons from India*, 8 INT'L J. CONST. L. 739, 743–44 (2010) (noting limited judicial enforceability of socioeconomic goals); see also S. P. SATHE, *JUDICIAL ACTIVISM IN INDIA* 246 (2002).

9. See *infra* Part II, Section B (discussing patterns and trends in judicial deference to

Public law scholarship on the Supreme Court of India in the 1980s analyzed the court's activism in fundamental rights and PIL as a response to the court's earlier acquiescence to Emergency rule.¹⁰ Today, a growing body of scholarship has focused on law in India and the court's decision-making, tracing patterns of the court's activity in social rights and other areas.¹¹ India transitioned toward neoliberal economic reform policies in the post-1990 era and has experienced significant shifts in the central government's policy-making in affirmative action and quotas and, more broadly, religion and secularism.¹² Much of this scholarship has focused on the importance of the court's structure, broader political factors, and conditions motivating and constraining judicial decisions.¹³ Other recent work has focused on whether the Supreme Court of India has become more conservative in its rights and governance decisions in a neoliberal era.¹⁴

national security policy, economic policy, and development in which the Supreme Court has narrowed the scope of fundamental rights). The Indian Supreme Court's recent decision in *Kaushal v. Naz Found.*, Civil Appeal, No. 10972 of 2013 (arising out of SLP (C) No. 15436 of 2009) illustrates the continuing uneven activism and assertiveness of the court in fundamental rights. There, the court upheld Section 377 of the Indian Penal Code, an anti-sodomy law originally enacted by the British Raj in India, in holding that the provision did not violate INDIA CONST. art. 14 (equality). *Suresh Kumar Kaushal*, Civil Appeal, No. 10972 of 2013.

10. For scholarship on PIL and the court's activism in the late 1970s and early 1980s, see BAXI, *INDIAN SUPREME COURT*, *supra* note 4, at 122–23 (“[T]he Court as a whole appeared determined to bury its emergency past by an astonishing range of judicial activism” as part of a “populistic quest for legitimation”); SATHE, *supra* note 8, at 11–12 (analyzing the court's post-Emergency activism and arguing that it was motivated by redemptive and support-building motives); Baxi, *Taking Suffering Seriously*, *supra* note 4, at 115–16 (1985) (connecting criticism of the court's Emergency performance to its eventual development of PIL). *See generally* UPENDRA BAXI, *COURAGE, CRAFT AND CONTENTION: THE INDIAN SUPREME COURT IN THE EIGHTIES* 65 (1985) [hereinafter BAXI, *COURAGE, CRAFT AND CONTENTION*] (discussing earlier acquiescence by the Supreme Court to the central government); RAJEEV DHAVAN, *THE SUPREME COURT OF INDIA: A SOCIO-LEGAL CRITIQUE OF ITS JURISTIC TECHNIQUES* 421, 447 (1977); RAJEEV DHAVAN, *THE SUPREME COURT OF INDIA AND PARLIAMENTARY SOVEREIGNTY: A CRITIQUE OF ITS APPROACH TO THE RECENT CONSTITUTIONAL CRISIS* 6–13 (1976) [hereinafter DHAVAN, *THE SUPREME COURT OF INDIA AND PARLIAMENTARY SOVEREIGNTY*] (describing the court's transition from a period of largely favoring government actions to key decisions imposing constitutional limits); Clark D. Cunningham, *Public Interest Litigation in Indian Supreme Court: A Study in the Light of American Experience*, 29 J. INDIAN L. INST. 494, 496–97 (1987); Rajeev Dhavan, *Law as Struggle: Notes on Public Interest Law in India*, 36 J. INDIAN L. INST. 302 (1994) [hereinafter Dhavan, *Law as Struggle*].

11. *See, e.g.*, SHYLASHRI SHANKAR, *SCALING JUSTICE: INDIA'S SUPREME COURT, ANTI-TERROR LAWS, AND SOCIAL RIGHTS* 86–87 (2009) (finding the court has not been assertive in challenging central government policies in the area of anti-terrorism laws).

12. Oliver Mendelsohn, *The Supreme Court as the Most Trusted Public Institution in India*, 23 S. ASIA: J. S. ASIAN STUD. 103, 119 (2000).

13. *See, e.g.*, SATHE, *supra* note 8; SHANKAR, *supra* note 11; Nick Robinson, *Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts*, 61 AM. J. COMP. L. 173 (2013).

14. *See* Balakrishnan Rajagopal, *Pro-Human Rights but Anti-Poor? A Critical Evaluation of the Indian Supreme Court from a Social Movement Perspective*, 18 HUM. RTS. REV. 157, 166–68 (2007) (arguing that the court's conservative shift is a product of its embrace of statist and

This article contributes to this previous scholarship by providing an explanatory account of the motives and factors that drove the Supreme Court of India's selective activism and assertiveness in politically significant fundamental rights decisions.¹⁵ This article finds that existing public law theories, including regime politics, institutionalist models, and strategic models, fail to provide a complete account of patterns of judicial assertiveness in the Supreme Court of India. Instead, these theories should be supplemented by focusing on a new variable—the values of national political, professional, and intellectual elites that influence judges' worldviews, attitudes, and role conceptions, as well as the way professional and political elites and the media evaluate assertive high court decisions.¹⁶ I refer to this approach as “elite institutionalism.” According to elite institutionalism, the unique institutional environment *and* broader normative and intellectual atmosphere of courts shape the institutional perspectives and policy worldviews that may drive or limit judicial activism and assertiveness. Therefore, at least in the Indian case—and perhaps beyond—variation in activism and assertiveness can most adequately be explained by the factors or variables summarized by the idea of “elite institutionalism.”

Elite institutionalism builds on key insights about the fundamentally hierarchical and stratified nature of Indian politics and elite discourse and the fundamentally distinct discourse of law and constitutional politics.¹⁷ Recent public

developmental ideology and the social and class perspectives of Indian judges and lawyers). *But see* Sudhir Krishnaswamy & Madhav Khosla, *Social Justice and the Supreme Court*, in *THE SHIFTING SCALES OF JUSTICE: THE SUPREME COURT IN NEO-LIBERAL INDIA* 109, 110 (Mayur Suresh & Siddharth Narrain eds., 2014) (questioning empirical support for common arguments that the court has moved in a conservative direction).

15. Activism is defined here as the extent to which the court expansively interprets the constitutional and statutory texts to support substantive outcomes, rather than deciding legalistically, emphasizing judicial restraint and fidelity to the constitutional and statutory texts. *See* Keenan D. Kmiec, *The Origin and Current Meanings of “Judicial Activism,”* 92 CAL. L. REV. 1441, 1444–50 (2004). Assertiveness is defined as the extent to which the court invalidates or otherwise challenges the exercise of power by the central government, including the extent to which the court takes over policy-making or governance functions. *See* *THE GLOBAL EXPANSION OF JUDICIAL POWER* 5, 13 (C. Neal Tate & Torbjorn Vallinder eds., 1995) (arguing that judicialization of governance entails two phenomena: (1) the process by which courts and judges come to make or increasingly dominate the making of public policies that had previously been made by other governmental agencies, especially legislatures and executives and (2) the process by which non-judicial negotiating and decision-making forums come to be dominated by quasi-judicial (legalistic) rules and procedures).

16. The influence of elite institutional factors on the court's expanding role in governance is analyzed in Mate, *The Rise of Judicial Governance*, *supra* note 3.

17. *See* Upendra Baxi, *The Avatars of Judicial Activism: Explorations in the Geography of (In) Justice*, in *FIFTY YEARS OF THE SUPREME COURT OF INDIA* 156–209 (S.K. Verma and K. Kumar eds., 2001) (arguing that PIL has facilitated the widening of the processes of “social conversation” between courts, litigants, and social actors on issues related to law, fundamental rights, and justice and that middle-class elites and NGOs have shifted the court's decision-making through the reframing of issues); *see also* Dhavan, *Law as Struggle*, *supra* note 10, at. 302 (discussing how PIL emerged as an outgrowth of an overdue combination of protest and thinking among India's disadvantaged groups and growing middle class of intellectuals and describing how PIL has now shifted beyond claims involving the plight of the poor and disadvantaged). *See*

law scholarship has identified the importance of “judicial communities” and the importance of ideational and cultural factors in influencing judicial decision-making in other polities.¹⁸ In addition, other scholars have also emphasized the elite background of lawyers as a profession in post-colonial Asian countries while others have highlighted the hierarchical and stratified nature of law and jurisprudence in India.¹⁹ A key insight of this article is that Supreme Court of India’s justices constitute an elite group within Indian politics,²⁰ and, as elites, these justices influence other elites through both their decisions and their speeches, writings, public service on government commissions and bodies, and other commentary during and after their tenure as justices.²¹

This article also argues that several groups are part of and constitute “elites” that play a role in influencing and shaping judicial worldviews and judicial decision-making. First, elites include, but are not limited to, the Supreme Court and high court judges themselves, leading senior advocates and advocates of the Supreme Court Bar, public interest lawyers who have been active in PIL, government officials and lawyers in the law ministry, law commission, and other government agencies and commissions related to law and constitutional politics.²²

generally SANDRA FREDMAN, HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES (2008).

18. See LISA HILBINK, JUDGES BEYOND POLITICS IN DEMOCRACY AND DICTATORSHIP: LESSONS FROM CHILE (2007) (arguing that judicial deference to authoritarian rule in Chile was motivated by a culture of apoliticism and an ideology of judicial conservatism); PATRICIA WOODS, JUDICIAL POWER AND NATIONAL POLITICS: COURTS AND GENDER IN THE RELIGIOUS-SECULAR CONFLICT IN ISRAEL (2009) (examining the role of judicial communities in driving and motivating judicial decision-making in Israel); see also ALEXANDRA HUNNEUS, CULTURES OF LEGALITY: JUDICIALIZATION AND POLITICAL ACTIVISM IN LATIN AMERICA (Javier A. Couso, Alexandra Hunneus, & Rachel Sieder eds., 2011).

19. See, e.g., YVES DEZALAY & BRYANT GARTH, ASIAN LEGAL REVIVALS: LAWYERS IN THE SHADOW OF EMPIRE (2010); Marc Galanter & Nick Robinson, *India’s Grand Advocates: A Legal Elite Flourishing in the Era of Globalization*, 20 INT’L J. LEGAL PROF. 241 (2014).

20. See GEORGE GADBOIS, JUDGES OF THE SUPREME COURT OF INDIA: 1950–1989 (2011) (analyzing biographical and other data on Indian Supreme Court justices and finding that most justices of the Supreme Court of India between 1950 and 1989 came from families of relatively higher economic status in which the father was often in the legal profession). See *generally* CHARLES EPP, THE RIGHTS REVOLUTION (1994) (arguing that the lack of a legal support structure for legal mobilization prevented a full rights revolution in India).

21. There is a well-established tradition in India of judges serving in high-level commissions and other posts after their retirement at the age of sixty-five. See *Judgmental about work: Public debate rages over post-retirement jobs for judges*, MAIL ONLINE INDIA (Oct. 2, 2012), <http://www.dailymail.co.uk/indiahome/indianews/article-2211988/Judgemental-work-Public-debate-rages-post-retirement-jobs-judges.html> (describing opposition to the common practice of many judges to seek prestigious and political jobs after retirement).

22. 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 (Terrence C. Halliday, Lucien Karpik & Malcolm M. Feely eds., 2012) [hereinafter Mate, *Priests in the Temple of Justice*] (defining the legal complex as consisting of government and private lawyers, judges, legal scholars and commentators, legal journalists, and civil servants in the law ministry and law commission).

Second, elites also include political ministers and leaders within the executive and legislative branches of the central government, including the prime minister, cabinet ministers, members of Parliament, and leaders of national and regional parties in India. Third, elites also include legal scholars and intellectuals who study and write about the court and law in India and legal journalists and other elites within the news media who closely cover and analyze the court.

The role of elite institutional factors is examined through close analysis of the Supreme Court of India's decision-making in *politically significant* fundamental rights decisions.²³ Several other scholars of law and courts have used this approach.²⁴ The approach entails: (1) close attention to the opinions of justices in decisions;²⁵ (2) field interviews of retired justices of the court, legal scholars, court advocates, journalists, former Cabinet ministers, and other experts; and (3) the study of news editorial coverage of these decisions. Thus, this article looks both *within* the court, highlighting the sources of the justices' institutional values, and

23. Politically significant decisions are defined as referring to controversial or "high stakes" decisions in which the elected branches of the central government—the executive and Parliament—had a significant stake in the outcome of the decision or those that directly affected the scope of the power of the central government. The author employed a three-stage methodology to select these cases. First, the author reviewed the leading literature on law and the Supreme Court of India that discusses specific decisions and made an initial list of decisions based on frequency. Second, the author conducted field interviews with leading legal scholars, senior advocates, former Supreme Court of India justices, and other experts on Indian law, asking them to identify decisions in the post-Emergency period they believed to be politically significant. These first two stages of this process yielded an initial list of judicial decisions. Note that while the definition includes a focus on central government power, some decisions involving state government actions were deemed politically significant because of their implications for central government policy-making and power. The author then provided his definition of political significance to a small panel of three experts and conferred with these experts to identify and generate a list of the most politically significant decisions. The panel consisted of a retired Supreme Court of India justice, a senior advocate who was an established expert on Indian constitutional law, and an advocate.

24. Diana Kapiszewski employed a multifaceted case-selection methodology in order to measure judicial assertiveness in the high courts of Brazil and Argentina. DIANA KAPISZEWSKI, *HIGH COURTS AND ECONOMIC GOVERNANCE IN ARGENTINA AND BRAZIL* 211–15 (2012). She focused on politically important decisions in which these courts had the opportunity to challenge the exercise of government power on issues with high political salience. *Id.* at 211. In his study of high court assertiveness in Zambia and Malawi, Peter Vondoeep used a similar case-selection methodology. Peter Vondoeep, *Politics and Judicial Assertiveness in Emerging Democracies: High Court Behavior in Malawi and Zambia*, 59 POL. RES. Q. 389, 392 (2006). Vondoeep designated judicial decisions as "political" where the outcome of a particular case "had implications for the ability of governments to exercise or retain power, or had any impact on the political fortunes and activities of actors in civil and political society." *Id.* This methodology yielded a sample of cases "that were of interest to state power-holders and their opponents." *Id.*

25. To access full versions of published decisions, I relied on the *Supreme Court Cases Online* electronic database of published Supreme Court decisions, which as of early 2007 contained over 36,000 reported judicial decisions since 1950 and is the most complete collection of published Supreme Court decisions available. This database is used by the leading senior advocates of the court for research in their litigation and appellate practices and by the justices and clerks of the Supreme Court in conducting legal research for judicial opinions. I also used the Access World News database to search for salient decisions from 2001 to 2007 based on mentions in multiple newspapers.

outside the court to understand how the broader political and intellectual discourse shaped and influenced the elite policy worldviews of judges. This article illustrates that the selective activism and assertiveness of the court in fundamental rights decisions reflected both the institutional values and motives of justices and the ascendance and influence of elite “meta-regimes.” Elite meta-regimes refer to the broader consensus of political, professional, and intellectual elite worldviews on particular constitutional, political, and social issues. These meta-regimes capture the broader intellectual currents of elites within specific periods.

The Supreme Court of India’s push toward selective activism and assertiveness in fundamental rights cases in the 1977–1989 period was motivated by the justices’ desire for institutional redemption and restoration of legitimacy lost as a result of the court’s acquiescence to the Emergency regime.²⁶ In addition, the court’s selective assertiveness in certain domains, such as the basic structure doctrine, reflected the justices’ desire to bolster and strengthen the court’s institutional solidity. At the same time, the court’s deference to the central government in certain areas such as economic and national security policy in the 1980s reflected a confluence of strategic, institutional, and elite intellectual motivations.²⁷ The court gradually expanded the scope of its assertiveness in governance cases in the 1980s and 1990s in PIL cases, effectively transforming its role in the Indian polity.²⁸ At the same time, the court was only selectively activist and assertive in challenging the central government in fundamental rights cases.²⁹

For example, the court was assertive in challenging the central government’s policies, actions, and power in cases involving the scope of judicial review of governmental action, the basic structure doctrine, and the scope of Parliament’s amending power, free speech, and immigration policy.³⁰ In contrast, the Supreme Court of India was highly deferential in endorsing the policies and actions of the central government in the areas of economic policy, development, and national

26. See BAXI, INDIAN SUPREME COURT, *supra* note 4, at 122–23 (identifying judicial activism as a means for the court to bury its past); SATHE, *supra* note 8, at 11–12 (contrasting judicial activism with an earlier case restricting personal liberty); see also Manoj Mate, *Public Interest Litigation and the Transformation of the Supreme Court of India*, in CONSEQUENTIAL COURTS: JUDICIAL ROLES IN GLOBAL PERSPECTIVE 262, 269–70 (Diana Kapiszewski et al. eds. 2013) [hereinafter Mate, *Transformation of the Supreme Court of India*] (tracing the court’s PIL activism from its Emergency period acquiescence).

27. See BAXI, INDIAN SUPREME COURT, *supra* note 4, at 122–23.

28. See Mate, *The Rise of Judicial Governance*, *supra* note 3; Mate, *Transformation of the Supreme Court of India*, *supra* note 26 (arguing that the court’s expansion of standing doctrine for PIL in the 1980s fundamentally altered and transformed the role of the court in governance).

29. See *supra* note 23 (defining politically significant judicial decisions and discussing the case selection methodology used in this study).

30. See *infra* Part II, Section B (discussing patterns and trends in judicial assertiveness). See *People’s Union for Civil Liberties v. Union of India*, (2007) 1 S.C.C. 719 (recognizing right to food, and issuing orders to expand access to food); *Unnikrishan v. State of Andhra Pradesh*, (1993) S.C.C. (1) 64 (challenging system of capitation fees and proposing new regulations for professional colleges); *Mohini Jain v. State of Karnataka*, (1992) 3 S.C.C. 666 (holding that right to education was a fundamental right).

security.³¹ In many of these cases, the court has also directly questioned the nature and scope of PIL and the extent to which it can be utilized as a tool for challenging government policy through fundamental rights-based challenges.

In the post-1990 era, the court's selective assertiveness and deference was a product of both an acceptance by the justices of inherited jurisprudential traditions and institutional norms and the justices' own elite legal and policy worldviews. The court thus sought to defend and expand the basic structure doctrine to protect and expand the institutional strength and jurisdiction of the judiciary, and it was activist and assertive in politically significant freedom of speech cases, drawing on earlier jurisprudential traditions of free speech.³² At the same time, the court was for the most part neither activist nor assertive in economic, development, and national security policy decisions.³³ In many of these cases, the court adopted a restricted or limited view of the scope of fundamental rights in Articles 14, 19, and 21 of the Indian Constitution and applied a lower degree of scrutiny to government policies and actions.³⁴

Existing public law theories fail to provide a complete motivational account of this shift. The thesis of elite institutionalism helps complete existing models by examining how a broader consensus of the policy worldviews and beliefs of political, legal-professional, and intellectual elites on sets of key issues helped inform and shape the court's selective activism and assertiveness in the post-Emergency era. The thesis of elite institutionalism suggests that, in constructing the scope and meaning of fundamental rights, judges are influenced not only by law and institutional context, but also by broader elite political and intellectual discourse.

As illustrated in the analysis of judicial decisions in this article, the unique structure of the Supreme Court of India also affects the nature of judicial decision-making. In contrast to the U.S. Supreme Court, the Supreme Court of India is a large court consisting of thirty justices who decide cases in smaller panel benches of two, three, or five or more justices, and the chief justice assigns case matters to benches of varying strength.³⁵ This can lead to variation in the degree to which justices apply earlier precedents of the court, thus undermining uniformity of adherence to doctrine.³⁶ As a result, justices' own elite worldviews are often amplified in decisions of smaller benches of two or three justices.

Part II provides a descriptive analysis of the court's activism in fundamental rights cases in the immediate post-Emergency period (1977–1989) and of variation

31. See *infra* Part II, Section B (discussing patterns and trends in judicial deference to national security policy, economic policy, and development).

32. See *infra* Part II, Section D(4)(a) (discussing patterns and trends in judicial assertiveness with regard to free speech cases).

33. See *infra* Part II, Section B (discussing patterns and trends in judicial deference to national security policy, economic policy, and development).

34. See *infra* Part II, Section D(3) (discussing the judicial restriction of fundamental rights arising from Articles 14, 19, and 21).

35. See *infra* note 397 and accompanying text for a discussion of relative jurisprudential freedom of smaller panel benches of the Supreme Court of India.

36. See Robinson, *supra* note 13.

in judicial assertiveness using both quantitative and qualitative evidence. Part III examines how existing public law theories of motivation fail to provide a complete account of this dynamic. Part IV illustrates how the thesis of elite institutionalism adds to existing public law theories in providing a compelling account of shifts in activism and selective assertiveness. Finally, Part V concludes with what elite institutionalism can more fully explain and how and the implications of this theory for further study and analysis.

II. ACTIVISM AND ASSERTIVENESS IN FUNDAMENTAL RIGHTS

A. *Fundamental Rights Activism in the Post-Emergency Era: 1977–1989*

During the post-Emergency period, a push to restore and protect fundamental rights figured prominently in national politics. The Janata Party³⁷ coalition government defeated Gandhi's Congress Party in the 1977 elections, marking the first defeat of the Congress Party since the inception of the Indian Republic in 1950.³⁸ The mandate of the elections was clear: the Indian electorate had rejected the excesses of Indira Gandhi's Emergency regime.³⁹ The Janata Party had campaigned on an agenda calling for the lifting of the Emergency and repeal of the draconian Maintenance of Internal Security Act (MISA),⁴⁰ rescinding of the constitutional amendments enacted by the Emergency regime,⁴¹ and restoration of

37. The Janata Party regime was a coalition made up of the conservative "old guard" Congress ("O") faction that had opposed Gandhi, the Hindu-right Jana Sangh Party, the pro-business and pro-property Swatantra Party, the Samyukta Socialist Party, and the Bharatava Lok Dal. See AUSTIN, *supra* note 6, at 397 (describing the formation of the Janata party). This diverse coalition of parties came together with the express purpose of defeating Gandhi, ending the Emergency, and restoring constitutional democracy and fundamental rights. See *id.* at 658 (noting the Janata government's use of its own amendments of the constitution to counteract those of the Emergency period). In a significant development, the Janata coalition also succeeded in gaining the support of the Communist Party of India (Marxist) (CPI-M) and other leftist parties in the 1977 campaign, which had been reluctant to join the Janata coalition of parties because of its ties to the Hindu right and conservative elements. *Id.*; see also 1–2 MADHU LIMAYE, *JANATA PARTY EXPERIMENT: AN INSIDER'S ACCOUNT OF OPPOSITION POLITICS: 1975–1977* (1999).

38. See BAXI, *INDIAN SUPREME COURT*, *supra* note 4, at 121 (noting the uniqueness of the 1977 election in voting in opposition power); see also AUSTIN, *supra* note 6, at 391–94.

39. See AUSTIN, *supra* note 6, at 391–94 (tracing the electoral defeat to a sense of loathing of the Emergency).

40. MISA was first enacted by the Gandhi government in 1973. See RAJU THOMAS, *INDIA SECURITY POLICY 101–102* (1986). MISA granted the government broad powers of "preventive" detention and wiretapping. See *id.* The law was used during the Emergency to arbitrarily imprison thousands, including leaders from the opposition parties. See *id.*

41. These include the Thirty-Eighth, Thirty-Ninth, Fortieth, and Forty-Second Amendments. See Burt Neuborne, *The Supreme Court of India*, 1 INT'L J. CONST. L. 476, 493–94 (2003) (describing these amendments as providing protection to Gandhi from judicial attack). The Thirty-Ninth Amendment had immunized MISA from judicial review. BAXI, *INDIAN SUPREME COURT*, *supra* note 4, at 39. The Forty-Second Amendment attacked judicial power by barring judicial review of the 1971 elections, including Gandhi's, and stripped the court of its power to review the validity of constitutional amendments. See Neuborne, *supra*, at 494 (detailing aspects

democracy, fundamental freedoms, and constitutionalism.⁴² During the Emergency, the Supreme Court of India acquiesced to the regime's suspension of democratic rule and fundamental rights, including the suspension of habeas corpus for detainees under MISA,⁴³ and to the central government's direct attacks on the court's jurisdiction and power via the Forty-Second Amendment.

