

The Variable Power of Courts:
The Expansion of the Power of the Supreme Court of India
in Fundamental Rights and Governance Decisions

By

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Abstract

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This dissertation analyzed the extraordinary expansion of the power of the Supreme Court of India from 1967 to 2007, through close study of the Court's politically significant decisions in the areas of fundamental rights and governance. During this period, the justices of the Supreme Court India shifted toward greater activism in constitutional interpretation, and toward heightened, albeit selective, assertiveness, and greater authority, in challenging the exercise of Central Government power. Referencing existing public law theories, this study sought to provide an explanatory account of this shift by analyzing both the *motives* that drove judicial activism and assertiveness and the *opportunity structure* for judicial power. The interaction of these two factors are examined through close analysis of the Court's decision-making in politically significant rights and governance decisions, through field interviews with retired judges, legal scholars and other experts on the Court, and through analysis of news editorial coverage of these decisions.

To understand the expansion of the power of the Indian Court, this study looks both *within* the Court, highlighting the sources of the judges' institutional values and policy worldviews, and *outside* the Court to understand how the broader political, and professional and intellectual elite environment, both shaped and constrained the assertiveness and authority of the Court. I argue that the Court's shift toward activism, selective assertiveness, and greater authority in rights can most adequately be explained by the thesis of "elite institutionalism." According to the thesis of elite institutionalism, the unique institutional environment and intellectual atmosphere of the Court shapes the institutional perspectives and policy worldviews that drove activism and selective assertiveness in rights and governance decisions.

I found that the identity of judges as members of the Supreme Court and judicial branch, and their professional alignment with the Court as an institution was a source of the judges' values and motivations in key decisions. Indeed, much of the Court's activism and assertiveness was driven by the judges' desire to protect constitutionalism and fundamental rights and the Court's role in protecting both, and later, a drive in the

post-Emergency era to build popular support to bolster the Court's legitimacy. This is in line with "historical new institutionalist" scholarship (e.g. Gillman 1993) that suggests that judges may be motivated by a unique "institutional mission" that flows from their membership and identification with the judicial branch (see Gillman 1993; Keck 2008).

Elite institutionalism, however, differs from existing institutionalist theories by situating judicial decision-making within the larger intellectual milieu and context of Indian judging. I argued in this study that judges' institutional mission or outlook/identity is a subset or part of a judges' overall intellectual identity and worldviews, which judges tend to share with professional and intellectual elites in India. The Indian judiciary—the judges of the Indian Supreme Court and High Courts—reflect the broader ethos of professional and intellectual elite opinion nationally. I contend that the justices of the Court were part of, and influenced by broader elite "meta-regimes"—the collective values or currents of professional and intellectual elite opinion on a set of constitutional or political issues. In the pre-Emergency period, the Court's basic structure doctrine decisions were shaped and influenced by the meta-regime of "constitutionalism." In the area of fundamental rights, shifts in the Court's activism and selective assertiveness in fundamental rights cases in the post-Emergency era (1977-2007) reflected a broader shift from influence of the meta-regime of "liberal democracy" to that of "liberal reform. In the area of governance, I suggest that broader shifts in the Court's activism and selective assertiveness reflected a shift from the meta-regime of social justice, to liberal reform.

The study also illustrates how the thesis of elite institutionalism helps complement and broaden the strategic model of the political opportunity structure. In the post-Emergency era, and in particular, in the post-1990 period, the Court's authority was bolstered by stronger levels of intellectual and professional elite opinion, and national public support. This was because political regimes in the post-1990 era perceived that the Court had higher levels of public support vis-à-vis the Executive and Parliament (as illustrated by elite news coverage of the Court's decisions, and news coverage of public reactions and debate within Parliament and among ministers in the Executive branch). Political regimes in this era were reluctant to attack or resist the Court's assertive judicial decisions in rights and governance cases, because of public support for the Court's relative effectiveness in ameliorating governance failures.

The Court's strong level of authority, then, was not only a result of the weakening of political institutions at the Central Government level. In addition, the Court's authority has been bolstered by the elite media and leaders of the Indian Bar who have played a crucial role in framing and shaping public perception of the Court's activist and assertive decisions. Media elites, and other governance constituencies such as the Bar, policy groups, court-appointed commissions, and opposition parties in the Central Government, have continued to play a crucial role as a powerful ally and advocate for the Court's activism and selective assertiveness in fundamental rights decisions. This is reflected in the strong levels of support in national newspapers' editorial coverage of most of the Court's assertive and deferential decisions in the post-1990 period. The national news media, the Bar, and opposition political parties have thus emerged as "watchdogs" (see Vanberg 2001; Staton 2002) that enable other elites, and the national public to monitor the Central Government's compliance with the Court's decisions in the area of fundamental rights. The thesis of elite institutionalism illustrates how the media

and legal elites, and governance constituencies, can help constrain political actors and bolster the authority of courts, by closely scrutinizing government policies for compliance with the rule of law and constitutional norms.

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Chapter 1

Introduction: Understanding the Expansion of Judicial Power in India

Introduction

Over the past century, constitutional courts have expanded their power across different polities around the world. The judicialization of governance is now well-recognized as a global phenomenon, as many constitutional courts worldwide have transitioned from institutions of dispute resolution, to active and assertive participants in governance and policy-making (see e.g. Tate and Vallinder 1995; Shapiro 1999; Shapiro and Stone Sweet 2002). The expansion of the power¹ of constitutional courts has varied across different polities, that is, with significant variation in the levels of *judicial activism* in interpreting constitutional texts, in *judicial assertiveness* in challenging political regimes, and in the relative *authority of courts* vis-à-vis the elected branches of government.

How do we explain variation in these dimensions of judicial power across different polities? What drives courts to become more activist and assertive in challenging governments? And where courts are assertive, what enables them to exert authority to secure compliance from governments with their assertive decisions? Within the political science literature, scholars have sought to understand the conditions under which courts are able to successfully challenge the exercise of government power, analyzing the determinants of judicial decision-making both in terms of the *motives* of judges, and in terms of the *political opportunity structure* for judicial power. While this body of scholarship has without question advanced our understanding of the way courts function and operate, our collective understanding of judging and courts is still quite poor and limited relative to other political institutions. This study examines these questions through a study of judicial decision-making in the Supreme Court of India from 1967 to 2007. It traces broader shifts in the Court's activism, and analyzes patterns of judicial assertiveness and authority in fundamental rights and governance decisions.

This chapter begins by presenting and analyzing “the puzzle of judicial power,” framing and the research questions of the study. Second, I present an overview of the theoretical framework of the study. Third, I apply this theoretical framework and illustrate how it explains the expansion of judicial power in India². Fourth, I examine the historical and institutional context of the Indian Supreme Court. The chapter concludes by outlining the case selection and methodology of the study.

I. The Puzzle of Judicial Power

The Supreme Court of India is today arguably one of the most powerful and influential constitutional courts in the world, and presently plays an active role in the areas of fundamental rights and governance at the national level (*see* Sathe 2002; Verma et al 2003; Kirpal et al 2000). And yet following the ratification of the Indian Constitution in 1950, few could have predicted the scope of the Court's power today,

¹ See pages 5-6 for this study's definition and conceptualization of judicial power.

given the relatively subordinate role assigned to the Court by the Constituent Assembly (the body that drafted the Constitution).³

The power of the Supreme Court of India today is indeed a far cry from the relatively limited role of the Court during the early years of the Indian Republic. The Court has developed the extraordinary power to adjudicate the validity of constitutional amendments in accordance with “the basic structure” of the Indian Constitution. The Court today also has final authority over judicial appointments and transfers. Finally, the Court today has emerged as an active and powerful institution of governance and policy-making. It currently plays an important role in the areas of corruption and accountability, environmental policy, human rights, and development. How can one explain these variations and shifts in judicial activism, assertiveness, and authority?

Regime Politics Theory and the Puzzle of Judicial Power

Our modern understanding of judicial decision-making within courts in the field of public law has in large part been shaped by the dominant “regime politics” and “political jurisprudence models (see Dahl 1957; Shapiro 1964). According to these models, judges and courts seek to advance the political or policy agenda of the governing coalition in power and/or the party regime that appointed and/or promoted judges on high courts. However, as Keck (2007a) and other scholars have suggested, this and other existing models do not provide a complete account of the “puzzle of judicial power”: Why, under certain conditions, are judges and courts able to successfully challenge political regimes, and assert and promote their own independent constitutional visions or jurisprudential traditions instead of conventional partisan or policy commitments? This question entails an examination of both the motives that drive judges to be activist and assertive, and the political conditions that enable courts to be authoritative.

The legal-institutionalist model suggests one possible answer or explanatory account for this puzzle to this shortcoming on the motivational side, by suggesting that institutional norms, jurisprudential traditions, and other institutional factors help explain why judges decide cases independently of the partisan or policy commitments of the regime in power. Proponents of the institutionalist model have suggested that judicial activism and assertiveness may be motivated by a sense of institutional mission or identity (see Gillman 1993) or institutional duty (Keck 2007b). According to this view, judges “may view themselves as stewards of particular institutional missions, and ...this sense of identity [may] generate motivations of duty and professional responsibility” which sometimes pull against their policy preferences and partisan commitments”

³ Prime Minister Nehru highlighted this vision of parliamentary supremacy and a subordinate judiciary during the Constituent Assembly Debates, observing that: Within limits no judge and no Supreme Court can make itself a third chamber [of the Legislature]. No Supreme Court and no judiciary can stand in judgment over the sovereign will of Parliament representing the will of the entire community. If we go wrong here and there it can point it out, but in the ultimate analysis, where the future of the community is concerned, no judiciary can come in the way. And if it comes in the way, ultimately the whole Constitution is a creature of Parliament. See Sathe (2002), 37, citing *Constituent Assembly Debates*, Vol. 9, p. 1195.

(Gillman 1993, 79-80).

However, our understanding of how institutional or mission or identity shapes judicial activism and assertiveness is still limited. And 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. 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. A major shortcoming of the institutionalist model, then, is that it doesn't 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.

And 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. Moreover, existing institutional scholarship does not closely focus on judges' identity as members of the broader political and intellectual elite community that they regularly interact with and are a part of. In particular, I suggest that 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 intellectuals, affects and shapes their own worldviews.

A second major weakness or gap in the literature has to do with our understanding of the conditions under which courts are able to exert authority—that is, to secure high levels of compliance and/or acquiescence with their assertive decisions from the government. As for the political opportunity structure, existing models have sought to provide an account of why judges may be more willing to challenge political regimes, by examining the relative strength or weakness of the court vis-à-vis the political regime, as measured in such factors as:

- (1) the extent to which assertive court decisions fall within (or transgress) the "tolerance interval" bounded by ruling political authorities' strong policy preferences (Epstein, Knight, & Shvetsova 2001);
- (2) the degree to which political authorities are politically divided and hence cannot easily create a consensus to defy or retaliate against court decisions they regard as undesirable (see Cooter and Ginsburg 1996; Ginsburg 2003);
- (3) levels of popular support for courts (Vanberg 2001; Staton 2002).

These are indeed important elements of the "political opportunity structure" faced by a would-be activist and assertive Court. However, in focusing mainly on public opinion and the "tolerance intervals" of the ruling regime, the literature has failed to pay

significant attention to the role that elite opinion, legal professionals, and other elite constituencies and groups play in bolstering the authority of courts. More importantly, these models have failed to examine the role of elite constituencies in bolstering the assertiveness and authority of the Court against political backlash. This dissertation seeks to address these shortcomings in the literature by examining how these factors affected and altered the political opportunity structure for judicial power in the Supreme Court of India.

Existing Scholarship on the Puzzle of Judicial Power in India

This study also seeks to build-on existing scholarship in advancing our understanding of the Supreme Court of India as an institution. Much of the scholarship on the Court has been a product of Indian legal scholars and experts (see e.g. Dhavan 1976, 1977; Baxi 1967, 1975, 1980, 1983; Sathe 2002; Andhyarujina 1989). Among this group, Baxi (1980, 1983), Dhavan (1977), and Sathe (2002), analyze the political context of decisions and provide a partial account of the motives driving judicial-decision making. Although leading scholars of public law have analyzed the development of law and courts and judicial activism in India (Galanter 1984, 1989; Cunningham 1987; Epp 1994), only a few have sought to understand the motivations and political conditions that affect judicial decision-making (e.g. Gadbois 1967; Beller 1983; Dua 1983; Moog 1998a, 1998b, 2002). Gadbois's work in the 1970s and 1980s analyzed biographical data on the justices of the Supreme Court.

Beller (1983) suggested that the Court's "ability to act as an autonomous institution is linked to important cultural and structural properties of the Indian polity" (Beller, 1983, 515). Beller concluded that the Court's activism and assertiveness in the pre-Emergency era could be traced to two factors. First, he suggests that most of the leaders of the independence movement were legal professionals affiliated with High Courts under British rule, and as a result, the "tendency to define the goals of political groups in legal-constitutional language became deeply inbred within Indian political culture." (Id.) Second, Beller posited that professionalized methods of judicial recruitment and appointment reinforced judicial autonomy and traditions of judicial independence. (519). In contrast to Beller's institutional-cultural account of judicial assertiveness in the pre-Emergency era, Dua (1983) argued that from 1977 to 1983, the post-Emergency Court was strategically deferential to the Gandhi regime in politically controversial decisions; this reflected the justices' concern for institutional survival, given Gandhi's history of attacks on the Court.

Robert Moog's scholarship on the Indian Supreme Court (1998a, 1998b, 2002) represents the most recent work in political science and public law analyzing the Court's recent judicial decision-making, and its political context in the post-Emergency era. In a series of short articles, Moog examined the expanding role of the Court in governance (Moog 1998), and the assertion of judicial control over appointments, transfers and administration (Moog 2002). Picking up on a theme emphasized by many Indian legal scholars, Moog (1998) traced the Court's expanding role in governance to "deinstitutionalization" and declining confidence of the public in the government and

political bureaucracy. As other institutions declined, the Court expanded its role by “filling the void” left by the weakening government institutions (Moog 1998, 126). Moog (2002) suggests that the Court’s assertiveness in the area of judicial appointments was in part a story of the Court’s reaction to earlier government attacks on the Court during the Gandhi years (1967-1976, 1980-1984) and fear and concern about the Court’s future independence. But Moog calls into question regime politics and other theories, suggesting that the political context may not always explain or account for variation in judicial independence: “The impression is of varying levels of judicial independence largely dictated by the good will of more powerful external actors. But must this be the case? Is it necessary that a judiciary be provided with a proper environment to become functionally independent, or can courts themselves influence the perpetuation or development of that environment beyond mere jaw-boning?” (Moog 1998, 269).

Research Questions and Conceptualization

This study seeks to go beyond this existing body of scholarship, while advancing our understanding of judges and courts in the public law literature by analyzing two key questions. First, what *motivational* account best explains the Court’s shift toward activism and then its shift from selective to heightened assertiveness in challenging the Central Government in fundamental rights and governance cases? Second, what account of the political opportunity structure for judicial power best explains the shift toward a higher level of judicial authority in the post-Emergency era in fundamental rights and governance cases?

The dependent variable of this study focuses on change in the Indian Supreme Court’s power (see Table 1.1, p. 6). In line with previous public law scholarship, I suggest that there are three dimensions of judicial power. The first dimension of judicial role is judicial activism. Judicial activism describes 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.⁴ The second dimension is judicial assertiveness,⁵ which refers to 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.⁶ The third dimension of judicial

⁴ See Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism"*, 92 CALIF LAW REV. 1441 at pp. 1444-50 (2004).

⁶ The latter dimension of my definition of judicial assertiveness is similar to one dimension of Tate and Vallinder’s conceptualization of the term “judicialization of politics” (Tate and Vallinder 1995). According to their definition, judicialization entails two phenomena: (a) 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 (b) The process by which nonjudicial negotiating and decision-making forums come to be dominated by quasi-judicial (legalistic) rules and procedures (Tate and Vallinder, 1995). It also closely approximates the definition of judicial activism presented by Holland (1991, page 1): “when courts do not confine themselves to adjudicate legal conflicts but venture to make social policy...the activism of a court...can be measured by the degree of power that it exercises over citizens, the legislature, and the administration.”

power is judicial authority (Kapiszewski 2008). I rely on Kapiszewski's (2008) conceptualization of judicial assertiveness: the extent to which the Court secures compliance or acquiescence from the Central Government.

Table 1.1: Dimensions of Judicial Power

Judicial Activism	The extent to which judges expansively interpret the constitutional and statutory texts and/or deviate from original intent or prior doctrine to support substantive outcomes.
Judicial Assertiveness	The degree to which courts challenge the validity of legislation and executive orders and other policies, <i>and</i> the extent to which the Court takes over policy-making or governance functions.
Judicial Authority	The extent to which courts are able to secure compliance or acquiescence with Court decisions from the Government (Kapiszewski 2007; Finkel 2003).

The next section proposes a theoretical framework that addresses both motives and opportunity structure that addresses the two key research questions of this study.

II. Elite Institutionalism: Expanding the Regime Politics and Institutional Theories of Judicial Power

How can one explain the expansion of the power of the Supreme Court of India from 1967 to 2007? Referencing existing public law theories, this study seeks to provide an explanatory account of this shift by analyzing both the *motives* that drove judicial activism and assertiveness and the *opportunity structure* for judicial power. I supplement existing theories, however, by focusing especially on a new variable – the values of national political and professional elites that influence the judge's attitudes and role conception that influence the way professional and political elites and the media evaluate assertive high court decisions. I call this the 'elite institutionalism' thesis.

The role of elite institutional factors is examined through close analysis of the Court's decision-making in *politically significant rights and governance decisions*. That analysis entails (a) close attention to the opinions of Indian Supreme Court judges, (b) field interviews of retired judges of the Court, legal scholars, Supreme Court advocates, journalists, former Cabinet ministers and other experts, and (c) the study of news editorial coverage of these decisions. Thus I look both *within* the Court, highlighting the sources of the judges' institutional values and elite policy worldviews, and *outside* the Court to understand how the broader political opportunity structure limited or facilitated the assertiveness and authority of the Court. I conclude that, at least in the Indian case (and perhaps beyond), variation in levels of activism, assertiveness, and judicial authority in rights and governance cases can most adequately be explained by the factors or variables summarized by the idea of "elite institutionalism."

Elite Institutionalism and Judicial Motive

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 a source 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/or 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 (see Smith 1988; Gillman 1993; Keck 2007b). 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" (see Richards and Kritzer 2002).

Elite institutionalism, however, supplements 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 judge's policy worldviews and judicial activism and assertiveness. I argue that 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 politics theory, which has dominated the public law literature in recent decades (see Keck 2007b). In the regime politics model, judges act to advance the policy agenda of the governing coalitions or party regimes in power and/or 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 I refer to as "elite meta-regimes" on one or more issues or policies.⁷ Elite metaregimes 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 zeitgeist 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 doctrine 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 (see Atiyah and Summers 1987). A robust news media can serve as 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 on government commissions, and other public fora.

Elite Institutionalism and the Political Opportunity Structure for Judicial Power

In order to understand the opportunity structure which also shapes judicial decisions, one must attend to the extent to which a court's activist, assertive decisions can help or hurt a court win powerful allies that can provide vocal support and protect the Court from political backlash. Existing scholarship suggests that courts can gradually cultivate and develop deeper "reservoirs of public support" that enable courts to issue controversial decisions without threatening their legitimacy as institutions (Gibson, Caldeira, and Spence 2003).

Vanberg (2001) suggested that judges and courts are more likely to be assertive and authoritative where they have a strong base of constituent support that is ready to defend the Court. Staton's (2002) study of judicial politics in Mexico posited that judges were more likely to be assertive where they perceived that they would have strong levels of national public support for their decisions, and that judges may even have some control over the level of support through use of public media campaigns. For Vanberg and Staton, public opinion can serve as a "baseline" for judicial power that enables courts to exert authority and secure compliance from the government in power. Staton refers to this as a public enforcement mechanism for judicial power. Vanberg and Staton identify two conditions that are necessary for courts to challenge and constrain government: (1) courts must enjoy sufficient public support; and (2) information about judicial decisions must be transparent; voters must be able to monitor legislative responses to judicial decisions effectively and reliably (Vanberg 2001, 347; Staton and Vanberg 2008). In discussing the importance of this second condition, Vanberg (2001) suggested that interest groups can play a critical role as "watchdogs" that increase the transparency of the political environment. Indeed, Epp (1998) also suggested that interest groups can provide the judiciary with "active partners in the fight against opponents of implementation." Staton refers to this as a public model of enforcement.

In order to fully understand how elite institutionalism affects the political opportunity structure for judicial power, one must also define which groups or interests are part of the relevant professional, political, and intellectual elite groups that shape and constrain judicial activism, assertiveness, and authority. Drawing on insights from Halliday et al's conceptualization of the legal complex (2008) and Baum's analysis of the importance of judicial audiences (2006), I suggest that several groups may be part of the cluster of elite constituencies and elite opinion that affects judicial decisionmaking and judicial authority. This includes the judges' peers on the Court, members of the Bar and Supreme Court advocates, political leaders and government officials within relevant government agencies that interact extensively with the Court, (including ministries of law, law commissions, and other departments), the media and legal journalists, legal scholars and academics, and professional policy groups (including NGOs and public interest organizations).