The new government sought to restore democracy and judicial independence and power through the repeal of the constitutional amendments enacted during the Emergency.⁴⁴ By enacting the Forty-Third and Forty-Fourth Amendments, the Janata government repealed most of the provisions of the Emergency amendments.⁴⁵ Also, the new government launched investigations into alleged crimes and abuses of rights committed by the Emergency regime, and established special courts to prosecute offenses committed by political officials under that regime.⁴⁶ The national media also began extensively covering abuses of human rights and repression of civil liberties in this period, in contrast to its coverage during the Emergency period, which had been heavily restricted by government censorship.⁴⁷

During this period, the Janata government was faced with a court full of justices that had been appointed by Gandhi's regime.⁴⁸ In contrast to Congress

of the Forty-Second Amendment that curtailed judicial powers); *see also* BAXI, COURAGE, CRAFT AND CONTENTION, *supra* note 10, at 85 (describing the Forty-Second Amendment's limitation on review as an attack on the basic structure doctrine); SATHE, *supra* note 8, at 86 (describing the Forty-Second Amendment as an attempt to limit judicial review).

42. *See* AUSTIN, *supra* note 6, at 399–400 (outlining the Janata party's election manifesto); LIMAYE, *supra* note 37, at 215–30 (1999) (detailing the demands and agenda of the Janata party).

43. *See* *Jabalpur v. Shiv Kant Shukla*, (1976) 2 S.C.C. 521 (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 (ruling that the court could not examine whether conditions of detention were in compliance with prison legislation and legal and constitutional requirements during a period of Emergency rule).

44. *See generally* LIMAYE, *supra* note 37.

45. The one exception was the Janata regime's failure to repeal Sections 4 and 55 of the Forty-Second Amendment. *See* AUSTIN, *supra* note 6 at 423–425. This was a result of intense opposition in the Rajya Sabha (the upper house of the Parliament), which remained under the control of the Congress Party during the Janata interlude of 1977–1979. *See id.* Ultimately, the court itself invalidated Sections 4 and 55 in *Minerva Mills, Ltd. v. Union of India*, (1981) 1 S.C.R. 206 (1980).

46. *See* BAXI, INDIAN SUPREME COURT, *supra* note 4, at 122–23, 209 (discussing a Commission of Enquiry set up by the central government and the introduction of the special courts).

47. *See* Baxi, *Taking Suffering Seriously*, *supra* note 4, at 114 n.37–38 (contrasting coverage of Emergency excesses to prior periods and suggesting this heralded a press focus on abuses against common Indians).

48. Manoj Mate, *The Origins of Due Process of India: The Role of Borrowing in Personal Liberty and Preventive Detention Cases*, 28 BERKLEY J. INT'L L. 216, 245 n.118 (2010) [hereinafter Mate, *The Origins of Due Process of India*] (“In March 1977, the senior leadership of the Court was headed by Chief Justice M.H. Beg, and Justice Y.V. Chandrachud (appointed in 1972), Justice P.N. Bhagwati (1973) and Justice V.R. Krishna Iyer (1973), and Justice P.K.

governments led by her father, Jawarhalal Nehru, Gandhi's government did not defer to the chief justice in appointment matters or to the norm of seniority in selection of chief justices.⁴⁹ Instead, the Gandhi government selected justices perceived to be committed to her social-egalitarian agenda.⁵⁰

In the post-Emergency Janata period, the court launched a new rights activism and supported the Janata regime's efforts to restore fundamental rights and constitutional supremacy and repudiate Gandhi's Emergency regime's policies. In particular, this shift towards a new activist approach, which also included the development of court-led PIL, was championed and led by several justices, including P.N. Bhagwati, V.R. Krishna Iyer, and Chief Justice Y.V. Chandrachud.⁵¹ Two key examples of the court's activism are the court's decisions in *Maneka Gandhi v. Union of India*⁵² and *Minerva Mills v. Union of India*.⁵³

1. Expanding Fundamental Rights: *Maneka Gandhi v. Union of India*

In *Maneka Gandhi*, the Indian Supreme Court adopted an activist approach to fundamental rights in the first major decision of the Supreme Court involving personal liberty and fundamental rights in the post-Emergency period.⁵⁴ In this litigation, Maneka Gandhi, Indira Gandhi's daughter-in-law, challenged the seizure of her passport by the Janata government under the Passports Act of 1967.⁵⁵ The

Goswami-all Gandhi appointees.”).

49. See AUSTIN, *supra* note 6, at 125, 278 (describing Gandhi's executive dominance of the judiciary and supersession). Although the Indian Constitution had established an appointment mechanism in which the prime minister and cabinet had the primary responsibility for making appointments after consultation with the chief justice and other Supreme Court and high court judges, there was some ambiguity as to the exact role and influence of the chief justice and other judges and government officials in this process. *Id.* at 125. As a result, under the Nehru Congress regime (1950–1966), the government largely deferred to the chief justice in appointment of justices to the court, in light of existing conventions. *Id.* at 124, 131.

50. See *id.* at 328 (outlining maneuvers, including supersession, against the judiciary that would allow Gandhi to act unhindered). Justice Reddy, a member of the *Kesavananda* majority, suggested that Gandhi started packing the court in 1971 with the goal of overturning *Golaknath v. State of Punjab*, (1967) 2 S.C.R. 762. AUSTIN, *supra* note 6, at 269–70.

51. See BAXI, INDIAN SUPREME COURT, *supra* note 4, at 153–55.

52. (1978) 2 S.C.R. 621.

53. (1981) 1 S.C.R. 206. The other dimension of the court's activism in this period centered on procedural activism—the court broadened popular access to the judiciary by radically reinterpreting Article 32 to expand standing doctrine and developing a model of non-adversarial litigation based on expanded remedial powers in the *First Judges' Case*. *Gupta v. President of India*, (1982) 2 S.C.R. 365, 373 (1981) [hereinafter *First Judges' Case*]. The expansion of standing doctrine and development of PIL is analyzed in Mate, *The Rise of Judicial Governance*, *supra* note 3. See also Mate, *Transformation of the Supreme Court of India*, *supra* note 26.

54. See BAXI, INDIAN SUPREME COURT, *supra* note 4, at 151 (emphasizing the significance of the case as India recovered from the Emergency period).

55. *Id.* at 151–52. The act had been reformed following an earlier challenge in *Satwant Singh Sawhney v. D. Ramarathnam*, (1967) 2 S.C.R. 525, in which the court held that the right to travel was a part of the “personal liberty” guaranteed under Article 21 and consequently that it could only be limited by a law that provided for adequate procedures under the law and not under

Janata government was concerned that Maneka Gandhi was planning to leave India to avoid testifying in an ongoing investigation into crimes committed by her husband Sanjay Gandhi.⁵⁶ She argued that the action violated Articles 14 and 21 of the Indian Constitution by failing to provide notice or a hearing prior to impoundment of the passport.⁵⁷

In a *Marbury v. Madison*⁵⁸-type decision, the Supreme Court of India accommodated the government by upholding the impoundment of the passport, but expanded the scope of fundamental rights and judicial review in the process.⁵⁹ The outcome was an *adverse* one for Indira Gandhi—although the court extracted procedural concessions from the Janata regime, it placated the government by upholding the seizure of the passport and making changes to existing fundamental rights doctrine.⁶⁰ The majority upheld the seizure of the passport after the attorney general offered to provide the petitioner with a hearing.⁶¹ Significantly, the court forced the government to change its behavior, as the government had anticipated an adverse judgment.⁶²

The majority in *Maneka Gandhi* repudiated the restrictive, legalistic approach to interpreting fundamental rights first adopted by the court in *A. K. Gopalan v. State of Madras*,⁶³ an approach that had held sway for more than two decades, and broke new doctrinal ground on several fronts. First, the *Maneka Gandhi* court read an expansive conception of due process protections into Article 21 of the constitution,⁶⁴ which the court had refused to do in *Gopalan*. The court thus held that any procedures implicating the rights to life and liberty in Article 21 must be “right and just and fair and not arbitrary, fanciful or oppressive” to pass Article 21 scrutiny.⁶⁵ Justice Bhagwati thus broke from earlier doctrine in holding “that principles of *natural justice* must be read in to Article 21 of the Constitution, and require that the petitioner be afforded with reasons a hearing in passport revocation matters.”⁶⁶ Second, the court created a new standard of non-arbitrariness.⁶⁷ Justice

the exercise of unlimited executive discretion. *Id.*

56. *Id.* at 151.

57. *Maneka Gandhi*, 2 S.C.R. at 621–23.

58. 5 U.S. 137 (1803).

59. See BAXI, INDIAN SUPREME COURT, *supra* note 4, at 157–58 (contrasting the personal rights expansion of *Maneka Gandhi* with resulting decision against voiding the restrictive order).

60. See *id.* at 166 (balancing the personal rights gains with the institutional accommodation to the executive).

61. See SATHE, *supra* note 8, at 111 (discussing Beg’s dissent, which argued the order should be invalidated as unconstitutional).

62. Baxi suggested that *Maneka Gandhi* was akin to an “advisory opinion in the guise of contentious proceedings” given that “lots of concessions were made by the Attorney-General and they were accepted and the order was *not* set aside.” BAXI, INDIAN SUPREME COURT, *supra* note 4, at 165.

63. (1950) S.C.R. 88.

64. Article 21 provides: “Protection of life and personal liberty[—]No person shall be deprived of life or personal liberty except according to procedure established by law.” INDIA CONST. art. 21.

65. *Maneka Gandhi v. Union of India* (1978) 2 S.C.R. 621, 629.

66. Mate, *The Origins of Due Process of India*, *supra* note 48, at 247 (emphasis added).

Bhagwati supported this new approach by recognizing an expansive conception of equality in Article 14.⁶⁸ Under this new doctrine, the court could scrutinize key aspects of governance and policy-making and rein in government illegality.⁶⁹ The court built on this non-arbitrariness standard in a series of decisions that ushered in the beginning of a new administrative law regime in India.⁷⁰

The *Maneka Gandhi* case thus created higher levels of judicial scrutiny for laws or policies that restrict personal liberty and fundamental rights. After *Maneka Gandhi*, these laws and policies would be subject to scrutiny under due process (Article 21), “reasonableness” review⁷¹ (Article 19),⁷² and the doctrine of “non-arbitrariness” (Article 14).⁷³ However, the court selectively wielded this activist framework vis-à-vis the central government’s policies and actions.⁷⁴ In addition, the court in subsequent decisions after *Maneka Gandhi* expansively interpreted Articles 19 and 21 as guaranteeing new rights.⁷⁵

Invoking a familiar technique in Indian constitutional law, Bhagwati interpreted Section 10(c)(3) of the Passport Act expansively to uphold it and held that the act implies just and fair procedures that comply with the dictates of natural justice.

67. See *Maneka Gandhi v. Union of India* (1978) 2 S.C.R. 621, 629 (holding that non-arbitrariness pervades Article 14); see also BAXI, INDIAN SUPREME COURT, *supra* note 4, at 157 (listing the implications of *Maneka Gandhi*). Article 14 reads: “Equality before law[—]The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.” INDIA CONST. art. 14; see also T.R. ANDHYARUJINA, JUDICIAL ACTIVISM AND CONSTITUTIONAL DEMOCRACY IN INDIA 30 (1992).

68. See *Maneka Gandhi*, 2 S.C.R. at 629 (citing *Royappa v. Tamil Nadu*, (1974) 4 S.C.C. 3, 38–39).

69. ANDHYARUJINA, *supra* note 67, at 30.

70. See *Shetty v. Int’l Airport Auth. Of India*, (1979) 3 S.C.R. 1014 (applying doctrine of non-arbitrariness inherent in Articles 14, 19, and 21 to the Bombay Municipal Corporation’s International Airport Authority’s failure to comply with its own stated standards of eligibility in a notice for tenders for restaurants and snack bars in Bombay Airport); see also *Reddy v. Jammu*, (1980) 3 S.C.R. 1338; *Hasia v. Sehravadi*, (1981) 2 S.C.R. 79.

71. See INDIA CONST. art. 19(1) (“All citizens shall have the right—(a) to freedom of speech and expression; (b) to assemble peaceably and without arms; (c) to form associations or unions; (d) to move freely throughout the territory of India; (e) to reside and settle in any part of the territory of India . . . [and] (g) to practise any profession, or to carry on any occupation, trade or business.”).

72. Article 19, after setting forth protections for various individual freedoms in 19(1), then introduces several limiting clauses allowing the state to limit each of those rights by imposing reasonable restrictions in clauses 2 through 6. For example, Article 19(3) states: “Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of [the sovereignty and integrity of India or] public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.” INDIA CONST. art. 19(3) (emphasis added).

73. “Equality before law[—]The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.” INDIA CONST. art. 14.

74. Mate, *Transformation of the Supreme Court of India*, *supra* note 26, at 293 (outlining the selective activism and assertiveness of the Indian Supreme Court).

75. See *Maneka Gandhi v. Union of India* (1978) 2 S.C.R. 621, 623.

2. The Basic Structure Doctrine: *Minerva Mills v. Union of India*

In the post-Emergency period, the Supreme Court of India also expanded the scope of fundamental rights provisions in reasserting and expanding the power to invalidate constitutional amendments under the “basic structure doctrine” in *Minerva Mills*, arguably marking the culmination of a decades-long battle for constitutional supremacy between the court and the central government.⁷⁶ The court had first asserted the power of judicial review of constitutional amendments in *I.C. Golaknath v. State of Punjab*⁷⁷ and *Kesavananda Bharati Sripadagalvaru v. State of Kerala*.⁷⁸ However, the court was *unable* to secure the compliance or acquiescence of the Gandhi regime with these decisions, and the Gandhi regime overrode these decisions through the enactment of constitutional amendments.⁷⁹ *Golaknath* and *Kesavananda* were arguably driven by the justices’ institutional motivations to protect fundamental rights and to preserve and protect the institutional power and legitimacy of the court in the face of efforts by the Gandhi regime to erode fundamental rights and limit judicial power.⁸⁰

In *Minerva Mills*, the court reasserted the basic structure doctrine without retaliation from the Gandhi government.⁸¹ The court in *Minerva Mills* adjudicated challenges to the constitutionality of sections 4 and 55 of the Forty-Second Amendment enacted by the Gandhi Emergency regime to override *Kesavananda*.⁸² Section 4 provided that no constitutional amendment could be subject to challenge via judicial review in any court.⁸³ Section 55 added Article 31-C to the constitution, which provided that no law enacted to advance the Directive Principles could be

76. See generally BAXI, COURAGE, CRAFT AND CONTENTION, *supra* note 10; DHAVAN, THE SUPREME COURT OF INDIA AND PARLIAMENTARY SOVEREIGNTY, *supra* note 10; Mate, *Priests in the Temple of Justice*, *supra* note 22; Manoj Mate, *Two Paths to Judicial Power: the Basic Structure Doctrine and Public Interest Litigation in Comparative Perspective*, 12 SAN DIEGO INT’L L.J. 175 (2010) [hereinafter Mate, *Two Paths to Judicial Power*].

77. A.I.R. 1967 S.C. 1643, ¶ 10 (discussing the validity of the Punjab Security of Land Tenures Act of 1953 and the Mysore Land Reforms Act as amended in 1965).

78. A.I.R. 1973 S.C. 1461, ¶ 2 (discussing the validity of the Twenty-Fourth, Twenty-Fifth, and Twenty-Ninth Amendments to the constitution).

79. See Manoj Mate, *State Constitutions and the Basic Structure Doctrine*, 45 COLUM. HUM. RTS. L. REV. 441, 475 (2014) [hereinafter Mate, *State Constitutions and the Basic Structure Doctrine*].

80. Interview with former Supreme Court Justice (SCJ-5); see also Mate, *Priests in the Temple of Justice*, *supra* note 22, at 140–42 (discussing elite support for the assertion and development of the basic structure doctrine); Mate, *State Constitutions and the Basic Structure Doctrine*, *supra* note 79, at 477 (noting that the *Minerva Mills* decision increased the power of the judiciary and lessened the effect of the Emergency rule in eliminating the remaining effects of the Emergency regime); Mate, *Two Paths to Judicial Power*, *supra* note 76, at 186 (asserting that *Minerva Mills* enabled the court to regain some of its power that it had lost to the government during the Emergency rule).

81. *Minerva Mills v. Union of India* (1981) 1 S.C.R. 206, 227–28; see also Mate, *State Constitutions and the Basic Structure Doctrine*, *supra* note 79, at 486 (noting that the court’s success in reasserting the basic structure doctrine led to the restoration of limited government, constitutionalism, and the rule of law).

82. *Minerva Mills*, 1 S.C.R. at 209.

83. See *id.* at 210 (discussing the purpose of Section 4).

challenged as violating the fundamental rights in Articles 14, 19, or 31.⁸⁴

The court invalidated both provisions of the amendment as violations of the basic structure of the constitution.⁸⁵ In its decision, the court held that judicial review was part of the basic structure of the constitution.⁸⁶ Chief Justice Chandrachud's lead opinion also held that the balance between the Directive Principles and the fundamental rights provisions of the constitution was part of the basic structure doctrine.⁸⁷

The court's decision in *Minerva Mills* met with strong approval among elites, such as legal and other commentators in major newspapers. The *Hindu* newspaper issued an editorial stating that the court's judgment had "struck a blow in favour of judicial review," and that to have ruled otherwise "would have been to leave temptation in the way of Parliament to repeat what happened under pressure during the Emergency."⁸⁸ Finally, the *Hindustan Times* also was strongly supportive of the decision and urged Prime Minister Gandhi to accept it.⁸⁹ Although the Gandhi government did attempt to challenge the decision through a review petition filed on September 5, 1980, the government ultimately abandoned its efforts in 1982.⁹⁰

B. An Overview of Patterns and Trends in Judicial Assertiveness: 1977–2007

While the court was arguably activist in the post-Emergency era in key fundamental rights decisions, like *Maneka Gandhi* and *Minerva Mills*, it was *selectively* assertive in politically significant fundamental rights decisions across the overall sample of decisions analyzed in the 1977–2007 period. This section analyzes trends in assertiveness by examining politically significant fundamental rights decisions by the court in the post-Emergency era (1977–2007) (the "rights sample"). The overall trends are summarized in Figure One.

Within the rights sample, the court decided cases involving a broad array of policy and issue areas: economic policy (nine decisions), freedom of speech and the right to information (seven decisions), Emergency cases and criminal justice and due process (five decisions), the basic structure doctrine (five decisions), national security and preventive detention (four decisions), development (three decisions), and immigration (two decisions). Following Kapiszewski's model to measure judicial assertiveness, this project employed the following scoring system for each decision and assigns four labels to differentiate variations in

84. See SATHE, *supra* note 8, at 87 (discussing the constitutional challenges to the Forty-Second Amendment).

85. See *Minerva Mills*, 1 S.C.R. at 206; see also SATHE, *supra* note 8, at 87.

86. *Minerva Mills*, 1 S.C.R. at 216.

87. *Id.* at 209; BAXI, COURAGE, CRAFT AND CONTENTION, *supra* note 10, at 115.

88. See AUSTIN, *supra* note 6, at 503 (noting that the Janata government had defended the validity of the Nationalization Act during the original hearings in *Minerva Mills*. The Janata government had eliminated the right to property from the fundamental rights by enacting the Forty-Fourth Amendment, which made property an "ordinary" right).

89. *Id.* (citing *Hindustan Times*, May 11, 1980).

90. *Id.* at 503–04 n.23.

assertiveness—“strong challenge,” “weak challenge,” “weak endorse,” and “strong endorse.”⁹¹ This scoring system analyzed several factors: the importance of the issue or policy to the regime in power, how the court ruled on the government policy or action; the implications of the decision for the broader exercise of government power and the role of the court, and the actual breakdown of votes and bench strength of the panel that decided the case.⁹²

Within the rights sample, the court was assertive in challenging the government in seventeen out of thirty-three decisions (48.6%) from 1977 to 2007. Although the court was highly assertive in challenging the government in these decisions, it was a *selective* assertiveness. The court was not as assertive in challenging the government in high-salience issue areas such as economic policy, development, and national security policy. In contrast, the court has been relatively more assertive in challenging the government in areas such as basic structure doctrine decisions, free speech and the right to information, and immigration.

91. See KAPISZEWSKI, *supra* note 24, at 7.

92. This section draws from field research and analysis conducted as part of the author's doctoral dissertation. See Mate, *The Variable Power of Courts*, *supra* note 2 (analyzing the extraordinary expansion of the power of the Supreme Court of India from 1977 to 2007 through close study of the court's politically significant decisions in the areas of fundamental rights and governance).

FIGURE 1
Politically Significant Fundamental Rights Decisions by Issue Area
(1977–2007)

Issue	Endorse		Challenge		Total	Percent (%) Assertive*
	Strong	Weak	Weak	Strong		
Economic Policy and Labor	6	0	2	1	9	33.3%
Freedom of Speech, Expression, and Right to Information	1	0	0	6	7	85.7%
Emergency	0	3	1	1	5	40%
Basic Structure and Judicial	1	0	0	4	5	80%
National Security and Terrorism	4	0	0	0	4	0%
Development	3	0	0	0	3	0%
Immigration	0	0	0	2	2	100%
Total	15	3	3	14	35	48.6%

* These figures were arrived at by dividing the number of “strong challenge” and “weak challenge” decisions by the total number of decisions regarding each politically significant fundamental right.

This pattern of selective assertiveness also reflects variation in activism across issue domains and individual decisions involving the fundamental rights provisions in Articles 14, 19, and 21. The court also has been less activist in its decisions upholding the government’s economic and development policies by effectively adopting a “mild” rational basis tier of scrutiny from the 1980s. This doctrine was adopted in *R.K. Garg v. Union of India*⁹³ in 1982 and is presently still employed.⁹⁴ This approach effectively “watered down” the stronger standard of non-arbitrariness in Article 14 that was originally adopted by the court in *Maneka Gandhi*.⁹⁵ Similarly, the court in the past has been less activist in politically significant decisions involving national security and terrorism, immigration policy,

93. (1981) 4 S.C.C 675.

94. See *R.K. Garg*, 4 S.C.C at 676–77 (discussing the latitude of laws relating to economic activities).

95. See *Maneka Gandhi v. Union of India* (1978) 2 S.C.R. 621, 629 (noting that non-arbitrariness and reasonableness are essential to Article 14).

and labor rights.⁹⁶ The following sections closely analyze key decisions to fully illustrate these patterns.

C. Judicial Assertiveness in the 1977–1989 Era

1. Emergency Cases (1977–1989)

In the immediate years following the end of the Emergency, the court was selectively activist and assertive, even in decisions involving challenges to the Gandhi Emergency regime's policies and actions. As Baxi and other scholars have argued, the court's decisions in *Maneka Gandhi*, *In re Special Courts Bill*,⁹⁷ and *Pathak v. Union of India*⁹⁸ were part of the court's attempts to atone for its acquiescence to the Emergency regime.⁹⁹ According to Baxi, “[j]udicial populism was partly an aspect of post-Emergency catharsis. Partly, it was an attempt to refurbish the image of the court tarnished by a few emergency decisions and also an attempt to seek new, historical bases of legitimation of judicial power.”¹⁰⁰

In addition, the court's decisions were also grounded in the justices' own views on the excesses of Emergency rule and the need to restore trust and credibility in government.¹⁰¹ In the *In re Special Courts Bill* decision, the court, under its advisory jurisdiction, evaluated the constitutionality of the proposed Special Courts Bill.¹⁰² The bill proposed the creation of special courts to try offenses committed by high-level government officials during the Emergency period (beginning June 27, 1975) and in the five-month period preceding the declaration of Emergency.¹⁰³ A seven-judge bench held that the proposed bill required changes to survive scrutiny under Article 14 and 21 and also recommended other changes to the bill.

The court held that the proposed classification of Emergency offenses was valid under Article 14 because it was based on a rational classification: that the Emergency offenses as a class were sufficiently different from others to be treated differently given the extraordinary nature of the repression of rights and liberties.¹⁰⁴ The court also held that there was a rational basis for prosecuting that class differently, based on the government's interest in restoring and protecting the “functioning of parliamentary democracy” and institutions of governance through

96. See *infra* Part II, Section D (discussing national security, terrorism, immigration policy, and labor rights in the post-1990 era).

97. (1979) 1 S.C.C. 380.

98. (1978) 2 S.C.C. 50.

99. See BAXI, INDIAN SUPREME COURT, *supra* note 4, at 123 (arguing that the court's exercise of judicial review was motivated by a desire to make up for its acquiescence to the Emergency rule).

100. Baxi, *Taking Suffering Seriously*, *supra* note 4, at 113.

101. *Id.*

102. See *In re Special Courts Bill*, 1 S.C.C. at 394 (noting that the bill was referred to the court's advisory jurisdiction via a presidential reference).

103. *Id.*

104. See *id.* at 429 (noting that the offenses committed during the Emergency rule can be considered in a class by themselves).

speedy prosecution and adjudication of Emergency crimes.¹⁰⁵ However, the court also held that the bill's grouping of individuals alleged to have committed offenses in the five month period preceding the declaration of Emergency with individuals alleged to have committed offenses during the Emergency (between June 27, 1975 and the end of the Emergency on March 21, 1977), was invalid as those pre-Emergency offenses were qualitatively different.¹⁰⁶

Finally, the court identified three defects in the legislation that violated Article 21's due process requirements and proposed changes to save the constitutionality of the legislation.¹⁰⁷ These changes included the provisions in Clause 7 of the bill, which allowed appointment of retired high court judges to special courts and appointment of judges without the concurrence of the chief justice of India.¹⁰⁸ Additionally, Clause 7 lacked a provision allowing "for the transfer of cases from one special court to another."¹⁰⁹ Justice Shinghal dissented in holding that the key provisions of the bill were invalid under Article 143 and under Article 14 and 21 scrutiny.¹¹⁰

Baxi contends that the court's decision was motivated by redemptive and legitimization motives.¹¹¹ While these motives are not explicitly apparent from Chief Justice Chandrachud's majority opinion, they are more obvious in the concurring opinion of Justice Krishna Iyer.¹¹² Justice Iyer thus notes in his concurring opinion in the *In re Special Courts* case:

[A]n Act of this nature, with the major changes mentioned by the Chief Justice to avert collision with Article 21 and with wider coverage to come to terms with Article 14, is long overdue and, if passed into law and enforced peremptorily, may partly salvage the sunken credibility of the general community in democracy-in-action, already demoralised, since Independence, by the perversion of power for oblique purposes as evidenced by periodical parliamentary debates and many Commission

105. *See id.* at 388 (upholding the bill as within the constitutional competence of the government as a separate rationale while focusing on the court's fundamental rights-based scrutiny of the legislation, based on Articles 14 and 21), 382 (holding that the bill is also valid because creating special courts is within the constitutional competence of the government); 394–95 (noting that the court's analysis of the bill is focused on fundamental rights).

106. *See In re Special Courts Bill*, 1 S.C.C. at 382 (holding that people who committed offenses before the Emergency rule period cannot be grouped with people who committed offenses during the Emergency rule).

107. *See id.* at 434–36 (identifying the due process violations caused by defects in the legislation and proposing possible changes that would address such violations).

108. *Id.* at 435.

109. *Id.*

110. *See id.* at 392–93 (Shinghal, J., dissenting) (discussing the invalidity of Clauses 5 and 7 of the bill).

111. *See* BAXI, INDIAN SUPREME COURT, *supra* note 4, at 230 (noting that a major issue for the court in *In re Special Courts Bill* was its need to preserve the values of judicial independence).

112. *See In re Special Courts Bill*, 1 S.C.C. at 390 (Iyer, J., concurring) (mentioning in his concurrence that the court's decision to uphold the Special Courts Bill also may be influenced by such redemptive and legitimization motives).

Reports still gathering dust.¹¹³

Justice Iyer thus acknowledged the need for the court to be pragmatic in light of the nation's experience with the Emergency:

To sum up, the Bill hovers perilously near unconstitutionality (Article 14) in certain respects, but is surely saved by application of pragmatic principles rooted in precedents. Nevertheless, justice to social justice is best done by a permanent statute to deal firmly and promptly with super-political offenders, since these “untouchable” and “unapproachable” power-wielders have become sinister yet constant companions of Development in developing countries. More remains to be done if the right to know and the right to express and expose are to be real and access to remedies available, absent which the rule of law shines in libraries, not among the people.¹¹⁴

In *Pathak*, the court invalidated the Gandhi Emergency regime's passage of the Life Insurance Corporation (LIC) (Modification of Settlement) Act of 1976.¹¹⁵ The act abrogated a 1974 settlement reached between the LIC, a statutory authority established by the central government, and four employee associations, in which the LIC had agreed to pay bonuses to certain classes of employees in accordance with Regulation 58.¹¹⁶ In September 1975, the government passed the Payment of Bonus (Amendment) Ordinance, 1975, which was relied upon to begin a review process to determine whether all of the bonuses awarded in the settlement should be paid out, in light of certain criteria, including wage level and financial circumstances in each case.¹¹⁷ In light of the government's actions, the LIC issued a circular notifying the employee associations that no bonuses would be paid out without the approval of the government.¹¹⁸ In response, the employee associations filed a writ petition in the Calcutta High Court seeking enforcement of the settlement.¹¹⁹ On May 21, 1976, the judge in that case allowed the writ petition and issued a writ of mandamus and prohibition, as requested in the writ, that the LIC pay out the bonuses in the settlement.¹²⁰ In response, the central government enacted the Modification of Settlement Act at issue, abrogating the bonuses.¹²¹

The employee associations thus challenged the Modification of Settlement Act on the grounds that the abrogation of the bonuses violated their property rights under Articles 19 and 31.¹²² Curiously, the Janata regime defended the Emergency

113. *Id.* at 441 (Iyer, J., concurring).

114. *Id.* at 450 (Iyer, J., concurring).

115. (1978) 2 S.C.C. 50.

116. *Id.* at 60–61 (providing for bonuses to certain classes of employees under Regulation 58, which stated that “The Corporation may, subject to such directions as the Central Government may issue, grant non-profit sharing bonus to its employees and the payment thereof, including conditions of eligibility for the bonus, shall be regulated by instructions issued by the Chairman from time to time.”).

117. *Id.* at 62.

118. *Id.*

119. *Id.* at 62–63.

120. *Id.* at 63.

121. *Pathak*, 2 S.C.C. at 63.

122. *See id.* at 64 (discussing the constitutional grounds on which petitioners challenged the

legislation, in part because of financial concerns, given that other groups such as the railroad workers were also demanding bonuses.¹²³ The government also may have thought it could successfully defend the legislation given that the court in a previous case had upheld the government's power to acquire private property in a scheme of nationalization for a public purpose.¹²⁴

The LIC and government asserted two defenses. First, the LIC cited to earlier precedent in claiming that the obligation to pay the bonuses was extinguished because of changed circumstances—that the basis on which the high court “judgment proceeded was fundamentally altered and that rendered the judgment ineffective and not binding on the parties.”¹²⁵ LIC also alleged that the petitioners did not have an absolute right to bonuses because, under Regulation 58, “the grant of annual cash bonus by the LIC was subject to such directions as the central government might issue.”¹²⁶ Finally, the central government also argued that the owed bonuses were not protected under Article 31 based on existing Indian doctrine similar to that of the majority view of this issue in United States, which states that the power of eminent domain can not be exercised with respect to money and choses-in-action.¹²⁷

The majority rejected each of the arguments, ruling that the government's abrogation was not vitiated by the doctrine of changed circumstances.¹²⁸ In rejecting the final two arguments, the court held that the government could not deprive the employees of their bonuses. Both Justices Bhagwati and Iyer thus ruled that the bonuses should be restored on the basis that the petitioners' property rights had been violated.¹²⁹ In reaching this decision, the court relied on an earlier decision holding that money and choses-in-action could not be acquired by the government under Article 31 where such acquisition did not serve a public purpose but only helped augment the financial resources of the state.¹³⁰

act at issue in *Pathak*).

123. See BAXI, INDIAN SUPREME COURT, *supra* note 4, at 176–77 (discussing the government's instruction to the attorney general to defend the emergency legislation).

124. See *Karnataka v. Ranganatha Reddy (Reddy)*, (1978) 1 S.C.R. 641 (upholding the government's power to acquire private property for public purposes, in this case buses owned by a private bus company); see also BAXI, INDIAN SUPREME COURT, *supra* note 4, at 169–73 (discussing the specific holding of *Reddy*—that acquiring private buses during a scheme of nationalization was not considered an acquisition for a public purpose within the meaning of the constitution).

125. *Pathak*, 2 S.C.C. at 66.

126. *Id.* at 68.

127. See *id.* at 72 (addressing government's argument that eminent domain cannot be exercised in respect to money and choses-in-action).

128. See *id.* at 67–82 (rejecting LIC's arguments and declaring the Modification of Settlement Act of 1976 void).

129. See *id.* at 72 (holding that the bonuses were clearly property that is protected by the constitution).

130. See *id.* at 74 (citing *State of M.P. v. Ranojirao Shinde*, (1968) 3 S.C.R. 489; *Bihar v. Kameshwar Singh*, (1952) 1 S.C.R. 889) (refusing to consider concepts from U.S. law and instead analyzing and interpreting the clause on its own terms).

However, as Baxi notes, the court's property-rights based rationale was problematic in light of its earlier decision—just four months earlier—that held that choses-in-action could be acquired by the government under Article 31(2) of the constitution for a public purpose.¹³¹ Baxi suggests that given the broad reading of the term “public purpose” in *Karnataka v. Ranganatha Reddy*¹³² and the court's own social-egalitarian leanings, the court could have easily upheld the impugned act. Alternatively, it could have ruled that the right to bonus was protected as part of the mandate of the Directive Principles.¹³³ However, the latter would have put Justice Iyer in the difficult position of defending the right to bonus based on social-egalitarian principles, when such bonuses were not available to most unorganized laborers and workers.¹³⁴ In a masterstroke of legalistic reasoning, the court effectively held that acquisition of a proprietary interest in the form of unpaid bonuses did not constitute a public purpose under the constitution because the sole purpose of abrogating the bonuses was to increase the revenues of the state, which was not a public purpose.¹³⁵

According to Baxi, the justices' reliance on the property rights protections in Article 19 and 31 to invalidate the Modification of Settlement Act was puzzling, given their social-egalitarian leanings and credentials.¹³⁶ This reliance on property rights was also puzzling given that Articles 19 and 31 were in their “very last days”—Janata Lok Sabha was in the process of enacting the 44th Amendment, which ultimately removed the right to property from Article 19 and demoted it to an “ordinary” right.¹³⁷ Instead of invalidating the Modification of Settlement Act, the court could have been more accommodating by ordering that the Calcutta High Court decision must be enforced and upholding the act.¹³⁸ Given that the settlement provided for bonuses from 1974 and 1977 and that the Modification of Settlement Act was passed in 1976, the bonuses were deprived only for one year, which the government then could have dealt with as part of a more comprehensive national policy on bonuses across all sectors.¹³⁹

Baxi suggests that the court's decision could be explained by a combination of social-egalitarian and legitimation motives, arguing that the court's decision was motivated mainly by a desire to correct an “Emergency excess.”¹⁴⁰ The majority noted that it was dealing with an “unusual piece of legislation” passed during a period “when there could hardly be any effective debate or discussion” on

131. See BAXI, INDIAN SUPREME COURT, *supra* note 4, at 169–73 (discussing *Reddy*).

132. *Karnataka v. Ranganatha Reddy (Reddy)*, (1978) 1 S.C.R. 641, 642–44 (discussing wide range of public purpose).

133. See BAXI, INDIAN SUPREME COURT, *supra* note 4, at 175 (discussing that workers' rights could be recognized as a requirement of the Directive Principles under the constitution).

134. See *id.* (discussing the right to bonus).

135. See *id.* at 174–75 (discussing the holding in *Reddy*).

136. See *id.* at 177 (noting that while it may seem puzzling that the court relied on Articles 19 and 31 in making its decision, it did so to politically legitimize the court).

137. *Id.*

138. *Id.* at 177.

139. BAXI, INDIAN SUPREME COURT, *supra* note 4, at 177.

140. *Id.*

something as important as a “solemn and deliberate” settlement between parties.¹⁴¹ This is further supported by Justice Bhagwati’s opinion, which held that “courts should be ready to rip open such stratagems and devices” that “trench[] upon . . . fundamental rights.”¹⁴² The *Pathak* decision, then, reflected the subordination of legalism and doctrine to legitimation and social-egalitarian motives. As Baxi notes: “Those who urge the Court to adopt neutral principles in constitutional adjudication may take note of the fact, to them unpalatable, that the Court will not easily countenance the loss of its power to do what it thinks is ‘substantive justice’ in some cases.”¹⁴³ According to Baxi, the court’s decision could be explained as part of the “search for political legitimacy by the Court.”¹⁴⁴ Thus, as a result of the court’s decision:

[T]he working classes [were] ensured that the court [was] their ally and would go so far as removing singlehanded what it perceived (perceives) to be an emergency excess. It also [ensured] the salaried classes that their provident fund and annuity deposits [were] safe from legislative ‘gobbling up’. And intellectuals and lawmen [could] scarcely complain when the Court [helped] the Class III and IV employees of the LIC to get their bonus under a settlement.¹⁴⁵

2. Basic Structure Doctrine Decisions (1977–1989)

As noted earlier, the decision in *Minerva Mills* reaffirmed and expanded the basic structure doctrine in one of the most activist and assertive decisions of the court in the post-Emergency era.¹⁴⁶ The court, however, mostly deferred and endorsed the government in the 1980s in basic structure decisions involving challenges to the government’s attempts to create a system of administrative courts. The governments of Indira and Rajiv Gandhi sought to reform the judicial system to create a system of administrative tribunals to deal with the growing number of civil service disputes.¹⁴⁷ During the Emergency, Gandhi’s government enacted the Forty-Second Amendment.¹⁴⁸ Section 46 of the Forty-Second Amendment introduced Article 323A, which authorized Parliament to establish a system of administrative tribunals with jurisdiction to decide civil service

141. *See id.* at 176 (quoting *Pathak v. Union of India* (1978) 2 S.C.C. 50, 59).

142. *See id.* (quoting *Pathak*, 2 S.C.C. at 81).

143. *Id.*

144. *Id.* at 177.

145. BAXI, INDIAN SUPREME COURT, *supra* note 4, at 177–78.

146. *See generally* *Minerva Mills v. Union of India* (1981) 1 S.C.R. 206 (discussing that the petitioners had challenged both the Sick Textiles Nationalization Act and Sections 4 and 55 of the Forty-Second Amendment that restricted judicial review of constitutional amendments and laws furthering the directive principles of state policy). Although the court did not rule on the validity of the Sick Textiles Nationalization Act, it did challenge the Gandhi government by invalidating Sections 4 and 55 of the Forty-Second Amendment. *See generally id.*

147. *See supra* Part II, Section A (discussing the government’s response to the increase in civil service disputes during the Emergency rule).

148. *See* Mate, *Transformation of the Supreme Court of India*, *supra* note 26, at 262–69 (discussing amendments enacted during Emergency rule).

disputes.¹⁴⁹ In addition, Article 323A also barred the jurisdiction of the high courts under Article 226 to adjudicate civil service disputes.¹⁵⁰ A closer look at Article 323B demonstrates that the Gandhi Emergency regime was keen on reigning in the courts through the creation of a parallel system of administrative courts with jurisdiction over key areas such as land reform, industrial and labor disputes, and elections.¹⁵¹

In 1985, the government of Rajiv Gandhi enacted the Administrative Tribunal Act of 1985.¹⁵² The act was challenged via PIL in *S.P. Sampath Kumar v. Union of India* on the grounds that Article 323A violated the basic structure of the constitution by taking away judicial review from the high courts in civil service disputes.¹⁵³ The court built on its earlier activist decision in *Minerva Mills* by holding that judicial review is part of the basic structure of the constitution.¹⁵⁴ But the court ultimately refused to rule on the validity of Article 323A and only scrutinized the validity of the Administrative Tribunal Act.¹⁵⁵ Ultimately, the court upheld the act, holding that judicial review had not been ousted because the tribunals were the functional equivalents of the high courts, as they had the power of judicial review.¹⁵⁶ In addition, the court held that the tribunals were “no less efficacious than” the high courts.¹⁵⁷

However, in order to save the act’s validity, the court reinterpreted the Administrative Tribunal Act. The court ruled that the act’s appointment provisions—giving the executive control over the appointment of the chairman, vice-chairman, and members of the administrative tribunal—were unconstitutional, because judicial independence is a basic and essential feature of the constitution.¹⁵⁸ The court also held that its decision would apply prospectively, thus upholding existing appointments under the act, and that the act would be saved if the government adopted an appointment process in which the government was required to consult with the chief Justice and defer heavily to the chief justice’s recommendations.¹⁵⁹ The government complied with the court’s decisions and

149. See *Kumar v. Union of India*, (1987) 1 S.C.R. 435, 452 (discussing the purpose of 323A).

150. See *id.* at 443 (discussing the exclusion of the high courts under 226).

151. See Mate, *Two Paths to Judicial Power*, *supra* note 76, at 188–89 (discussing administrative tribunals and the basic structure doctrine).

152. SATHE, *supra* note 8, at 305.

153. See (1987) 1 S.C.R. 435, 452 (discussing the constitutional challenges to 323A).

154. See SATHE, *supra* note 8, at 89 (noting that if the tribunals were going to be the equivalent of the high courts, they needed to have similar independence).

155. See *Kumar*, 1 S.C.R. at 445 (discussing the validity of the Administrative Tribunals Act).

156. See SATHE, *supra* note 8, at 89 (noting that the court held that the power of the high court was part of the basic structure of the constitution).

157. *Kumar*, 1 S.C.R. at 444.

158. See *id.* at 447 (holding that the tribunals created by the act are substitutes rather than supplements to the high courts, so they are not appropriate alternative mechanisms).

159. See *id.* at 448 (holding that this judgment will operate prospectively and would not affect the appointments to the offices of vice-chairman and members already made).

made the changes suggested by the court.¹⁶⁰

3. Economic Policy Decisions (1977–1989)

During the 1977–1989 period, the court was highly deferential to the government in challenges to economic policies. This is illustrated by the court’s decision in *R.K. Garg*.¹⁶¹ In that case, the court upheld the Special Bearer Bonds (Immunities and Exemptions) Ordinance Act¹⁶² enacted by the Gandhi Congress regime.¹⁶³ The Special Bearer Bonds Act targeted the problem of “black money” in the black market economy.¹⁶⁴ The act granted immunity from prosecution under the Income Tax Act to individuals who purchased these bonds with black money and forbade any investigation into the source of this money.¹⁶⁵ The petitioner challenged the act on the grounds that the separate treatment of black money investors in the act was arbitrary and violated Article 14.¹⁶⁶

The court endorsed the Special Bearer Bonds Act from a policy standpoint.¹⁶⁷ It ruled that the act’s separate treatment of black money investors did not violate Article 14 arbitrariness on the grounds that the classification had a rational basis in supporting the government’s efforts to channel black money back into the productive sector to promote economic growth.¹⁶⁸ The court ruled that it could not question the morality of particular legislation based on Article 14 and stressed the need for a deferential, rational-basis mode of review when examining government economic policies:

It would be outside the province of the Court to consider if any particular immunity or exemption is necessary or not for the purpose of inducing disclosure of black money. . . . The Court must defer to legislative judgment in matters relating to social and economic policies and must not interfere, unless the exercise of legislative judgment appears to be palpably arbitrary.¹⁶⁹

R.K. Garg was a critical decision in that the court effectively adopted the

160. See The Administrative Tribunals (Amendment) Act, 1986, No. 19, Acts of Parliament 1986 (India) (incorporating the amendments made to the act in compliance with the direction of the court in *Kumar*).

161. 4 S.C.C 675.

162. The Special Bearer Bonds (Immunities and Exemptions) Act, 1981, No. 7, Acts of Parliament, 1981 (India).

163. See *R.K. Garg*, 4 S.C.C at 678–79 (holding that the act did not violate Article 14 of the constitution, because it is not arbitrary and has a reasonable tie to the object of the act).

164. Black money is money earned but not officially reported for tax purposes.

165. See *R.K. Garg*, 4 S.C.C at 678–79 (showing the protections the act gave to those spending black money).

166. See *id.* at 677–78 (discussing the petitioners’ constitutionality challenges).

167. See *id.* at 677 (arguing that the act discriminates against honest taxpayers and therefore violates Article 14).

168. See *id.* at 678 (holding that the purpose of the act is to incentivize those with black money to make it available to the state for productive purposes).

169. *Id.* at 677.

“double standard” approach of applying heightened scrutiny to individual rights cases while applying a rational-basis review to economic policy. The court stated that another equally important rule is that “[l]aws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc.”¹⁷⁰

Although the court was highly deferential to the government in the area of economic policy, the court was assertive in challenging the central government’s policies involving the rights of government employees and pensioners. Another “policy” case, in which the court was primarily driven by social-egalitarian and responsive, support-building motives, was *D.S. Nakara v. Union of India*.¹⁷¹ In *D.S. Nakara*, the non-partisan public interest group Common Cause, an organization committed to improving governance, challenged the government’s adoption of a new, liberalized pension scheme.¹⁷² This scheme only applied to government employees who had retired after March 31, 1979 and was challenged on the grounds that such a cut-off date was arbitrary and violated Article 14.¹⁷³ The scheme also violated the social-egalitarian Directive Principles.¹⁷⁴ The government argued that the classification of pensioners based on their date of retirement was a valid classification for allocating pension benefits, based on a rational principle having a “direct correlation to the object sought to be achieved by the liberalised pension formula.”¹⁷⁵

Writing for a five-justice bench, Justice D.A. Desai invalidated the new policy as arbitrary under Article 14.¹⁷⁶ In evaluating the respective claims, a unanimous majority of the court focused its analysis on Articles 38(i), 39(e), 39(d), 41, and 43(3) of the Directive Principles and the addition of the word “socialist” in the preamble of the constitution, which was added by the Forty-Second Amendment.¹⁷⁷ The court held that the purpose of pensions and other welfare state policies was to eliminate income inequality, and Article 41¹⁷⁸ obligated the state to provide for a decent standard of living, medical aid, and freedom from dependence for the elderly.¹⁷⁹ The court also rejected the government’s contention that it was beyond

170. *Id.* at 676.

171. (1983) 1 S.C.C 305.

172. *See id.* at 311 (questioning the new retirement program).

173. *Id.*

174. *Id.*

175. *Id.* at 319.

176. *See id.* at 331 (holding that the classification is arbitrary). The five justices were Y.V. Chandrachud (C.J.), V.D. Tulzapurkar, D.A. Desai, O. Chinappa Reddy, and Baharul Islam. *Id.*

177. *See D.S. Nakara*, 1 S.C.C at 322–32 (analyzing articles of the Directive Principles).

178. *See* INDIA CONST. art. 41 (“[The] State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.”).