The thesis of elite institutionalism builds on these insights but rather than focusing mainly on national public opinion or national public support for courts, I suggest that levels of judicial assertiveness and authority are primarily affected by elite support (though national popular support can matter in highly controversial, highly transparent cases). I argue that the structure of elite opinion—the extent to which elites are united on a set of given issues or issues --can be a significant factor in determining the extent of a Court's authority. The national media—particularly newspapers that closely follow courts—plays a crucial role in “broadcasting” the opinion of elites regarding specific decisions and overall levels of, and overall support for the Court. Political regimes will look to media coverage (including editorial coverage) of the Court as a “proxy” for broader public support levels for the Court.

Building on Vanberg (2001) and Staton's (2002) insights on public support and the transparency of judicial decisions, one might expect national public opinion or national support to matter more than elite support in certain high profile, highly controversial cases in which the constitutional or political issues are relatively accessible to the public. This suggests that there may be a “sliding scale” of audiences inherent in Staton's conception of the public enforcement mechanism of judicial power: national popular support may play a greater role in affecting judicial assertiveness and authority in certain exceptional, extraordinary cases, while elite support matters more in the vast majority of the Court's decisions.

Elite institutionalism, then, suggests that judicial assertiveness and authority is strongly affected by how judges' and the ruling political regime perceive the strength of the Court. The level of elite support for the court and for particular judicial decisions can strongly affect the “zones of tolerance” of the regime in power. Stronger levels of elite support can effectively widen or expand regimes zones of tolerance by making political regimes more reluctant to overrule or resist judicial decisions. An important implication of elite institutionalism is that judges can gradually widen their base of popular support over time by building support among particular elite communities in specific cases and contexts. This may include the development and cultivation of what I refer to as “governance constituencies” (see Chapter 6), who can play a key role in bolstering the strength and support of a court by allowing the Court to intervene and play an active role

in governance and policy-making in different contexts. Where perceived public support for a Court is low (from the perspective of the judges), courts may be driven to cautiously rebuild broader support through the cultivation of elite support. Again, however, given that the link and connection, and the transparency of judicial decisions to the national public tends to be low for most judicial decisions (with the exception of a handful of cases which involve extremely high-profile national issues or controversies), the majority of cases decided by Court are really for the “consumption” of elite constituencies and audiences. Courts are thus far more likely in these cases to be driven to be more assertive where they know that they will have strong elite support among groups and in the media, particularly because the media helps indirectly shape elite and public opinion. But given that the majority of even high-stakes politically significant decisions usually involve more technical and complex issues, it seems more likely that judges and courts are more likely to pay attention to elite audiences including past editorial media coverage to get a sense of overall levels of public confidence and support for the Court.

IV. The Historical and Institutional Context

In order to understand why the judges of the Indian Supreme Court were so responsive to elite meta-regime values and able to assert their own independent institutional and/or policy worldviews, one must understand how the particular institutional context of the Court reinforced strong linkages between judicial decision-making and elite meta-regimes. This section provides a brief overview of the historical and institutional context,

Although India was formerly a British colony (gaining independence in 1947), the constitutional and political structure of post-independence India differed in important ways from British political and legal traditions. In contrast to the British political system, the Constituent Assembly of India adopted a written constitution that explicitly provided for the power of judicial review⁸, protections for fundamental rights⁹, and original jurisdiction based on Article 32¹⁰, which allowed for direct suits in the Supreme Court to enforce the fundamental rights provisions and empowered the court to issue writs to enforce these rights.¹¹ From the beginning of Indian Constitutional democracy in

⁸ See INDIA CONST. Article 13 (Judicial Review).

⁹ See INDIA CONST. Articles 14-31 (Fundamental Rights provisions).

¹⁰ Article 32 of Indian Constitution provides, in relevant part:

Remedies for enforcement of rights conferred by this Part.—

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

¹¹ It is also worth noting here that the Court was not given case-selection discretion under the original design of the Constitution, and that the Government responded to exploding caseloads by increasing the size of the Court from 8 in 1950 to 11 in 1956, 14 in 1960, 18 in 1978, and 26 in 1986. Kagan et al.’s (1978) study of state supreme courts in the United States suggests that courts that lack case-selection discretion are more likely to be legalistic in their decision-making.

1950, then, the Indian Supreme Court was armed with significant powers. Nevertheless, several aspects of the India's political structure and historical legacy limited the Court's development early on and militated against the expansion of judicial power vis-à-vis the political branches.

First, under the original design of the Indian Constitution, and notwithstanding the grant of the power of judicial review, Parliament was intended to be supreme, an inheritance of British colonial legacy. The Court was intended to be a subservient institution whose decisions could easily be overridden by the Parliament through the constitutional amendment process --which required only a simple majority vote¹² (see Sathe 2002). Second, the Constituent Assembly limited the power of the Indian Court by eliminating a due process clause from the final draft of Article 21¹³ of the Indian Constitution; the goal of the Congress Party, which dominated the Assembly, was to prevent the Court from reviewing the socialist Congress government's interference in the economy, and from reviewing the government's preventive detention laws (Austin 1966). Finally, the Indian Constitution as adopted in 1950 was a prolix, detailed document that limited the discretion of the Court by providing detailed provisos and limitations on the fundamental rights, including Article 19, which allowed for "reasonable restrictions" imposed by the state in the public interest.¹⁴

¹² Article 368 (2) of the Indian Constitution states:

"An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President who shall give his assent to the Bill and thereupon the Constitution shall stand amended in accordance with the terms of the Bill." Article 368(2)(a)-(e) requires that constitutional amendments must secure the ratification of at least half of the states (state legislatures).

¹³ Article 21 reads as follows: 21. Protection of Life and Personal Liberty--"No person shall be deprived of life or personal liberty except according to procedure established by law."

¹⁴ Article 19 provides as follows:

"Protection of certain rights regarding freedom of speech ,etc.—

(1) All citizens shall have the right –

- (a) to freedom of speech and expression;
- (b) to assembly peaceable 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
- (f) to acquire, hold, and dispose of private property (repealed by 44th Amendment)
- (g) to practise any profession, or to carry on any occupation, trade or business.

(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offense.

Article 19, clauses (3)-(6) contain similar limiting provisions as Article 19(2), but apply to the rights in 19(1)(b)-(g). 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 prevents 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.

The institutional context of judging in India—including the legal education, socialization and training of judges—helps explain why Supreme court judges acted independently in furthering their own constitutional or socio-political agenda. As a former British colony, India inherited a legacy of British common law traditions. One factor that helped promote judicial independence was the legal professional training and background of most of the early political leadership of the Congress party. As Beller (1983) suggests, many of the leaders of the Indian independence movement, the Constituent Assembly, and the first Congress government were drawn from the legal community. According to Seal (1971), High Court lawyers in India served as the “backbone of politics” during British colonial rule, and much of the nationalist discourse and goals of the Indian National Congress party during the independence movement were framed in terms of constitutional and legal issues (Beller 1983, citing Seal 1971, 129-30).

The system of judicial education and training also produced judges in India who were more receptive to professional and intellectual elite discourse and thought. Almost half of the judges who served on the Supreme Court of India between 1950 and 1967 received some of their legal education and training in England (Gadbois 1968, 325). Most of the judges of the Indian Supreme Court in this earlier period received bachelor degrees from the most prestigious and elite colleges in India, and among those who studied law in India, most attended national law schools whose curricula were shaped by British common law traditions. Most judges who served on the Court were drawn from the ranks of High Court advocates who were elevated to serve on a High Court. Moreover, a significant number of judges who have served on the Court received some level of graduate education or training in related fields in the social sciences.

Beller suggests that the colonial legacy of British common law, courts, and the legal training of India’s judges, lawyers and political elites played an important role in shaping the world view of judges. Moreover, a tradition of judicial independence and autonomy was reinforced through a system of judicial appointment and promotion based on largely professional criteria. Under this system, the Executive (Prime Minister, Council of Ministers, and President) was required to consult with the Chief Justice, senior Supreme Court Justices, state political leaders, and Senior Judges of the High Courts in making appointments. The Constituent Assembly embraced this system in order to create a nonpartisan judiciary that was free of ties and connections to leaders in executive and legislative branches (Beller 1983, 519, citing Dhavan and Jacob 1978). The Congress Government of Jawarhalal Nehru (1950-1964) helped promote a culture of judicial independence by deferring to the recommendations of the Chief Justice and senior justices of the Supreme Court and high courts in the appointment process (Dhavan and Jacob 1978).

Another unique aspect of the Court’s institutional structure was the mode of selection of the Chief Justice of India. The Chief Justice has been selected on the basis of seniority norms¹⁵, with the exception of the two supercessions under the Gandhi regime. One consequence of the seniority norm has been that most Chief Justices have

¹⁵ The seniority norm for selection of Chief Justice began in 1951, when the entire bench threatened to resign if the next senior-most justice was not made Chief Justice by the Nehru Congress Government.

served extremely short terms—many Chief Justices have served less than one year, and in the past fifty-eight years, India has had thirty-eight Chief Justices (including K.G. Balakrishnan, the current Chief Justice of India).¹⁶ Given that the Chief Justice has important institutional powers, including advising the executive in appointments, and assigning justices to specific case benches, this further reinforces the more professionalized, a-political design of the Supreme Court. In addition, justices of the Indian Supreme Court must retire at the age of 65. Because most justices are selected from the High Courts, this system usually guarantees selection of experienced, very senior justices from the state high courts in their late 50s or early 60s (the retirement age for high court judges is 62), and has meant that most justices serve very short terms, and a high level of turnover on the Supreme Court.

Another unique characteristic of the Court involves the lack of case selection discretion. While the Indian Constitution vests the Court with original, appellate, advisory, and “special leave” jurisdiction¹⁷, the Court was *not* vested with general case selection discretion like the United States Supreme Court. Because the Supreme Court of India lacks case-selection discretion, the Court hears thousands of cases each year, increasingly dramatically since 1950. Between 1950 and 1960, the Court decided an average of 2113 cases per year (Supreme Court Annual Report 2006-2007, 74-76). By comparison, the Court decided an average of 46,705 cases between 1996 and 2006 (*Id.*). Because the Court lacks cases selection discretion, the number of cases in “pendency” (cases that the Court is unable to decide) has also dramatically expanded.¹⁸ In terms of yearly benchmarks, the Court disposed of over 10,000 cases in 1977, and over 51,000 cases in 1985, and the total number of disposed cases has fluctuated between 30,000 to 50,000 cases over the past decade (Indian Supreme Court, Annual Report 2006-2007, 74-76). Most of the Court’s caseload consists of review of routine civil and criminal

¹⁶ Chief Justice Chandrachud served the longest tenure in the history of the Court as Chief Justice—his term lasted nearly seven years. Other Chief Justices’ tenures have lasted for only weeks or a few months. See The Supreme Court of India Website available at http://www.supremecourtindia.nic.in/new_s/wl_p1.htm

¹⁷ The framers vested the Indian Supreme Court with original jurisdiction over disputes arising between the central government and the states and union territories, and intra-state disputes. The Court also has original writ jurisdiction and original writ jurisdiction based on Article 32, which allows for direct suits in the Supreme Court to enforce the Fundamental Rights provisions and empowers the Court to issue writs to enforce these rights. The Court also was vested with appellate jurisdiction over the high courts involving civil and criminal proceedings, as well as jurisdiction to issue advisory opinions on matters referred to it by the President. The Indian Constitution also vested the Court with the discretion to grant special leave to “appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.”

¹⁸ The number of pending cases was 690 in 1950, 2,656 in 1960, to 8,653 in 1970, 37,851 in 1980, and 109,277 in 1990. This data is from the “Statement of Institution, Disposal, and Pendency of Cases in the supreme Court of India from 1950 to 12.13.2006” that was provided to me by the Registrar of the Supreme Court of India in February 2007.

appellate cases,¹⁹ of which thousands are summarily dismissed at the initial “admission” stage.

The Central Government responded by increasing the number of judges on the bench from 8 in 1950 to 11 in 1956, 14 in 1960, 18 in 1978 and 26 in 1986. This created and expanded opportunities for individual judges to act on and maximize their own sincere policy values. As the Court expanded in size, judges increasingly adjudicated matters, even politically significant ones, in smaller benches of 2 or 3 judges, with higher rates of unanimous decisions. This structural shift effectively facilitated the airing of a broader and more diverse array of policy-values on the Court, as individual judges emerged as “specialists” on the court and had the freedom in some cases to zealously pursue their own particular policy agenda.

Given the lack of case selection discretion and high caseloads, one would predict that the Court’s decision-making in the aggregate would tend to be highly legalistic (Kagan et al. 1978). However, the Court has evolved two mechanisms to provide itself with some degree of managing its heavy caseloads. First, the Court developed a “split-stage” process in which new “admission matters” are screened by designated benches on Monday and Friday, while regular matters are heard on Tuesday through Thursday.²⁰ Second, the Court adjudicates cases involving significant constitutional issues in special panels called “Constitution Benches,” which consist of a minimum of five justices. Third, the Court was able to develop a degree of discretion following the expansion of standing doctrine in PIL; the Court was thus able to screen out a large number of PIL writ petitions that were not deemed to be meritorious or in the public interest. Finally, in PIL cases, the Court has evolved the practice of taking cases “suo moto,” with judges themselves initiating new cases by activating old “dormant” matters that were never disposed of, or starting new litigation tangential to or arising from existing PIL cases.

Changes in The Institutional Context

Beller argues that the professionalized system of appointments and promotion helped foster the development of a “judicial ideology” of constitutional trusteeship in which judges believed the Court had the duty to serve “as the guarantor of constitutional order in a time of constitutional decay” during the late 1960s (Beller 1983, 525). This ideology drove the Court’s activism and assertiveness in the basic structure doctrine cases in the pre-Emergency era. This was precipitated by continued efforts on the part of the Central Government to insulate land reform laws from judicial review through the Ninth Schedule and amendment process.

However, in the late 1970s, the regime of Indira Gandhi departed from earlier system of judicial appointments in selecting judges based on their ideological

¹⁹ Epp (1994) distinguished between the “public agenda”, which consisted of all published cases, and the “routine agenda” of the Court, which consisted of all cases disposed of by the Court.

²⁰ Admission matters involve direct petitions and appeals to the Court, and are disposed of with final or interim orders on Mondays and Fridays (with approximately 60-65 matters on Monday and 45-48 matters on Fridays). Admission matters may be dismissed for lack of merit, summarily disposed of with a final order, or referred to another bench as a “regular matter.” Regular matters are those cases that involve significant questions of law that the Court believes need to be thoroughly examined. The Court hears regular matters on Tuesdays, Wednesdays, and Thursdays.

commitment to the regime. In response to the Court's decisions in *Golak Nath* and *Kesavananda*, the Gandhi regime appointed judges to the Court who were perceived to share Gandhi's social-egalitarian agenda. The Gandhi regime furthered this process by superceding senior justices on two occasions in selecting a Chief Justice perceived to be "committed" to the regime's policies. The Executive continued to have a dominant role in appointments until the Court's decision in the Second Judges' Cases of 1993, in which the Court asserted primacy over appointments and transfers.

This departure from the earlier professionalized system of appointment had important implications for judicial decision-making. In particular, the appointment of Justices Y.V. Chandrachud, P.N. Bhagwati, V.R. Krishna Iyer, helped bring about an important shift in the Court's receptivity to the policy reform ideas of the broader meta-regime of social justice. Bhagwati and Iyer, with the support of Chief Justice Chandrachud, helped advance and expand PIL in the post-Emergency era. PIL represented a new activist shift that reflected the goals and ideas of the legal aid movement that had been launched during the Emergency (1975-1976) by Indira Gandhi, and represented a significant component of Gandhi's social-egalitarian Twenty-Point Programme²¹ (Baxi 1985, 36).

In contrast to the more professionalized background and career experience of earlier judges, Justices Iyer and Bhagwati had played an active role in pushing for legal aid reform prior to their elevation to the court, and continued to advance that agenda as justices.²² Both men helped lead efforts prior to and during the Emergency to expand legal aid and access to justice, by organizing legal aid camps in villages, encouraging high court justices to adjudicate grievances in villages, and established camps and people's courts (lok adalats). Although PIL was consonant with the social-egalitarian reform agenda of Gandhi and the Congress party, the larger ethos of social egalitarianism and social justice that animated the Indian Supreme Court's activism in PIL cases also had roots within the broader professional and intellectual discourse of the legal reform among judges, lawyers, and scholars at the time. One illustration of this dynamic is a conference that was held in 1984 that was entitled "Role of Law and Judiciary in Transformation of Society: India-GDR Experiments." At the conference, Justices of the Supreme Court, including Justice P.N. Bhagwati, D.A. Desai, and O. Chinnappa Reddy, Energy Minister Shiv Shanker, High Court judges, Senior Advocates, legal scholars, and judges from the German Democratic Republic presented speeches and papers on the role of the judiciary in transforming society. At the conference, participants addressed the need to reform law and the legal system in order to create a more social-egalitarian order and advance

²¹ Gandhi's Twenty Point Programme largely focused on economic policies, and include proposals for: provision of land reforms, rural housing, the abolition of bonded labor, fighting tax evasion and smuggling, expanding worker participation in the industrial sector, and combating rural indebtedness (see Klieman 1981, 251).

²² As Chief Justice of the Gujarat High Court, Bhagwati chaired the state legal aid committee of that state, which issued recommendations for broadening legal aid and access to justice (See Government of Gujarat, Report of the Legal Aid Committee (1971)). Similarly, Justice Krishna Iyer chaired a Central Government panel which called for restructuring the legal system (see Government of India, Ministry of Law, Justice and Company Affairs, Report of the Expert Committee on Legal Aid: Processual Justice to the People (1973) (Chairperson: Justice V.R. Krishna Iyer)).

the cause of social justice on behalf of the poor and oppressed in India. Energy Minister Shiv Shanker, who had played a key role in advising Indira Gandhi regarding judicial appointments in the 1970s, advocated for the need for judicial activism that fulfilled the social-egalitarian goals of the Directive Principles, and that the Directive Principles should not be subordinated to the fundamental rights.

The conference recognized that a broader shift had taken place in the prevailing social and economic ideology of the country. Bhagwati went on to comment on what he envisioned to be the social-egalitarian goals of the Indian judiciary, in observing that "...the entire culture of the judicial process has to be geared to the goal of social justice which is the objective of the Constitution and irrespective of whether the politicians fulfill this objective or not, it has to be fulfilled by the courts...Social justice is a constitutional fundamental right and a socialist order, an economic imperative" (Desai 1984, 31). Other panelists at the conference spoke about the role the judiciary could play in promoting equality and social change.

V. Case Selection, Methodology and Data

In the comparative public law literature, much of the previous scholarship analyzing judicial assertiveness has employed large-n analysis (e.g. Helmke 2002, 2005; Scribner 2003). One shortcoming of this approach is that it fails to distinguish between decisions that are of crucial political importance to the ruling political regime, and those decision that are of lesser political importance. Gloppen (2006) highlighted the need for case selection methodologies that focus on the relative significance of particular decisions. In order to measure judicial assertiveness against the political regime, this dissertation used a case selection methodology similar to Kapiszewski (2008) to identify "politically significant" decisions.²³ I chose to focus on cases of extraordinary political significance to the Central Government, because the focus of this dissertation is on assessing the Court's ability to both challenge and secure the compliance or acquiescence of the Executive (the Prime Minister and the Council of Ministers and Bureaucracy) and Parliament. I therefore sought to identify decisions involving challenges to the power and authority of the Central Government in the most politically controversial or salient policy or issue domains, in order to fully understand the role of the Indian Court in the political system.

I employed a three-stage methodology to select these cases. First, I reviewed the leading scholarship and literature on law and the Indian Supreme Court that mention and discuss specific decisions, and made an initial list of decisions based on the frequency of

²³ Kapiszewski (2008) employed a multifaceted case-selection methodology in order to measure judicial assertiveness in the High Courts of Brazil and Argentina. Kapiszewski focused on politically important decisions in which these courts had the opportunity to challenge the exercise of Central Government power on issues with high political salience. In his study of High Court assertiveness in Zambia and Malawi, Vondoeep (2006) used a similar case-selection methodology. 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" (Vondoeep 2006, 391). This methodology yielded a sample of cases "that were of interest to state power-holders and their opponents" (*Id.*).

mention of specific decisions.²⁴ Second, I conducted field interviews with leading legal scholars, Senior Advocates, former Supreme Court 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. One limitation of this dissertation is that it focuses exclusively on the “public agenda” (Epp 1994)—the published cases of the Indian Supreme Court.²⁵

I then conferred with a smaller panel of three experts²⁶ to “filter” this preliminary of decisions, and to add any additional decisions missing from this list, in order to generate a sample of politically significant decisions. I refer to this sample as the “overall sample” (N=93) (see Appendix A, p. 221). The three substantive chapters of this dissertation focus on two subsets of this overall sample: fundamental rights decisions involving a challenge to the exercise of Central Government power (the “fundamental rights sample”); governance cases in which the Court asserted a policy-making function and/or compelled the government to take specified actions (the “governance sample”).

I chose to analyze these subsets for several reasons. First, this sample provides a test of judicial assertiveness in politically controversial contexts, in which judges’ own legal and policy views and goals may conflict with regime preferences or public opinion. In addition, focusing on a smaller set of politically significant decisions allows for closer analysis of the underlying government policies or actions, the government’s own position in the case, the larger political context, and the nature of the government’s compliance with adverse decisions.