179. *See D.S. Nakara*, 1 S.C.C. at 344. The court held that:

[W]ith the expanding horizons of socio-economic justice, the Socialist Republic and welfare State which we endeavour to set up and largely influenced by the fact that the old men who retired when emoluments were comparatively low and are exposed to vagaries of continuously rising prices, the falling value of the rupee consequent upon inflationary inputs,

the power of the court to unify two classes into one and that invalidating the policy on this basis would go against all existing precedent in the field.¹⁸⁰ In a remarkable passage, Justice D.A. Desai observed:

The last submission, *the absence of precedent need not deter us for a moment*. Every new norm of socio-economic justice, every new measure of social justice commenced for the first time at some point of history. If at that time it is rejected as being without a precedent, the law as an instrument of social engineering would have long since been dead and no tears would have been shed. To be pragmatic is not to be unconstitutional. In its onward march law as an institution ushers in socio-economic justice. In fact, social security in old age commended itself in earlier stages as a moral concept but in course of time it acquired legal connotation. The rules of natural justice owed their origin to ethical and moral code. Is there any doubt that they have become the integral and inseparable parts of rule of law of which any civilised society is proud? . . . And the advancing society converts in course of time moral or ethical code into enforceable legal formulations. Overemphasis on precedent furnishes an insurmountable road-block to the onward march towards promised millennium. An overdose of precedents is the bane of our system which is slowly getting stagnant, stratified and atrophied.¹⁸¹

Justice Desai's opinion reflects the social-egalitarian aspirations codified in the Directive Principles and the social-egalitarian worldviews of many justices on the court.¹⁸² As a result of the court's decision, the central government was ordered to alter its scheme of pension increases so as to increase the central government outlays by at least 510 million rupees.¹⁸³

4. National Security Decisions (1977–1989)

As in the area of economic policy, the court was also deferential to and endorsed the central government's policy in the area of national security in the 1977–1989 period, as illustrated by the court's decision in *A.K. Roy v. Union of*

we are satisfied that by introducing an arbitrary eligibility criterion: 'being in service and retiring subsequent to the specified date' for being eligible for the liberalised pension scheme and thereby dividing a homogeneous class, the classification being not based on any discernible rational principle and having been found wholly unrelated to the objects sought to be achieved by grant of liberalised pension and the eligibility criteria devised being thoroughly arbitrary, we are of the view that the eligibility for liberalised pension scheme of 'being in service on the specified date and retiring subsequent to that date' in impugned memoranda . . . violates Article 14 and is unconstitutional and is struck down.

Id.

180. *See id.* at 329–30 (discussing the reasoning behind unification of classes).

181. *Id.* at 330 (emphasis added).

182. *See id.* at 305 (listing the parties of the case, including the Gandhi regime).

183. *See id.* at 343–44 (examining the financial implications); *see also* *New Trends in Pension Law*, THE ORGANIZER WKLY., Aug. 5, 2012, <http://www.organiser.org/Encyc/2012/7/30/New-Trends-in-Pension-Laws.aspx?NB=&lang=4&m1=&m2=&p1=&p2=&p3=&p4=&PageType=N> (stating that *D.S. Nakara* was a landmark case in upholding the pension right).

India.¹⁸⁴ In *A.K. Roy*, the court upheld the National Security Act enacted by the Gandhi Congress government.¹⁸⁵ The petitioners challenged the law on the grounds that it clearly violated Article 22—governing preventive detention of the constitution—which had been amended by the Forty-Fourth Constitution Amendment Act in 1979.¹⁸⁶ Section 3 of the National Security Act amended Article 22 to require that any law providing for preventive detention of individuals in excess of two months must provide for advisory boards to review whether there is sufficient cause for such detention.¹⁸⁷ Section 3 of the act also provided that “an Advisory Board shall consist of a Chairman and not less than two other members, and the Chairman shall be a serving Judge of the appropriate High Court and the other members shall be serving or retired Judges of any High Court.”¹⁸⁸

The National Security Act, however, allowed for the creation of advisory boards in which only persons qualified to be appointed as a judge of one of the high courts could serve.¹⁸⁹ This requirement effectively removed the safeguard of quasi-judicial review. The government justified this move on technical grounds, based on the “notification” procedure embedded in the law enacting the amendment to Article 22.¹⁹⁰ The Forty-Fourth Constitution Amendment Act of 1978 stipulated that it would come into force when notification was issued, but the Gandhi regime had issued notifications for all provisions except Section 3.¹⁹¹ The Gandhi regime argued that because it had not brought the newly amended Article 22 into force, it did not apply to the National Security Act.¹⁹² The majority upheld the government’s position and ruled that the court could not issue a mandamus to compel the president to bring the amendment into force.¹⁹³

D. Selective Assertiveness: The Post-1990 Era

1. Economic Policy Decisions

The court continued to defer to government economic policies as India

184. (1982) 1 S.C.C. 271.

185. *See id.* at 277 (upholding the act, because a detainee has no constitutional right to appear through an attorney in the proceedings before the advisory board).

186. *See id.* at 300–01, 333 (showing that Article 22 of the constitution allows preventative detention for reasons connected to the security of the state, maintenance of public order, or maintenance of supplies and services essential to the community).

187. *Id.* at 333.

188. *Id.* at 304.

189. *See id.* at 334.

190. *See A.K. Roy*, 1 S.C.C. at 310 (holding that under the Forty-Fourth Amendment the central government must issue a notification in the official gazette stating when a particular provision of the amendment will come into force or that provision will not be effective).

191. *See id.* at 306 (showing that most of the provisions of the Forty-Fourth Amendment were brought into force by notification issued by the central government on June 18, 1979 and August 1, 1979, except for Section 3, which was never brought into force by notification).

192. *See id.* at 307 (showing the different facets of the Gandhi regime’s arguments).

193. *See id.* at 310 (“But we find ourselves unable to intervene in a matter of this nature by issuing a mandamus to the Central Government obligating it to bring the provisions of section 3 into force.”).

adopted economic liberalization reforms in the early 1990s. In 1991, the Indian economy entered a period of economic downturn in which it faced high inflation and declining public sector production and GDP growth.¹⁹⁴ In response, the Congress regime of P.V. Narasimha Rao launched a new economic liberalization policy program that sought to move India from a socialist to an open, market-based economy.¹⁹⁵ The government introduced policies aimed at relaxing government controls and regulations on the private sector, liberalizing licensing regimes across various industries, and promoting privatization of state-owned industries and enterprises.¹⁹⁶ “Several aspects of these policies were challenged in the Supreme Court. . . . In almost all of these cases, the Court upheld and endorsed the governments’ [sic] policies” of economic liberalization.¹⁹⁷

In the area of economic policy and development, the Supreme Court was highly deferential to the central government in decisions in the rights sample. This is illustrated by the court’s decisions reviewing the central government’s economic liberalization and privatization policies in the post-1990 era.¹⁹⁸ In *Delhi Science Forum v. Union of India*, the court adjudicated a challenge to the Rao Congress government’s adoption of the National Telecom Policy.¹⁹⁹ Prior to the adoption of the new policy, the telecom sector had been under government control.²⁰⁰ Under the new policy, the government authorized the granting of licenses to private companies to establish and maintain telecommunication systems nationwide.²⁰¹ The main petitioners in the case were the Delhi Science Forum, a public interest group focusing on issues of science and technology policy, and seven members of Parliament in the Rajya Sabha (the upper house) representing multiple opposition

194. See Atul Kohli, *Politics of Economic Growth in India, 1980-2005: Part II: The 1990s and Beyond*, 41 *ECON. & POL. WKLY.* 1361, 1363 (2006) (discussing the economic crises in India that began in 1990, which led to economic reforms beginning in 1991); see also David B. H. Denoon, *Cycles in Indian Economic Liberalization, 1966—1996*, 31 *COMP. POL.* 43, 53 (1998) (finding that in 1991 there was an inflation rate of 13%, an approximately \$10 billion deficit, and a GDP decline of about 1% and noting that it was the first real economic recession since 1980).

195. See Denoon, *supra* note 194, at 53 (showing that India had three liberalization periods where the government experimented with relaxing controls over trade, finance, and industry).

196. See *id.* (noting that some of the key elements of Rao’s policy package were to drop industrial licensing for most industries and to reduce limitations on investment by large firms).

197. Mate, *Transformation of the Supreme Court of India*, *supra* note 26, at 276 (discussing the line of cases in which the government’s attempts to liberalize the economy were challenged).

198. In 1991 the Congress regime of P.V. Narasimha Rao launched an agenda of economic liberalization reforms that sought to move India from a socialist, or *dirigiste* system, to a more open, market-based economy with less government controls, regulation, and state-owned enterprises. See Denoon, *supra* note 194, at 53–54 (showing that Rao’s policy changes produced a real transformation in the private sector and traded goods and services). The Congress government of Rao introduced policies aimed at relaxing government controls and regulations on the private sector, liberalizing licensing regimes across various industries, and promoting privatization of state-owned industries and enterprises. *Id.*

199. (1996) 2 S.C.C. 405, 405–06.

200. See *id.* at 411–12.

201. *Id.* at 410.

parties, including the center-right Bharatiya Janata Party (BJP).²⁰²

The petitioners challenged the government's policy on two main grounds. First, the petitioners challenged the legality of the policy on the grounds that the government had no authority to part with the privilege granted under the Telegraph Act because the new policy amounted to "an out and out sale of the said privilege."²⁰³ In challenging the legality of the policy, the petitioners also challenged the legality of the tender evaluation procedures adopted by the central government for granting licenses under the National Telecom Policy.²⁰⁴ Although the petitioners did not allege bad faith or *mala fides* in the grant of licenses to private companies, some commentators suggested that the process for granting licenses may have been biased and the Tender Evaluation Committee, which awarded licenses under the new policy, considered factors other than merit.²⁰⁵

Second, petitioners brought a substantive challenge on policy grounds arguing that the telecom liberalization would not serve the interests of consumers or India's national security interests.²⁰⁶ The court upheld the National Telecom Policy and grant of licenses to private companies.²⁰⁷ The majority reiterated the court's earlier ruling in *R.K. Garg* that the court must review economic policies under a deferential standard of rational basis scrutiny and could not question the substantive merits of policies adopted by Parliament:

Courts have their limitations—because these issues rest with the policy-makers for the nation. No direction can be given or is expected from the courts unless while implementing such policies, there is violation or infringement of any of the constitutional or statutory provisions. . . . This Court cannot review and examine as to whether the said policy should have been adopted. Of course, whether there is any legal or constitutional bar in adopting such policy can certainly be examined by the Court.²⁰⁸

In addition, the court reiterated that its scrutiny of administrative decisions under the non-arbitrariness standard of Article 14 must be limited primarily to determining whether such decisions are taken in bad faith, based on irrational or irrelevant considerations, or made without following the prescribed procedures

202. See Arun K. Thiruvengadam & Piyush Joshi, *Judiciaries as Crucial Actors in Southern Regulatory Systems: A Case Study of Indian Telecom Regulation*, in NAVROZ K. DUBASH & BRONWEN MORGAN, *THE RISE OF THE REGULATORY STATE OF THE SOUTH: INFRASTRUCTURE AND DEVELOPMENT IN EMERGING ECONOMIES* 145 (2013) (stating that some of the petitioners were parties within the government and the main petitioner was an NGO); see also *About Us*, DELHI SCI. FORUM, <http://delhiscienceforum.net/about-us.html> (last updated Jan. 12, 2009).

203. *Delhi Sci. Forum*, 2 S.C.C. at 413.

204. *Id.* at 411.

205. Mate, *The Variable Power of Courts*, *supra* note 2, at 72 n.29 (citing SC upholds Govt decision on telecom privatization, *Hindustan Times*, Feb. 19, 1996; Bal Krishna, SC Draws Lakshman Rekha for Courts, *Hindustan Times*, Feb. 25, 1996).

206. *Delhi Sci. Forum*, 2 S.C.C. at 413 (arguing that telecommunications is a sensitive service that should always be in the exclusive control of the central government).

207. See *id.* at 415 (holding that the authority of the central government to grant licenses to private bodies cannot be questioned); Thiruvengadam & Joshi, *supra* note 202, at 145–46.

208. *Delhi Sci. Forum*, 2 S.C.C. at 413.

required under a statute.²⁰⁹ In finding that the government's decision to grant licenses to private telecoms did not violate Article 14, the court again noted the need for deference to the government and administrative bodies:

Under the changed scenarios and circumstances prevailing in the society, courts are not following the rule of judicial self-restraint. But at the same time all decisions which are to be taken by an authority vested with such power cannot be tested and examined by the court. The situation is all the more difficult so far as the commercial contracts are concerned. . . . While granting licenses a statutory authority . . . should have latitude to select the best offers on terms and conditions to be prescribed taking into account the economic and social interest of the nation.²¹⁰

The court also was deferential to subsequent regimes' disinvestment policies. In *BALCO Employees Union v. Union of India*,²¹¹ the court upheld the BJP government's disinvestment in the Bharat Aluminum Corporation (BALCO) and sale of its share in BALCO to a private company, Sterlite.²¹² The BJP government had decided to sell 51% of BALCO to a private company pursuant to a recommendation of the Disinvestment Commission, a non-statutory body established in 1996 by the Janata Dal government of H.D. Deve Gowda.²¹³ Following an open tender offer process conducted with the assistance of an outside "global advisor," Sterlite, as the highest bidder, was selected; the sale was approved by the cabinet and later by both houses of Parliament.²¹⁴ The petitioners in the case were the BALCO Employees' Union and the State of Chhattisgarh, which was where BALCO's mining and production facilities were located.²¹⁵ The disinvestment was originally challenged in Article 32 writ petitions by the BALCO Employees' Union and Dr. B.L. Wadhera,²¹⁶ who had filed a PIL petition, in the Delhi High Court and by another BALCO employee in the Chhattisgarh High Court.²¹⁷

The petitioners in *BALCO* challenged the disinvestment of the company on several grounds. First, the BALCO Employees' Union alleged that the government-owned company had failed to properly consult with the employees of

209. *See id.* at 417–18 (explaining that if a decision is shown to breach these standards, then it has violated the test of Article 14).

210. *Id.* at 418.

211. (2002) 2 S.C.C. 333.

212. *See id.* at 383 (holding that the government's disinvestment in BALCO was valid).

213. *See id.* at 347–50 (describing the process that led to the lawsuit against the disinvestment of BALCO).

214. *See id.* at 348–50.

215. *See id.* at 352 (describing the petitions filed in the case).

216. Dr. Wadhera is a political science professor, scholar, and a frequent filer of PIL writ petitions in the Indian courts. *See id.* at 376 (stating that Wadhera has filed large amount of PIL lawsuits).

217. *See BALCO Employees Union*, 2 S.C.C. at 352–53 (finding that under Article 32 the petitioners have the right to approach the high court).

the company prior to the divestment.²¹⁸ As a result, petitioners argued that the workers' rights to be heard under Articles 14 and 16 prior to and during the divestment process had been violated.²¹⁹ Second, the petitioners argued that the procedure and decision-making process in the divestment of BALCO was not conducted in a just, fair, and reasonable manner.²²⁰ They argued that the process was arbitrary and violated Article 14, because the government had failed to properly take into account the interests and welfare of the employees.²²¹ In support of this latter argument, the petitioners argued that the Divestment Commission originally had recommended providing employees with an equity share in the new private venture to solicit worker participation and the long term success of the enterprise.²²² Third, petitioners alleged the divestment process was flawed because the process was not transparent.²²³

The *BALCO* case also had strong political overtones involving a conflict between the Congress chief minister of Chhattisgarh, Ajit Jogi, and the BJP government.²²⁴ Because the majority of Chhattisgarh was populated by tribal constituencies and BALCO's plant and facilities were located on lands that originally had belonged to local tribes, Jogi sought to politicize the BALCO dispute.²²⁵ Jogi publicly argued that because the BALCO aluminum plant and facilities were located on tribal lands, the government could only sell the enterprise to the state government or to another state-owned corporation.²²⁶ A similar argument was made by the state of Chhattisgarh in their pleadings before the Supreme Court.²²⁷ This argument was based on the court's earlier decision in *Samatha v. State of A.P.*²²⁸ In that case, the Supreme Court held that, pursuant to Section 5 of the Indian Constitution and the Andhra Pradesh Scheduled Areas and Land Transfer Regulation Act of 1959, no land or mining leases in tribal areas

218. *See id.* (arguing that the employees' opinions regarding the divestment should have been heard to protect their interests).

219. *Id.* at 353.

220. *Id.* at 354.

221. *See id.* (arguing that the interests of workers in the industrial sector cannot be undermined, actions cannot be taken to exclude a class of employees, and the government of India has not shown that it considered the possible repercussions on the interests, rights, and status of the workers).

222. *Id.*

223. *See BALCO Employees Union*, 2 S.C.C. at 373.

224. *See generally V. Sridhar, Battle over Balco*, FRONTLINE, Mar. 17–30, 2001, available at <http://www.frontline.in/static/html/fl1806/18060240.htm> (discussing the stiff resistance from workers' unions with the support by Ajit Jogi of the Chhattisgarh government against the private sale of BALCO).

225. *See id.* (stating that members of the Congress Party felt Jogi was making "political capital" out of the issue).

226. *See id.* (arguing that because the land was no longer owned by a public entity, it should be returned to its original owners).

227. *See BALCO Employees Union*, 2 S.C.C. at 373 (contending that because the land was originally tribal land, the land can be used by the public sector but not the private sector).

228. *Id.* (citing *Samatha v. State of A.P.* (1997) 8 S.C.C 191).

could be transferred to non-tribals.²²⁹

The government defended its disinvestment of BALCO on two main grounds. The attorney general first argued that disinvestment in government-owned enterprises was necessary because these enterprises had been performing poorly in terms of profit and their annual rates of return.²³⁰ Second, the government drew on the court's earlier decision in *R.K. Garg* and other decisions in arguing that the "wisdom and advisability of economic policies . . . are not amenable to judicial review."²³¹

The court rejected each of the petitioners' claims and upheld the disinvestment.²³² In its decision, the court reiterated that economic policies must be reviewed under "milder" rational basis scrutiny, following its earlier decisions in *R.K. Garg* and *Delhi Science Forum*. The majority in *BALCO* openly endorsed the need for disinvestment and change in economic policies, observing that:

The policies of the government ought not to remain static. With the change in the economic climate, the wisdom and the manner for the Government to run commercial ventures may require reconsideration. What may have been in the public interest at a point in time may no longer be so.²³³

In addition, the court held that the employees of the BALCO union did not have a right to a hearing prior to the disinvestment of government-owned enterprises.²³⁴ The court further held that the government's decision to disinvest in BALCO had not been shown to be "capricious, arbitrary, illegal or uninformed" and that the process was completely transparent.²³⁵

Significantly, the court dismissed Dr. Wadhera's PIL writ petition on the grounds that he lacked standing to bring a challenge in the case because he was neither an employee of the company nor a prospective bidder.²³⁶ In dismissing Wadhera's petition, the court went on to criticize the abuse of PIL and suggested the need to impose limits on PIL.²³⁷ According to the court, PIL had been originally conceived as a mechanism to safeguard the human rights of the weak and marginalized classes, but, in recent years, "is now tending to become publicity interest litigation or private interest litigation and has a tendency to be counterproductive."²³⁸ The court went on to note that PIL was not meant to be a "pill or panacea for all wrongs" but was "essentially meant to protect basic human

229. *See id.* at 373–74 ("consider[ing] the validity of the grant of mining lease of government land in a scheduled area to the 'non-tribals'").

230. *See id.* at 354 (discussing the poor economic performance of government enterprises).

231. *See id.* at 355–56 (analyzing economic policies through past court decisions).

232. *Id.* at 383.

233. *BALCO Employees Union*, 2 S.C.C at 365.

234. *Id.*

235. *Id.* at 362, 373.

236. *See id.* at 381 (holding that Wadhera did not have standing for his PIL petition).

237. *See id.* at 377.

238. *Id.*

rights of the weak and the disadvantaged.”²³⁹ The court further noted that there have been “increasingly instances of abuse of PIL,” and there is now a “need to re-emphasize the parameters within which PIL can be resorted to by a Petitioner and entertained by the court.”²⁴⁰

Moreover, the court held that PIL was not originally intended to be used as a mechanism for challenging “the financial or economic decisions which are taken by the Government in exercise of their administrative power.”²⁴¹ As a result, the court concluded that “[t]he decision to disinvest and the implementation thereof is purely an administrative decision relating to the economic policy of the State and challenge to the same at the instance of a busybody cannot fall within the parameters of public interest litigation.”²⁴²

2. National Security and Immigration Decisions

In the post-Emergency period, the Supreme Court of India also was highly deferential to government policies in the area of national security. In particular, the court strongly endorsed government anti-terrorism policies in two decisions—*Kartar Singh v. State of Punjab*²⁴³ and *People’s Union for Civil Liberties v. Union of India*.²⁴⁴

In *Kartar Singh*, the court adjudicated a challenge to the validity of the Terrorist and Disruptive Activities Act (TADA).²⁴⁵ TADA was enacted by the Congress government of Rajiv Gandhi in 1985 to deal with the growing threat of the Sikh militant insurgency²⁴⁶ in the Punjab.²⁴⁷ TADA established a draconian preventive detention regime that authorized the government to detain and prosecute suspected terrorists and insurgents in separate TADA courts outside the existing criminal law system.²⁴⁸ TADA thus created an extraordinary legal regime with less procedural safeguards than ordinary criminal law courts.²⁴⁹ The

239. *BALCO Employees Union*, 2 S.C.C. at 377.

240. *Id.*

241. *Id.* at 381.

242. *Id.*

243. (1994) 3 S.C.C. 569.

244. (2003) 4 S.C.C. 399.

245. *See Kartar Singh*, 3 S.C.C. at 614 (noting that the petitioners are challenging TADA and Section 9 of the Code of Criminal Procedure).

246. Also known as the “Khalistan insurgency.” C. Christine Fair, *Diaspora Involvement in Insurgencies: Insights from the Khalistan and Tamil Eelam Movements*, 11 NATIONALISM & ETHNIC POL. 125, 126 (2005).

247. *See AUSTIN*, *supra* note 6, at 510 (stating that TADA was enacted after two Sikhs had murdered Indira Gandhi and Rajiv Gandhi became prime minister). In the early 1980s, militant Sikhs in the Punjab started a movement calling for the creation of a separate Sikh state called Khalistan within the state of Punjab. Fair, *supra* note 246, at 126.

248. *See Kartar Singh*, 3 S.C.C. at 619, 636 (holding that procedural safeguards required under the constitution have been completely denied and that the procedures are oppressive and unreasonable).

249. *See id.* at 636 (stating that the system has been altered to the prejudice of the accused); *see also* UJJWAL KUMAR SINGH, *THE STATE, DEMOCRACY AND ANTI-TERROR LAWS IN INDIA* 28–29 (2007) (discussing what makes TADA an extraordinary law and how it created less

petitioners challenged the constitutionality of TADA on two main grounds: first, Parliament did not have the legislative competency or authority to enact TADA, and second, TADA was invalid because it violated the fundamental rights provisions of the constitution.²⁵⁰ The crux of the petitioners' challenge to the competency of Parliament to enact TADA was a federalism based argument that fighting terrorism fell within the issue of domain of the states, not the central government.²⁵¹

Under the Indian Constitution, which provides for a federal system, the Seventh Schedule delineates the separate and concurrent legislative powers of the central government and state governments.²⁵² List I (The Union List) of the Seventh Schedule contains the list of central government powers, List II (the State List) contains the list of state powers, and List III (The Concurrent List) delineates the areas in which union and state legislatures share concurrent jurisdiction.²⁵³ The petitioners in *Kartar Singh* challenged Parliament's legislative competency to enact TADA on the grounds that this issue fell under the first entry of the State List—public order—and did not fall under either the Union List or Concurrent List, when read in light of Article 246.²⁵⁴

procedural safeguards).

250. See Aditya Swarup, *Terrorism and the Rule of Law: A Case Comment on Kartar Singh v. State of Punjab*, SOC. SCI. RES. NETWORK, Sept. 2007, at 5, available at <http://works.bepress.com/adityaswarup/3> (showing the challenge to the validity of the acts on the grounds that the legislature was not competent to make them and they violated constitutionally protected rights).

251. See *Kartar Singh*, 3 S.C.C. at 626–28 (discussing the makeup of the Indian Constitution and the criminal laws that fall within the domain of the state).

252. See SHRI P.M. BAKSHI, BACKGROUND PAPER ON CONCURRENT POWERS OF LEGISLATION UNDER LIST III OF THE CONSTITUTION, available at <http://lawmin.nic.in/ncrwc/finalreport/v2b3-3.htm> (explaining that Article 245 stipulates that, subject to the Seventh Schedule in the constitution, the central government makes laws for India and each state legislature makes laws for that state.).

253. See *id.* (stating the powers provided to Parliament and the state legislatures under the Seventh Schedule of the constitution).

254. *Kartar Singh*, 3 S.C.C. at 626. Article 246 of the constitution provides as follows:

246. Subject-matter of laws made by Parliament and by the Legislatures of States[—]

(1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the 'Union List').

(2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the 'Concurrent List').

(3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the 'State List').

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included [in a State] notwithstanding that such matter is a matter enumerated in the State List.

INDIA CONST. art. 246.

A three-of-five-justices majority upheld the constitutionality of all provisions of TADA, except Section 22, which was struck down by the court unanimously.²⁵⁵ In its ruling, the majority held that because terrorism posed a grave and serious threat to the sovereignty of the Indian government that transcended state borders, TADA fell within the power of the union government pursuant to the “Defence of India” clause contained in List I.²⁵⁶

One of the most controversial provisions of TADA was Section 15, which provided that confessions made by suspects to police during custodial interrogations were admissible in a court of law.²⁵⁷ However, the court upheld this provision, holding by implication that it did not violate Article 20’s protection against self-incrimination. The court further ruled that the “mere possibility of abuse is not a valid ground to challenge the validity of a statute,”²⁵⁸ and that the rights of the accused were protected by the rules of evidence under the Code of Criminal Procedure.²⁵⁹ The court also ruled that Section 15 did not violate either Article 14 non-arbitrariness or Article 21 due process, because TADA was a special law that delineated a set of procedures for a distinct class of offenses.²⁶⁰

The court attempted to apply some limits on some provisions and imposed procedural safeguards on the TADA regime, including Section 15. The court laid down a series of guidelines to “ensure that the confession obtained in the pre-indictment interrogation by a police officer not lower in rank than a Superintendent of Police is not tainted with any vice but is in strict conformity with the well-recognized and accepted aesthetic principles and fundamental fairness.”²⁶¹ In addition, the court introduced an intent requirement for the offense of “abetment” of a terrorist act in TADA²⁶² and reformed the offense of possession of specified arms and ammunition.²⁶³ In order to save this latter provision from arbitrariness,

255. See *Kartar Singh*, 3 S.C.C. at 711–15 (discussing the findings on different sections of TADA). Section 22 allowed for witness identification of the accused based on a photograph and declared that such identifications would have the same evidentiary value as lineup identifications. *Id.* The court invalidated this provision on the grounds that photographs could be easily doctored or manipulated using modern technology. *Id.* at 711.

256. *Id.* at 633, 712. The clause reads as follows: “1. Defence of India and every part thereof including preparation for defence and all such acts as may be conducive in times of war to its prosecution and after its termination to effective demobilisation.” INDIA CONST. art. 246, sched. 7, list I.

257. See *Kartar Singh*, 3 S.C.C. at 681–82 (discussing the conditions under which confessions to a police officer are admissible in court under Section 15).

258. *Id.* at 674 (citing *Pannalal Binraj v. Union of India* (1957) S.C.R. 233).

259. See *id.* at 678–79 (finding that the constitution and the rules of evidence condemn the conduct of any official in extorting a confession or information under compulsion).

260. See *id.* at 673 (holding that TADA is not unfair, oppressive, or unjust under Articles 14 and 21 because the aggravated nature of the offenses tried under TADA makes the persons tried under it a distinct class of persons, so the procedure for trying them may be different than for ordinary criminals).

261. *Id.* at 682.

262. See *id.* at 644 (“The offence of abetment depends upon the intention of the person who abets, and not upon the act which is actually done by the person whom he abets.”).

263. See *Kartar Singh*, 3 S.C.C. at 759–60 (articulating that possession of arms and ammunition has the same punishment as terrorist activities and to prevent arbitrary application,

the court held that it could only be invoked where possession was connected with use thereof.²⁶⁴ Finally, to provide for some degree of quasi-judicial scrutiny and oversight of TADA, the court issued a directive ordering that the central government constitute special “Review Committees” to review TADA cases initiated by the central government.²⁶⁵ Still, according to leading experts on terrorism law, the court’s decision in *Kartar Singh* overall represented a strong endorsement of the government’s anti-terrorism policies.²⁶⁶

India’s battle against insurgency continued in the post-1990 period against radical terrorist groups based in Kashmir and Pakistan. In October 2001, terrorists attacked the Jammu and Kashmir Assembly building²⁶⁷ and launched twenty-eight suicide attacks in various cities.²⁶⁸ Additionally, within a few months of the terrorist attacks of September 11, 2001, terrorists bombed and attacked the Indian Parliament building in December 2001²⁶⁹ and launched attacks in several other cities nationwide in 2002.²⁷⁰

In response to these attacks, the Bharatiya Janata Party Government enacted the Prevention of Terrorism Act (POTA) in March 2003.²⁷¹ Like TADA, POTA established an extraordinary legal regime with special courts that allowed the central government to bypass procedural safeguards provided under normal criminal law.²⁷² Under POTA, confessions to the police and telephone interceptions

there must be some evidence showing an intention to use the arms and ammunition for terrorist activities).

264. *See id.* at 760 (holding that if the section has to be immune from arbitrariness, then it may only be invoked if there is some evidence to show that the person who held the arms intended to use them for terrorist or disruptive activities or in fact used them for such activities).

265. *Id.* at 683.

266. *See* Y.K. Sabharwal, Chief Justice of India, Supreme Court of India, Meeting the Challenge of Terrorism - Indian Model (Experiments in India), *available at* http://www.supremecourtindia.nic.in/speeches/speeches_2006/terrorism%20paper.pdf (finding that the most significant contribution to the jurisprudence of counterterrorism measures came in *Kartar Singh* and that its’ holding has been integrated into anti-terrorism legislation).

267. YASUHIRO TAKEDA, *Asia*, in *ENCYCLOPEDIA OF MILITARY SCIENCE* 175, 179 (G. Kurt Piehler ed., 2013).

268. *See id.* (describing attacks that terrorists were responsible for committing in 2001); *see also* *People’s Union for Civil Liberties v. Union of India* (2004) 9 S.C.C. 580, 593 (“In the year 2001 there were as many as 28 suicide attacks.”).

269. *See Parliament Suicide Attack Stuns India*, *BBC NEWS* (Dec. 13, 2011, 17:15 GMT), http://news.bbc.co.uk/2/hi/south_asia/1708853.stm (discussing the suicide attack and gunfight in the Indian Parliament).

270. *See Major Terror Attacks in India During Last 25 Years*, *NEWS INT’L*, Oct. 28, 2013, <http://www.thenews.com.pk/Todays-News-2-210676-Major-terror-attacks-in-India-during-last-25-years> (listing multiple attacks that happened across India in 2002).

271. *See* Sabharwal, *supra* note 266 (discussing that the legislature established POTA, because it realized that terrorist organizations have acquired global dimensions as a result of modern communication technology that enables them to easily attack people and that the current criminal justice system was insufficient to deal with terrorist crimes).

272. *See* Aditya Krishnamurthy, *Should India Revamp Its Anti-Terrorism Laws After the July 11 Serial Explosions On Trains In Mumbai?*, *LEGAL SERVS. INDIA*,

were deemed to be valid and admissible evidence.²⁷³ In addition, POTA allowed the government to deny detainees bail for at least one year, and bail could not be granted if the prosecution opposed it and unless the court found the detainee to be innocent.²⁷⁴

In the *Sarbananda Sonowal v. Union of India* (2005) (*Sonowal I*)²⁷⁵ and *Sarbanada Sonowal v. Union of India* (2006) (*Sonowal II*)²⁷⁶ decisions, the court adjudicated the constitutionality of immigration laws and procedures for the processing of migrants from Bangladesh. In *Sonowal I*, the court expressed its strong support for efforts to expeditiously deport illegal Bangladeshi migrants from the state of Assam in order to safeguard the rule of law and effectively prevent insurgency and terrorism.²⁷⁷ The court held that the central government had a duty to prevent any internal disturbance and maintain law and order and that the state of Assam was confronted with “external aggression and internal disturbance” resulting from the “large scale illegal migration of Bangladeshi nationals.”²⁷⁸ The court further held that Article 355 of the Indian Constitution²⁷⁹ required that the central government “take all measures for protection of the State of Assam from such external aggression and internal disturbance as enjoined in Article 355 of the Constitution,”²⁸⁰ and invalidated the Illegal Migrants (Determined by Tribunal) Act (IMDT Act) as violating Article 355 of the constitution.²⁸¹

In *Sonowal II*, the court invalidated a second law, the Foreigners Act, enacted by the Congress government to override the court’s decision in *Sonowal I*.²⁸² Again, this decision reflected the court’s desire to protect the rule of law and state security. As an editorial in *The Tribune* highlighted, the court’s decision reflected the assertion of rule of law values against the political motivations of the central government to preserve its hold on power in Assam:

When the apex court had struck down the IMDT Act precisely for the same reason, the Centre was foolish in incorporating the questionable clause in the Foreigners Act in February. It was guided solely by electoral considerations. It amounted to creating a parallel and cumbersome adjudication system, making almost impossible deportation

http://www.legalserviceindia.com/articles/terror_pota.htm (last visited Oct. 26, 2014) (discussing TADA and POTA and stating that the special courts created under POTA had the discretion to hold trials in private places and could withhold trial records from the public).

273. SINGH, *supra* note 249, at 70.

274. *Id.* at 40.

275. (2005) 5 S.C.C. 665.

276. (2007) 1 S.C.C. 174 (2006).

277. *See Sonowal I*, 5 S.C.C. at 667–68.

278. *Id.* at 666, 668.

279. INDIA CONST. art. 355. Article 355 of the Indian Constitution states as follows: “355. Duty of the Union to protect States against external aggression and internal disturbance[—]It shall be the duty of the Union to protect every State against external aggression and internal disturbance and to ensure that the Government of every State is carried on in accordance with the provisions of this Constitution.” *Id.*

280. *Sonowal I*, 5 S.C.C. at 668.

281. *Id.* at 716.

282. *Sonowal II*, 1 S.C.C. at 197–98.

of foreigners from Assam. The Bench was not impressed by the Centre's stand that it was meant to prevent harassment of Indian citizens, who could otherwise be victimised in the name of detection and deportation of illegal migrants. Small wonder that the Asom Gana Parishad had criticised the Centre and the Assam government for bringing the IMDT Act through the backdoor.

Illegal migration is too serious an issue to be handled callously by the Central and state governments. Needless to say, successive governments at the Centre and in the state have only compounded the menace by their administrative inaction. An unchecked influx across the border can change Assam's demography and cause unrest in the border districts. Not surprisingly, while quashing the IMDT Act last year, the Supreme Court had said that the presence of millions of illegal migrants from Bangladesh is an act of aggression on Assam, which has also contributed to insurgency and serious internal turmoil.²⁸³

The court's assertiveness in the *Sonowal* cases thus reflected the ascendance of the reform regime and the particular understandings of the rule of the justices. Moreover, the *Tribune* editorial was one of several editorials that endorsed the decision, reflecting the Court's alignment with other intellectual elites on this issue.

In *People's Union for Civil Liberties*, the People's Union for Civil Liberties (PUCL), a public interest group, invoked a similar argument as the petitioners in *Kartar Singh*. The petitioners argued that Parliament lacked legislative competence to enact the law, because it fell under the public order entry of the State List, which was within the domain of the states', not the central government's, powers.²⁸⁴ However, a two-justice bench of the court unanimously rejected the petitioner's assertion that "terrorist activity is confined only to State(s) and therefore State(s) only have the competence to enact a legislation."²⁸⁵ Instead, the court accepted the government's contentions that terrorism posed a threat to the "sovereignty and integrity" of the nation and that the extreme threat of terrorism required granting the government extraordinary powers.²⁸⁶ Citing to its earlier decision in *Kartar*

283. *Challenge in Assam: Deport the Illegal Migrant, Protect the Citizen*, THE TRIBUNE (India) Dec. 8, 2006, available at <http://www.tribuneindia.com/2006/20061208/edit.htm#3>.

284. *People's Union for Civil Liberties*, 9 S.C.C. at 591.

285. *Id.* at 591–93.

286. On this point, the court held that the

[f]ight against the overt and covert acts of terrorism is not a regular criminal justice endeavor. Rather, it is defence of our nation and its citizens. It is a challenge to the whole nation and invisible force of Indianness that binds this great nation together. . . . This new breed of menace was hitherto unheard of. Terrorism is definitely a criminal act, but it is much more than mere criminality. Today the government is charged with the duty of protecting the unity, integrity, secularism and sovereignty of India from terrorists, both from outside and within the borders. To face terrorism *we need new approaches, techniques, weapons, expertise and of course new laws*. In the above said circumstances Parliament felt that a new anti-terrorism law is necessary for a better future. This parliamentary resolve is epitomized in POTA.

Id. at 596 (emphasis added).

Singh, the court held that terrorism fell under a “residuary power” that was not defined in the constitution that conferred broad powers on Parliament.²⁸⁷ Also similar to *Kartar Singh*, the court in *People’s Union for Civil Liberties* upheld POTA and issued a strong endorsement of the central government’s anti-terrorism policies.²⁸⁸

3. Basic Structure Decisions

The court in the post-1990 era built on its earlier decision in *Minerva Mills* in asserting that judicial review and judicial independence were part of the basic structure of the constitution.²⁸⁹ In 1994, a three-justice bench in *L. Chandra Kumar v. Union of India* held that a seven-justice constitutional bench should be convened to review the correctness of the earlier decision of the five-justice bench in *S.P. Sampath Kumar* with respect to validity of Article 323A.²⁹⁰ The court overruled *S.P. Sampath Kumar*, holding that Article 323A of the constitution violated the basic structure in that it allowed Parliament to exclude the jurisdiction of high courts under Article 226 over the administrative tribunals and only allowed appeals to the Supreme Court.²⁹¹ The court ruled that the “power of judicial review over legislative action vested in the High Courts under Article 226 and in this Court under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure.”²⁹²

Most recently, a nine-justice bench of the court in *I.R. Coelho v. State of Tamil Nadu*²⁹³ reaffirmed the basic structure doctrine and the court’s earlier decisions in *Minerva Mills* and *Waman Rao v. Union of India*.²⁹⁴ In 1999, an earlier five-justice 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

287. The court held that:

the ambit of the field of legislation with respect to ‘public order’ under Entry 1 in the State List has to be confined to disorders of lesser gravity having an impact within the boundaries of the State. Activities of a more serious nature which threaten the security and integrity of the country as a whole would not be within the legislative field assigned to the States under Entry 1 of the State List but would fall within the ambit of Entry 1 of the Union List relating to defence of India and in any event under the residuary powers conferred on Parliament under Article 248 read with Entry 97 of the Union List.

Id. at 981.

288. *Id.* at 596.

289. See generally *L. Chandra Kumar v. Union of India*, (1997) 3 S.C.C. 261; *I.R. Coelho v. State of Tamil Nadu*, (1999) 7 S.C.C. 580; *Waman Rao v. Union of India*, (1981) 2 S.C.C. 362 (1980).

290. (1997) 3 S.C.C. 261.

291. SATHE, *supra* note 8, at 88–89.

292. *L. Chandra Kumar*, 3 S.C.C. at 301.

293. A.I.R. 2007 S.C. 861.

294. (1981) 2 S.C.C. 362 (1980). In *Waman Rao*, the Supreme Court held that any laws added to the Ninth Schedule after April 24, 1973 could be challenged in court. *Id.* 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. *Id.*

invalidated in court.²⁹⁵ These laws had been added to the schedule by the Thirty-Fourth and Sixty-Sixth Amendments. The bench held that the court's earlier judgment in *Waman Rao* needed to be reconsidered to determine whether a law invalidated by the courts for infringing the fundamental rights could subsequently be included in the Ninth Schedule.²⁹⁶ In order to decide the issue in the case, the five-justice bench referred to a larger bench the question of whether laws declared invalid by courts could subsequently be added to the Ninth Schedule.²⁹⁷

In *Coelho*, the larger nine-justice 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.²⁹⁸ 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.²⁹⁹ The court noted that the original intent of the schedule was to protect only a limited number of laws related to agrarian reform.³⁰⁰ Finally, the decision reaffirmed the court's earlier holding in *Minerva Mills* that the “golden triangle” of Articles 14, 19, and 21 were part of the “touchstone” of the basic structure of the constitution.³⁰¹

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.³⁰² Significantly, the Congress government did not challenge or seek review of the court's decision.³⁰³ In fact, the Congress government and party leaders accepted the judgment's finality, and leaders of the opposition BJP praised the decision³⁰⁴

295. 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.” See *Coelho*, 7 S.C.C at 581–83 (citing *Balmadies Plantations Ltd. v. State of T.N.*, (1972) 2 S.C.C. 133). Similarly, in 1979, Section 2(c) of the West Bengal Land Holding Revenue Act of 1979 was struck down by the Calcutta High Court as being arbitrary and therefore unconstitutional. *Id.*

296. See *Coelho*, 7 S.C.C. at 581–83 (discussing the need for further consideration of the *Waman Rao* decision by a larger bench to reconcile inconsistencies).

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.* (considering the *Waman Rao* decision in order to reconcile whether a regulation violates a fundamental right or whether it amends the Ninth Schedule that damages or destroys the basic structure of the constitution that can be struck down).

301. *Id.*

302. *Coelho*, 7 S.C.C. at 582 (holding that if the amendment's impact affects the basic structure, then the law will not be afforded the Ninth Schedule's protection).

303. See Pathik Gandhi, Note, *Basic Structure and Ordinary Laws (Analysis of the Election Case & the Coelho Case)*, 4 INDIAN J. CONST. L. 47, 69 (2010) (citing the need for legislative reform in the face of the *Coelho* decision, which has to date not occurred yet).

304. See *Govt interest not harmed by SC verdict: Bhardwaj*, OUTLOOK INDIA, Jan. 11,

4. Freedom of Expression Decisions

a. Freedom of Speech and Press Decisions

The court's record in politically significant free speech decisions has been mixed. In the 1980s and 1990s, the court was activist and assertive in some decisions in recognizing that Article 19 provided protections for the freedom of speech and press, but also acknowledged in some decisions that the state could place reasonable restrictions on these rights as provided for in Article 19(2). In *Indian Express v. Union of India*, the court recognized that the freedom of press was a right within Article 19(1)(a) and held that a government levy of a high customs duty on newsprint violated a newspaper company's right to freedom of press under Article 19.³⁰⁵ In *Odyssey Communications Ltd. v. Sanghatana*, the court recognized the right of citizens to show films on Doordarshan, the government-sponsored television channel.³⁰⁶ In *Secretary, Ministry of Info. & Broad. v. Cricket Assoc. of Bengal (Airwaves Case)* the court ruled that private broadcasters have the right to telecast cricket tournaments, but Doordarshan still had exclusive telecasting rights and that Trans World International would have to pay Doordarshan fees for broadcasting each match.³⁰⁷ In reaching this decision, the court held that viewers of matches have a right to information.³⁰⁸

b. Right to Information Decisions

The right to information movement in the 1990s in India eventually found its way into the Supreme Court. In the mid-1990s, the national media and civil society groups played a key role in exposing increasing levels of corruption and criminality in the central government. Following the release of the Vohra Report in 1994,³⁰⁹ highlighting the growing criminalization of Indian politics, a national right to information movement demanded reforms in improving accountability and implementation in government social programs and sought new disclosure regulations for legislative candidates in national and state elections.³¹⁰ In more

2007, available at <http://www.outlookindia.com/news/article/Govt-interest-not-harmed-by-SC-verdict-Bhardwaj/442945> (citing the union law minister's response to the verdict, which included a warning to governments in the country to think twice before including new laws under the Ninth Schedule).

305. (1985) 1 S.C.C. 641.

306. (1988) 3 S.C.C. 410.

307. (1995) 2 S.C.C. 161.

308. *Id.*

309. Krishna K. Tummala, *Combating Corruption: Lessons Out of India*, 10 INT'L PUB. MGMT. R. 1, 42 (2009). In response to public pressure, the Congress government led by P.V.N. Rao appointed a committee headed by N.N. Vohra to investigate government corruption. *Id.* In 1994, the committee issued a report that focused the attention of the nation and, in particular, political and professional elites, on the nexus between criminals, politicians, and bureaucrats in the Indian polity. S. K. RAY, *POLITY AND ECONOMY OF THE UNDERWORLD* 96–97 (2004).

310. Andrew Puddephatt, *Exploring the role of Civil Society in the Formulation and Adoption of Access to Information Laws: The Cases of Bulgaria, India, Mexico, South Africa, and the United Kingdom*, in ACCESS TO INFORMATION WORKING PAPER SERIES, at 22 (World Bank Inst., Learning for Dev. 2009), available at <http://siteresources.worldbank.org/PSGLP/>

recent decisions, the court has played an active role in asserting an expanded right to information in elections.³¹¹

In 1997, the Election Commission of India entered the fray and announced that it would take steps to “break the nexus between crime and politics.”³¹² According to the Election Commission, forty out of the 545 members of Parliament and 700 of the 4,072 members of the legislative assemblies had a criminal background.³¹³ In response to increasing public pressure for reform, the government ordered the Law Commission of India to review the Representation of the People Act of 1951 to “make the electoral process more fair, transparent, and equitable and to reduce the distortions and evils that have crept into the Indian electoral system” and to recommend reform measures.³¹⁴

In May 1999, the Law Commission submitted its 170th report recommending electoral reforms to the Law Ministry.³¹⁵ The Law Commission recommended that candidates convicted of certain criminal offences be barred from contesting seats in the Lok Sabha.³¹⁶ In addition, the report recommended that all candidates for the Lok Sabha be required to disclose criminal records, as well as a statement of the financial assets owned by the candidates and their families.³¹⁷ However, the BJP government failed to take any action in implementing the Law Commission report recommendations.³¹⁸

In 1999, the Association for Democratic Reforms filed a PIL in the Delhi High Court, seeking a direction to implement the recommendations of the Law Commission report, and to order the Election Commission to implement the disclosure requirements.³¹⁹ On November 2, 1999, the Delhi High Court held that citizens had a fundamental right to receive information regarding the criminal activities and financial assets of candidates prior to casting their vote.³²⁰

Resources/WP-Civil-web-RevFin.pdf.

311. See Manoj Mate, *High Courts and Election Law Reform in the United States and India*, 32 B.U. INT'L L.J. 267, 270 (2014) (discussing the reforms for transparency in elections and the recent regulations of mandatory disclosure of electoral candidates).

312. Express News Service, *EC Focus on Crime-Politics Ties*, THE INDIAN EXPRESS, Aug. 21, 1997, <http://archive.indianexpress.com/Storyold/10279/>.

313. *The Unholy Nexus*, THE INDIAN EXPRESS, Aug. 22, 1997, <http://archive.indianexpress.com/Storyold/10370/>.

314. *Union of India v. Ass'n For Democratic Reforms*, (2002) 5 S.C.C. 294, 300.

315. LAW COMMISSION OF INDIA REP. NO. 170 (1999) (regarding the reform of electoral laws), available at <http://www.lawcommissionofindia.nic.in/lc170.htm>.

316. *Id.*

317. *Id.* at §§ 1.4.1.19, 5.1.

318. “[T]he Centre had over the years deliberately not entered the provision in the [Representation of People] Act as per the recommendation [by the Election Commission].” *PIL Seeks Cap on Election Expenses by Parties*, THE HINDU, June 2, 2004, available at <http://www.thehindu.com/todays-paper/tp-national/tp-newdelhi/pil-seeks-cap-on-election-expenses-by-parties/article6073500.ece>.