V. An Overview of The Expansion of Judicial Power in India

The Pre-Emergency Era

This section provides an overview of how the thesis of elite institutionalism helps explain the expansion of judicial power in India, that previews the empirical findings of the substantive chapters of this study. In the pre-Emergency era (1967-1976), the justices

²⁴ Because there are relatively few books and articles analyzing Supreme Court cases decided since 2002, I also used the Access World News database (available online on the Berkeley Library website) to search for salient decisions from 2001-2007, based on mentions in multiple newspapers. I did this by searching for the terms “Supreme Court” and “India.” The Access World News database contains news articles from all major Indian newspapers from 2001-present. Unfortunately, this database does not contain articles prior to 2001.

²⁵ To access full versions of published decisions, I relied on the *Supreme Court Cases Online* electronic database of published Supreme Court decisions, which contains 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. Based on interviews with several leading Senior Advocates, Advocates, and legal scholars, I am confident that this database contains within it all “politically significant” judicial decisions of the Court for the purposes of the dissertation.

²⁶ The panel consisted of a retired Supreme Court justice, a Senior Advocate (and established expert on Indian Constitutional Law), and a junior Advocate. To cull down the list, I only included cases in the overall sample on which at least 2 out of the 3 experts agreed met my definition of political significance.

of the Indian Supreme Court acted on and asserted their own institutional values in asserting the basic structure doctrine in the *Golak Nath*, *Kesavananda* and the *Indira Nehru Gandhi* (1976) decisions. These decisions reflected a growing consensus within the Court, and among the Bar and professional and intellectual elites nationally, about the need for imposing limits on Parliament's constituent power of amendment so as to preserve and protect constitutional rights, especially property rights and economic liberty, from erosion. The judges of the Court may have also been motivated by their own economic policy views in asserting limits on Parliament's ability to abrogate property rights.²⁷

As illustrated in Chapter 2, the Court's activism and assertiveness in the basic structure decisions was shaped by the unique institutional *and* intellectual environment of the Court. Up until the 1970s, justices to the Indian Supreme Court were appointed mainly on the basis of professional criteria and merit. In the late 1960s and 1970s, justices' identification with the institutional role of the Court drove them to act to assert limits on the constituent power of the amendment, in response to the judges' heightened concern about Parliament's continued and repeated use of the "Ninth Schedule" to shield land reform laws from judicial review. Although previous constitutional benches of the Supreme Court had upheld parliamentary supremacy and an unlimited constituent power of amendment in the 1950s and early 1960s, justices on the Court became increasingly concerned about the gradual "erosion of fundamental rights" and the role of the Court in protecting constitutionalism and the rule of law (see Chapter 2; Subba Rao 1973).

The Court's assertiveness in the pre-Emergency era was informed by the larger metaregime of "constitutionalism." Legal scholars and Senior Advocates advanced the intellectual and legal arguments and rationale that supported the need for implied limits on the constituent power of amendment, arguments that were embraced and adopted by majorities in the *Golak Nath* (1967) and *Kesavananda* (1973). In these decisions, justices (including Chief Justice Subba Rao, Chief Justice Sikri, and others) were motivated by their desire to protect constitutionalism. They adopted and endorsed the basic structure doctrine to protect the institutional solidity of the court and to maintain its role as a guardian of the constitution and the rule of law and fundamental rights. The Court's support of the basic structure doctrine enjoyed the support of many in the professional and intellectual elite sector, as reflected in the elite editorial coverage of these decisions, and of leaders and members of the growing coalition of opposition leaders that would ultimately constitute the Janata party.

²⁷ Chief Justice K. Subba Rao, who authored the leading majority opinion in *Golak Nath*, launched an unsuccessful campaign for President of India within months of his retirement from the Court. Subba Rao ran as the candidate of the conservative, pro-property rights Swatantra party. Although Subba Rao accepted the social-egalitarian aspirations of the Directive Principles of the Indian Constitution, he defended the decision in *Golak Nath* in subsequent lectures and writings on both constitutional grounds, and the need to protect property and business/corporate rights. See e.g. Chief Justice K. Subba Rao, Property Rights Under the Constitution, (1969) 2 SCC (Jour) 1, Lecture to lecture was delivered on 26-10-1968, under the auspices of the Forum of Free Enterprise in Bombay.

But ultimately, the Court did not enjoy a high degree of authority within the broader political environment, especially among the Congress party leadership, and its property rights and basic structure decisions were overturned by the Gandhi regime via constitutional amendments and legislation in the 1970s. In addition, the Gandhi regime directly attacked the Court following the *Kesavananda* (1973) decision by superceding the seniority norm and “packing” the Court with judges who shared the social-egalitarian worldviews of Gandhi and her executive team.

During the Emergency, the Court, fighting for its institutional survival, was forced to defer to the Gandhi regime in highly controversial cases. In the *Indira Gandhi Election case* (1976)²⁸, the Court adjudicated an appeal from a lower court decision ruling that Indira Gandhi had violated election laws during the 1971 campaign. In response to the lower court decision, the Gandhi regime retroactively amended the existing election laws and enacted a constitutional amendment barring the judiciary from scrutinizing the legality of the elections of Prime Ministers. The Supreme Court invalidated the amendment as violative of the basic structure doctrine, but, acting strategically, it nevertheless upheld Indira Gandhi’s election in light of the retroactive legislation. The Emergency regime also effectively overturned the Court’s decision in *Kesavananda* by enacting the 42nd Amendment, which reasserted Parliament’s unlimited power of constitutional amendment, and dramatically curbed the power of the court.

Finally, in the face of direct political attacks and threats to its very institutional survival during the Emergency, the Court ultimately acquiesced to the regime in the *Habeas Case* (1976)²⁹, by upholding the constitutionality and legality of the Emergency orders and ordinances that had authorized draconian preventive detention, and suspended the right to petition courts for protections under the fundamental rights. As a result of its acquiescence, the Court lost a great deal of support, both among elites and the broader public. Because of its acquiescence to the Emergency regime in *Habeas case*, the Court had suffered a loss of prestige and legitimacy in the eyes of national elites and the broader public, as reflected in the harsh critique in the media of Justices Beg, Chandrachud, and Bhagwati (who voted to uphold the Emergency in Shukla).

The Post-Emergency Era

1977-1989: Elite Institutionalism and Support-Building

Changes in the political opportunity structure in the post-Emergency era had a profound impact in both shaping and constraining judicial activism and assertiveness on the Indian Supreme Court. In the post-Emergency era, justices became more intensely conscious of the Court’s public image and reputation, and were compelled by public criticism of the Court to act on and assert their own institutional and sincere policy values through an aggressive new activism in rights and governance cases. At the same time, in its bid to build public support and legitimacy, the post-Emergency Court was careful to

²⁸ *Indira Nehru Gandhi v. Raj Narain* (1976).

²⁹ *ADM Jabalpur v. Shiv Kant Shukla* (1976).

heed the “strategic caution” message that it learned from its earlier confrontations with the Gandhi Congress regime in the late 1960s and early 1970s (see Epstein et al 2002).

The election of the Janata party in 1977 signaled a change in the broader political environment, as the new government set out to repeal the Emergency laws and constitutional amendments, investigate and purge Emergency offences, and restore fundamental rights and constitutionalism. As Baxi (1980, 1985) and other scholars observed, justices on the Court in the post-Emergency period were motivated by a desire to rehabilitate the Court’s image and reputation in the media, among political leaders in the Janata Government, and in the national public eye. And because the Janata Party Government embraced a return to constitutionalism and limited government, the Court faced a far more hospitable political environment for activism and asserting and expanded conception of fundamental rights.

Indeed, strong public criticism of the leading senior justices of the Court for their acquiescence to the Emergency (Chief Justice Beg, Justice Chandrachud, and Justice Bhagwati) helped motivate and compel these and other judges to act on and assert their own institutional and sincere policy values (which included a strong flavor of social-egalitarian reform) and to launch a new phase of activism and selective assertiveness in rights and governance cases. In contrast to the pre-Emergency era, the justices of the Court were intensely conscious of the Court’s public image and of their individual reputations. In part, this was driven by public calls for the ouster of many of the “Emergency” judges.

Supporters of the Janata party called on the new government to remove Chief Justice M.H. Beg, because the Gandhi Government had superceded Justice H.R. Khanna (part of the *Kesavananda* majority and the lone dissenter in the Habeas Corpus case) to select Beg as Chief Justice. Prime Minister Morarji Desai resisted public pressure and did not act to remove Beg. In the months before Beg’s retirement in February 1978, Janata supporters and leaders within the Supreme Court and state bars publicly advocated for the supercession of the next two seniormost judges in line to become Chief Justice—Justices Y.V. Chandrachud and P.N. Bhagwati—because of their votes to uphold the Emergency in the Habeas case. The leading newspapers closely covered this public criticism of the Court, and in some instances published editorials that strongly condemned these judges.

Unlike previous Courts, then, the justices on the post-Emergency Court were exposed to a level of public critique and admonition that was previously unheard of in India. This was a court that was well aware of the need to rehabilitate its legitimacy and cultivate popular support, without imperiling the Court’s legitimacy through asserting itself too strongly against the governing regimes in power. The Courts legitimacy and the reputation of judges became intensely tied up with and related to media and public perception in a way that it had never been before—so justices felt the need to build public support with the governing regime, professional and intellectual elites, and the broader public in a way that they never did before – leading Upendra Baxi to refer to this as an era of “judicial populism” (Baxi 1985).

The justices of the Court set about the task of rebuilding the Court’s image and legitimacy by advancing their own institutional and policy values through a new activism

and selective assertiveness. But it is also crucial that the judges did so in alignment with the Janata Party commitment to restoring democracy and constitutionalism (1975-1977) (Baxi 1980). I argue, therefore, that the activism and selective assertiveness during the Janata years reflected the transcendence of the meta-regime of “liberal democracy.” The Court enjoyed the political support or acquiescence of the Janata regime as it expanded the scope of fundamental rights, including the right to life and liberty, and widened the scope of judicial review of governmental arbitrariness in *Maneka Gandhi* (1978), overturning its earlier, more restricted approach to interpretation in *Gopalan* (1950)

Between 1977 and 1979, the Court, aided and supported by the media, NGOs, and public interest litigation groups, began to take on the cause of human rights in cases involving prison reform, and other cases of state repression. At the same time, in the *Pathak LIC Bonus* case (1978), the Court endorsed and deferred to the Janata Government’s efforts to reverse and repeal the Emergency and in the *Special Courts Bill case* (1978), Court upheld the government’s investigation and purge of Emergency offences. Finally, in *Minerva Mills* (1980), the Court reasserted the basic structure doctrine in invalidating part of the 42nd Amendment enacted by the Emergency regime of Indira Gandhi.

Following the return of Indira Gandhi to power in the 1980 elections, the justices of the Indian Court continued to act on and advance their own institutional and social-egalitarian policy values to take on the cause of human rights and the rights of the poor and oppressed. The Gandhi regime went along with the Court’s assertiveness in *Minerva Mills* (actually decided after Gandhi returned to power) because of the strong public support for repeal of the Emergency. The regime also went along with the Court’s activism and selective assertiveness because it actually supported and advanced Gandhi’s social-egalitarian agenda, and with the exception of the Court’s decision in *Minerva Mills*, the Court avoided challenging Gandhi in the areas of judicial appointments, economic policy, and national security policy.

During this era, the Court, led by Justices V.R. Krishna Iyer and P.N. Bhagwati, helped launch Public Interest Litigation (PIL) in an effort to expand access to the Court to the poor and oppressed classes. As illustrated in Chapters 5 and 6, the Court’s endorsement of PIL in this era reflected the broader meta-regime of social justice/social egalitarianism and reflected a larger movement within the Court, and among professional and intellectual elites to reform the legal system to ameliorate inequality and social injustices. In addition, the Court’s support of PIL reflected the Court’s effort to continue to build support and bolster its institutional legitimacy, both by aligning itself with the agenda of the regimes of Indira, and later Rajiv Gandhi, and by cultivating broader public support among the public and “governance constituencies” (see Chapters 5 and 6).

Together with other leading judges (including Chief Justice Chandrachud, and Justices Reddy, Desai, Pathak and others), the Court radically expanded standing doctrine for PIL claims and developed a new mode of non-adversarial litigation directed at reining in governmental illegality and lawlessness. During the 1980s, the Court continued its activism in the area of human rights, and in particular asserted an expanded new rights-based jurisprudence in the area of environmental policy. The Court asserted an expanded

role in policing and monitoring cases involving bonded labor and other human rights violations, river and air pollution, and other cases of environmental degradation.

The political environment in this period, however, was not a favorable one for assertiveness in challenging the *Central* Government. Like the Second Russian Constitutional Court (see Epstein et al 2003), the Indian Supreme Court had effectively learned the lesson from the pre-Emergency era to avoid direct conflicts with the Central Government in areas of high political salience. During the 1980s, a strong Congress government dominated both the executive and legislative branches, and the executive still dominated Parliament in the 1980s. In addition, Indira Gandhi's regime in the early 1980s asserted control over the Court through the appointment and transfer process.

Hence the Court continued to be cautious and *selectively* assertive in continuing to build support and institutional solidity. The Court deferred to and/or endorsed the policies and actions of the Gandhi Government in both fundamental rights and governance cases in the areas of judicial appointments, economic policy, and national security policy. In many decisions, the Court, while implicitly endorsing the underlying government action or policy, effectively created and applied doctrines that enabled the Court to avoid confrontation with the regime in power, including the doctrines of "judicially manageable standards" and the "milder" rational basis review standard for review of the Government's economic policy applied in the *R.K. Garg* decision (1981). The Court largely continued this pattern during the regime of Rajiv Gandhi (1985-1989).

The Post-1990 Era: The Era of Heightened Judicial Assertiveness

In the post-1990 era, the Indian Supreme Court entered a new period of expanded activism and assertiveness. As the Congress party weakened, and the Hindu Right BJP increased in power, and regional and caste-based parties began to emerge as powerful blocs, India entered a period of fragmented and weak coalition governments at the Center. The result was a decline in responsible governance in and the effectiveness of both the Executive Branch and Parliament. Fragmented and weak coalition governments lacked the ability to consistently resist, challenge and/or override the Court in this era. Public and elite frustration with corruption and ineffectiveness in the Central Government further undermined public support for the elected branches of the Central Government. At the same time, the Court enjoyed an increase in public support and legitimacy as it gradually proved its ability to ameliorate and remedy governance failures (Mendolsohn 2000). This shift in the political opportunity structure enabled the Court to become bolder in asserting their own institutional and policy values in challenging Central Government policies and actions.

The elite policy values and worldviews of justices shifted in the post-1990s as socialism's star gradually faded away among national policy, and intellectual elites and a broader meta-regime of "liberal reform" took hold. As India moved toward a free market, liberal economy, judges, along with professional and intellectual elites, gradually accepted and supported the neoliberal economic policies of the Congress and BJP regimes. Additionally, judges, like professional and intellectual elites nationally, became increasingly frustrated with increasing levels of corruption and governance failures in the areas of environmental policy and human rights. Coupled with increased media attention and focus, and the mobilization of public interest organizations, the Bar,

and NGOs, the Court asserted an expanded role in policing, monitoring, and overseeing investigations and prosecutions of government corruption.

In contrast to the 1977-1989 period, the post-1990 Court was bolder in taking on the Central Government itself. Judges in this period were motivated by their own sincere belief that that the Court had to intervene to save the rule of law in cases of governance failures. And the judges perceived that they had stronger levels of elite and public support vis-à-vis an ineffective bureaucracy. And an executive and legislative branch weakened by corruption and political fragmentation. As illustrated in Chapters 5 and 6, the Court asserted control over internal reforms of judicial administration in the *Second and Third Judges' Cases* by taking control over the appointments and transfers process from the Executive. It acted to restore public trust and confidence in government by intervening in the *Vineet Narain* case (1996-1998) (in which the Court took over and monitored the CBI's investigation of high level ministers and members of Parliament in the Jain Hawala Scandal). And it took over the protection and management of India's forests in the *Godavarman* (Forest Bench) case (1996-present), in response to the capture of the Ministry of Forests by mining and logging interests.

In the area of fundamental rights, judges in this period continued to act on and assert institutional values in bolstering and expanding the power of the Court, as illustrated by the Court's reassertion and expansion of the basic structure doctrine in cases like *L. Chandra Kumar* (1997) and *Coelho* (2007) (see Chapter 3). While the Court remained a selectively assertive one in the area of fundamental rights, it asserted itself on new fronts. The Court challenged Central Government policies and actions in the area of free speech and civil liberties. And the court went further than the 1977-1989 Court, and challenged the Central Government in asserting the voters' right to information in Parliamentary elections in the *Right to Information* cases (2002-2003), and also challenged the Government's immigration policy for the north-eastern states bordering Bangladesh (the *Sonowal I and II decisions* (2005-2006)).

But the court continued to endorse and/or defer to the Central Government in the area of economic, development, and national security policies. However, I argue in Chapters 3 and 4, the Court's deference in the post-1990 era was not necessarily a reflection of the justices' strategic deference to the regime. Instead, the Court's deference and restraint in these areas was largely self-imposed: judicial deference or restraint reflected the judges' embrace of existing doctrines of restraint because of the judges' own institutional norms and commitments, or reflected the judges' genuine support for the underlying government policies that they upheld. So it wasn't that the Court didn't believe it couldn't challenge the government without backlash, but rather the justices' own embrace of existing legal standards and traditions, and their sincere policy values, that accounted for the Court's selective assertiveness.

The Court's activism and assertiveness in post-Emergency cases like *Maneka Gandhi* (1978), and *Minerva Mills* (1980), was motivated by a larger desire to "redeem" itself for acquiescing to the emergency and to build legitimacy by demonstrating its commitment to liberal democracy, constitutionalism and fundamental rights. The broader context of the judges' and Court's public image and reputation was defined by elite news media coverage of the Court. Sathe (2002) suggests that the Supreme Court of

India had “learned” a valuable lesson from the pre-Emergency era—that it was unable to assert authority in this period in its basic structure doctrine cases because it lacked a broader elite base of support for it as an institution (as political and professional-intellectual elites were divided over the basic structure doctrine). The basic structure doctrine cases only developed backing and support among a very narrow range of elite interests. And during the Emergency, the Court saw its reputation and support levels badly diminished as a result of its total acquiescence to the Gandhi regime.

Both Baxi and Sathe suggest that the post-Emergency Court consciously acted and was motivated by a desire to broaden the base of public support for the Court. Baxi thus suggested that the court’s activism in *Maneka* and activism and selective assertiveness in other cases involving the purge of the Emergency were reflective of a larger “judicial populism.” But in reality, the audience for these decisions, and for the Court’s early endorsement of PIL was really elite constituencies including lawyers and public interest groups, who could take advantage of and support and expand the court’s expansion of fundamental rights and procedural rights through subsequent litigation, advocacy, and the media, who could help broadcast what the Court was doing to other elite constituencies and the public.

In the post-1990 era, bolstered by stronger levels of intellectual and professional elite opinion, and public opinion, the justices of the Court now acted boldly in asserting/maximizing both institutional values (consolidating control of judicial appointments and judicial administration), as well as rule of law values (fighting corruption, promoting good governance). And as illustrated in Chapters 4 and 6, the Court exerted a higher level of authority than the two previous periods analyzed in this study. This was because the political regimes in the post-1990 era perceived that the Court had higher levels of public support vis-à-vis the Executive and Parliament (as illustrated by elite news coverage of the Court’s decisions, and news coverage of public reactions and debate within Parliament and among ministers in the Executive branch).³⁰ Political regimes in this era were reluctant to attack or resist the Court’s assertive judicial decisions in rights and governance cases, because of public support for the Court’s relative effectiveness in ameliorating governance failures.

This dissertation analyzes the dynamics by which the Indian Supreme Court was able to expand its power to its current levels, by focusing on broader shifts in the Court’s activism, assertiveness, and authority over the past four decades. The path to judicial power in India was not an easy one in which the Court steadily and independently

³⁰ Changes in the political opportunity structure in the post-1990 era also made it more difficult for the Central Government to override judicial decisions via the amendment process. The Constitution, in Article 368, requires only a two-thirds vote of both the Lok Sabha and Rajya Sabha houses of Parliament for most amendments. In the 1990s, Congress party strength diminished significantly, as the Janata Dal, the center-right Bharitya Janata Party, and regional parties increased in strength. Since 1989, no single political party has been able to win a supermajority in Parliament, and instead the largest parties have been forced to form coalition governments with partner parties. The simple majority requirement for amendment also limited the power of the Court early on. But as the Congress party diminished, and new opposition and regional parties gained power, the Court gained a degree of policy space as it was difficult for coalition governments to override the Court due to lack of numerical strength in Parliament.

expanded the scope of its power and authority. Rather, a closer investigation of the expansion of the Court's power illustrates a much more complex, nuanced story - a story of an activist, but cautious Court that gradually built power and legitimacy.

Overview of Chapters

Chapter 2 begins by analyzing the dynamics behind the Court's activism and assertiveness in the pre-Emergency and Emergency periods (1967-1976). During this period, the Court fought to protect its own institutional power, and indeed, its very survival as an institution. The Court asserted the basic structure doctrine, and limits on the constituent power of amendment, in order to challenge the social-egalitarian reform agenda of Prime Minister Indira Gandhi's Congress regime.³¹ This chapter analyzes the elite professional and intellectual origins of the basic structure doctrine, and how the basic structure decisions triggered significant political backlash from the Gandhi regime. Ultimately, the Court was forced to acquiesce to the Gandhi regime in the face of direct attacks on the Court's jurisdiction and power. The Court was unable to overcome an inhospitable political opportunity structure during this period.

Chapters 3 through 6 analyze how the post-Emergency Court (1977-2007) was able to gradually re-build legitimacy and expand its power vis-à-vis the elected branches of the Central Government. I examine broader shifts in the Court's power in two key issue areas—fundamental rights and governance. I chose to focus on these two areas because they capture crucial dimensions of the Court's activity and power, and some of the most significant areas of conflict between the Central Government and the judiciary.³² I trace these dynamics across two distinct time periods: the 1977-1989 era (in which the Central Government was governed by Janata and Congress governments), and the post-1990 era (in which the Government was controlled primarily by weaker coalition governments). Through qualitative analysis of politically significant decisions of the Court, field interviews with retired judges and other experts, and analysis of elite news editorial coverage of decisions, Chapters 3 and 5 analyzed the *motives* that drove the Court to shift toward activism and greater assertiveness, and how the *political opportunity structure* for judicial power affected the Court's assertiveness and authority.

As illustrated in Chapters 3 and 4, the post-Emergency Court shifted toward greater activism in expanding the scope of the fundamental rights. Overall, however, the Court was selectively assertive in challenging the Central Government in fundamental rights cases in both the 1977-1989 and post-1990 periods. The Court reasserted its power in several basic structure cases in the post-Emergency era. The Court was also assertive in challenging Central Government policies in cases involving free speech and civil liberties, the right to information, and immigration policy. However, the Court deferred to

³¹ As illustrated in Chapter 2, the Court's activism and assertiveness in the basic structure doctrine cases was driven by the Court's concerns about the potential for future erosion of fundamental rights and the role of the Court in protecting those rights. From 1950 to 1967, the Central Government of Prime Minister Jawarhalal Nehru enacted a series of constitutional amendments designed to insulate government land reform laws from judicial review.

³² Other areas not analyzed in this dissertation in which the Court has played a significant role are quotas/affirmative action and equality cases, federalism, and secularism and religion (see Appendices 1).

and/or endorsed the Government in most high stakes controversies involving economic, development, and national security policy in both time periods. Across both time periods, the Court exerted relatively high levels of authority where it was assertive.

As illustrated in Chapters 5 and 6, the Court gradually expanded its power in governance during the post-Emergency era. Following Indira Gandhi's victory in the 1980 elections, the Court embraced a new activism and expanded the scope of key fundamental rights provisions of the Indian Constitution, including Articles 14, 19 and 21. In addition, the Court broadly reinterpreted Article 32 to liberalize standing doctrine to expand access to the Court for public interest litigation (PIL) claims challenging government illegality, repression of human rights, and the failure to arrest environmental degradation. During the 1980s, however, the Court steered clear of directly challenging the elected branches of the Central Government, as evidenced by the Court's endorsement of executive primacy in judicial appointments in the *Judges' Case* (1981). The Court gradually built support and power by demonstrating its commitment to human rights and good governance in these cases (Baxi 1987, 37-39, 45). And in the post-1990 era, an emboldened Court became more assertive in challenging the power of the Central Government in the areas of judicial appointments and administration, corruption and accountability, environmental policy, and human rights-governance matters. In some of these areas, the Court went so far as to virtually take control over governance and policy-making functions that were previously the domain of the political branches.

Chapter 2

Activism and Assertiveness in the Pre-Emergency and Emergency Era: The Role of the Indian Legal Complex in Basic Structure Doctrine Decisions

As illustrated in Chapters 3 and 5 of this study, the Supreme Court of India today is one of the most powerful courts in the world in the domains of fundamental rights and governance. In 2007, the Court in *Coelho v. State of Tamil Nadu* reasserted the extraordinary power to invalidate constitutional amendments that violate the “basic structure” of the Indian Constitution (see Chapter 3). During the early part of the post-Independence era (1950-1967), however, the Court was largely positivist in its approach to constitutional interpretation, and asserted a relatively limited role in governance. From the 1970s to the present, the Court shifted toward a new activism and assertiveness in the area of fundamental rights, and emerged as champion of the rule of law, constitutionalism and fundamental rights. Aided by the Indian legal complex, the Court shifted toward a more activist and assertive approach in challenging government land reform policies and Parliament’s constituent power of amendment in a series of landmark decisions involving property rights.

As presented in Chapter 1, I suggest that the thesis of elite institutionalism can help expand existing public law theoretical accounts of the shifts in the activism and assertiveness of the Indian Supreme Court. According to this thesis, the institutional context of courts, and the intellectual climate of legal-professional and intellectual elite worldviews within which judges are situated can help motivate and constrain judicial decision-making. This chapter explores the critical role played by the “Indian legal complex” in the battle over protection of property rights, fundamental rights, constitutionalism, and the rule of law in the Indian Supreme Court. The independence and power of the Indian judiciary today is in part a product of a series of epic battles between government lawyers who defended Parliament’s power to amend the Constitution without limitation, and leading legal scholars, Senior Advocates from the private bar, media elites, and leading conservative intellectuals and political leaders who argued for the basic structure doctrine and implied limitations on the amending power. In these battles, the Indian legal complex played an important role in developing the legal and doctrinal arguments that were ultimately adopted by the Court in a series of landmark decisions asserting and developing the basic structure doctrine. In addition, the Bar and other groups also helped shape and influence a broader shift in the role conceptions of judges, who accepted and asserted the Court’s role as a guardian of the Indian Constitution and fundamental rights. The justices of the Court were thus driven by a larger commitment to constitutionalism.

However, the Court was ultimately unable to overcome a hostile political opportunity structure with its decisions, as the Government overturned the Court’s decisions and attacked the Court through court-packing and attacks on the Court’s power and jurisdiction during the Emergency. The Court was unable to secure compliance with its basic structure decisions until after the Emergency and the election of the Janata Party coalition in the 1977 national elections.

Following Halliday et al (2007), I define the legal complex in India as consisting of government and private lawyers, judges, legal scholars and commentators, journalists and legal commentators in the media, and civil servants in the law ministry and law commission. As Halliday et al (2007) illustrate, the legal complex has played a very different role across different polities in bolstering political liberalism and a moderate state. Analyzing the relationship between mobilization of the legal complex and political liberalism requires a careful and nuanced understanding of the socialist ideology and worldview of the dominant Indian National Congress party and the social-egalitarian aspirations of the Indian Constitution. This emphasis on social-egalitarian reform must be juxtaposed against the quasi-feudal, highly unequal distribution of land under the zamindar system, a legacy of British rule.

I argue in this chapter that the push to advance the basic structure doctrine in India was characterized by initial contestation between leading lawyers and political leaders in the ruling Congress Party, and conservative lawyers and political leaders from conservative opposition parties over land reform policies and protections for property rights. However, as illustrated in Chapters 3 and 4 of this study, following the end of Indira Gandhi's authoritarian Emergency rule regime (1975-1977), and the election of the Janata Party coalition in the 1977 elections, legal and political elites coalesced in their support for the basic structure doctrine as a vehicle for entrenching core principles of constitutionalism, limited government, and the rule of law.

Part I offers a brief overview of the role of the Indian legal complex in the framing of the Indian Constitution, and seeks to understand the origins of the tension and conflict between the social-egalitarian reform agenda and vision of the dominant Congress party, and the push for fundamental rights and limits on Parliament's amending power by legal scholars, lawyers, and political and intellectual leaders of conservative opposition parties. Part II of this article traces the role of government lawyers, legal academia and the private bar, in the battle over the basic structure doctrine, examining how subset of the legal complex helped advance and build support for the "basic structure" doctrine. Part III analyzes the battle over the basic structure doctrine within India from the larger perspective of the legal complex, and its broader implications for political liberalism in India.

I. The Historical and Constitutional Context

India's present constitutional and political system system was shaped in large part by elite lawyers and political leaders within the Indian National Congress party. The Congress Party was founded in 1885, and was at the forefront of the struggle for independence from British rule. Under the leadership of Mahatma Gandhi and Jawarhalal Nehru, the party effectively mobilized the Indian masses in support of the independence movement. India achieved independence from British rule in 1947. The nexus between the Congress Party and the legal complex was a strong one: Nehru, Gandhi, and many other leaders of the Congress Party had been trained as lawyers in England or in India.

The leadership of the Congress Party was committed to the cause of social reform in India. This vision of social reform had two main strands. Gandhi's vision of social-egalitarian reform emphasized the need to advance the cause of social equality in India by

bringing an end to untouchability and other forms of discrimination. Nehru, in contrast, espoused a more statist or state-led conception of socialism in which the government would play a leading role in redistributing wealth through state-led industrialization, and land reform. Additionally, lawyers and legal scholars within the Congress Party, including Babasaheb Ambedkar, India's first Attorney General, also played a key role as members of the Constituent Assembly. The Assembly was charged with the extraordinary task of drafting a new Constitution for the new republic.

In creating a new constitution, Nehru and the other leaders of the Constituent Assembly attempted to strike a balance between the socialist-reformist aspirations of the Congress party, and the commitment to protecting fundamental rights. The Assembly achieved this by drafting a Constitution that included both the social-aspirational Directive Principles, which set forth a set of social-egalitarian goals, and the Fundamental Rights provisions, a set of negative rights imposing limits on government power. The former articulated the "humanitarian socialist precepts..." at the heart "...of the Indian social revolution" (Austin 1966, 75). The Fundamental Rights, in contrast, set forth explicit, justiciable negative rights, and were modeled in part on the American Bill of Rights (Austin 1966, 55).

A demand for both positive rights and negative rights had been central to the impetus for founding the Indian National Congress, stemming from a desire among Indians for the same rights enjoyed by their British rulers (Austin 1966, 55). A set of Indian pre-independence documents parallel the aspirational American Declaration of Independence's demand for rights: The Constitution of India Bill of 1895, the Commonwealth of India Bill of 1925, the Nehru Report of 1928, the Karachi Resolution of 1931, and the Sapru Report of 1945. The Constitution of India Bill set forth a "variety of rights including those of free speech, imprisonment only by competent authority, and of free state education" (Austin, 1966, 55). In addition, "a series of Congress resolutions adopted between 1917 and 1919" called for civil rights and equal status with the British citizens (Id.). The Commonwealth of India Bill of 1925, authored by Annie Besant, a freedom fighter and social reformer, set forth seven provisions for fundamental rights, stating that individual liberty, freedom of conscience, free expression of opinion, free assembly, and equality before the law were to be guaranteed (Id). The Karachi Resolution highlighted a melding of the Congress party's commitment to social reform and protecting minority rights (Id). Ultimately, the Fundamental Rights contained in the Indian Constitution were in large part derived from the third document in this series—the Fundamental Rights of the Nehru Report, a product of the Forty-Third Annual Session of the Indian National Congress prior to independence in 1928 (Austin 1966, 54). The Nehru Report's exposition of Fundamental Rights were based heavily on those "included in the American and post-war European constitutions" and drew explicitly on language contained in the aforementioned Commonwealth of India Bill (Austin 1966, 53). But at the same time, the Constituent Assembly sought to limit the scope of judicial activism and assertiveness in cases involving government policies affecting property rights and personal liberty. The Assembly eliminated due process clause provisions for the property and compensation provisions (Article 31), and for the right to life and personal liberty (Article 21) (see Andhyarujina 2000; Mate 2009).

In many ways, the battles between the Indian judiciary and Parliament over the basic structure doctrine can be traced to a fundamental tension within the Indian Constitution between the liberal commitment to individual rights, including property, in the Fundamental Rights section (Part III), and the social-egalitarian aspirations contained in the Directive Principles (Part IV) (*see* Austin 1966; Jacobsohn 2003). Granville Austin, the leading historian of the Indian Constitution, wrote that the Fundamental Rights and Directive Principles together were the “conscience of the Indian Constitution” (Austin 1966, 50-54).

The post-independence Congress regimes of Jawarhalal Nehru and Indira Gandhi sought to fulfill the mandate of the Directive Principles through aggressive land reform policies. This tension reflected a broader clash between the Congress party’s desire to fundamentally reform India by eliminating social and economic inequality, and the desire of the zamindari class of wealthy landholders that had grown powerful under British colonial rule to retain their holdings and status in a new Indian republic (*see* Merillat 1970). Drawing upon the fundamental rights, wealthy landholders challenged the land reform policies in the High Courts and Supreme Courts. In 1951, the Patna High Court invalidated a land reform law enacted by the State of Bihar on the ground that the law did not provide adequate compensation to landholders.¹

In response to these early decisions, in 1951, the Congress Government of Nehru amended the Constitution, introducing a series of amendments to Article 31 (which protected property rights).² In enacting the First Amendment, the Government added Articles 31-A and 31B to the Constitution, adding the “Ninth Schedule” to the Indian Constitution in Article 31-A. This schedule “placed all laws enacted for the purpose of abolishing the proprietary and intermediate interests in agricultural lands above challenge in the courts” on the grounds that they violated any of the fundamental rights provisions of the Constitution.³ Article 31B insulated any laws placed in the Ninth Schedule of the Constitution from judicial review.

The Nehru Government’s efforts to introduce legislation to amend the Constitution so as to insulate land reform legislation from judicial review met with significant opposition from some political leaders, leading members of the Bar, and from the media. For example, S. P. Mookherjee, the leader of the Hindu-right Jana Sangh party, questioned the government’s “indecent haste” to amend the Constitution, arguing on the floor of Parliament that the government was effectively treating the Constitution as a “scrap of paper” (Austin 1999, 88). Mookherjee’s comments echoed the *Times of*

¹ Kameshwar Singh v. State of Bihar, AIR 1951 Pat 91 (1951). Similar laws were upheld by the Uttar Pradesh and Madhya Pradesh High Courts.

² Article 31 of the Constitution set forth protections for private property, and in its original form, stipulated that:

(1) No person shall be deprived of his property save by authority of law
(2) No property, movable or immovable including any interest in or in any company owning any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given.

³ S.P. SATHE, CONSTITUTIONAL AMENDMENTS 1950-199: LAW AND POLITICS 4 (1989): 4

India's editorial coverage, which concluded that “an air of indecent haste pervades” the amending process (Austin 1999, 88, n. 57). In addition, the Supreme Court Bar Association, along with other groups of advocates released statements expressing their opposition to the amendment (Id.). Even President Rajendra Prasad initially objected to the First Amendment bill after it was enacted, but prior to the bill reaching him for his formal assent; Prasad ultimately gave his assent to the bill.

In response, in a series of decisions in 1954, the Supreme Court ruled that economic regulations that caused restrictions on property rights constituted an abridgment of the property right, and thus triggered the compensation requirement.⁴ In these decisions, the Court interpreted the term “compensation” in Article 31 as requiring fair and adequate compensation.⁵ Continuing the see-saw battle, the Government passed the Fourth Amendment, which sought to limit compensation only to those cases where the state actually acquired property, and stipulated that it was the government, not the courts, who would have the final say in determining the amount of compensation required. In addition, the amendment expanded the number of categories of legislation contained in Article 31A that were immune from challenge for abridging the fundamental rights provisions contained in Articles 14, 19, or 31, and also added seven additional Acts to the Ninth Schedule.

The battle over property rights continued into the 1960s. The Government responded to the judicial invalidation of two *state* land reform measures by passing the Seventeenth Amendment, which sought to expand the term “state” in Article 31 to encompass a broader array of land units, and also added an additional forty-four laws into the Ninth Schedule to immunize them from judicial review.⁶ The battle between the judiciary and the Government over property rights culminated in two landmark decisions—*Golak Nath v. State of Punjab*⁷ in 1967, and *Kesavananda Bharati v. State of Kerala* in 1973.

II. The Indian Legal Complex and the Basic Structure Doctrine

Although leading justices of the Court were ultimately instrumental in advancing the doctrine of implied limitations and the basic structure doctrine, legal scholars and leading Senior Advocates of the Indian bar played a key role both in advancing the theoretical foundations, as well as the legal argumentation and advocacy in support of the basic structure doctrine. In addition, the battle over the basic structure doctrine was grounded within a larger political struggle between the Congress party government and its agenda of social-reform, and political elites that opposed the government’s efforts to

⁴ See *State of West Bengal v. Bela Banerjee* (1954) SCR 558; *State of West Bengal v. Subodh Gopal* A.I.R. 1954 S.C. 92; *Dwarkadas Srinivas v. Sholapur Spinning & Weaving Co.*, A.I.R. 1954 SC. 119 (1954).

⁵ Raju Ramachandran, “The Supreme Court and the Basic Structure Doctrine,” in B.N. KIRPAL ET AL., EDS., SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA (New Delhi: Oxford Univ. Press 2000), 110.

⁶ The Supreme Court invalidated the Kerala Agrarian Relations Act of 1961, and the Madras Land Reforms Act of 1961, on the grounds that the state governments had defined the term “estate” as excluding “ryotwari estates,” the subject of the local land reform regulations. See *Karimbil Kunhikonam v. Kerala*, A.I.R. 1962 S.C. 723; *Krishnaswami v. Madras*, A.I.R. 1964 S.C. 1515.

⁷ 2 SCR 762 (1967); A.I.R. 1967 S.C. 1643

amend the constitution so as to insulate the government's land reform policies from judicial review. Support for maintaining Parliament's unlimited power to amend the Constitution during the 1960s and 1970s was solid among leading members of the legal complex within the Congress governments of Nehru and Gandhi government, including the various Law Ministers, Attorney Generals, solicitor generals, members of the Law Commission (an advisory group charged with making recommendations regarding constitutional revision and change), and other cabinet ministers.

A gifted group of Senior Advocates of the Supreme Court Bar, led by M.K. Nambyar, Nani Palkhivala, C.K. Dapthary (a former Attorney General), Soli Sorabjee (Palkhivala's junior), M.C. Chagla (a former Chief Justice of the Bombay High Court), J.B. Dadachanji, and Anil Divan all played a key role in advancing the basic structure doctrine through legal argumentation and advocacy before the Supreme Court. In addition, several high profile retired justices, along with legal analysts in the media, also played an important role in advocating for the basic structure doctrine in the media, public symposia and other forums in which legal and constitutional issues were debated and discussed. Significantly, the efforts of these lawyers were supported by leaders of political opposition parties and civil society groups.

Support for the basic structure doctrine steadily gained momentum among three main groups within the Indian legal complex during the late 1960s and early 1970s: constitutionalists, conservatives, and a third group of Congress dissenters and socialists and communists. First, a group of leading intellectuals, scholars, and statesman that I refer to here as "constitutionalists," supported the doctrine because of concern that the Congress government of Indira Gandhi was fundamentally changing and improperly altering the original design and constitutional framework adopted by the Constituent Assembly in 1950. Included in this group were leaders such as former Governor General and Madras Chief Minister C. Rajagopalachari, K.M. Munshi and Acharya Kripalani (members of the Constituent Assembly), and other leaders who played a key role in the independence movement and/or the drafting of the Indian Constitution.

A second group (that also overlapped with the constitutionalist circle) included what I refer to here as the "conservative bloc" consisting of political leaders from conservative opposition parties such as the pro-property Swatantra party (which ultimately formed a part of the Janata coalition party that came to power in 1977), retired judges, and leaders from the Jana Sangh, a Hindu Right party. Leaders from these parties included former Governor General C. Rajagopalachari, S.P. Mookherjee, A.B. Vajpayee (who later became Prime Minister of the BJP governments of 1998-2004, and Ram Jethmalani.

Curiously, during the 1970s, even leaders from the Left within Parliament found themselves allied with constitutionalists and conservatives in their opposition to some of the Gandhi regime's efforts to alter the constitution (Austin 1999, 204 n. 21). This third group of supporters for the basic structure doctrine included leaders from the socialist and communist parties who also joined with the constitutionalists and conservatives in opposing Gandhi's efforts to supercede justices and "pack" the Court following the Court's decision in *Kesavananda* in 1973.

Origins of the Basic Structure Doctrine

The basic structure doctrine actually had its origins in German constitutional law. Dieter Conrad, a German scholar and head of the law department at the South Asia Institute of the University of Heidelberg, first introduced the concept of the basic structure in a lecture on the “Implied Limitations of the Amending Power” to the Banaras Hindu University Law Faculty. Conrad based his lecture on insights drawn from civil law and the German Constitution-the Basic Law of 1949 (Singh 2001). The Basic Law contained certain "eternal clauses" which provided that the German Constitutional Court could invalidate constitutional amendments that altered or changed the Basic Law; included in these clauses were Article 1 (human life) and Article 20 (basic principles of popular sovereignty) (Spevack 1997; Kommers 1999).

At the time of his lecture, most Indian jurists were not familiar with the basic structure doctrine, in part because the doctrine was rooted in civil law. Commenting on the significance of Conrad’s contribution, Singh (2001) notes that the concept of the basic structure limitation was:

known to the civil law countries and was, among others, expressed in the German Constitution - the Basic Law of 1949. By bringing it to the notice of the lawyers in India and by convincing them about its natural existence in the Indian Constitution, or for that matter in any Constitution, Conrad bridged the common law and the civil law traditions in a major way. In order to ensure the durability and smooth operation of the bridge, he continued to supervise it (Singh 2001).