319. *Id.*

320. *Ass'n. for Democratic Reforms*, 5 S.C.C. at 300 (referring to original writ petition decided by Delhi High Court in 1999).

Accordingly, the Delhi High Court directed the Election Commission to require that candidates for the Lok Sabha and State Legislative Assembly disclose any prior criminal record and a record of financial assets.³²¹ Furthermore, the court ordered the Election Commission to require disclosure of any facts “giving insight to candidate’s competence, capacity and suitability for acting as parliamentarian or legislator including details of his/her educational qualifications” and information that the Election Commission deemed “necessary for judging the capacity and capability of the political party fielding the candidate for election to Parliament or the State Legislature.”³²² The BJP government challenged this decision on appeal in the Supreme Court of India, and the Congress Party intervened in the action.³²³ In the appellate matter, the PUCL also joined the action, filing a PIL writ petition in support of heightened disclosure requirements.³²⁴ The government and Congress Party argued that the high court should not have issued any directions to the Election Commission until the Lok Sabha had enacted amendments to the Representation of Peoples Act of 1951 and Election Commission rules.³²⁵

In *Union of India v. Assoc. for Democratic Reforms*, the Supreme Court of India upheld the decision of the Delhi High Court and, subject to some minor modifications, issued directions to the Election Commission to promulgate revised disclosure requirements.³²⁶ The Supreme Court of India rejected the arguments of the government and the Congress Party and held that the court had the power to issue directions to “fill the vacuum” of legislation “till [sic] such time the legislature steps in to cover the gap or the executive discharges its role.”³²⁷ In June 2002, the Election Commission issued new disclosure requirements in line with the court’s decision.³²⁸

Shortly thereafter, the government enacted the Representation of the People (Third Amendment) Ordinance in August 2002.³²⁹ Section 33B of the act was

321. *Id.* at 300–01.

322. *Id.* at 302–03.

323. *People’s Union for Civil Liberties*, 9 S.C.C. at 580.

324. *Id.* The PUCL thus sought a directive to be issued to the Election Commission (1) to enact measures that require declaration of assets by the candidate for the elections and for such mandatory declaration every year during the tenure as an elected representative as a member of Parliament or member of a legislative assembly and to enact measures that require declaration by the candidate contesting election whether any charge in respect of any offense has been framed against him or her; and (c) to frame such guidelines under Article 141 of the constitution by taking into consideration the 170th report of the Law Commission of India. *See id.*

325. *Id.* at 614.

326. (2002) 5 S.C.C. 294. The court, in modifying the high court’s proposed disclosure requirements, effectively followed the recommendations contained in the Election Commission’s submissions to the court. *Id.* The court thus removed the disclosure requirement of information regarding the capacity and capability of the political parties on the ground that it was up to parties themselves to project capacity and capability directly to the voters. *Id.*

327. *Id.* at 307.

328. *Ruling for reform*, THE HINDU, Mar. 15, 2003, <http://www.thehindu.com/thehindu/2003/03/15/stories/2003031500361000.htm>.

329. The Representation Of The People (Third Amendment) Act, No. 72 of 2002 (2002), available at <http://indiankanoon.org/doc/1955466/>.

directly aimed at overturning the court's earlier decision in *Association for Democratic Reforms* and provided:

Notwithstanding anything contained in any judgment, decree or order of any court or any direction, order or any other instruction issued by the Election Commission, no candidate shall be liable to disclose or furnish any such information, in respect of his election, which is not required to be disclosed or furnished under this Act or the rules made thereunder.³³⁰

The new law also included weaker disclosure requirements. Candidates under this act were not required to disclose cases in which they were either acquitted or discharged of criminal offenses, their assets and liabilities, or their educational qualifications.³³¹ The PUCL filed a PIL shortly thereafter challenging the validity of the act on the grounds that it violated voters' fundamental right under Article 19(1)(a) of the constitution to know the antecedents of a candidate.³³²

In *People's Union for Civil Liberties*, the Supreme Court struck down Section 33B as unconstitutional. The court held that the law was beyond the legislative competence of Parliament and violated the voters' fundamental right to know the antecedents of candidates under Article 19(1)(a).³³³ Significantly, the court acknowledged that the amended act, apart from Section 33B, was a step in the right direction, in that the government did adopt some of the disclosure requirements.³³⁴ The court, however, noted that the legislation did not require disclosure of cases involving cases of acquittal or discharge, assets and liabilities, or educational qualification.³³⁵ Therefore, the court ordered the Election Commission must also require disclosure of these items.³³⁶ In a concession to the government, the court held the Election Commission would be required to revise its previous instructions stipulating that candidates would be disqualified for non-compliance with the disclosure requirements or for filing a false affidavit with the Election Commission.³³⁷ With these changes, the court reissued an order similar to its 2002 decision and again ordered the Election Commission to issue new disclosure guidelines.³³⁸ On March 27, 2003, the Election Commission issued guidelines in

330. *Id.* at ¶ 3.

331. *See generally id.* (stating the general requirements for disclosure).

332. *People's Union for Civil Liberties*, 9 S.C.C. at 421–23.

333. *Id.*

334. *Id.* at 610.

335. *Id.* at 588.

336. *Id.* at 591.

337. The court held that the Election Commission's orders should be reversed on this point because it accepted the government's argument regarding the difficulty of returning Election Commission officers in the field to make determinations as to the integrity of the affidavits submitted by candidates in such a compressed time period. Rajindar Sachar, *Avoid Confrontation*, THE HINDU, Apr. 14, 2003, <http://www.thehindu.com/thehindu/2003/04/14/stories/2003041400441000.htm>. The affidavit could only be challenged after the election in a high court under the new guidelines. *Id.*

338. *Id.*

line with the court's 2003 decision.³³⁹

As illustrated by news editorial coverage, elite opinion leading up to both decisions and following the decisions was universally and strongly supportive of the Delhi High Court and Supreme Court decisions. The *Times of India*, the *Hindu*, the *Indian Express*, the *Hindustan Times*, and the *Statesman* all issued editorials supportive of the recommendations of the Law Commission's 170th report and of both court decisions.³⁴⁰ These leading newspaper editorials praised the court for seeking to promote the rule of law and to rein in government criminality and corruption, reflecting the frustrations of professional and intellectual elites, as well as the middle classes, with political corruption.³⁴¹ Additionally, national public opinion also was firmly behind the court.³⁴² The court secured compliance with its decision and the Election Commission held elections under the new guidelines in state elections in 2003 and national elections in 2004.³⁴³

339. HANDBOOK FOR CANDIDATES APP. VI-B, at 263–67 (Election Commission of India, 2009), available at http://eci.nic.in/eci_main/ElectoralLaws/HandBooks/Handbook_for_Candidates.pdf.

340. See, e.g., Utkarsh Anand, *SC gives electors the right to reject, says there's dire need of negative voting*, THE INDIAN EXPRESS, Sept. 28, 2013, <http://indianexpress.com/article/news-archive/web/sc-gives-electors-the-right-to-reject-says-theres-dire-need-of-negative-voting/>; see also Manoj Mate, *The Variable Power of Courts*, *supra* note 2 (analyzing news editorial coverage of Supreme Court decisions).

341. See, e.g., Jayaprakash Narayan, *Time to Respond to the People*, THE HINDU, Aug. 27, 2002, <http://www.thehindu.com/2002/08/27/stories/2002082701551000.htm>; Op-Ed., *The Voter's Right to Know*, THE HINDU, May 4, 2002, <http://www.thehindu.com/thehindu/2002/05/04/stories/2002050400061000.htm>. Narayan said:

The Supreme Court's verdict in this case is one more instance where the scope of the [Election Commission]'s powers have been widened only because Parliament failed to do the needful. Be that as it may, the verdict and its fallout are only a small step in the task of cleansing the electoral process of criminal elements. Persons with criminal records manage to get elected not because the voters are unaware of their antecedents. They achieve their ends because they manage to terrorise the voters in many instances or appeal to them on narrow sectarian or populist grounds. This being the reality, the task of cleaning the political stable of criminal elements will be possible only when civil society wakes up to the challenge. The Court's directive can, however, aid such efforts.

Id.

342. See Narayan, *supra* note 341 (“Never before during peacetime have people at large been united so strongly on any issue over the past 50 years. Several surveys, opinion polls and ballots showed that an overwhelming majority of the people—95 percent or more—are in favour of full disclosure of criminal records and financial details of candidates.”); see also Jayaprakash Narayan, *A NOTE ON THE REPRESENTATION OF THE PEOPLE'S (AMENDMENT) BILL 2002*, (Lok Satta, Dec. 7, 2012), available at <http://www.loksatta.org/cms/documents/advocacy/ANRPBILL.pdf> (discussing a people's ballot conducted in 2002 that found that over ninety-eight percent of respondents supported disclosure reforms in elections).

343. See, e.g., ELECTION COMMISSION OF INDIA, *STATISTICAL REPORT ON GENERAL ELECTION, 2003 TO THE LEGISLATIVE ASSEMBLY OF CHHATTISGARH (2003)*, available at http://eci.nic.in/eci_main/StatisticalReports/SE_NOV_2003/StatisticalReports_CHH_Nov2003.pdf.

III. EXPLAINING THE SHIFT TOWARD SELECTIVE ACTIVISM AND ASSERTIVENESS: EXISTING PUBLIC LAW THEORIES AND THE INDIAN CASE

In analyzing the court's broader shift toward selective activism and assertiveness in fundamental rights decisions, existing public law theories, such as regime politics, the institutionalist model, and the strategic model, fail to provide a complete account of these dynamics. This section explains how each theory fails to explain fully this shift.

A. Regime Politics

The regime politics theory, or regime politics approach, suggests that judges decide cases in line with and to advance the partisan agenda or policy preferences of the governing coalition that appointed them.³⁴⁴ In explaining judicial decision-making in the United States, the regime politics theory suggests that political majorities advance their agendas through courts by appointing judges who share their political ideology, partisan values, or worldviews.³⁴⁵

Alternative conceptions of the regime politics theory posit that judges decide cases in alignment with national public opinion. Significantly, in his work analyzing civil rights decisions from *Plessy v. Ferguson*³⁴⁶ to *Brown v. Board of Education*,³⁴⁷ Klarman argues that the Supreme Court of the United States' civil rights decisions from the late 1800s to the civil rights era were influenced by the judges' own values, which "generally reflect broader social attitudes," and

344. See, e.g., Jack Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1064–74 (2001) (advancing a theory of partisan entrenchment whereby presidents from each of the two major political parties in the United States appoint judges who share the policy and constitutional values of the dominant party coalition); see also TERRI PERETTI, IN DEFENSE OF A POLITICAL COURT (1999); MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER (2003); Cornell Clayton & David May, *The New Institutionalism and Supreme Court Decision Making: Toward a Political Regimes Approach*, 32 POLITY 233–52 (1999); Cornell Clayton & J. Mitchell Pickerill, *The Politics of Criminal Justice: How the New Right Regime Shaped the Rehnquist Court's Criminal Justice Jurisprudence*, 94 GEO. L.J. 1385 (2006); Robert Dahl, *Decision Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957); Thomas Keck, *Party Politics or Judicial Independence? The Regime Politics Literature Hits the Law Schools*, 32 LAW & SOC. INQUIRY 511 (2007); Marin Shapiro, *Political Jurisprudence*, 52 KY. L.J. 294 (1963).

345. See Balkin & Levinson, *supra* note 344, at 1064–74. Other modern scholarship that advances regime politics approaches includes BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998); MARK A. GRABER, CONSEQUENTIAL COURTS: JUDICIAL ROLES IN GLOBAL PERSPECTIVE 364 (2013) (“[The] regime politics’ theory [] treats judges as mere minions of more powerful governing officials or coalitions.”); RAN HIRSCHL, TOWARD JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004); MARK TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW (2006); Mark A. Graber, *Constructing Judicial Review*, 8 AM. POL. SCI. REV. 425 (2005); Mark A. Graber, *The Non-Majoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. IN AM. POL. DEV. 35 (1993).

346. 163 U.S. 537 (1896).

347. 347 U.S. 483 (1954).

observed that “judges are part of contemporary culture, and they rarely hold views that deviate far from dominant public opinion.”³⁴⁸ Klarman acknowledged that on some issues and in certain contexts, judges’ own worldviews are aligned more with those of elites with higher education and higher levels of income and that judges as a group often embraced pro-civil rights positions decades earlier than the national public.³⁴⁹

According to this conception of the regime politics model, one might have expected the court filled with Gandhi appointees to have resisted the reforms of the Janata period (1977–1989). However, in the post-Emergency Janata years, the Supreme Court launched a new activism, embracing and buttressing the new regime’s commitment to fundamental rights and the Janata regime’s efforts to repudiate and overturn the policies of the Emergency regime.³⁵⁰ Three justices, Justice P.N. Bhagwati, Justice V.R. Krishna Iyer, and Chief Justice Y.V. Chandrachud, played a key role in forging a new activist approach of advancing rights and the development of public interest litigation to advance social justice claims.³⁵¹ The court’s selective activism and assertiveness in the immediate post-Emergency period reflects a rival conception of the regime politics model. According to this alternate model, judges may decide cases in alignment with national public opinion or the political regime in power.³⁵²

Regime politics approaches fail to provide a complete account of the court’s post-1990 selective activism and assertiveness. The court was still selectively assertive in challenging laws and actions of the central government in basic structure cases, immigration policy, and fundamental rights. At the same time, the court did endorse central government policies in the area of economic policy, development, and national security and terrorism policy throughout the 1980s through the 2000s. The court’s decision-making in these cases was not solely influenced by the policy views or partisan agenda of ruling political elites. Instead, the justices of the court held worldviews that were part of, and also influenced by, the prevailing policy worldviews and ideological values of legal-professional and intellectual elites in India.³⁵³

B. The Institutional Model

The institutionalist model may help explain the court’s shift toward activism and selective assertiveness in the 1977–1989 and post-1990 era. According to this model, institutional norms, jurisprudential traditions, and other institutional factors

348. MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY, 5–6 (2004).

349. *Id.*

350. *See* BAXI, INDIAN SUPREME COURT, *supra* note 4, at 121–23.

351. *Id.* at 125.

352. *See, e.g.,* Keck, *supra* note 344; KLARMAN, *supra* note 348.

353. In this sense, elite institutionalism aligns with Klarman’s conception of regime politics, in which judges’ worldviews are influenced by or are in alignment with national public opinion, elite public opinion, or the agenda of the political regime in power. *See* Keck, *supra* note 344; KLARMAN, *supra* note 348 (arguing that the U.S. Supreme Court’s decisions in civil rights cases from *Plessy to Brown* reflected the court’s alignment with public opinion).

help motivate and drive judicial behavior.³⁵⁴

Institutionalist scholarship in public law emphasizes the importance of institutions in both structuring incentives and shaping individual preferences through ideational influence.³⁵⁵ Rogers Smith suggested that institutions should be defined as “relatively enduring patterns of behavior that (1) have arguable importance for human decisions that significantly shape social development and (2) appear subject to meaningful modification through such choices and conflicts.”³⁵⁶ Proponents of the institutionalist model argue that judges are motivated not only by their own policy views and understanding of existing doctrine, but also by their concern for maintaining or strengthening the legitimacy and solidity of courts as institutions and by legal jurisprudence and legal traditions and norms.³⁵⁷ As Gillman suggests, judges “may sometimes view themselves as stewards of particular institutional missions, and this identity generates motivations of duty and professional responsibility not easily incorporated into the view of rational choice.”³⁵⁸

An analysis of the court’s decisions in this era reflects that the court’s activism and assertiveness in decisions like *Maneka Gandhi v. Union of India*³⁵⁹ and *Minerva Mills v. Union of India*³⁶⁰ were driven by the institutional motives of justices, including a desire to rehabilitate institutional legitimacy by building support for the court and to bolster and protect the court’s power. Baxi³⁶¹ and Sathe³⁶² claimed that the court’s activism in *Maneka Gandhi* was part of the court’s attempt to atone for its earlier acquiescence to the Emergency regime in cases like *Jabalpur v. Shivkant Shukla*.³⁶³ In *Shukla*, the court upheld the Emergency regime’s suspension of access to the courts by political detainees through habeas corpus petitions and overturned the decisions of several high courts granting such access.³⁶⁴

354. See generally JEB BARNES, *OVERRULED?: LEGISLATIVE OVERRIDES, PLURALISM, AND CONTEMPORARY COURT-CONGRESS RELATIONS* 64 (2004); Rogers M. Smith, *Political Jurisprudence, The “New Institutionalism,” and the Future of Public Law*, 82 AM. POL. SCI. REV. 89 (1988); Keith Whittington, *Once More unto the Breach: PostBehavioralist Approaches to Judicial Politics*, 25 LAW & SOC. INQUIRY. 601 (2000).

355. Whittington, *supra* note 354, at 615.

356. *Id.* (citing Smith, *supra* note 354, at 91).

357. BARNES, *supra* note 354, at 64.

358. Howard Gillman, *The Court as an Idea, Not a Building (Or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-Making*, in *SUPREME COURT DECISION MAKING: NEW INSTITUTIONALIST APPROACHES* 65, 68–69 (Cornell W. Clayton & Howard Gillman eds., 1999).

359. (1978) 2 S.C.R. 621.

360. (1981) 1 S.C.R. 206 (1980).

361. BAXI, *COURAGE, CRAFT AND CONTENTION*, *supra* note 10, at 75–76, 78; BAXI, *INDIAN SUPREME COURT*, *supra* note 4, at 152–53.

362. SATHE, *supra* note 8, at 88–89.

363. (1976) 2 S.C.C. 521.

364. *Id.*

Indeed, Justices Chandrachud and Bhagwati's motivations to pursue an expansive fundamental rights-based activism reflected the justices' own perception of their professional standing among the bar and political and intellectual elites. This was partly due to the public criticism both justices received during the controversial public debate over the Janata government's decision to find a successor to Chief Justice Beg, who retired in 1978.³⁶⁵ Leading members of the Bombay Bar Association went so far as to pen the "Bombay Memorandum," which publicly criticized Chandrachud and Bhagwati for upholding the constitutionality of the Emergency regime's suspension of habeas corpus in *Shukla*.³⁶⁶

Commenting on the court's activist decision in *Maneka Gandhi*, Baxi observed that:

The Court thus is able to demonstrate that it is as committed to the high constitutional values as those who formed the new government and as the people who voted them into power in the extraordinary Sixth General Elections. The motivation for such demonstration must have been especially strong for the three justices who participated in the Shiv Kant decision: there is thus a certain contextual poignancy concerning the opinions of Justices Beg, Chandrachud and Bhagwati. Any assessment of *Maneka* which ignores this would be flawed to this extent.³⁶⁷

In a later article, Baxi reiterated this argument, noting with respect to the court's activism in *Maneka Gandhi* and other decisions that:

Partly, it was an attempt to refurbish the image of the Court tarnished by a few emergency decisions and also an attempt to seek new, historical bases of legitimation of judicial power. Partly, too, the Court was responding, like all other dominant agencies of governance, to the post-Emergency *euphoria at the return of liberal democracy*.³⁶⁸

Baxi's assessment of the court's activism in *Maneka Gandhi* also suggests that these justices were attuned to the changed political context following the elections of 1977.³⁶⁹

The court's reassertion of the basic structure doctrine in *Minerva Mills* was also driven by institutional motives. The court in *Kesavananda Bharati Sripadagalvaru v. State of Kerala*³⁷⁰ sought to assert and protect judicial power while strategically accommodating the Gandhi Government in overturning its earlier decision in *I.C. Golaknath v. State of Punjab*.³⁷¹ In *Minerva Mills*, the court

365. See Bhagwan D. Dua, *A Study in Executive-Judicial Conflict: The Indian Case*, 23 ASIAN SURVEY 463, 470 (1983) (noting that although Chandrachud had been appointed as the next chief justice, he was still receiving criticism and felt he had to rebuild his credibility), available at <http://ipc498a.files.wordpress.com/2007/04/evisceratingthejudiciary.pdf>.

366. *Id.* at 470–71.

367. BAXI, INDIAN SUPREME COURT, *supra* note 4, at 153.

368. Baxi, *Taking Suffering Seriously*, *supra* note 4, at 113 (emphasis added).

369. *Id.* at 114.

370. A.I.R. 1973 S.C. 1461, 1461.

371. A.I.R. 1967 S.C. 1643.

again sought to consolidate its institutional power by reasserting the basic structure doctrine and invalidating Sections 4 and 55 of the Forty-Second Amendment.³⁷²

In addition, the institutional model offers an account of the court's reassertion of the basic structure doctrine in the *L. Chandra Kumar v. Union of India*³⁷³ and *I.R. Coelho v. State of Tamil Nadu*³⁷⁴ decisions. In both of these decisions, the court sought to bolster and protect its institutional strength and power against the central government's incursions on judicial power. In *L. Chandra Kumar*, the court sought to reassert judicial primacy by invalidating the Administrative Tribunals Act, which had effectively sought to replace the jurisdiction of high courts over appeals from lower administrative tribunals through the creation of special central administrative courts.³⁷⁵ In *Coelho*, the court reasserted the basic structure doctrine in response to the central government's addition of many new laws to the Ninth Schedule of the constitution since the *Kesavananda Bharati Sripadagalvaru* decision in 1973.³⁷⁶ Ramachandran suggested that the court's decision in *Coelho* reflected the court's desire to bolster and protect its jurisdiction and authority in order to protect fundamental rights and constitutionalism.³⁷⁷

C. The Strategic Model

The strategic model offers some insights regarding the activism and selective assertiveness of the court in fundamental rights decisions in the post-Emergency period. As Baxi³⁷⁸ and Dua³⁷⁹ observed, the court in the Emergency period was arguably strategic in deferring to and endorsing the Janata regime's efforts to rectify and prosecute Emergency offenses in the *In re Special Courts Bill* case.³⁸⁰ The court's pragmatic and deferential approach to adjudicating challenges to government economic and national security policies in the 1977–1989 era reflected the primacy of strategic considerations.³⁸¹ In decisions involving challenges to economic policies, the court adopted a new deferential standard in *R.K. Garg v. Union of India*, in which the court announced that it would apply a much “milder” form of rational basis scrutiny to government economic policies.³⁸² Several experts interviewed for this project suggested that the court's adoption and application of a

372. See *Minerva Mills*, 1 S.C.R. at 206.

373. (1997) 3 S.C.C. 261.

374. (1999) 7 S.C.C. 580.

375. See *L. Chandra Kumar*, 3 S.C.C. at 363–66.

376. See *Coelho*, 7 S.C.C. at 582.

377. See Interview by V. Venkatesan with Raju Ramachandran, former Additional Solicitor General of India, 24 FRONTLINE, no. 2, 2007, available at <http://www.frontline.in/static/html/fl2402/stories/20070209004901400.htm>.

378. See BAXI, INDIAN SUPREME COURT, *supra* note 4, at 33 (describing the third phase of the Emergency period).

379. See Dua, *supra* note 365, at 463–65.

380. (1979) 1 S.C.C. 380, 382.

381. See generally BAXI, COURAGE, CRAFT AND CONTENTION, *supra* note 10; Mate, The Variable Power of Courts, *supra* note 2. Consider interviews SA-2, SA-3; SCJ-5.

382. See *R. K. Garg v. Union of India*, (1981) 4 S.C.C. 675, 678.

deferential standard of review in decisions involving economic and development policy cases reflected strategic motivations.³⁸³

The court has reiterated this deferential standard in cases involving the validity of the government's economic liberalization and privatization policies, including *Delhi Science Forum v. Union of India*³⁸⁴ and *BALCO Employees Union v. Union of India*.³⁸⁵ In each of these decisions, the court has invoked earlier doctrine in justifying its application of mild rational basis review, upheld and endorsed government policies, and held that it lacks the jurisdiction and expertise to scrutinize the substantive merits of government policies.