In his lecture, Conrad noted the need for imposing limitations on the amending power, particularly given Germany’s experience with Nazi rule:

Perhaps the position of the Supreme Court is influenced by the fact that it has not so far been confronted with any extreme type of constitutional amendments. It is the duty of the jurist, though, to anticipate extreme cases of conflict, and sometimes only extreme tests reveal the true nature of a legal concept. So, if for the purpose of legal discussion, I may propose some fictive amendment laws to you, could it still be considered a valid exercise of the amendment power conferred by Article 368 if a two-thirds majority changed Article 1 by dividing India into two States of Tamilnad and Hindustan proper?

Could a constitutional amendment abolish Article 21, to the effect that forthwith a person could be deprived of his life or personal liberty without authorization by law? Could the ruling party, if it sees its majority shrinking, amend Article 368 to the effect that the amending power rests with the President acting on the advice of the Prime Minister? Could the amending power be used to abolish the Constitution and reintroduce, let us say, the rule of a mogul emperor or of the Crown of England? I do not want, by posing such questions, to provoke easy answers. But I should like to acquaint you with the discussion which took place on such questions among constitutional lawyers in Germany in the Weimar period

- discussion, seeming academic at first, but suddenly illustrated by history in a drastic and terrible manner (Conrad 1965, cited in Noorani 1982 at 278-279).

Ultimately, Conrad's theoretical argument and perspective would be adopted and deployed by Chief Justice K. Subba Rao in the landmark decision of in *Golak Nath v. State of Punjab* (1967), in which the Court, for the first time, asserted the power to invalidate constitutional amendments that abrogated the fundamental rights provisions of the Indian Constitution.

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

In *Golak Nath*, the petitioners challenged the validity of the First, Fourth, and Seventeenth Amendments, through which the Government had enacted the Ninth Schedule, and added subsequent land-reform laws to the Schedule to immunize them from judicial review. At issue in *Golak Nath* was whether Parliament's power to amend the Constitution under Article 368 was unlimited. In *Sankari Prasad v. Union of India*,⁸ the Court had rejected the argument that there were limitations on the amending power, and held that that "there was a clear distinction between ordinary law made in exercise of legislative power, and constitutional law made in exercise of constituent power."⁹ Similarly, in *Sajjan Singh v. State of Rajasthan*¹⁰, the Court adjudicated a challenge to the constitutionality of the Seventeenth Amendment. In upholding the amendment, the Court reaffirmed its earlier decision in *Sankari Prasad*.

Several of the leading Senior Advocates of the time skillfully argued the petitioners' case in *Golak Nath*. M.K. Nambyar, the lead counsel for the petitioners in *Golak Nath*, advanced the concept of the basic structure doctrine for the first time in this case, and cited Conrad's lecture before the Court (Austin 1999, 199). Nambyar argued that the word "amendment... cannot be so construed as to enable the Parliament to destroy the permanent character of the Constitution" (Austin 1999, 199, citing *Golak Nath* at 781-783). In addition, he argued that "the fundamental rights are a part of the basic structure of the constitution" and that Parliament's amending power could be "exercised only to preserve rather than destroy the essence of those rights" (*Id.*). In addition, Senior Advocate Nani Palkhivala argued that a constitutional amendment should be considered to be a "law" subject to judicial review under Article 13. This line of argument was opposed by the lawyers representing the Government.

The lawyers for the Government argued that Parliament's power to amend the Constitution so as to enforce the Directive Principles was unlimited and outside the courts' jurisdiction (Austin 1999, 1999). Citing to the Court's earlier judgments in *Sankari Prasad* and *Sajjan Singh*, the government argued that Article 368 contained no implied limitations on the amending power (*Id.*). In addition, the Government argued that "if the amending power is restricted by implied limitations, the Constitution itself might be destroyed by revolution. Indeed it [the amending power] is a safety valve and

⁸ 1952 S.C.R 89; A.I.R. 1951 S.C. 458 (1951)

⁹ Ramachandran, *supra* note 14, at 109.

¹⁰ 1 S.C.R. 933 (1965); A.I.R. 1965 SC 845

an alternative for a violent change by revolution” (*Id.*, citing *Golak Nath* at 783). Finally, the Government argued that all of the provisions in the constitution were basic (*Id.*).

The majority in *Golak Nath* sided with Nambyar, Palkhivala, and the petitioners, overruling the earlier judgments in Shankari Prasad and Sajjan Singh. In a closely divided 6-5 decision, the Court ruled that Parliament cannot enact constitutional amendments that violate the fundamental rights provisions of the constitution. Writing for the majority, Chief Justice K. Subba Rao held that Article 368 did not actually confer the power to amend the Constitution, but rather set forth the procedures for amendment. He went on to hold that amendments enacted under Article 368 were ordinary “laws” under article 13, and thus could be subject to judicial review. The Court also ruled that it was within Parliament’s power to convene a new Constituent Assembly for the purposes of amending the Constitution. Finally, in a strategic move, the Court invoked the doctrine of “prospective overruling,” which meant that the ruling would only apply to future amendments (and that the First, Fourth and Seventeenth Amendments, though deemed to be unconstitutional, would remain in effect).¹¹ The dissenting justices in *Golak Nath*, led by Justice Wanchoo, argued that the “argument of fear” advanced by Subba Rao and the majority constituted a political, and not legal argument. In line with earlier precedent, these justices held that there could be no limitations on the power of amendment under Article 368.

According to several senior advocates who argued before the court in *Golak Nath*, Chief Justice Subba Rao was influenced by Conrad’s argument although the Court ultimately did not hold that there were implied limitations on the amending power (Austin 1999, 200). In addition, Subba Rao’s decision was also influenced by his own fear that the Congress party government would continue to infringe upon the fundamental rights provisions, particularly property rights (*Id.*). He noted that the emergency rule that had been declared in 1962 was still in force, and that the suspension of the rights contained in Articles 14, 19, 21, and 22 constituted a form of “constitutional despotism” (*Id.*). Subba Rao was apprehensive about the Congress party’s past record of enacting amendments that infringed the fundamental rights, and with the death of Nehru in 1964, Subba Rao feared future damage to the fundamental rights by the “brute majority” of the Congress party in the future under the leadership of Indira Gandhi (Austin 1999, 200, citing Subba Rao 1967).

The Court’s decision in *Golak Nath* received a mixed response from legal and professional elites as reflected in the extensive media coverage of the decision (Austin 1999, 203, n. 18). Media coverage of the decision reflected divisions among legal and political elites over the Government’s use of the amending power to advance social and economic reform policies to implement the Directive Principles. While the *Indian Express*, *Hindustan Times*, and *Tribune* welcomed the decision and emphasized the need to protect the fundamental rights, the *Statesman* and *Hindu* were more cautious in their assessments. The *Statesman* suggested that the Court’s decision had introduced a “rigidity in the Constitution” (*Statesman*, New Delhi March 1, 1967). The *Hindu* noted that “many will be inclined to argue that the supremacy of parliament in legislating for

¹¹ SATHE, *supra* note 12, at 17.

the needs of a changing society should not be unduly hampered by judicial interpretations of constitutional provisions in terms of a rigid framework. After all, the basic safeguards for citizens in a democracy are the vigilance exercised by a live public opinion and the periodic accountability of ministers and legislators to the electorate” (*Hindu*, March 3, 1967).

The *Golak Nath* decision led to a political backlash among both legal and political elites which underscored some of the divisions among these elites over the scope of the Government’s power to amend the Constitution so as to abrogate the right to property. Roughly five weeks after the decision, Nath Pai, a Member of Parliament from the Samyukta Socialist Party (SSP), introduced a bill¹² to override the decision by allowing for easy amendment of the Constitution (Austin 1999, 202).

In the public debate over the Nath Pai bill at a conference on “Fundamental Rights and Constitutional Amendment” various legal and political elites argued for and against the Court’s decision. Many of the leading members of the bar, including Attorney General M.C. Setalvad and Senior Advocate N.C. Chatterjee, criticized the Court’s close 6-5 decision. Setalvad suggested that addition of the votes in *Golak Nath* and the previous two cases it overruled suggested that there was a 13-5 majority for the proposition that Article 368 contained an unlimited power of amendment. And Chatterjee announced his support for the Nath Pai Bill, arguing that Court had “ignored the distinction between constituent and legislative power” (Austin 1999, 206).

In contrast, Justice Hidayatullah, a member of the *Golak Nath* majority, and Acharya Kripalani, a member of the Constituent Assembly that had drafted the Constitution, defended the decision. Kripalani argued that property should not be part of the fundamental rights, but that “certain rights cannot be left at the mercy of the majority” (Austin at 205). In addition, the *Golak Nath* decision reflected the growing divisions among legal and political elites over the government’s land reform policies, and use of the amending power to insulate these policies from judicial review. Overall, an analysis of media coverage and analysis of the Court’s decisions by leading scholars and commentators suggests that the position of the Subba Rao majority in *Golak Nath* was held by a relatively small minority of legal and political elites, while the vast majority of lawyers and politicians who were part of the Congress party opposed the decision. But even this small minority of legal elites who supported limitations on Parliament’s amending power, wielded disproportionate sway and influence over the Indian Court in the post-*Golak Nath* era.

In fact, Chief Justice Subba Rao stirred additional controversy and politicized the issue further when he resigned from the Court in April 1967 shortly after the *Golak Nath* case was decided, and announced that he would run for President of India as a member of the conservative, pro-property, Swatantra party.¹³ The Swatantra party had won a record

¹² The Nath Pai bill would ultimately become the basis for the 24th Amendment which was later enacted by Gandhi’s Congress Government in 1971.

¹³ The President in India is formally the head of state of the Indian republic, while the Prime Minister is the head of the government with control and authority over policy making and governance. In addition, the

number of seats (increasing from 18 to 44 seats) in the 1967 Lok Sabha elections, while the Congress party suffered a serious setback, dropping from 361 seats to 283 seats (out of 545).

Following the introduction of the Nath Pai Bill, a small group of leaders within the Samyukta Socialist Party (SSP), including Ram Manohar Lohia, Jayaprakash Narayan, and Madhu Limaye, and some leaders of the Communist Party of India (CPI), also began to publicly voice their frustration with the Gandhi government's efforts to alter the Indian Constitution. Both Lohia and Limaye opposed the Nath Pai bill on the grounds that it would allow for the abrogation of fundamental rights and with it, democracy (Austin 1999, 204). Lohia and Limaye went so far as to support the removal of the right to property from the fundamental rights so as to save the rest of the rights provisions. Many of these leaders went so far as to throw their support behind former Chief Justice K. Subba Rao's candidacy for President in 1967 (Id.).

Although *Golak Nath* ultimately did not have the effect of invalidating the three amendments, the Court did seek to mitigate the effect of the Fourth Amendment, which stipulated that the adequacy of compensation in takings would be non-justiciable. In a later decision, *R.C. Cooper v. Union of India* (1970) (the "Bank Nationalization" case),¹⁴ the Court invalidated the Bank Nationalization Act passed by Indira Gandhi's Congress government, on the grounds that the act provided only illusory compensation, and constituted hostile discrimination by imposing restrictions on only certain banks.¹⁵ The Court went on to rule that that it could hold that regulations were not "reasonable" under Article 31(2) of the Constitution where those regulations failed to provide adequate compensation. In another challenge to the Gandhi Government, the Court in *Madhav Rao Scindia v. India* (1970) (the "Privy Purses case")¹⁶ invalidated the Gandhi government's efforts to abolish the titles, privileges, and privy purses of the former rulers of the princely states.

The Court's decisions in *Golak Nath*, the *Bank Nationalization case*, and the *Privy Purses case* provoked a backlash from the Gandhi Congress government, which had lacked the supermajority in Parliament that was necessary to overturn these decisions. In response to these rulings, Indira Gandhi requested that the President dissolve the Lok Sabha in late 1970 (for the first time in India's political history), and called for new elections to be held in 1971. During the elections, Gandhi openly campaigned against the Court, promising to make basic changes in the Constitution to provide for social equality and poverty alleviation ("Garibi Hatao").¹⁷ A group of opposition parties consisting of the "Old Guard" faction of Congress, the Hindu right Jana Sangh, and the pro-property Swatantra party formed the "Grand Alliance" to contest the 1971 elections (Austin 1999, 232).

President is indirectly elected by the state legislatures, while the Prime Minister is elected in direct national elections as the leader of the party (or coalition of parties) that is able to win a majority of seats.

¹⁴ A.I.R. 1970 S.C. 564.

¹⁵ SATHE, *supra* note 12, at 18.

¹⁶ A.I.R. 1971 S.C. 530.

¹⁷ SATHE, *supra* note 12, at 18.

Following a landslide win, Gandhi's government enacted three amendments to override the Court's rulings. In 1971, the government enacted the Twenty-Fourth Amendment, which sought to overrule *Golak Nath* by affirming and reasserting Parliament's unlimited power to amend the Constitution under Article 368, including the Fundamental Rights provisions, and declared that such amendments were not ordinary "laws" under Article 13, and thus could not be subject to judicial review by the Court.¹⁸ In 1972, the Government overturned the *R.C. Cooper* decision by enacting the Twenty-Fifth Amendment, which sought to make compensation associated with land acquisition laws nonjusticiable, give primacy to the Directive Principles in Article 39 over the Fundamental Rights provisions in Articles 14, 19, and 31, and stipulated that laws enacted to give effect to the Directive Principles could not be challenged in Court. Finally, in 1972, the 29th Amendment was enacted to add two Kerala land reform laws to the Ninth Schedule.

The framing and consideration of these amendments met with some opposition from lawyers and even the Law Commission, an advisory unit within the Law Ministry. Indira Gandhi charged Law Minister H.R. Gokhale, Steel Minister M. Kumaramangalam, and Education Minister S.S. Ray with leadership roles in the drafting of these amendments (Austin 1999, 237). This group worked in tandem with together with the leftist Congress Forum for Socialist Action, led by Rajni Patel (one of Bombay's "whisky communists"), and Dev Kanta Borooah who later became President of the Congress party (*Id.*). The public debate over these amendments highlighted divisions between the socialist ideology of the Congress party, and the more conservative, pro-property views of the right. To try to build support for the amendments, the Congress Forum, and the Congress Parliamentary Party (the legislative wing of the party) led by Krishan Kant, organized a seminar entitled "Our Constitution and Social Transformation" (*Id.* at 241). The purpose of the seminar was to help lawyers and jurists find a way to resolve the impasse created by *Golak Nath* (*Id.*, citing *Statesman*, July 13, 1971). The seminar advanced the socialist goals and aspirations of the Congress Forum, and argued for the need to restore to Parliament the unlimited power of amendment. In addition, the seminar called for the removal of the word "compensation" from Article 31, and argued that the fundamental rights in Articles 14, 19, and 31

Must be withdrawn ...to reduce the concentration of wealth in the urban sector ..and monopolies in the industrial sector...Without these changes our commitment to establish a socialist society shall remain a dead letter ...Parliament and legislatures must be free to exercise complete control over the ownership of the means of production and the property used for controlling others (Austin at 242, citing "Parliamentarians' Seminar on Constitutional Amendments," (*Socialist India*, July 31, August 31 1971).

In contrast, leading jurists from the conservative parties, such as former Chief Justice Subba Rao, Senior Advocate Nani Palkhivala, and other leaders such as Ashoka

¹⁸ *Id.*

Mehta, publicly critiqued and challenged the seminar's "propaganda" that suggested that the fundamental rights were an impediment to social change (Austin at 242, citing *Swarajya*, July 31, 1971). Subba Rao argued that the right to property and to carry on a business "is sought to be substituted...by a totalitarian philosophy..[enabling] the State ...to confiscate property directly or indirectly or nationalize any business" (Austin at 242, citing Subba Rao 1971). Palkhivala argued that an attempt to limit the right to property "would ...run counter to the eternal law of human nature... "Property" has become a dirty word today, "Liberty" may..tomorrow" (Austin at 242, citing Palkhivala 1971).

Elite reaction to the proposed amendments was mixed. Although there was a strong consensus of support for the 24th Amendment, the 25th Amendment was more controversial.¹⁹ The left leaning *National Herald* and *Socialist India* supported both amendments (Austin at 248). But other papers were more critical. The *Hindustan Times* supported a restoration of the pre-*Golak Nath* status quo as envisioned in the 24th Amendment, but argued that the proposed Article 31C (in the 25th Amendment bill) could lead to "arbitrary and vindictive political action against which the citizen has no redress" (Austin at 248). Former Attorney General M.C. Setalvad, who had supported the 24th Amendment in the Rajya Sabha, viewed the 25th Amendment to be an "unwise step and a complete negation of the rule of law" (*Id.*).

Surprisingly, even the Government's own Law Commission, led by former Chief Justice P.B Gajendragadkar expressed partial opposition to parts of the 25th Amendment in the *Forty-sixth Report on the Constitution* (Twenty-Fifth Amendment). The report suggested that not all of the freedoms contained in Article 19 should be subordinated to implementation of the Directive Principles, but only 19 (1)(f) and (g) (invoked by the Court to invalidate the Bank Nationalization Act), which contained the right to property and the right to practice a profession or carry on an occupation or business (*Id.*). The report also recommended that the proposed "escape clause" in Article 31 be deleted. Arguing that there was "no justification for excluding judicial enquiry ...as to whether there is any rational nexus...between the law passed...and the objective intended to be achieve (*Id.*, citing *Forty-Sixth Report* at 11).

***Kesavananda Bharati v. State of Kerala* (1973): Emerging Consensus on Basic Structure Doctrine, Dissensus on Property Rights**

The Indian bar played an integral role in arguing for the adoption of the basic structure doctrine in *Kesavananda Bharati v. State of Kerala* (1973). In *Kesavananda*,²⁰ the Court heard a series of challenges to the Twenty-Fourth, Twenty-Fifth, and Twenty-Ninth Amendments. The case was based on the claims of one Swami Kesavananda, the head of a monastery in Kerala, who had challenged the attempts of the Kerala state government to impose restrictions on the management of his property (Austin at 258-259). During the pendency of his original writ, the Government had enacted the 24th, 25th, and 29th amendments. The 29th Amendment had placed the 1969 Kerala Land

¹⁹ *The Hindustan Times* ran an editorial entitled "24 Yes, 25 No," which captured the mood of most elites at the time (Austin 1999 at 247).

²⁰ A.I.R. 1973 S.C. 1461.

Reform Act in the Ninth Schedule to immunize it from judicial review. As a result, the Swami believed that he needed to challenge the validity of these amendments, and his lead counsel—Nani Palkhivala and J.B. Dadachanji, reframed the case around the issue of implied limitations and the basic structure doctrine.

The case featured arguments by the most eminent and accomplished lawyers in India. Senior Advocates Nani Palkhivala, C.K. Dapthary (a former Attorney General), Soli Sorabjee (Palkhivala's junior), M.C. Chagla (a former Chief Justice of the Bombay High Court), J.B. Dadachanji, and Anil Divan skillfully made the case for implied limitations on Parliament's amending power and adoption of the basic structure doctrine. H.M. Seervai, one of India's leading legal scholars and the Advocate-General of Maharashtra, L.M. Singhvi (Advocate General of Rajasthan), and Attorney General Niren De, presented the Government's case. The hearings in the case continued over seventy days between October 1972 and March 1973. Palkhivala's arguments lasted for thirty-three days. Palkhivala and the other counsel for the petitioners again drew heavily from Conrad's arguments for implied limitations on the amending power.²¹ Palkhivala argued that Parliament did not have the power to abrogate or destroy human rights or fundamental freedoms, including the right to property contained in Article 19 (Austin at 261). He also argued that if Parliament could amend the Constitution without limitation, liberty could be threatened or lost, and an authoritarian government could be established (*Id.*). Palkhivala directed his attention to Article 31C which he argued effectively gave Parliament a "blank charter" to defy the Constitution and the fundamental rights provisions (*Id.*). The Government responded by reiterating contentions advanced in *Golak Nath*, and argued that in written constitutions there could be no implied limitations on the amending power. Furthermore, counsel for the Government noted that the framers of the Indian Constitution had provided for an unlimited power in Article 368, and argued that the fundamental rights provisions were subservient to the Directive Principles (*Id.* at 262).

In a 1002 page decision consisting of *eleven* separate opinions, a closely divided 7-6 bench overruled its earlier decision in *Golak Nath*, holding that Parliament could amend the fundamental rights provisions.²² But the court also held that under Article 368, Parliament could not enact constitutional amendments that altered the "basic structure" of the Indian Constitution.²³ Six judges (Chief Justice S.M. Sikri, Justices J.M. Shelat, A.N. Grover, K.S. Hegde, S. Mukherjee and P. Jagan Mohan Reddy) held that Article 368 barred Parliament from abrogating the fundamental rights, because the Article contained "implied limitations" that did not allow Parliament to alter or destroy the "basic structure" of the Constitution (Noorani 2001). In contrast, six other judges (Justices Ray, M.H. Beg, D.G. Palekar, S.N. Dwivedi, K.K. Mathew and Y.V.

²¹ Following the *Golak Nath* decision, Conrad had published an article in 1970 arguing that the government could not make amendments amounting to "a practical abrogation or a total review" or so drastic that "the fundamental identity of the constitution is no longer apparent" (see Austin at 261, n. 6); D. Conrad, "Limitation of Amendment Procedures and the Constituent Power"; *Indian Year Book of International Affairs*, 1966-1967, Madras, pp. 375-430.

²² Ramachandran, *supra* note 14, at 114.

²³ *Id.*

Chandrachud) held that Article 368 did not contain any implied limitations on the power of constitutional amendment, and that Parliament could amend any provision of the Constitution (Noorani 2001; *see* Sathe 2002).

The critical seventh swing vote for the majority was that of Justice H.R. Khanna. Although Khanna essentially rejected the theory of implied limitations, he held that the term "amendment" itself suggested a limitation on the amending power: "The power of amendment under Article 368 does not include the power to abrogate the Constitution nor does it include the power to alter the basic structure or framework of the Constitution. Subject to the retention of the basic structure, the power of amendment is plenary and includes within itself the power to amend the various articles of the Constitution, including those relating to fundamental rights as well as those which may be said to relate to essential features" (Noorani 2001). Khanna also endorsed Conrad's argument that "Any amending body organised within the statutory scheme, howsoever verbally unlimited its power, cannot by its very structure change the fundamental pillars supporting its constitutional authority" (*Id.*).

Including part of Justice Khanna's opinion, seven justices upheld the Twenty-fourth and Twenty-Ninth amendments in their entirety, and the part of the Twenty-Fifth Amendment. However, the Court held that the second part of the Twenty-Fifth Amendment was invalid and violated the basic structure of the Constitution. That part had added Article 31C to the Constitution, which provided that "no law containing a declaration that is for giving effect to" the directive principles under Articles 39(b) and (c) "shall be called in question in any court on the ground that it" does not give effect to such principles". Again, as in *Golak Nath*, the Court's ruling was prospective—the Court upheld the validity of the existing amendments, but held that it would have the power to review future amendments, including additions to the Ninth Schedule. Although there was arguably a narrow majority for the Court's ruling, nine justices of the Court signed a "summary" statement of the opinion of the Court. According to Austin (1994), Chief Justice Sikri had requested that each judge include a brief statement of conclusions in their opinion. Sikri drafted the summary statement based on these conclusions, and in particular, drew heavily upon Justice Khanna's fifteen point statement of conclusions.

What was remarkable about the Court's decision was that it occurred amidst intense, and often overt, political pressure from the Government. Top government officials, including Law Minister H.R. Gokhale, Steel Minister M. Kumaramangalam, Law Commission Chairman Gajendragadkar, and others actively sought information from inside the bench during the proceedings. In addition, several drafts of some of the judges' opinions actually reached officials within the government well before the decision was announced (Austin 1999 at 270).

The justices in the majority offered differing views of what might comprise the basic structure of the Constitution. For example, Chief Justice Sikri held that the basic structure included:

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

dignity and freedom of the individual. This is of supreme importance. This cannot by any form of amendment be destroyed.²⁴

In addition to the foregoing features, Justice Shelat believed “the unity and integrity of the nation,” and “the mandate given to the state in the directive principles of state policy” were also basic features of the Constitution.²⁵

The arguments and closely divided ruling, in *Kesavananda* revealed that while a growing consensus of legal elites supported the basic structure doctrine and principles of constitutionalism, legal and political elites remained intensely divided on the issue of property rights and land reform. The six dissenting justices all agreed that *Golak Nath* has been incorrectly decided, and that amendments were not “law” under Article 13 (judicial review). However, within the bloc of dissenting opinions, Justices Mathew and Ray appeared to acknowledge some limitations on the power of amendment, noting that no amendment could completely abrogate or repeal the Constitution “without substituting a mechanism by which the State is constituted or organized” (Austin at 266, citing *Kesavananda* at 898, Mathew, J, dissenting). And although they upheld the validity of the second part of the 25th Amendment-- Article 31C’s “escape clause,” three justices suggested that the declaration in that clause (“and no law containing a declaration that is for giving effect to such policy shall be called into question in any court on the ground that it did not give effect to such policy”) did not oust the jurisdiction of the court to question whether a law gave effect to the policy (Austin 1999, 267). Finally, two of the six dissenting justices, Justices Chandrachud and Palekar, still agreed to sign the summary statement.

Elite reaction to the Court’s decision was generally positive and favorable in the major newspapers, suggesting a growing consensus among professional, business and intellectual elites for the basic structure doctrine and implied limitations on the amending power. The *Tribune* welcomed the decision “as the best workable proposition. It shuns extremes, and the result is an admirable exercise in compromise of both the opposing schools of thought. While restoring to Parliament the power to amend the fundamental rights, the court has made it clear that such power is not unlimited and does not extend to the destruction of the framework or the structure of the constitution” (*Tribune*, April 26, 1973). The *Hindu* also praised the judgment, but acknowledged that it would have a “mixed reception among the people” (*Hindu*, April 26, 1973). The *Indian Express* suggested that the government had “good reason to be pleased” with the decision because it had eliminated the “constitutional roadblock” presented by *Golak Nath* to amending the fundamental rights. However, the *Indian Express* also noted that the Court was closely divided on the issue of implied limitations on the amending power. Significantly, the *Indian Express* praised the Court’s invalidation of the second part of the 25th Amendment (the “escape clause”) as a victory for judicial independence:

However attenuated the fundamental rights may be as a result of amendments by Parliament so far as property rights are concerned, it is clear that after the 25th

²⁴ Ramachandran, *supra* note 14, at 114, citing *Kesavananda*, A.I.R. 1973 S.C. 1461 at 1535 (Sikri, C.J.)

²⁵ Ramachandran, *supra* note 14, at 114, citing *Kesavananda*, A.I.R. 1973 S.C. 1461 at 1603 (Shelat, J.).

amendment, they are virtually reduced to what Parliament in its wisdom and good sense will permit. As long as they form a vital part of the constitution, there is no escape from recourse to the judiciary for the vindication of those rights. Parliament should regard the Supreme Court as the legitimate refuge of the citizen and not as a rival authority challenging sovereignty (*Indian Express*, April 27, 1973)

Although most legal scholars and elites now have accepted the legitimacy of the basic structure doctrine, at the time of the *Kesavananda* decision, leading scholars including P.K. Tripathi, H.M. Seervai, S.P. Sathe and T. R. Andhyarujina, were originally critical of the decision. The presence of such a large number of opinions in the case ultimately resulted in confusion among the Bar and legal scholars over what the actual holding of the case.²⁶ Several prominent Senior Advocates and legal scholars, including H.M. Seervai (who had argued against the basic structure doctrine in *Kesavananda*) and Rajeev Dhavan, suggested that the signed summary statement did not accurately reflect the ratio of the majority's holding in the case. Dhavan argued that "only a hard core of six judges ... really accepted the summary statement," and "hoped that the summary statement would be rejected as either too ambiguous or misleading (Austin at 268). Another scholar, Professor P.K. Tripathi criticized the judgment as an attempt by the Court to "wrest finality to itself" and argued that the decision constituted an impermissible act of lawmaking that should be left to the people and the elected branches (Sathe 2002, 71, citing Tripathi 1975, 17, 33). Additional Solicitor General T.R. Andhyarujina argued that the power to review amendments in line with the basic structure doctrine was "not only anti-majoritarian but inconsistent with constitutional democracy" (*Id.*, citing Andhyarujina 1992 at 10).

In contrast, several of the justices in the majority, along with advocates such as Palkhivala and some legal scholars, defended the basic structure doctrine and argued that there was a clear majority for it in the decision. Justice Jagamohan Reddy wrote that eight justices had held that there were basic features in the Constitution, while Justice Khanna suggested that a majority of seven, including himself, supported the basic structure doctrine. In a book published in 1975, Nani Palkhivala concurred with Justice Khanna in suggesting that there had been a seven-judge majority for the basic structure doctrine. Professor A.R. Blackshield argued for the basic structure doctrine in an article criticizing the inadequacy of the *Golak Nath* decision and the need for a more "elastic" and flexible approach that would preserve the Constitution (Austin 1999, 71).

Another leading legal scholar and lawyer, Upendra Baxi, argued that the summary statement of the nine justices could not be disregarded in determining the ratio of the case. Baxi argued that the constituent power was actually shared between Parliament and the Court (Sathe 2002, 71, citing Baxi 1978, 22). Significantly, Baxi argued that the judgment "is, in some sense, the Indian Constitution of the future" and "the truth is that all the Fundamental Rights together with the majority of the Directive Principles

²⁶ See ANDHYARUJINA at 26-27 citing H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA, Vol. 2, 3rd ed. at 2635; see H.M. SEERVAI, *Fundamental Rights Case at the Cross Road* (1973) 75 BOM. L.R. 47 JOURNAL.

elucidate the constitutional conceptions of social justice for India... values which cannot be fulfilled concurrently in an economy of scarcity.”²⁷ Ultimately, the minority view of legal elites and scholars such as Palkhivala, Blackshield and Baxi would become the dominant one following the Emergency. As Sathe (2002) noted: “Although these views appeared to be reflecting a minority opinion at that time, they have been vindicated by the events that took place thereafter” (Sathe 2002, 71).

What was particularly striking about the *Kesavananda* decision was that it represented a direct political challenge by the Court to the electoral mandate of Gandhi’s Congress (R) regime, which had won 350 out of 545 seats in the 1971 Lok Sabha elections. In its manifesto, the Congress (R) sought a mandate “for the reassertion of Parliamentary Supremacy in the matter of amendment of fundamental rights,” a direct reference to the Court’s decision in *Golak Nath*.²⁸ In fact, in its decision, the Court went so far as to question the electoral mandate of the Congress party, noting that “Two-thirds of the members of the two Houses of Parliament need not represent even the majority of the people in this country. Our electoral system is such that even a minority of voters can elect more than two-thirds of the members of either House of Parliament.”²⁹

The controversial decision did not sit well with Indira Gandhi, who proceeded to supercede the three next senior-most justices in the *Kesavananda* majority, in selecting A.N. Ray to be the next Chief Justice. The three superceded justices, Shelat, Hegde and Grover, all resigned immediately. Significantly, the supercession of these justices provoked strong criticism from the Supreme Court Bar and legal complex, retired Supreme Court justices, and leaders of political parties across all spectrums, including the Swatantra, Jana Sangh, Socialist and Communist parties. The leadership of each of these parties publicly criticized the move as threatening the independence of the Indian judiciary. In terms of its historic importance, most scholars of Indian constitutional law today have recognized and noted the significance of this moment in India’s political and constitutional history, though the immediate reaction to the decision was more hostile.³⁰

Assertion of the Basic Structure During The Emergency: the Indira Gandhi Election Case (1976)

In 1975, an Allahabad High Court judge ruled that Gandhi had violated election laws in the 1971 elections. This decision was stayed by the Supreme Court in an order by Justice Krishna Iyer, who ruled that Gandhi could continue to hold office pending the adjudication of the appeal, but could not participate nor vote in Parliamentary debates, or receive salary as a member of Parliament. In response to growing public agitation calling

²⁷ Austin 1999 at 275, citing Baxi 1973 at 130, 132.

²⁸ UPENDRA BAXI, *THE INDIAN SUPREME COURT AND POLITICS* (1980), 22.

²⁹ BAXI, *supra* note 31 at 22, citing *Kesavananda* at 481.

³⁰ See e.g. Upendra Baxi, “The Constitutional Quicksands of Kesavananda Bharati and the Twenty-Fifth Amendment,” (1974) 1 S.C.C. (Jour.) 45 (noting that the decision represented the “constitution of the future”). See P.K. Tripathi, “Kesavananda Bharati v. State of Kerala—Who Wins? (1974) S.C.C. (Jour.) 3; H.M. Seervai, “The Fundamental Rights Case at the Crossroads,” LXXV *Bombay Law Reporter* (Jour.) 47 (1973); ANDHYARUJINA *supra* note 6 at 10.

for Gandhi's resignation, and national strikes organized by opposition leaders that would ultimately form the Janata party, Gandhi declared Emergency rule on June 26, 1975.

During the Emergency, the Court, fighting for its institutional survival, was forced to defer to the Gandhi regime in highly controversial cases. In the *Indira Gandhi Election case* (1976)³¹, the Court adjudicated the appeal from the Allahabad High court decision that Indira Gandhi had violated election laws during the 1971 campaign, and also dealt with a challenge to the constitutionality of the 39th Amendment that had been enacted by the Gandhi Government to immunize her election from judicial review. The basic structure doctrine was invoked by the Court during the Emergency in the case of *Smt. Indira Nehru Gandhi v. Raj Narain*³². The 39th Amendment was enacted in response to the Allahabad High Court setting aside Gandhi's election on the grounds that her campaign had committed a "corrupt practice"³³ and Justice Krishna Iyer's order issuing a stay of the High Court decision pending its adjudication on appeal in the Supreme Court. In addition to the enactment of the Amendment, Parliament also enacted legislation that retroactively changed election law to make the practice that Gandhi had been found to have violated, legal and permissible.

The Five-Bench Panel in *Indira Nehru Gandhi*, which consisted of four justices (Chief Justice Ray, Justice M. Beg, K.K. Mathew, and Y.V. Chandrachud) who had originally dissented in *Kesavananda*, and one judge who had voted for the "basic structure" decision (Justice H.R. Khanna), ultimately accepted and applied the basic structure doctrine, with four out of the five justices voting to invalidate clause (4) of Article 329A³⁴, added by the Thirty-Ninth Amendment, though three of these justices were more strident in asserting the basic structure doctrine (Justice A.N. Ray does not appear to openly assert a violation of basic structure, but still invalidated the clause).³⁵ Clause 4 was enacted to retroactively validate Gandhi's election by superseding the applicability of all previous election laws and immunizing all elections involving the Prime Minister or Speaker of the Lok Sabha from judicial review.³⁶ The Court upheld Clause 4 and ruled that the Government did have the power to retrospectively amend election laws (*Id.*). Austin (1994) observed that the negative reaction of several justices during the hearings toward the permissibility of retrospective effect legislation suggested the possibility of strategic action, noting that "at least three of the judges must have swallowed hard to" uphold Gandhi's election (*Id.*).

Justice Khanna held that the clause violated the basic structure of the Indian Constitution, by contravening the "democratic set-up" of the Constitution and the "rule of law," given that democracy requires that "elections should be free and fair."³⁷ In contrast, Justice Chandrachud invalidated the clause on the grounds that it violated the

³¹ *Indira Nehru Gandhi v. Raj Narain* (1976).

³² 1975 Supp S.C.C. 1.

³³ Ramachandran, *supra* note 14, at 115.

³⁴ *Id.*

³⁵ BAXI, *supra* note 31, at 57-58, citing *Indira Nehru Gandhi*, 1975 Supp S.C.C. 1 at 90-92.

³⁶ Ramachandran, *supra* note 14, at 116.

³⁷ BAXI, *supra* note 31, at 57, citing *Indira Nehru Gandhi*, 1975 Supp S.C.C. 1 at 90-92.

basic structure in that it represented “an outright negation of the right to equality,” and as “arbitrary, and calculated to damage or destroy the rule of law.”³⁸ Justices Ray and Matthew held that Article 329A was invalid “because constituent power cannot be employed to exercise judicial power.”³⁹

However, the Court’s decision was a strategic one: although the Court invalidated the Amendment, the Court acted strategically in upholding Indira Gandhi’s election in light of the retroactive legislation that had been enacted by Parliament. The Court ruled that laws “could be changed with retrospective effect to make legal actions that previously had been offences under the law” and thus upheld Gandhi’s election on the grounds that she had not violated any law” (Austin 1999, 323). Thus the Court upheld the basic structure doctrine, but backed away from strongly challenging Gandhi’s power to continue to rule

Moreover, although the Court was able to assert the basic structure doctrine in the Indira Gandhi Election case, the Emergency regime ultimately sought to restrict and curb judicial power. The Emergency regime effectively overturned the Court’s decision in *Kesavananda* by enacting the 42nd Amendment, which reasserted Parliament’s unlimited power of constitutional amendment, and dramatically curbed the power of the court by restricting its power to review constitutional amendments.

Furthermore, in the face of direct political attacks and threats to its very institutional survival during the Emergency, the Court ultimately acquiesced to the regime in the *Habeas Case* (1976).⁴⁰ The Court upheld the constitutionality and legality of the Emergency orders and ordinances that had authorized draconian preventive detention and that had suspended the right to petition courts for protections under the fundamental rights provisions.⁴¹ Because of its acquiescence to the Emergency regime in *Habeas case*, the Court had suffered a loss of prestige and legitimacy in the eyes of national elites and the broader public, as reflected in the harsh critique in the media of Justices Beg, Chandrachud, and Bhagwati (who voted to uphold the Emergency in *Shukla*) (see Chapter 3).

III. Conclusion: The Indian Legal Complex, Constitutionalism and the Post-Emergency Era

The Indian legal complex played a central role in the battle over the basic structure doctrine and judicial power in the pre- and post-Emergency period. Indeed, the conflict between the Congress party government’s redistributive land reform agenda, and the

³⁸ BAXI, *supra* note 31, at 57, citing *Indira Nehru Gandhi*, 1975 Supp S.C.C. 1 at 257-258.

³⁹ BAXI, *supra* note 31, at 58., citing *Indira Nehru Gandhi*, 1975 Supp S.C.C. 1 at 90-92.

⁴⁰ *ADM Jabalpur v. Shiv Kant Shukla* (1976).

⁴¹ See *A.D.M. Jabalpur v. Shivkant Shukla* (1976) A.I.R. (S.C.) 1207 (Supreme Court upheld Government’s suspension of habeas corpus under MISA, and ruled 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* (1977) A.I.R. SC 1027 (Supreme Court ruled that it could not examine whether conditions of detention were in compliance with prison legislation and legal and constitutional requirements during a period of Emergency rule).

movement to protect and entrench property rights among constitutionalists, conservatives, and leading Senior Advocates could be traced to a tension within the Indian Constitution between the social-egalitarian Directive Principles, and the liberal Fundamental Rights. Through legal scholarship and legal advocacy, the legal complex helped advance the arguments for implied limitations on Parliament's amending power before the Supreme Court, and in the courtroom of public opinion as evidenced by analysis of media coverage of the *Golak Nath*, *Kesavananda*, and *Minerva Mills* decisions.

The role of key sectors within the Indian legal complex in the battle over property rights and limits on the amending power suggests some important insights about the relationship between the legal complex and political liberalism in India. First, the battle over land reform and property rights polarized the Indian legal complex and the political system writ large. As illustrated in the legal argumentation and public debate surrounding each of these decisions, the battle over the basic structure doctrine ultimately divided the Indian legal complex. Judges voting in the majority in *Golak Nath* and *Kesavananda* were supported by the legal and constitutional advocacy of leading Senior Advocates, and by constitutionalist and conservative groups and parties within the political arena and media discourse. In contrast, judges in the minority of these decisions were in line with political majorities in the Gandhi Congress governments, and a majority of the Indian legal complex, which opposed the basic structure doctrine and supported the regime's redistributive land reform agenda.

Second, the legal complex's advocacy for, and the Court's adoption of, the basic structure doctrine demonstrates how the legal complex in India ultimately transformed political liberalism in India. In an effort to achieve the goals set forth in the directive principles, the Congress party regimes of Nehru and Gandhi enacted constitutional amendments to insulate and protect land reform laws from judicial review by the courts. Judges, lawyers, and other political elites who voted and advocated for the basic doctrine were motivated by concerns about protecting the Constitution and enforcing the fundamental rights provisions. The battle fought by constitutionalists, conservatives, and conservative lawyers to enforce property rights, and to entrench limitations on Parliament's amending power through the basic structure doctrine, transformed the role of the Court in the pre-Emergency period as a guardian of the Constitution. The legal and constitutional struggle to protect and enforce rights effectively became a vehicle for redefining the limits of Parliament's and the Court's power. Indeed, the legal complex played a critical role in interpreting and distilling the complex judgments contained in the *Kesavananda* decision, and in the process, played an invaluable role in highlighting the implications of the basic structure doctrine for broader principles of constitutionalism and limited government. This discourse also helped provide legal and constitutional discourse that would ultimately be utilized by opposition parties in their election campaigns against Gandhi and the Congress party.

However, the basic structure doctrine was controversial and faced resistance from many legal scholars and advocates of the Indian Bar. In part, this reflected the worldviews of the legal community at the time, which for the most part envisioned a very limited role for the Indian Supreme Court vis-à-vis the legislative and political supremacy

of Parliament. But I argue here that the controversy over the basic structure also reflected deep political divisions over property rights and the socialist land reform policies of the dominant Congress party regime. Beginning in the late 1960s, conservative parties which favored property rights and constitutionalism, such as the Swatantra party, made modest gains, as reflected in the results of the 1967 elections. The decisions in *Golak Nath* and *Kesavananda* in part arguably reflected the responsiveness of court majorities to the concerns of a small, but growing consensus of professional and legal elites who feared that the Gandhi Government would irrevocably abrogate the fundamental rights and alter the basic structure of the Constitution.

The Court did not enjoy a high degree of authority within the broader political environment, especially among the Congress party leadership, and its property rights and basic structure decisions were overturned by the Gandhi regime via constitutional amendments and legislation in the 1970s. Although the basic structure doctrine had the support of opposition political leaders and prominent professional and intellectual elites, it still reflected a minority view within the broader climate of political, professional, and intellectual elite opinion. As reflected in the mixed media reaction to the *Golak Nath* decision, most legal and political elites still supported the Gandhi Government's land reform agenda, and Parliament's unlimited power of amendment. Elite support for the *Kesavananda* decision was stronger, in part because the Court reached a "compromise" decision in overruling *Golak Nath* and upholding most of the Government's amendments restricting property rights, while asserting the basic structure doctrine.