However, as illustrated in the next section, the court's deference in endorsing the central government in the areas of economic policy and national security also reflected the justices' own policy worldviews and beliefs regarding economic reform and the rule of law. In other words, the court's deference in these areas was not driven by the justices' desire to avoid confrontation with the political regime at the center and thus was different from the earlier "strategic retreat" of the court in the 1980s. Indeed, the court went beyond mere deference to issue strong endorsements of the central government's policies of economic reform in these decisions. The court's decisions in these cases reflected the justices' alignment with and support for a broader elite consensus for economic reforms in the post-1990 era. The strategic model thus does not provide insights on the underlying policy values or worldviews of judges that may also drive judicial deference.

IV. ELITE INSTITUTIONALISM: AN EXPLANATORY ACCOUNT

The thesis of elite institutionalism provides the most compelling account of judicial motive with respect to the court's selective activism and assertiveness in the post-Emergency era in fundamental rights cases. It illustrates how both the institutional context and the political, professional, and intellectual elite atmosphere of the court shaped the justices' values and worldviews and also motivated and constrained the judicial decision-making process.³⁸⁶ An examination of the professional and elite atmosphere of courts helps fill an important gap in the regime politics model by looking beyond the views of political elites that are part of the leadership in the party or political regime. It explores how the professional and intellectual elite groups help shape judicial activism and assertiveness.³⁸⁷ Elite

383. See Interview with Supreme Court Advocate No. 3, Supreme Court Justice No. 4 (New Delhi, February 2007); see also Lee Epstein, Jack Knight & Olga Shvetsova, *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 LAW & SOC'Y REV. 117, 155–56 (2001) (arguing that developing and applying a doctrine of rational basis review for certain policy domains is a strategy employed by many constitutional courts around the globe to maintain the legitimacy of the judiciary and avoid interference in difficult policy disputes).

384. (1996) 2 S.C.C. 405.

385. (2002) 2 S.C.C. 333.

386. See *supra* notes 16–17 and accompanying text discussing the meaning of elite institutionalism and factors that shape judicial decision-making in India.

387. See *supra* note 17 and accompanying text discussing examinations of courts in Chile and Israel and the importance of "judicial communities" and other factors in influencing judicial

institutionalism also adds a key variable to existing institutionalist theories. It suggests that the institutional context of judging interacts with the broader intellectual climate and values of political, professional, and intellectual elites to shape judicial activism and assertiveness.³⁸⁸

The legal-institutionalist model suggests one possible answer or explanatory account for this puzzle to this shortcoming on the motivational side. It suggests that institutional norms, legal doctrine and jurisprudential traditions, and other institutional factors help explain why judges decide cases independently of the partisan or policy preferences of the governing regime.³⁸⁹ However, our understanding of how institutional mission or identity shapes judicial activism and assertiveness is still limited. Where judicial activism and assertiveness is motivated by judges' sincere policy worldviews—as opposed to their institutional mission or identity or the partisan or policy agenda of the regime—our understanding of the sources of those worldviews is also poor.³⁹⁰ This is especially true of judicial systems in which the appointment process primarily emphasizes professional criteria and merit and does not heavily weigh the ideological preferences of judges.

In systems where judicial decision-making is more attenuated from the partisan or policy preferences of political regimes, one may need to look further and beyond the traditional liberal-conservative ideological spectrum to fully understand judges' own professional and intellectual identities and worldviews.³⁹¹ A major shortcoming of the institutionalist model, then, is that it does not provide a clear picture of how the institutional context interacts with the judges' broader professional and intellectual elite identity and reference groups in shaping judicial activism and assertiveness.

The regime politics model also fails to provide an account that goes beyond the influence of partisan or political elites in the governing coalition on the court. Put simply, this literature fails to provide us with a complete picture of judges' identities as legal professionals and their source in that community.³⁹² Moreover, existing institutional scholarship does not closely focus on judges' identity as members of the broader political and intellectual elite community of which they regularly interact with and are a part.³⁹³ In particular, the political science literature has failed to completely open up the “black box” of judicial decision-making to enable us to truly understand how judges' identities as legal professionals and elite

decision-making.

388. See *supra* note 16 and accompanying text discussing how activism and assertiveness can most adequately be explained by the factors or variables summarized by the idea of “elite institutionalism.”

389. See *supra* notes 358–61 and accompanying text explaining the institutionalist model.

390. See Mate, *The Variable Power of Courts*, *supra* note 2, at 3.

391. See *supra* notes 350–53 and accompanying text discussing alternative conceptions of regime politics, which posit that judges decide cases in alignment with national public opinion.

392. See *supra* notes 348–356 and accompanying text discussing the regime politics theory.

393. See *id.*

intellectuals affects and shapes their own worldviews.³⁹⁴

A. Elite Institutionalism and Judicial Motives

Existing public law theories fail to examine how the values of national, political, professional, and intellectual elites influence judges' attitudes and role conceptions, as well as the way professional and political elites and the media evaluate assertive high court decisions. According to the thesis of elite institutionalism, the unique institutional environment and intellectual atmosphere of courts shapes the institutional perspectives and policy worldviews that may drive or discourage judicial activism and assertiveness. The identity of judges as members of the Supreme Court and judicial branch and their professional alignment with the court as an institution are sources of the judges' values and motivations. Judicial activism and assertiveness will often be motivated by judges' desire to protect and advance core legal and constitutional values and norms that are central to the function of courts, to bolster the institutional solidity of courts, and to protect and expand the jurisdiction and authority of courts. This is in line with "historical new institutionalist" scholarship that suggests that judges may be motivated by a unique "institutional mission" that flows from their membership and identification with the judicial branch.³⁹⁵ This literature also acknowledges the influence of institutional norms and procedures and existing law and jurisprudence in shaping judicial decision-making. Judicial decision-making can also be shaped and influenced by inherited jurisprudential traditions or "jurisprudential regimes."³⁹⁶ In his influential article on institutionalism, Keith Whittington suggested that "an exploration of the diverse and particular contexts within which the justices operate—from the procedures for setting the docket and deciding cases to the constellations of external interests to the intellectual climate and doctrinal legacy" could help bolster our understandings of how courts operate.³⁹⁷

Elite institutionalism thus supplements and expands upon existing institutionalist theories by situating judicial decision-making within the larger intellectual milieu and political context of high court judging. It seeks to understand how the broader currents of intellectual elite opinion shape judges' policy worldviews and judicial activism and assertiveness. Judges' sense of their institutional mission and judicial role is merely a part of judges' overall intellectual identity and policy worldviews, which high court judges, at least in India, tend to share with other professional and intellectual elites in India.

The thesis of elite institutionalism also seeks to add precision to regime

394. *See id.*

395. *See* Cornell Clayton & Howard Gillman, *Introduction*, in *THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS* 1, 4 (Howard Gillman & Cornell Clayton eds., 1999) (describing new institutionalism); HOWARD GILLMAN, *THE CONSTITUTION BESIEGED* 212 n.28 (1993); Smith, *supra* note 354, at 90.

396. *See* Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 *AM. POL. SCI. REV.* 305, 305 (2002) (arguing that law does affect the votes of U.S. Supreme Court justices and that justices make decisions as though bound by law).

397. *See* Whittington, *supra* note 354, at 629.

politics theory, which has dominated the public law literature in recent decades.³⁹⁸ In the regime politics model, judges act to advance the policy agenda of the governing coalitions or party regimes in power and the regimes or political leaders who appointed them. The thesis of elite institutionalism seeks to broaden regime politics theory by suggesting that judges are not solely responsive to and influenced by the political and legal ideas of the political leaders and parties that appoint and promote them. In addition, judges are also influenced and responsive to the worldviews and opinions of the set of legal and professional elites from which those judges arose and those elites' views of the proper role of judges and courts and the national interest. Given that judges in many political systems tend to be drawn from and remain a part of these elite groups, the judiciary in a polity can be understood as highly responsive to professional and intellectual elite opinion.

Consequently, to understand and explain the complete range and scope of judicial activism and assertiveness, one must go beyond the institutional context and the realm of regime politics to understand the source of judges' policy values. Judicial activism and assertiveness in cases can reflect the judges' own elite policy worldviews, which are a subset of what this article refers to as "elite meta-regimes" on one or more issues or policies.³⁹⁹ Elite meta-regimes refer to the broader consensus of political, professional, and intellectual elites on particular social and policy goals or values. These meta-regimes capture the broader intellectual currents or zeitgeists of professional, intellectual, and political elites in a specific period. This provides a more complete approach to understanding the substantive nature and scope of judicial activism and assertiveness.

The thesis of elite institutionalism may be a strong influence on judicial behavior only under certain conditions. One such condition or factor is the extent or degree to which judges and courts interact with other political, professional, intellectual, and policy elites. This level of interaction may be related to the larger institutional structure or framework of courts, including mechanisms for judicial education, recruitment, appointment, and promotion. Procedural and institutional norms within a court can affect the level of interaction. This may include procedural rules or doctrines that provide greater access to a wider array of policy and interest groups beyond lawyers. It may also include traditions in which judges are more receptive to citing to and relying on extra-judicial sources such as news articles and academic scholarship.⁴⁰⁰ A robust news media can serve as an

398. See Thomas M. Keck, *Symposium on America's Constitution*, 59 SYRACUSE L. REV. 59, 61 (2008) (arguing that the U.S. Constitution was less democratic, because it catered to the liberal values of the framers).

399. See Mate, *The Variable Power of Courts*, *supra* note 2, at 7 (discussing and defining elite meta-regimes).

400. See P.S. ATIYAH & ROBERT S. SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS* 419 (1987) (discussing the inherently social nature of jurisprudence by examining the American and English legal systems).

important mechanism for facilitating the public interaction and broadcast of various elite viewpoints and opinions both to and from courts. Judges may also interact with elites through academic and legal conferences, participation in government commissions, and other public fora.⁴⁰¹

B. Elite Meta-Regimes: From Liberal Restoration to Reform

The unique structure of the Supreme Court of India effectively amplifies the individual worldviews of justices in smaller bench decisions. A lack of uniformity in application of doctrine and precedent has plagued the court, because its unique institutional structure allows for smaller benches of two to three justices to decide politically controversial decisions. Indeed, several scholars have observed that the Indian Supreme Court is actually an amalgamation of “many courts.”⁴⁰² In contrast to larger constitutional benches, judges in smaller bench panels face significantly less legal-doctrinal and institutional constraints and have more freedom to decide cases based on their own elite worldviews and ideologies. Thus, they have more freedom to advance those worldviews and ideologies in the decisions themselves.

During the 1977–1989 era, most benches of the court were influenced by the elite meta-regime of liberal restoration, which reflected the broader consensus of support among elites for restoring fundamental rights, liberal democracy, constitutionalism, and restoration of checks and balances with a strengthened judiciary.⁴⁰³ At the same time, the court in this period was highly deferential to government economic policies and national security policies.

In the post-1990 era, the worldviews of justices were shaped by the ideas and worldviews associated with the meta-regime of reform, which reflected broader elite support for enacting policies of economic reform and development, for protecting the national security interests of the Indian state, and for protecting the rule of law. It should be noted, however, that because of the court’s unique institutional structure, the court’s activism and assertiveness has been uneven; thus, even well into the 1990s, 2000s, and 2010s, some justices continued to express positions and views in alignment with social-egalitarian justice and for strong court intervention to advance the cause of social justice and human rights.

401. This article analyzes the “negative rights” aspects of these rights provisions and does not primarily focus on positive rights, social or cultural rights. The court’s activism and intervention in governance is addressed, including positive rights, in Mate, *The Rise of Judicial Governance*, *supra* note 3. For other scholarship addressing the court’s activism and assertiveness in social and economic rights cases, see generally SHYLASHRI SHANKAR, *SCALING JUSTICE: INDIA’S SUPREME COURT, SOCIAL RIGHTS, AND CIVIL LIBERTIES* (2009); COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD (Varun Gauri & Daniel M. Brinks eds., 2008).

402. See Robinson, *supra* note 13, at 110–11 (explaining that due to the court’s liberal interpretation of its jurisdiction and the flooding of cases, the court’s size has expanded to a total of thirty-one justices).

403. It should be noted here that in social rights and governance cases from 1977 through 1989, the author has previously argued that the court was influenced by the meta-regime of social justice. Mate, *The Rise of Judicial Governance*, *supra* note 3.

1. The Meta-Regime of Liberal Restoration: 1977–1989

The court's activism in landmark cases like *Maneka Gandhi v. Union of India*⁴⁰⁴ and *Minerva Mills v. Union of India*⁴⁰⁵ reflected a confluence of both the justices' own institutional motivations to build support for the court and bolster institutional strength *and* the broader shift in the climate of political, professional, and intellectual elite opinion regarding fundamental rights, limited government, and the need to restore liberal democracy. The traumatic years of Emergency rule followed by the election of the Janata regime fundamentally reshaped national public opinion and awareness regarding the need for limits and checks on executive power to safeguard democracy. This broader shift in the national political ethos affected the views and ideology of political, professional, and intellectual elites, who embraced a restoration of judicial power and fundamental rights.

As India transitioned from Emergency rule to democratic rule under the Janata party coalition, a broad consensus developed among professional and intellectual elites and national public opinion in support of strong judicial review with an expanded court role in protecting fundamental rights, the rule of law, and enforcing limits on Parliament's amending power.⁴⁰⁶ From 1977 to 1989, the court's activism and assertiveness in fundamental rights cases was shaped and influenced by the meta-regime of liberal restoration—a set of principles and commitments to limited government, constitutionalism, democratic rule, separation of powers, judicial review, the protection of fundamental rights, and the maintenance and enforcement of the rule of law.

The regime politics model thus appears to provide a compelling account of the shift in the worldviews of political, professional, and intellectual elites in alignment with the verdict of the 1977 elections. The court's selective activism and assertiveness in fundamental rights cases in the immediate post-Emergency era reflected this broader shift in the political ethos toward an embrace of liberal democracy. The court's recognition of an expansive conception of the right to travel and the right to liberty, a robust conception of due process, and a new doctrine of non-arbitrariness in *Maneka Gandhi* reflected a confluence of institutional and professional-intellectual elite values and worldviews in the post-Emergency era. The court's decisions in *In re Special Courts Bill*⁴⁰⁷ and *Pathak v. Union of India*⁴⁰⁸ reflected the court's strong support of the Janata regime's attempts to prosecute and purge Emergency officials and political leaders.

However, the legal-professional elites in the bar and intellectual elites also

404. (1978) 2 S.C.R. 261.

405. (1981) 1 S.C.R. 206 (1980).

406. See BAXI, INDIAN SUPREME COURT, *supra* note 4, at 121–26; SATHE, *supra* note 8, at 106–07 (discussing the adoption of two strategies by the court: reinterpretation of fundamental rights more liberally and the facilitation of access to the courts).

407. (1979) 1 S.C.C. 380.

408. (1978) 2 S.C.C. 50.

played a key role in increasing pressure on the court to become more activist and assertive. In part, the court's new activism was shaped by the pressures from professional elites in the bar and intellectual elites in the media, who were highly critical in "judging" Justices Chandrachud and Bhagwati for their acquiescence to the Emergency in *Shukla*. In commenting on this public criticism of Chandrachud and Bhagwati in the media and other public statements by the bar and other elites during the Janata years, Baxi observed:

This was the intellectual ethos or communicative field created by sheer force of events in the first year of the new regime; unfortunately it persists even today. It is in this ethos that people were judged: everyone asked the eclectics "what did you do in the emergency?" . . . the justices of the Supreme Court fell victim to this kind of atmosphere.⁴⁰⁹

Indeed, in a public speech delivered during the Janata years, Chandrachud acknowledged that while he still believed he could not have decided *Shukla* in any other way based on the facts and law, he felt that he lacked the courage to resign after the decision.⁴¹⁰ Baxi took note of how the bar and intellectual elites in the media invoked a moral absolutism in condemning Chandrachud, to "depict a cruel caricature of the man and his work."⁴¹¹

Both Baxi and Dua suggested that the criticism of the court by professional and media elites motivated Chandrachud and Justice Bhagwati to adopt a robust and expansive activism in fundamental rights cases, in order to build credibility and support and to "atone" for their acquiescence in *Shukla*.⁴¹² In building this support, Baxi suggested that the court was cognizant of the need to appeal to the concerns of the upper middle classes and intellectual elites, as illustrated by the court's assertion of a right to travel in *Maneka Gandhi*:

Maneka's immediate constituency is the Indian middle classes, particularly those who work with their heads rather than hands. They must feel assured that the Court protects their right to go abroad. And they must appreciate the Court's gesture. But, if we go the Krishna Iyer lane, other groups—the toiling masses of skilled workers—are also assured that the Court cares for them. *Shiv Kant*, they are being told, was an aberration of an exceptional nature. Also, those associated with the

409. BAXI, INDIAN SUPREME COURT, *supra* note 4, at 196.

410. *See id.* at 197–98 (discussing the writings of Justice Chandrachud).

411. *Id.* at 198. The most prominent example of this criticism can be seen in the writing of Arun Shourie, the editor of the *Indian Express* newspaper. *See* ARUN SHOURIE, SYMPTOMS OF FASCISM 308 (1978). Shourie stated:

Thus, we have our "leaders" and our "laws." We have our judges too. Judges represented at the top by a judge who one day upholds the fascist decision of a clique to deny six hundred and fifty million the right to habeas corpus, who the next day wishes he had had the courage to resign rather than pronounce that judgment, who the day after addresses one of the principal culprits of the Emergency [Sanjay Gandhi] again and again as "a very responsible member of society."

Id. (alteration in original).

412. *See* BAXI, INDIAN SUPREME COURT, *supra* note 4, at 196–97; Dua, *supra* note 365, at 469–70 (asserting that the court would strike down any restriction on fundamental rights and personal freedoms).

previous regime are assured that the Court will be zealous to protect their rights. And everyone is generally reminded that the Court is, when all is said and done, the final protector of their liberty.⁴¹³

The court's decision in *Maneka Gandhi* thus reflected the judges' desire to consciously build professional and intellectual elite support and bolster the legitimacy of the judges and the court. Justice Bhagwati adopted an expansive conception of the right to liberty in Article 21 and observed that the right to travel abroad was "a basic human right" as reflected in the Declaration of Human Rights and an important aspect of liberty related to the "spiritual dimension of man."⁴¹⁴ The particular nature of the court's activism in *Maneka Gandhi* also reflected a broader consensus of political, professional, and intellectual elites for a stronger judicial role in safeguarding liberty against executive encroachment. Justice Bhagwati's majority opinion in *Maneka Gandhi* reflected this dynamic. Bhagwati's opinion concluded on an optimistic and hopeful tone:

It is hoped that such cases will not recur under a Government constitutionally committed to uphold freedom and liberty but it is well to remember, at all times, that eternal vigilance is the price of liberty, for history shows that it is always subtle and insidious encroachments made ostensibly for a good cause that imperceptibly but surely [sic] corrode the foundations of liberty.⁴¹⁵

Baxi suggested that the court's activism and selective assertiveness in *Maneka Gandhi*, *In re Special Courts Bill*, and *Pathak* was motivated by the court's desire for institutional redemption and support-building, a direct response to public criticism of Justices Beg, Chandrachud, and Bhagwati for their acquiescence to the Emergency regime in the habeas case.⁴¹⁶ Commenting on the court's activist decision in *Maneka Gandhi*, Upendra Baxi observed:

The Court thus is able to demonstrate that it is as committed to the high constitutional values as those who formed the new government and as the people who voted them into power in the extraordinary Sixth General Elections. The motivation for such demonstration must have been especially strong for the three justices who participated in the *Shiv Kant* decision: there is thus a certain contextual poignancy concerning the opinions of Justices Beg, Chandrachud and Bhagwati. Any assessment of *Maneka* which ignores this would be flawed to this extent.⁴¹⁷

In a later article, Baxi reiterated this argument, commenting on the court's activism in *Maneka Gandhi* and other decisions:

Partly, it was an attempt to refurbish the image of the Court tarnished by a few emergency decisions and also an attempt to seek new, historical bases of legitimation of judicial power [footnote omitted]. Partly, too, the

413. BAXI, INDIAN SUPREME COURT, *supra* note 4, at 165.

414. *See Maneka Gandhi*, 2 S.C.R. at 651, 692.

415. *Id.* at 711.

416. *See* BAXI, INDIAN SUPREME COURT, *supra* note 4, at 152–53.

417. *Id.* at 153.

Court was responding, like all other dominant agencies of governance, to the post-Emergency euphoria at the return of liberal democracy.⁴¹⁸

Baxi's assessment of the court's activism in *Maneka Gandhi* also suggests that these judges were attuned to the changed political context following the elections of 1977.

Indeed, the court's decision in *Minerva Mills* reflected the broader elite and national ethos of support for liberal democracy that resulted in the election of the Janata party regime in 1977. The public debate and legal argumentation surrounding the decision ultimately highlighted a critical shift following the 1977 elections. A new consensus of support for the basic structure doctrine had developed among constitutionalists, conservatives, and even leading political and legal elites within the Congress Party itself.

Significantly, earlier divisions within the legal complex over support for the basic structure doctrine faded away following the end of Emergency rule and the election of the Janata party government. The *Minerva Mills* decision was overwhelmingly welcomed by professional and intellectual elites, reflecting the strong consensus of elite support for the basic structure doctrine.⁴¹⁹

2. The Meta-Regime of Reform: 1991–2007

While the court's selective activism and assertiveness in the 1977–1989 era reflected the political views and beliefs associated with the meta-regime of liberal restoration, in the post-1990 era, the court's selective activism and assertiveness was increasingly influenced by the values associated with the meta-regime of reform. This meta-regime encompassed the emerging consensus of political, professional, and intellectual support for the neo-liberal economic reform policies of liberalization, privatization, and development advanced by successive governments in the post-1990 era. It also reflected a growing consensus of elite and national support for stronger and more effective anti-terrorism policies from the central government.

In the post-1990 era, India underwent two significant transitions. First, there was an overall weakening of the strength of many of India's political institutions—a dynamic that Kohli and other scholars have described as “deinstitutionalization.”⁴²⁰ During this period, India's central government transitioned from the one-party dominance of the Congress Party in the 1980s to a period of greater political fragmentation in which opposition parties and regional parties grew in power.⁴²¹ In this new political environment, judges became increasingly concerned about correcting the governance failures of the state and protecting the rule of law.

418. Baxi, *Taking Suffering Seriously*, *supra* note 4, at 113.

419. See AUSTIN, *supra* note 6, at 503 (discussing and citing a *Hindu Times* news article and its support of the *Minerva Mills* decision).

420. Atul Kohli, *Introduction* to INDIA'S DEMOCRACY: AN ANALYSIS OF CHANGING STATE-SOCIETY RELATIONS 3, 16 (Atul Kohli ed., 1988).