The Government was thus able to override the Court's decisions in *Golak Nath* and *Kesavananda* because of the unity and strength of the Congress Party Government. Gandhi's Congress party commanded supermajorities in the Parliament that enabled it to enact amendments to overrule the Court's decisions, and the Executive was strong and unified in asserting parliamentary supremacy in order to protect the Government's economic and land reform policies from judicial review.

In Chapters 3 and 4, I argue that the Court's decision in *Minerva Mills* reflected the popular mandate of the 1977 election, and the broader ethos of liberal democracy. The Janata Party's victory in the 1977 election reflected the national electorate's desire for the restoration of liberal democracy and checks and balances lost during India's drift toward authoritarianism during the Emergency rule regime (1975-1977). This broader shift in the political landscape was accompanied by a realignment of public opinion among political elites and the legal complex in support of the basic structure doctrine, as reflected within the elite news editorial coverage of the decision (see Chapters 3 and 4).

The 1977 election also altered the political opportunity structure for judicial power, which helped bolster the Court's authority in the *Minerva Mills* decision in which the Court reasserted the basic structure doctrine. The Janata regime embraced the reassertion of judicial power and the restoration of fundamental rights, and the national electorate had effectively endorsed the Janata Party coalition's election manifesto and agenda, which called for the restoration of democracy and constitutionalism (Limaye 1994). In addition, I argue in Chapters 3 and 4 that the Court's enhanced authority was also a product of the Janata Government's elimination of the right to property from the Constitution through the 44th Amendment, and the strategic advocacy of Senior Advocate

Nani Palkhivala and his legal team in the case. In his legal argumentation and advocacy before the Court, Palkhivala was able to separate divisive and contentious issues of economic policy, from “core” constitutional issues related to limited government, democracy, fundamental rights, and the rule of law.

Through the development and articulation of the basic structure doctrine, the Indian legal complex helped the Court assume a “guardian”⁴² role in protecting basic features of the Constitution from being altered by political majorities, through legal scholarship and advocacy. In their legal advocacy in *Minerva Mills*, leading members of the Indian bar, succeeded in building support for the basic structure doctrine by framing it in terms of the larger “core” issues of political liberalism including the rule of law, constitutionalism, and separation of powers. The basic structure doctrine now has the support of most of the major political parties, including the Congress and BJP, and a broad consensus of legal and political elites. As recently as 2007, the Court in *I.R. Coehlo v. State of Tamil Nadu* (2007) reasserted the basic structure doctrine in holding that the Court could review the validity of all laws inserted into the Ninth Schedule after the *Kesavananda* decision in accordance with the basic structure of the Constitution and the fundamental rights provisions.⁴³ The Congress government acquiesced and accepted the Court’s decision, and elite reaction in the media was generally positive, confirming the broad level of support for the basic structure doctrine within the Indian among legal complex and among political elites at the national level in India today.

⁴² See ANDHYARUJINA *supra* note 6.

⁴³ See *I.R. Coehlo v. State of Tamil Nadu* (2007) at 111-112.

Chapter 3

Activism and Assertiveness in Fundamental Rights (1977-2007): From Liberal Democracy to Liberal Reform

“Judges have changed, but their ideology has been influenced by the prevailing economic policies, and the attitude of the mainstream media toward such issues, of the current sensibilities of the elites on such issues...”

- A Supreme Court Advocate interviewed for this project, commenting on changes in the worldviews of Indian Supreme Court Justices between the 1977-1989, and post-1990 eras

Introduction

The post-Emergency period (1977-1979) was a critical transition period in Indian politics. In the election of 1977, the Congress Party was defeated for the first time in post-independence Indian history, by the Janata Party coalition. The mandate of the elections was a clear one: the Indian electorate had rejected the excesses of Indira Gandhi's Emergency regime (see Austin 1999, 391-394). The Janata Party had campaigned on an agenda calling for the lifting of the Emergency and repeal of the draconian Maintenance of Internal Security Act¹ (MISA); rescinding of the constitutional amendments enacted by the Emergency regime²; and the restoration of democracy, fundamental freedoms, and constitutionalism (Limaye 1994; Austin 1999). During the Emergency, the Indian Supreme Court acquiesced to the regime's suspension of democratic rule and fundamental rights, including the suspension of habeas corpus for detainees under MISA³, and to the Government's direct attacks on the Court's jurisdiction and power via the 42nd Amendment.

However, in the post-Emergency period (1977-2007), the Indian Supreme Court adopted a new activism in interpreting the fundamental rights provisions of the Constitution (see Baxi 1980; Sathe 2002). At the same time, the Court was selectively

¹ The Maintenance of Internal Security Act (MISA) was first enacted by the Gandhi Government in 1973. MISA granted the government broad powers of "preventive" detention and wiretapping. The law was used during the Emergency to arbitrarily imprison thousands, including leaders from the opposition parties.

² These included the 38th, 39th, 40th, and 42nd amendments. The 39th Amendment had immunized MISA from judicial review. The 42nd 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 (Neuborne 2003, 494-495).

³ See *A.D.M. Jabalpur v. Shivkant Shukla* (1976) A.I.R. (S.C.) 1207 (Supreme Court upheld Government's suspension of habeas corpus under MISA, and ruled 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* (1977) A.I.R. SC 1027 (Supreme Court ruled that it could not examine whether conditions of detention were in compliance with prison legislation and legal and constitutional requirements during a period of Emergency rule).

assertive in challenging the Central Government in fundamental rights cases.⁴ For example, the Court was assertive in challenging the Central Government's policies, actions, and/or power in cases involving the scope of judicial review of governmental action, the basic structure doctrine and the scope of Parliament's amending power (see Chapter 2), free speech, and immigration policy. In contrast, the Indian Supreme Court was highly deferential in endorsing the policies and actions of the Central Government in the areas of economic policy, development and national security. Where the Court has been assertive in challenging the government, it has generally exerted a high level of authority, securing government compliance and/or acquiescence with its decisions (see Chapter 4). How can we explain the Court's activism and selective assertiveness in fundamental rights decisions in the post-Emergency era?

I argue in this chapter that the thesis of elite institutionalism helps account for these dynamics. As presented in Chapter 1, 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 judicial activism and assertiveness. Judges' identities as members of the Supreme Court and judiciary, and their professional alignment with the Court as an institution, are a source of judges' values and motivations. Consequently, activism and assertiveness in courts 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 and promote the institutional solidity of the judiciary, and to protect and/or 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 (*see* Smith 1988; Gillman 1993; Gillman and Clayton eds. 1999; Keck 2008). This literature also acknowledges that institutional norms and procedures, and existing law and jurisprudence also can be influential in constraining and shaping judicial decision-making. Judicial decision-making can also be shaped and influenced by inherited jurisprudential traditions or "jurisprudential regimes" (*see* Richards and Kritzer 2002).

The thesis of elite institutionalism differs from existing institutionalist models or accounts by situating judicial decision-making within the larger intellectual milieu and context of Indian judging. It seeks to go beyond the institutional context of the Court to understand how the broader currents of professional and intellectual elite opinion help shape and influence judges' policy worldviews, and activism and assertiveness in specific decisions. Judges' institutional mission or identity is a subset of their overall policy worldviews and intellectual identity, which judges tend to share with professional and intellectual elites in India. I illustrate in this chapter that the activism and selective assertiveness of the Court in fundamental rights decisions reflected both the institutional values and motives of judges, and the ascendance and influence of elite "meta-regimes." The Court's push toward greater activism in fundamental rights cases in the 1977-1989 period was motivated by the justices' desire for institutional redemption and restore

⁴ *See infra* page 17 for definition of politically significant judicial decisions, and discussion of the case selection methodology used in this study.

legitimacy lost as a result of the Court's acquiescence to the Emergency regime (Baxi 1980, 1985). 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 strategic motivations.

In the post-1990 era, the Court's selective assertiveness and deference was a product of both an acceptance by judges 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. At the same time, the Court was not activist in economic, development, and national security policy decisions, and was also not assertive in challenging the government in these areas. I suggest that 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 activism and selective assertiveness in the post-Emergency era. I argue in this chapter that the Court was influenced by the worldviews and ideas of two elite meta-regimes.

Parts I and II provides a descriptive analysis of the Court's shift toward activism in fundamental rights cases, and of variation in judicial assertiveness and authority in the post-Emergency period, using both quantitative and qualitative evidence. Part III examines how existing public law theories of motive fail to provide a complete account of these dynamics. Part IV examines how the thesis of elite institutionalism helps supplement existing public law theories in providing a compelling account of the shift toward greater activism and assertiveness. Part IV concludes.

I. Judicial Activism and Assertiveness in Fundamental Rights Decisions: 1977-1989

A. Activism and Assertiveness in the 1977-1989 Era

The Legacy of the Emergency and Activism in Fundamental Rights

This section analyzes broader shifts in two dimensions of judicial power⁵ in governance cases in the 1977-1989 era. As I laid out in Chapter 1, this study focuses its analysis on a smaller subset of politically significant decisions. Politically significant decisions refer 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, and/or those which directly affected the scope of the power of the Central Government.

Fundamental rights emerged as a salient issue in the post-Emergency era, as the Janata regime moved to restore democratic rule and judicial power by repealing the anti-

democratic constitutional amendments passed by the Emergency regime. 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, pro-property Swatantra Party, the Samyukta Socialist Party (led by Jayaprakash Narayan), and the Bharitya Lok Dal.⁶ This diverse coalition of parties came together with the express purpose of defeating Gandhi and ending the Emergency, and restoring constitutional democracy and fundamental rights (Limaye 1994, 215-230).

By enacting the 43rd and 44th Amendments, the Janata government repealed most of the provisions of the Emergency amendments.⁷ In addition, the new government launched investigations into alleged crimes and abuses of rights committed by the Emergency regime, and established special courts to prosecute offences committed by political officials under that regime (Baxi 1980, 122-123, 209). 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 (Baxi 1987, 37).

In this crucial period of transition, the Janata regime faced a Court consisting entirely of Gandhi’s appointees.⁸ Unlike the Nehru regime, Gandhi’s regime did not defer to the Chief Justice of India in appointment matters, or to the seniority convention that had previously determined selection of Chief Justices.⁹ Instead, Gandhi politicized the appointment process by selecting justices perceived to be committed to supporting the social-egalitarian and populist agenda of her government.¹⁰

One might have expected the Court, filled with Gandhi appointees, to resist the reforms of the Janata period (1977-1979). However, in the post-Emergency Janata years, the Supreme Court launched a new activism, and embraced and buttressed the new regime’s commitment to fundamental rights, and the Janata regime’s efforts to repudiate and overturn the policies of the Emergency regime. Three justices played a key role in

⁶ 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.

⁷ The one exception was the Janata regime’s failure to repeal Sections 4 and 55 of the 42nd Amendment. 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. Ultimately, the Court itself invalidated Sections 4 and 55 in *Minerva Mills v. Union of India* (1980).

⁸ 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. Goswami—all Gandhi appointees.

⁹ 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 (see Austin 1999, 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 (Austin 1999, 125), in light of existing conventions (see Chapter 2).

¹⁰ In an interview with Austin (1999), Justice Reddy, a member of the *Kesavananda* majority, suggested that Gandhi started packing the Court in 1971 with the goal of overturning *Golak Nath* (Austin 1999, 269).

forging a new activist approach: Justices P.N. Bhagwati, V.R. Krishna Iyer, and Chief Justice Y.V. Chandrachud (see Baxi 1980, 150).

The Court's activism in fundamental rights is illustrated by the Court's decisions in two landmark cases.¹¹ First, the Court radically reinterpreted and broadened the scope of Articles 14, 19, and 21 of the fundamental rights provisions of the Constitution in *Maneka Gandhi* (1978), and effectively broadened the scope of review of governmental laws and actions. Second, the Court reasserted the power to invalidate *constitutional amendments* under an expanded conception of the "basic structure" doctrine in the *Minerva Mills* (1980) decision.

Expanding Fundamental Rights: Maneka Gandhi v. Union of India (1978)

The Court launched a new activist approach to interpreting the fundamental rights in the landmark decision *Maneka Gandhi v. Union of India* (1978), the first major decision of the Supreme Court involving personal liberty and fundamental rights in the post-Emergency period (Baxi 1980, 151). In this case, Maneka Gandhi, the daughter-in-law of Indira Gandhi, challenged the seizure of her passport by the Janata Government under the Passports Act of 1967.¹² Gandhi challenged the seizure on the grounds that the action violated Articles 14 and 21 of the Constitution by not providing notice or a hearing prior to the impoundment of her passport. The Janata Government had issued an order impounding Gandhi's passport. The government feared Gandhi was planning to leave the country to avoid testifying in the regime's ongoing investigation involving crimes committed by her husband Sanjay Gandhi, Indira Gandhi's son.

The *Maneka* decision was arguably a "*Marbury*" type decision¹³, in that the Court *accommodated* the government in upholding the passport seizure, but expanded fundamental rights doctrine and the scope of judicial power. The *Maneka Gandhi* decision was also politically significant because the Court's ruling was an *adverse* one for Indira Gandhi both from a political and personal standpoint. Although it extracted procedural concessions from the Janata government, the Court arguably placated the Janata regime both by upholding the seizure of the Passport, and making changes to existing fundamental rights doctrine.

Six out of the seven justices in *Maneka* upheld the seizure of the passport after the Attorney General offered concessions on behalf of the government—specifically, by providing the petitioner with a hearing.¹⁴ The Court forced the government to change its

¹¹ The other dimension of the Court's activism in this period centered on procedural activism - the Court broadened popular access to the judiciary by expanding standing doctrine by radically reinterpreting Article 32 in the *First Judges' Case* (1981). I analyze the expansion of standing doctrine and development of Public Interest Litigation in Chapter 5.

¹² The Act had been reformed following an earlier challenge in *Satwant Singh Sawhney v. Union of India* (1967), 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 the exercise of unlimited executive discretion (Baxi 1980, 151).

¹⁴ Justice Beg actually dissented and held that the order should be invalidated as unconstitutional.

behavior, given that the government anticipated an adverse judgment.¹⁵ But in doctrinal terms, the decision was a ground-breaking one. The Court expanded the scope of judicial review, reading in due process protections into the Constitution,¹⁶ and creating a new standard of “nonarbitrariness.”¹⁷ In addition, the Court created a higher tier of judicial scrutiny by subjecting laws impinging upon fundamental rights to scrutiny under due process protections (Article 21), the nonarbitrariness standard (Article 14), and “reasonableness” review (Article 19).¹⁸

The majority in *Maneka* turned away from the more legalistic approach that held the field since the Court’s decision in *Gopalan v. State of Madras* (1950).¹⁹ Justice Kailasam’s separate opinion reflected the *Gopalan* approach – the doctrinal status quo and a more constrained approach to interpreting the fundamental rights provisions. Although Kailasam concurred with the majority in upholding the validity of the Passport Act and the government’s order, he dissented from the majority with respect to the Court’s overruling of *Gopalan*. Following *Gopalan*, Kailasam argued that Articles 14, 19, and 21 should be interpreted separately, and held that the order at issue could only be subject to a “mild” rational basis scrutiny (*Maneka Gandhi* at 363). In addition, Kailasam dissented from the majority’s holding that principles of natural justice could be read into these rights provisions so as to require that the government provide a hearing under the Passport Act or other statutes (*Id.*).

In contrast, the majority in *Maneka* broke with *Gopalan* and expanded the scope of the fundamental rights contained in Articles 14, 19, and 21. Justice P.N. Bhagwati held that the Court should “expand the reach and ambit of the fundamental rights rather than to attenuate their meaning and content by a process of judicial construction” (*Maneka Gandhi* at 280). First, the majority in *Maneka* read in an expansive conception of due process protections into Article 21 of the Constitution (which the Court refused to do in *Gopalan*). The majority 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 (*Id.*). Bhagwati thus broke from earlier doctrine, in holding “that principles of *natural justice* must be read in to Article 21 of the

¹⁵ Baxi (1980) suggests that the *Maneka Gandhi* case 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 1980, 165).

¹⁶ Article 21 provides as follows: Protection of Life and Personal Liberty--"No person shall be deprived of life or personal liberty except according to procedure established by law."

¹⁷ Article 14 reads as follows: “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.

¹⁸ Article 19 (1) provides as follows: “Protection of certain rights regarding freedom of speech ,etc.—

(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

(f) to acquire, hold, and dispose of private property (repealed by 44th Amendment)

(g) to practise any profession, or to carry on any occupation, trade or business.

Constitution, and require that the petitioner be afforded with reasons a hearing in passport revocation matters” (italics added). Invoking a familiar technique in Indian constitutional law, Bhagwati interpreted Section 10(c)(3) of the Act expansively to uphold it, and held that the Act implies just and fair procedures that comply with the dictates of natural justice.

Second, the Court effectively created a new doctrine of nonarbitrariness, based on Article 14 and 21 (Andhyarujina 1992, 30). To support that approach, Bhagwati set forth an expansive conception of equality in Article 14 developed an expansive view of equality in Article 14²⁰:

“We must reiterate here what we pointed out in *E.P. Royappa v. State of Tamil Nadu* namely, that “from a positivistic point of view, equality is antithetical to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14.”²¹

In this passage, Bhagwati conjured up a new source of judicial power—a new doctrine of nonarbitrariness that empowered the Court to scrutinize key aspects of governance and policy-making, and rein in government illegality (Andhyarujina 1992, 30). In perhaps one of the most famous passages in Indian constitutional law, Bhagwati references Justice Holmes in articulating the new doctrine of nonarbitrariness in *Maneka* as comprised of the principles of reasonableness and fundamental fairness:

The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness, pervades Article 14 like a *brooding omnipresence* and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be “right and just and fair” and not arbitrary, fanciful or oppressive; otherwise it would be no procedure at all and the requirement of Article 21 would not be satisfied.²²

The *Maneka* case was significant because it overturned *Gopalan* in effectively creating a higher tier of judicial scrutiny for laws or policies that restrict personal liberty and fundamental rights. After *Maneka*, these laws and policies would be subject to scrutiny under the due process requirement (Article 21), the “reasonableness” doctrine (Article 19),²³ and the doctrine of “nonarbitrariness” (Article 14). However, as illustrated in this

²⁰ Article 14 reads as follows:

14. 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.

²¹ *Maneka Gandhi* at 283, citing *E.P. Royappa v. State of Tamil Nadu*, (1974) 4 S.C.C. 3 at 38-39.

²² *Id.*

²³ 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:

chapter, the Court selectively wielded this activist framework vis-à-vis Central Government policies and actions. And as illustrated in Chapter 5, the Court built on its decision in *Maneka* and expanded the scope and content of the fundamental rights in a series of governance cases involving human rights and social justice issues. Multiple scholarly accounts of *Maneka* suggest that the Court's decision was motivated by the justices' desire for institutional redemption and out of an effort to rehabilitate the Court's legitimacy that had been weakened as a result of its acquiescence during the Emergency (see Part IV for further discussion of this dynamic).

Reasserting the Basic Structure Doctrine: *Minerva Mills v. Union of India* (1980)

In addition to expanding the scope of fundamental rights, the Indian Supreme Court pushed the frontiers of activism by reasserting the power to invalidate constitutional amendments under the “basic structure doctrine” in *Minerva Mills v. Union of India* (1980). The *Minerva Mills* decision represented the culmination of the battle between the judiciary and the Government for constitutional supremacy (see Chapter 2). The Court had first asserted the power to invalidate constitutional amendments in the landmark decisions *I.C. Golak Nath v. State of Punjab* (1967), and *Kesavananda Bharati v. Union of India* (1973). However, the Court was *unable* to secure the compliance or acquiescence of the Gandhi regime with these decisions. In contrast, the Court in *Minerva Mills* successfully reasserted the basic structure doctrine, and the Gandhi Government acquiesced to the decision.

As illustrated in Chapter 2, the Court's decisions in *Golak Nath* and *Kesavananda* decision were driven by the justices' institutional motivations to protect the fundamental rights and preserve the power and legitimacy of the Court as a guardian of the Constitution. These decisions also reflected the larger elite meta-regime of constitutionalism. This meta-regime reflected the frustrations and concerns of a growing number of professional and intellectual elites regarding the Government's frequent use of the amending power to insulate land reform and economic policies from judicial review, and the resulting erosion of protections for fundamental rights.

In addition, the *Kesavananda* decision also reflected the justices' own recognition of the strategic political context. Austin (1999) wrote that the “court mollified the government by over-ruling *Golak Nath* and upholding the three amendments—in effect, nearly returning to the *Sankari Prasad* case position—while preserving, indeed strengthening, its own power of judicial review” (Austin 1999, 276). In discussing the motivations that drove the majority in *Kesavananda*, Madhu Limaye, a leading scholar and thinker within the Janata party observed: “what weighed with them was both apprehension about the future of liberty as well as their own desire to save and protect their own power and jurisdiction” (Limaye 1994, 57).

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 (*italics added*).

In the *Minerva Mills* (1980) decision, the Court reasserted the power to invalidate constitutional amendments that violated the “basic structure” of the Indian Constitution, *and* did so without triggering retaliation from the Government. The petitioners’ (the owners of the Minerva Mills) original claim involved a challenge to the Government’s nationalization and takeover of the mills under the Government’s Sick Textiles Undertakings (Nationalization) Act of 1974. However, Nani Palkhivala, the counsel for petitioners’ succeeded in reframing the legal issue in terms of the Government’s power to amend the Constitution (Austin 1999, 498-499). Although Palkhivala argued that the nationalization infringed the mill owners’ fundamental right to carry on their business, he also argued that the Court should decide the larger constitutional issue involving the validity of Sections 4 and Section 55 of the 42nd Amendment. The Government’s counsel argued that this larger issue did not arise directly from the petitions’ and that since the 42nd Amendment had been enacted after the passage of the Nationalization Act, that the Court should not reach these issues.