421. See Atul Kohli, *Indian Democracy: Stress and Resilience*, J. DEMOCRACY, Jan. 1992, at 52, 53.

Second, India transitioned from a socialist-statist economy to a liberal, free market economic system in the early 1990s. The Congress regime of P.V. Narasimha Rao launched a series of economic reforms in response to an external payments crisis in 1991 that saw a decline in foreign exchange reserves, rising inflation, a decline in production, and the possibility of India defaulting on its external balance of payments obligations.⁴²² The Janata Dal coalition government of Chandra Shekhar undertook emergency measures to avoid defaulting on external debt payments, borrowing \$1.8 billion from the International Monetary Fund, and an additional \$400 million from the Bank of England in exchange for all of India's gold stocks in the spring of 1991.⁴²³ In 1991, the Congress Party won the most seats in the 1991 election and formed a coalition government.⁴²⁴ Under the leadership of Prime Minister Rao and then-Finance Minister Manmohan Singh, India initiated a series of economic reform initiatives that included liberalization of domestic and foreign private investment, liberalization of international trade, partial or complete privatization of public-sector enterprises, and labor market reforms.⁴²⁵ As illustrated by Tendulkar and Bhavani, the fragmentation of Indian politics in the post-1990 era led to a decline in responsible governance at the center, though the executive branch in several Congress and BJP governments was able to advance an agenda of economic reform and liberalization between 1991 and the present.⁴²⁶

a. Support for Economic Reform Policies

The social-egalitarian worldviews of judges and other professional and intellectual elites gradually faded away in the post-1990 era, as India shifted from socialist-statist to neoliberal free-market policies in the 1990s. The court's decision

422. See SURESH D. TENDULKAR & T.A. BHAVANI, UNDERSTANDING REFORMS: POST 1991 INDIA 80–81, 83–84 (2007).

423. See *id.* at 82.

424. See Kohli, *supra* note 421, at 63 (discussing the results of the 1991 election).

425. TENDULKAR & BHAVANI, *supra* note 422, at 83–84.

426. *Id.* at 81–88. It should be noted that the 1990s were arguably a transitional period in terms of evolving views of elites and judges with respect to economic policy. Judges on the Supreme Court sought to reconcile the tension between the court's earlier socialist jurisprudence based on the constitution's own commitment to socialism in the preamble, see INDIA CONST. pmbl., amended by The Constitution (Forty-Second Amendment) Act, 1976, and directive principles and the shift to policies of neoliberal economic reforms. While the court in some decisions in the 1990s, see *Delhi Sci. Forum v. Union of India* (1996) 2 S.C.C. 405; *BALCO Employees Union v. Union of India*, (2002) 2 S.C.C. 333, evinced support for reform policies, in other decisions, see *Mohini Jain v. State of Karnataka*, (1992) 3 S.C.C. 666; *Unnikrishan v. State of Andhra Pradesh*, (1993) S.C.C. (1) 64; *Samatha v. State of A.P.* (1997) 8 S.C.C. 191, the court was arguably more progressive and socialist in its orientation. See Alexander Fischer, *Which Road to Social Revolution? Liberalization and Constitutional Reform in India*, (Heidelberg Papers in South Asian and Comparative Politics, Working Paper No. 34, 2007), available at http://archiv.ub.uni-heidelberg.de/volltextserver/7950/1/ALEX_HPSACP_20_DEC_07.pdf; see also Vikram Raghavan, *Socialism and Our Constitution*, Law and Other Things Blog, available at <http://lawandotherthings.blogspot.com/2005/11/socialism-and-our-constitution.html>.

in the *Supreme Court Advocates-on-Record Ass'n v. Union of India (Second Judges' Case)*,⁴²⁷ in which the court asserted primacy and final control over judicial appointments in transfers, further reinforced this shift.

In 2006, various legal experts met for a conference entitled "Has the Judiciary Turned its Back on the Poor?"⁴²⁸ The group, comprised of leading senior advocates of the Supreme Court, leaders from NGOs, and policy and public interest groups, discussed whether the ideology and worldviews of the Supreme Court had changed in the 1990s and whether this helped explain the court's decisions in the area of economic policy and development.⁴²⁹

Senior Advocate Prashant Bhushan noted that in the 1990s the justices of the court began to reflect the worldviews and political values of the affluent middle classes and began to appoint justices who shared those views and values:

[In the p]re-1993 era, the judges were appointed by the government that was answerable to the elected house committed to the social cause. But in 1993, a nine-judge bench of the Supreme Court gave a judgment, which took away this power from the executive and giving independent power to a collegium of five judges to do the appointments of new judges. Today, the judiciary itself has appropriated this power The situation of appointments in India is such that the Supreme Court judges would themselves *decide to appoint some like-minded judges who are away from the social philosophy and reality of India*. The judges belong to the most affluent class who has never acquainted themselves with the pain and suffering of the working people. This is also one of the reasons why the Public Interest Litigation concept has taken back stage.⁴³⁰

The court's decisions in several cases that involved challenges to the central government's economic reform policies reflected the justices' own alignment with the broader climate of professional and intellectual elite opinion and the support of these elites for economic reform policies. Significantly, the court strongly endorsed the new policies of the government in *Delhi Science Forum v. Union of India*⁴³¹ and *BALCO Employees Union v. Union of India*.⁴³² In *Delhi Science Forum*, Justice N.P. Singh hailed the government's adoption of telecom liberalization as a historic break from the era of state monopolies and a necessary step for promoting economic growth.⁴³³ Editorials published prior to the court's decision in *Delhi Science Forum* reflected strong professional elite support for the government's

427. (1993) 4 S.C.C. 441.

428. For more information on the conference, see Shanti Bhushan ji, *Has The Judiciary Turned Its Back on the Poor? A Report on the Seminar*, INDIAN SOC'Y FOR INT'L LAW (Nov. 4, 2006), <http://bharatiyas.in/cjarold/files/Has%20the%20judiciary%20turned%20its%20back%20on%20the%20poor.pdf>.

429. *See id.*

430. *Id.* (emphasis added).

431. (1996) 2 S.C.C. 405.

432. (2002) 2 S.C.C. 333; *see* Thiruvengadam & Joshi, *supra* note 202, at 157 (arguing that the Supreme Court has been motivated by the public interest in a regulatory and legal system that upholds rule of law values).

433. *See Delhi Sci. F.*, A.I.R. 1996 S.C. at 1368.

liberalization policies.⁴³⁴ Editorial coverage of the court's decision was uniformly positive.

The government's response to the court's decision was overwhelmingly positive, and most government leaders argued that the decision represented an endorsement of the government's telecom liberalization policies. The court's endorsement of the government's economic policies arguably reflected the justices' own support of the government's economic reform policies. Chief Justice Ahmadi observed in a 1996 speech that "liberalisation was consistent with socialism because equitable distribution first required wealth creation."⁴³⁵ As Karat observed, the "higher judiciary has adapted itself to the new values which are espoused by the dominant sections of society."⁴³⁶

The court's decision in *BALCO* further reflected the influence of the broader elite meta-regime of reform. As illustrated earlier in this chapter, the court in *BALCO* applied the highly deferential rational-basis standard of review for government economic policies first articulated by the court in *R.K. Garg v. Union of India*.⁴³⁷ But Justice Kirpal, in writing the opinion of the court, went further by actually endorsing the underlying government privatization policies in observing:

[T]he policies of the Government ought not to remain static. With the change in economic climate, the wisdom and the manner for the Government to run commercial ventures may require reconsideration. What may have been in the public interest at a point of time may no longer be so. The Government has taken a policy decision that it is in public interest to disinvest in BALCO.⁴³⁸

The court also quoted with approval observations made by the Karnataka High Court in *Prof. Babu Mathew v. Union of India*:⁴³⁹

Any economic reform, including disinvestment in PSEs is intended to shake the system for public good. The intention of disinvestment is to make PSEs more efficient and competitive and perform better. The concept of the public sector and what should be the role of the public sector in the development of the country, are matters of policy closely linked to economic reforms.⁴⁴⁰

As illustrated in the earlier discussion of *BALCO*, the court in that decision also criticized the abuse of PIL as counterproductive and restricted the scope of

434. See Sunil Jain, *Economic Liberalisation: Waiting for a Push*, INDIA TODAY (Jan. 15, 1994), available at <http://indiatoday.intoday.in/story/with-reforms-still-incomplete-further-inacti-on-may-reverse-gains-made-so-far/1/292666.html> (highlighting the need for complete or partial disinvestment in certain public sector units in keeping the reform process on track).

435. Prakash Karat, *Supreme Court In Liberalised Times*, COUNTERCURRENTS.ORG (Aug. 9, 2003), <http://www.countercurrents.org/hr-karat090803.htm>.

436. *Id.*

437. (1981) 4 S.C.C. 675.

438. *BALCO Employees' Union v. Union of India* (2002) 2 S.C.C. 333, 337.

439. *Prof. Babu Mathew v. Union of India* (1997) 90 Comp. Cas. 455 (Kar).

440. *BALCO*, 2 S.C.C. at 370 (quoting *Prof. Babu Mathew*, 90 Comp. Cas. 455).

PIL by articulating a set of advisory parameters.⁴⁴¹ In rejecting the writ petition of B.L. Wadhwa, the court ruled that PIL could not be used by “busybody” litigants to challenge the merits of the central government’s policies.⁴⁴²

The court’s decision in *BALCO* was a critical one in that it reflected a strong endorsement of the BJP government’s policies of privatization. Indeed, then-BJP Law Minister Arun Jaitley, attending a conference on the role of the judiciary in economic reforms, observed that the judgment of the court in the *BALCO* case “has been a turning point, a defining moment and a milestone toward ongoing economic reforms and privatization of public sector undertakings.”⁴⁴³

Senior Advocate and legal expert Prashant Bhushan has also argued that the court’s deference to and endorsement of government economic policies in cases like *BALCO*, *Andolan v. Union of India (Narmada Dam)*,⁴⁴⁴ and *Rangarajan v. Gov’t of Tamil Nadu*,⁴⁴⁵ demonstrates the judges’ broader support for the ideology of economic reforms. In *BALCO*, *Narmada Dam*, and *Rangarajan*, Bhushan argues the court actually restricted the scope of Article 21, which had been expanded in *Maneka Gandhi*, in line with the justices’ worldviews regarding economic reforms.⁴⁴⁶ According to Bhushan:

[T]he court has in fact bought the ideology underlying the economic reforms—an ideology which venerates the virtues of the free market and undermines the role of the state in providing education, jobs, and the basic amenities of life to its citizens. Such an ideology runs counter to the court’s earlier expansive interpretation of Article 21.⁴⁴⁷

Indeed, the court’s decision in *Rangarajan*, in which the court held that employees did not have a right to strike under the constitution, reflected the court’s strong support for the central government’s labor reform policies.⁴⁴⁸ The court in *Rangarajan* and other cases actually helped to advance the government’s labor

441. *Id.* at 376–78.

442. *Id.* at 379.

443. Press Release, Press Info. Bureau of Gov’t of India, Role of Judiciary in Econ. Reforms Now Encouraging, Says Arun Jaitley (Jan. 30, 2002), available at <http://pib.nic.in/archieve/lreng/lyr2002/rjan2002/30012002/r3001200215.html>.

444. (2000) 10 S.C.C. 664 (2001) (holding that the displacement of tribals and others for development purposes would not necessarily result in a violation of their fundamental rights).

445. (2003) 6 S.C.C. 581 (holding that there is no right to strike contained in the fundamental rights of the Indian Constitution).

446. Prashant Bhushan, *Supreme Court and PIL: Changing Perspectives under Liberalisation*, 39 ECON. AND POL. WEEKLY 1770 (2004), available at <http://www.jstor.org/stable/4414951>.

447. *Id.* at 1774.

448. See *Rangarajan*, 6 S.C.C. at 581; see also Bhushan, *supra* note 446, at 1774 (explaining the *Rangarajan* case in detail). See Lloyd I. Rudolph & Susanne Hoeber Rudolph, *Redoing the Constitutional Design: From an Interventionist to a Regulatory State*, in *THE SUCCESS OF INDIA’S DEMOCRACY* (Atul Kohli, ed.) (2001) (“With the launching of economic reform in 1991, a centralized, tutelary, interventionist state whose political and administrative elites were committed to the notion that they knew best and could do best was challenged by an increasingly decentralized regulatory state and market economy whose politicians and entrepreneurs turned to voters, consumers, and investors for ideas and actions.”).

reform agenda. In the post-2000 era, the central government has been unable to pass comprehensive labor market reforms through amendments to the Industrial Disputes Act because of opposition from the Left Front, including the communist parties, which were supporting the United Progressive Alliance and Congress government of Manmohan Singh from the outside.⁴⁴⁹ However, the court, reflecting the broader ethos of reform, has arguably assisted the government in this process by issuing decisions that have undercut the rights of labor and bolstered the rights of employers.⁴⁵⁰ The *Times of India* went on to observe, “[w]hile the government is finding it difficult to change the rigid labour laws, the Supreme Court is slowly moving towards relaxing them in line with contemporary practice . . . in labour market.”⁴⁵¹ In fact, the *Times* in an editorial article observed that the court had “unintentionally paved the way for both PSU [public sector undertakings] and labour market reforms . . . if this happens, the private organized sector is also certain to demand its right to exercise exit option.”⁴⁵² The court’s decision in *Rangarajan* thus reflected the broader views of political and economic elites.

b. The Rule of Law and State Security

A second key component of the elite meta-regime of reform consists of the desire for political, professional, and intellectual elites to protect the rule of law, especially in matters of national security. Several of the court’s decisions in the fundamental rights sample illustrate the justices’ broader commitment to preserving and maintaining the rule of law and the integrity of the state, while at the same time protecting core fundamental rights protections.

For example, the court’s decisions upholding and endorsing the government’s anti-terror laws in *Kartar Singh v. State of Punjab*⁴⁵³ and *People’s Union for Civil Liberties (PUCL) v. Union of India*⁴⁵⁴ while attempting to impose some procedural safeguards reflected the justices’ alignment with the broader concerns of elites, as

449. See TENDULKAR & BHAVANI, *supra* note 422, at 145–46.

450. *Id.* at 148; see also Bhushan, *supra* note 446, at 1774. More recently, justices of the court have been more forthcoming in expressing their own views in support of economic reforms. In 2012, both outgoing Chief Justice S.H. Kapadia and incoming Chief Justice A. Kabir expressed strong support for the Congress government’s announcement of new policies of economic reform in speeches at a conference entitled “Economic Growth and Changes of Corporate Environment in Asia.” See Manoj Joshi and Gyanant Singh, *CJI S.H. Kapadia and CJI-designate Altamas Kabir Praise Prime Minister Manmohan Singh’s Reform Steps*, INDIA TODAY (Sept. 23, 2012), <http://indiatoday.intoday.in/story/cji-sh-kapadia-cji-designate-altamas-kabir-manmohan-singh-economic-reform/1/221820.html>. Both justices noted that these policies were necessary for restoring the confidence of foreign investors and promoting job growth, while stressing the need for “inclusive growth” and development, “humane” labor laws, and “economic democracy.” *Id.*

451. TENDULKAR & BHAVANI, *supra* note 422, at 148 (quoting the TIMES OF INDIA, April 1, 2006).

452. *Id.*

453. (1994) 3 S.C.C. 569.

454. (2003) 4 S.C.C. 299.

reflected in the editorial news coverage of the court's decisions in this area.⁴⁵⁵ For example, several editions in leading newspapers expressed support for extraordinary anti-terror laws with some safeguards.⁴⁵⁶

Former Chief Justice Y.K. Sabharwal, in an article about the Supreme Court and terrorism laws in India, recognized the need for strong anti-terrorism laws and strong judicial safeguards and protections of detainees' rights in order to preserve the rule of law.⁴⁵⁷

Following the terrorist attacks on the Indian Parliament in 2001 that ultimately led to the adoption of POTA, editorials in the leading national newspapers called for the enactment of strong anti-terror legislation that protected the security of the state while also protecting fundamental rights of those prosecuted under POTA. One example of this was an editorial in the *Indian Express*:

This calls for extraordinary vigilance and unity on our part. As Prime Minister Vajpayee in his address to the nation declared, this country will fight a decisive battle against terrorism to the end. The security of the country is too important an issue to be used to score narrow political points, or to serve narrow political ends—as the recent debate on the Prevention of Terrorism Ordinance demonstrated. We certainly need laws that are wise, that are effective in making the nation more secure, and which preserve the values this country stands for and which our Parliament animates.⁴⁵⁸

In its decision to uphold POTA in *PUCL*, the court's opinion reflected the justices' embracement of the values articulated above by recognizing the need for a stronger set of laws and central government powers to combat terrorism in India.⁴⁵⁹ The opinion also reflects the justice's recognition that stronger terrorism laws were in the national interest. For example, the court observed in *PUCL* that the

[f]ight against the overt and covert acts of terrorism is not a regular criminal justice endeavor. Rather, it is defence of our nation and its citizens. It is a challenge to the whole nation and invisible force of Indianness that binds this great nation together To face terrorism we need new approaches, techniques, weapons, expertise and of course new laws. In the abovesaid circumstances Parliament felt that a new anti-terrorism law is necessary for a better future. This parliamentary resolve is epitomized in POTA.⁴⁶⁰

Singh argued that the court's decisions in *Kartar Singh* and *PUCL* reflected not only an extraordinary degree of judicial deference, but a strong endorsement of

455. See *Singh*, 3 S.C.C. at 569 (upholding TADA); *PUCL*, 9 S.C.C. at 580 (upholding POTA).

456. Mate, *The Variable Power of Courts*, *supra* note 2, 91–92, 120–22.

457. *Id.* at 91.

458. Editorial, *Parliament Stands Firm*, THE INDIAN EXPRESS, Dec. 14, 2001, <http://www.mea.gov.in/articles-in-indian-media.htm?dtl/18367/Parliament+stands+firm>.

459. See *PUCL*, 9 S.C.C. at 580 (discussing the necessity for the central government to have the power to declare an organization as a terrorist organization even without a hearing).

460. *Id.* at 596 (emphasis added).

expanded government power in the area of anti-terrorism policy:

Significantly, judicial responses to questions challenging the constitutional validity of anti-terror laws have more often than not been confirmatory of extraordinary laws It is significant that while affirming the constitutional validity of extraordinary laws, as in *PUCL v. Union of India* . . . the Supreme Court has invariably focused on the question of ‘legislative competence’, while *choosing not to interrogate the ‘need’ for such a law on the ground that it was a ‘policy matter’ and hence not subject to judicial review*. In the process, the Supreme Court has expanded the legislative authority of the executive, giving it the overreach by means of which, it transcends the contest over, as expressed earlier, what the *state perceives as necessary power*, and *what the law actually makes available*.⁴⁶¹

The court’s decisions in *Sonowal I* and *II* also reflected the broader concern among some political parties and elites for stronger central government policies for policing immigration in Assam and the northeastern border of India. Both cases dealt with laws enacted by Congress central governments arguably aimed at maintaining the support of the large population of Muslim voters in the state of Assam, many of whom were former Bangladeshi migrants.⁴⁶² However, the justices on both benches were motivated to invalidate both laws on the grounds that they prevented the state of Assam from effectively policing its borders and fighting the growing insurgency and terrorism in that state.

V. CONCLUSION

This article illustrates how the thesis of elite institutionalism provides an account of the selective activism and assertiveness of the Supreme Court of India in politically significant fundamental rights decisions. It does so by closely examining how Indian Supreme Court justices’ worldviews and role conceptions are shaped and influenced by the values of national political, professional, and intellectual elites. The unique institutional environment *and* broader normative and intellectual atmosphere of courts shapes the institutional perspectives and policy worldviews that may drive judicial activism and assertiveness.

From the end of the Emergency in 1977 through the 1980s, the court’s selective activism and assertiveness in fundamental rights reflected the broader meta-regime of liberal restoration, reflecting the broader consensus of support

461. SINGH, *supra* note 249, at 157.

462. In contrast to the court’s deferential decisions in *Kartar Singh* and *PUCL*, the court in the *Sonowal* cases invalidated two central government laws—the IMDT and the Foreigners Act of 2005—that were deemed by the court to be blocking efforts to deport illegal Bangladeshi migrants out of the northeast state of Assam. *Sarbananda Sonowal v. Union of India (Sonowal I)*, (2005) 5 S.C.C. 665; *Sarbananda Sonowal v. Union of India (Sonowal II)*, (2007) 1 S.C.C. 174 (2006). Both laws provided suspected illegal migrants with greater procedural rights under a system of judicial tribunals. *Sonowal I*, 5 S.C.C. 665; *Sonowal II*, 1 S.C.C. 174 (2006). The court’s decisions arguably reflected the justices’ acceptance of *Sonowal*’s (and other groups’) arguments that Bangladeshi migrants posed a threat to the security and demography of Assam. *Sonowal I*, 5 S.C.C. 665; *Sonowal II*, 1 S.C.C. 174 (2006).

among elites for restoring fundamental rights, liberal democracy, constitutionalism, and restoration of checks and balances with a strengthened judiciary. The court's deference to the central government's policies in economic and national security decisions reflected the justices' elite worldviews and perspectives regarding early economic reforms in the 1980s aimed at modernization and broader support, in alignment with broader elite worldviews, for government policies.

In the post-1990 era, the worldviews of judges were shaped by the ideas and worldviews associated with the meta-regime of reform, which reflected broader elite support for policies of economic reform and development protecting the national security interests of the Indian state and protecting the rule of law. As illustrated in this chapter, the court's activism was also variable across issue areas, as the court restricted the scope of the fundamental rights in Articles 14, 19, and 21 in the domains of economic policy and national security. However, it should be noted that because of the court's unique institutional structure, the court's activism and assertiveness has been uneven. Thus, even well into the 1990s, 2000s and 2010s, some justices continued to express positions and views in alignment with social-egalitarian justice, and for strong court intervention to advance the causes of social justice and human rights. Justices appointed in certain eras may thus continue to hold worldviews shaped by their education and socialization in earlier time periods that run counter to or clash with policies of contemporary governments.

Elite institutionalism can bolster existing institutionalist approaches in public law by examining ideational and normative factors that shape judicial worldviews and decision-making. The unique structure of the Supreme Court of India arguably magnifies the influence of individual judges and their particular worldviews and ideology, because many matters are heard in smaller panels of two or three judges. In addition, elite institutionalism can also broaden and add precision to regime politics theory⁴⁶³ by examining how judges are not solely influenced by the political values and ideology of the parties that appoint and promote them. In addition, judges' own worldviews may be shaped, through the process of litigation and constitutional adjudication and intellectual elite discourse, by the worldviews and opinions of the group of legal and professional elites that judges themselves are a part of.⁴⁶⁴ Elite institutionalism seeks to move beyond the institutional context and the realm of regime politics to understand the source of judges' policy values. As discussed in this article, judges' own elite policy worldviews are a subset of what this article refers to as "elite meta-regimes" on one or more issues or policies.⁴⁶⁵ Elite meta-regimes encompass the broader consensus of political, professional, and intellectual elites on particular social and policy goals or values

463. See *supra* note 357 and accompanying text for a discussion of the alignment of elite institutionalism and regime politics.

464. See GADBOIS, *supra* note 20 (discussing the high relative economic and legal backgrounds of Indian Supreme Court justices).

465. See *supra* Part IV, Section B for a discussion on the influence of the elite meta-regime of liberal restoration as it reflected issues supported by the elite.

and capture the broader intellectual currents or zeitgeist of professional, intellectual, and political elites in and across certain time periods.

Elite institutionalism arguably has important normative implications for our understanding of how the scope of fundamental rights can be influenced by factors other than legal precedent, statutory law, and the institutional context and factors that shape judicial worldviews and motives. As illustrated in this article, elite worldviews may shape and influence how fundamental rights are construed, and the scope of rights may vary across issue domains. Additionally, elite institutionalism as a thesis may also provide important insights for understanding the broader nature of law and politics in India and beyond. India's political system, at least at the national level, is dominated by political and media elites. Because the Indian judiciary operates within arguably an even more elite institutional context and discursive framework, the "gap" between judicial decision-making and "mass politics" is significant. Therefore, the result is a judicial system in which legal processes and decisions are aimed at resolving issues and problems in a way that does not reflect the worldviews, and arguably the needs and interests, of the masses.

As Sudipta Kaviraj has argued, contemporary Indian political discourse has suffered from a critical gap between elite discourse and "vernacular" discourse, resulting in a translation gap between discourse about policy-making at the national level and popular discourse more broadly.⁴⁶⁶ Deliberation and policy development in the area of economic policy in India, for example, have largely occurred within and among economists and intellectuals within the executive branch, as has policy-making in other domains like development, environmental policy, and national security. In the domain of law in India, this "translation gap" may be exacerbated, given the elite nature of discourse that frames and influences judging in the Supreme Court and high courts of India.⁴⁶⁷

466. See SUDIPTA KAVIRAJ, *THE IMAGINARY INSTITUTION OF INDIA* 23–34 (2010).

467. See *supra* notes 462–63 and accompanying text for a discussion of the influence of discourse on judges.