However, the Court accepted Palkhivala’s framing of the case, and Palkhivala proceeded to argue that the two sections of the 42nd Amendment, in subordinating the fundamental rights to the directive principles, violated the basic structure of the Constitution. According to Austin (1999), “public appreciation of the case, judging from newspaper headlines, mirrored Palkhivala’s” (Austin 1999, 500). Media and public elites thus were sympathetic to his framing of the case as one about the Government’s power to amend the Constitution. A headline in the Calcutta newspaper the *Statesman* read “42nd Amendment Act an Arrogant Act,” and the Madras-based *Hindu* ran a story entitled “Hearing Begins in Case Against 42nd Amendment” (*Id.*, citing *Statesman*, November 7, 1979; *Hindu*, October 23, 1979).

The majority, led by Chief Justice Chandrachud, invalidated section 4 of the 42nd Amendment amending Article 368, which had been enacted by Gandhi’s emergency regime to override the *Kesavananda* decision. Section 4 provided that no constitutional amendment could be subject to challenge via judicial review in any court, ruling that this provision itself violated the basic structure of the Constitution. Second, the Court invalidated Article 31-C, amended by the 42nd Amendment (clause 55) to provide that no law enacted to advance the Directive Principles could be challenged as violative of the fundamental rights in Articles 14, 19, or 31, on the grounds that it violated the basic structure of the Constitution (Sathe 2002, 87).

In invalidating the two provisions, the Court also held that judicial review was part of the basic structure of the Constitution. This was significant in that the Court entrenched judicial review of constitutional amendments. Chandrachud’s lead opinion carefully struck a delicate balance between the Directive Principles and the fundamental rights provisions of the Constitution (see Baxi 1983). Chandrachud held that “the Indian Constitution is founded on the bedrock of the balance between Parts III and IV. To give absolute primacy to one over the other is to disturb the harmony of the Constitution. This harmony...between fundamental rights and directive principles is an essential feature of the basic structure of the constitution” (*Minerva Mills* at 612).

Significantly, the Supreme Court did *not* invalidate the Sick Textiles Undertakings (Nationalization) Act of 1974 in *Minerva Mills v. Union of India* (1980).

Chief Justice Chandrachud observed in his majority opinion that “we are not concerned with the merits of that challenge at this stage” (*Minerva Mills* at 601). In fact, the original owners of the *Minerva Mills* brought another separate challenge to the Act in 1986, but lost. According to Austin (1994), the outgoing Janata Government welcomed the Court’s ultimate decision in *Minerva Mills*, because the Court had accomplished a goal that the regime had been unable to accomplish itself, without interfering with the nationalization of the Mills.²⁴

The decision of the Court was welcomed by elites. Thus, the *Hindu* newspaper issued an editorial that stated 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” (Austin, 503, citing the *Hindu*, May 12, 1980). In addition, K.K. Katyal, a Hindu columnist, lauded the Court for doing what the Janata was unable to get done through the Rajya Sabha in 1978 (which was under Congress Control) (*Id.*). Finally, the *Hindustan Times* observed that the decision “was inevitable given the *Kesavananda* decision” and that “the Prime Minister would do well to accept the new situation” (*Id.*, citing *Hindustan Times*, May 11, 1980).

The Government attempted to challenge the Court’s decision by filing a review petition on September 5, 1980, on the grounds that the decision “was not a judgment of the Court at all” because as Bhagwati’s dissent noted, Justice Chandrachud had not properly held a judicial conference and circulated opinions in advance of issuing the Court’s opinion. The Government also argued that Article 38 of the Directive Principles, which called for the State to pursue policies ameliorating socio-economic inequality, was also part of the basic structure of the Constitution. But the Government ultimately gave up in its efforts to review the decision in 1982 (Austin 1999, 503-504, n. 23).

II. Judicial Assertiveness in Fundamental Rights Cases

An Overview of Patterns and Trends in Judicial Assertiveness: 1977-2007

This section provides an overview of the sample of politically significant fundamental rights cases across the 1977-1989, and 1990-2007 periods, examining variation and trends in the Court’s assertiveness by examining the most important fundamental rights decisions decided by the Court in the post-Emergency era (1977-2007) (hereinafter the “rights sample”).²⁵ Table 3.1 (p. 65) is a summary of analysis of the Court’s assertiveness in politically significant fundamental rights decisions in the 1977-2007 era.

These trends are summarized in Table 3.1 (p. 60), and are organized by year and political regime. The decisions in the rights sample illustrate that petitioners’ have invoked the fundamental rights provisions to challenge the government in a broad array

²⁴ 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 44th Amendment, which made property an “ordinary” right.

²⁵ For an overview of characteristics of the overall sample of politically significant cases, see Appendix A-1, p. 221.

of policy and issue areas: economic policy (8 decisions), freedom of speech and the right to information (6 decisions), criminal justice and due process (6 decisions), the basic structure doctrine (5 decisions), national security and preventive detention (5 decisions), development (3), and immigration (2).

Table 3.1 reflects the broad range of issue areas that the Court has adjudicated in fundamental rights decisions. To measure the assertiveness of the Court, I used the following scoring system for measuring the Court's assertiveness in each decision and assigned four labels—"strong challenge," "weak challenge," "weak endorse," and "strong endorse," following Kapiszewski (2008). This scoring system was based on 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.

I assigned assertiveness scores to the Court's decision-making for each regime.²⁶ Although the Court's overall level of assertiveness in terms of total numbers of challenges actually decreased from 54 percent in the 1977-1989 era, to 46 percent in the post-1990 era, the Court arguably was more assertive in this second period, with the number of strong challenges increasing from 1 in the pre-1990 period, to 6 in the post-1990 period. The Court's assertiveness has not varied considerably across regime, ranging from -3 to +3 in all regimes except the NDA/BJP Regime (1998-2004), during which the Court scored the lowest assertiveness score (-7) and the post-2004 Congress regime (+5) during which the Court registered the highest assertive score (see Table 3.1, p. 17). The Court's low assertiveness score during the period of BJP rule (1998-2004) reflected the large number of decisions in which the Court endorsed that regime's economic policies of liberalization and disinvestment, development, and anti-terrorism policy. The relatively high level of assertiveness during the Congress regime (2004-present) reflected the Court's assertiveness in Coelho of the basic structure doctrine, and of its decisions in the *Right to Information* and *Sonowal* decisions involving immigration policy in the northeastern state of Assam.

²⁶ I assigned a +2 for strong challenges, a +1 for weak challenge, -1 for weak endorse cases, and -2 for strong endorse cases.

Table 3.1 Supreme Court Assertiveness in Fundamental Rights Cases by Political Regime: 1977-2007

Regime (Prime Minister)	Time Period	Assertive		Defer/Endorse		Total Number of Cases	Assertiveness Score (% Strong Challenge)
		Strong (+2)	Weak (+1)	Weak (-1)	Strong (-2)		
Janata (Desai)	1977- 1979		2	2		4	0 (none)
Congress (Indira Gandhi)	1980- 1984	1	1	2	2	6	-3 (17%)
Congress (Rajiv Gandhi)	1984- 1989		2	1		3	+3 (none)
Janata Dal (Singh/ Chandra Shekhar)	1989- 1991						0 (none)
Congress (Rao)	1991- 1996		2	1	2	5	-3 (none)
BJP (Vajpayee)	1996- 1996						
Janata Dal (Gujral/Deve Gowda)	1996- 1998	1		1		2	+1 (50%)
BJP (Vajpayee)	1998- 2004	2	1	2	5	10	-7 (20%)
Congress (Singh)	2004- 2007	3	2		1	5	+5 (60%)
Totals		7 (20%)	10 (26%)	9 (26%)	10 (28%)	35	
	Overall: 1977- 2007	16 (44%)		19 (56%)		35	
		1 (9%)	5 (45%)	4 (36%)	1 (9%)	11 (34%)	
	1977- 1989	6 (54%)		5 (46%)			
		6 (25%)	5 (21%)	4 (17%)	10 (42%)	24 (66%)	
	1990- 2007	11 (46%)		13 (54%)			

Overall, the Court was assertive in politically controversial fundamental rights cases, challenging the government in 16 out of 36 decisions (approximately 47%). While this can be viewed as a high level of judicial assertiveness, it was a *selective* assertiveness: the Court was not as assertive in challenging the Government in high-salience issue areas such as economic policy (endorsing government policies in 6 out of 8 decisions), development (endorsing government policies in 3 out of 3 decisions), and national security policy (endorsing government policies in 4 out of 5 decisions) (see Table 3.8). In contrast, the Court has been more relatively more assertive in challenging the government in basic structure doctrine decisions (challenging the government in 4 out of 5 decisions), free speech and the right to information (5 out of 6 decisions), and immigration (2 out of 2 decisions).

Table 3.2 : Politically Significant Fundamental Rights Decisions By Issue Area (1977-2007)

Issue	Endorse	Challenge	Total	% Assertive	Strong Challenges
Economic Policy/Labor	6	1	7	18%	0
Freedom of Speech, Expression, Right to Information	1	5	6	83%	2
Criminal Justice and Due Process	3	2	5	40%	1
Basic Structure/Judicial	1	4	5	80%	3
National Security and Terrorism	4	1	5	20%	0
Development	3	0	3	100%	0
Immigration	0	2	2	100%	2
Other Areas			2		

This variation in assertiveness *also* reflects variation in activism across issue domains and individual decisions involving the fundamental rights provisions in Articles 14, 19, and 21. As illustrated in Section II.B., The Court has been *less* activist in its decisions upholding the government’s economic and development policies, in effectively adopting a “mild” rational basis tier of scrutiny, from the 1980s (this doctrine was adopted in *R.K. Garg v. Union of India* (1982), to the present. This approach effectively “watered down” the stronger standard of nonarbitrariness in Article 14 that was originally adopted by the Court in *Maneka Gandhi v. Union of India* (1978). The Court has adhered closely to this deferential approach in its review of economic and development policies.

Similarly, the Court in the post-has been less activist in politically significant decisions involving national security and terrorism, immigration policy, and labor rights. The next sections provide a closer analysis of the actual decisions themselves in order to understand the dynamics that motivated these patterns and trends.

A. Judicial Assertiveness in the 1977-1989 Era

Fundamental Rights and the Janata’s Post-Emergency Reforms

As illustrated in the first section of this chapter, during the period of Janata rule (1977-1979), the Court was confronted with a series of cases related to the Janata regime’s attempts to prosecute and purge Emergency regime officials, including *Maneka Gandhi* (1978) (*Pathak* (1978) (in which petitioners’ challenged the Emergency regime’s abrogation of bonuses awarded in a settlement between the Life Insurance Corporation and its employees), and *In re Special Courts Bill* (1978) (upholding the validity of proposed legislation that sought to establish special courts to try Emergency officials).

Basic Structure Doctrine Decisions: 1977-1989

As noted earlier, the court 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. Recall that in *Minerva*, the petitioners had challenged both the Sick Textiles Nationalization Act and Sections 4 and 55 of the 42nd 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 42nd Amendment.

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. During the Emergency, Gandhi's government enacted the Forty-Second Amendment. 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 disputes. In addition, 323A also barred the jurisdiction of the High Courts under Article 226 to adjudicate civil service disputes (*Id.*). 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 such key areas as land reform, industrial and labor disputes, and elections (Ramachandran 2000, 122-123). In 1985, the Government of Rajiv Gandhi enacted the Administrative Tribunal Act of 1985.

The Act was challenged via a PIL in *S.P. Sampath Kumar v. Union of India* (1987), 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. The Court built on its earlier activist decision in *Minerva Mills* (1980) in holding that that judicial review is part of the basic structure of the Constitution. But the Court ultimately refused to rule on the validity of Article 323A, and only scrutinized the validity of the Act. 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 given that they had the power of judicial review. In addition the Court held that the tribunals were "no less efficacious than" the High Courts (see Sathe 2002, 156).

However, the Court re-interpreted the Act so as to save its validity, ruling that the Act's appointment provisions, which provided for executive control over appointment of the Chairman, Vice-Chairman, and Members of the Administrative Tribunal would be unconstitutional since judicial independence is a basic essential feature of the Constitution. 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. The Government complied with the Court's decisions and made the changes suggested by the Court.

Deference to Central Government Economic Policies

The Court was also highly deferential in the 1977-1989 period to the government in challenges to economic policies. This is illustrated by the Court's decision in *R.K. Garg v. Union of India* (1982), which involved a challenge to the Gandhi regime's enactment of the Bearer Bonds Act (targeting the problem of "black money" in the black market economy). In *R.K. Garg* (1980), the Court upheld the Special Bearer Bonds (Immunities and Exemptions) Ordinance Act enacted by the Gandhi Congress regime.

This legislation was enacted by the Executive (Prime Minister Indira Gandhi and Council of Ministers) within the Congress government as an ordinance to deal with the problem of “black money” (money that had been earned without being officially reported for tax purposes), and was later passed as an Act by Parliament. The Act granted immunity from prosecution under the Income Tax Act to individuals who purchased these bonds with black money, and forbid any investigation into the source of this money. The petitioner, R.K. Garg, challenged the Act on the grounds that the separate treatment of black money investors in the act was arbitrary and violated Article 14.

The Court endorsed the Bearer Bonds Act from a policy standpoint. The Court ruled that the Act’s separate treatment of black money investors was not violative of 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. 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. That would depend upon diverse fiscal and economic considerations based on practical necessity and administrative expediency and would also involve a certain amount of experimentation on which the Court would be least fitted to pronounce. The Court would not have the necessary competence and expertise to adjudicate upon such an economic issue ... 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 (*R.K. Garg* at 705-706).

The *R.K. Garg* decision was a critical one in that the Court effectively adopted the “double standard” approach of applying heightened scrutiny to individual rights cases, and rational-basis review to economic policy versus individual rights: “Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc” (*Id.*)

Rights of Government Employees and Pensioners

Although the Court was highly deferential to the Government in the area of economic policy, the Court was assertive in challenging Central Government policies involving the rights of government employees and pensioners. For example, in *D.S. Nakara v. Union of India* (1982), the public interest group Common Cause, challenged the government’s adoption of a new liberalized pension scheme that only applied to government employees who had retired after March 31, 1979, on the grounds that such a cut-off date was arbitrary and violative of Article 14, and also violated and the social-egalitarian Directive Principles. The Government argued that the classification of pensioners on the basis of

their date of retirement was a valid classification for the purpose of allocating pension benefits, based on a rational principle having a “direct correlation to the object sought to be achieved by the liberalized pension formula” (*Nakara* at 319).

The Court invalidated the new policy as arbitrary under Article 14. 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 (added by the 42nd Amendment). The Court held that the purpose of pensions and other welfare state policies was to eliminate income inequality, and Article 41²⁷ obligated the state to provide for a decent standard of living, medical aid and freedom from dependence for the elderly (*Nakara* at 344). The Gandhi Congress Government ultimately complied with the court’s decision, and altered its scheme of pension increases so as to increase the Central Government outlays by 510 million rupees. In contrast to its decision in *R.K. Garg*, the Court applied a high degree of scrutiny in standard based on Article 14.

²⁷ Article 41 provides: **41. Right to work, to education and to public assistance in certain cases.**—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.

Table 3.3: Assertiveness of Supreme Court of India in Politically Significant Rights Cases (1977-2007)

Regime	Year	Case	Proced.	Issue	Holding and Govt Response	Assertiveness
Janata (Desai/Singh)	1978	Maneka Gandhi v. Union of India	Article 32	Criminal Justice/Due Process	Govt modifies passport revocation order to provide hearing. Court upholds modified order and Passport Act, but reinterprets Articles 14, 19, and 21 broadly to create new standards of due process, nonarbitrariness.	Weak Challenge
Janata	1978	Pathak v. Union of India	Article 32	Socio-economic rights	Court orders that settlement must be enforced and bonuses paid. Government tries to nullify decision through new law, but Court passes interlocutory order refusing to stay payments pending passage of new legislation. Government complies with order.	Weak Challenge
Janata	1978	In re: Special Courts Bill	Advisory	Emergency	Under its Advisory Jurisdiction, Court upholds validity of Special Courts Bill to try emergency offences, but suggests modifications to Bill to save its constitutional validity. Government incorporates suggested modifications in legislation.	Weak Endorse
Janata	1978	Sanjay Gandhi Bail Case [State (Delhi Admin) v. Sanjay Gandhi]	Appeal	Criminal Justice	Court cancels Sanjay Gandhi's bail in light of his intimidation of prosecution witnesses in Kissa Kursi Ka case (involving Gandhi's role in conspiracy to destroy copies of an anti-Emergency film).	Weak Endorse
Congress (Indira Gandhi)	1980	Minerva Mills v. Union of India	Article 32	Basic Structure	Court invalidates Sections 5 and 44 of the 42nd Amendment, ruling that both violated the basic structure of the Constitution. These sections barred the Court from reviewing the validity of constitutional amendments and laws implementing the Directive Principles. Government decides to not to seek review of case and complies.	Strong Challenge
Congress	1980	V.C. Shukla Case (V.C. Shukla v. State of Delhi)	Appeal	Criminal Justice	Court upholds validity of special courts act, but overturns convictions of Sanjay Gandhi and V.C. Shukla on evidentiary grounds.	Weak Endorse
Congress	1981	R.K. Garg v. Union of India	PIL	Economic	Court upholds the constitutionality of the Special Bearer Bonds Act under Article 14 arbitrariness review.	Strong Endorse
Congress	1981	A.K. Roy v. Union of India	Article 32	National Security	Court upholds Government's preventive detention regime established by National Security Act of 1980	Weak Endorse

Regime	Year	Case	Proced.	Issue	Holding and Govt Response	Assertiveness
Congress	1982	D.S. Nakara v. Union of India	PIL	Economic	Court invalidates government's pension allocation scheme as violative of Article 14 nonarbitrariness standard.	Weak Challenge
Congress (Rajiv Gandhi)	1985	Indian Express Newspapers v. Union of India	Article 32	Free Speech	Court holds that government levy of high customs duty on newsprint violated newspaper company's right to freedom of press under Article 19. Government complies with decision and lifts levy.	Weak Challenge
Congress	1986	S.P. Sampath Kumar v. Union of India	Article 32	Basic Structure	Court upholds the validity of the Administrative Tribunals Act, but recommends changes to law to ensure that tribunals serve as an optimal alternative to courts. Government implements changes recommended by Court.	Weak Endorse
Congress	1987	P. Sambamurthy	Article 32	Basic Structure	Court invalidates Section 371(d) (5) of the Administrative Tribunals Act.	Weak Challenge
Congress (Rao)	1992	LIC v. Manubhai Shai	Article	Free Speech	Government rules that Doordarshan (state television station) was not justified in refusing to telecast film on Bhopal gas leak; refusal violated film producer's right to free expression under Article 19. In response to Court order, Doordarshan airs controversial film.	Weak Challenge
Congress	1994	Kartar Singh v. State of Punjab	Article 32	Nat'l Security	Court upholds the validity of most of TADA, on the grounds that Parliament has competency to enact laws to protect sovereignty. Court strikes down section 22 of Act (which allowed for witness identifications of suspects on the basis of photographic evidence).	Strong Endorse
Congress	1995	Airwaves Case	Appeal	Free Speech/Broadcasting rights	Court rules that private broadcasters have right to telecast Cricket Tournaments, but holds that Doordarshan (state owned television network) still had exclusive telecasting rights, and that TWI would have to pay Doordarshan fees for broadcasting each match. Court rules that viewers of matches have a right to information.	Weak Endorse
Congress	1996	Delhi Science Forum	Article 32	Economic	Court upholds Government disinvestment policy in telecom sector.	Strong Endorse
Janata Dal (Gujral/Deve Gowda)	1997	L. Chandra Kumar v. Union of India	Constitutional Reference	Basic Structure	Court invalidates Article 323 A on the grounds that it violated the basic structure by excluding the jurisdiction of High Courts under Article 226 over administrative tribunals. Government complies with decision of the Court.	Strong Challenge

Regime	Year	Case	Proced.	Issue	Holding and Govt Response	Assertiveness
Janata Dal	1997	PUCL v. India (Wiretapping)	PIL	Nat'l Security	Court upholds Government's power to tap phones, but rules that government must provide for procedural safeguards in tapping of telephones in order to safeguard the right of privacy under Article 21.	Weak Endorse
BJP (Vajpayee)	2000	Narmada Dam Case	PIL	Development	Petitioners seek to enjoin construction of Narmada Dam on the grounds that rehabilitation and resettlement of villages was not possible, and because environmental impacts of project had not been properly considered or addressed. Court rules that construction on Narmada dam can proceed, holding that project had substantially met environmental compliance requirements.	Strong Endorse
BJP	2000	Centre for PIL v. Union of India	PIL	Economic	Court upholds sale of government owned oil fields to private companies.	Strong Endorse
BJP	2001	BALCO v. Union of India	PIL	Economic	Court upholds Government policy of disinvestment in government owned aluminum company against challenge under Article 14. Court holds that economic policies must be reviewed under mild "rational basis" review and can only be reviewed for procedural illegality, and not on substantive grounds.	Strong Endorse
BJP	2003	Association for Democratic Reforms v. Union of India	PIL	Right to Information	Court orders Election Commission to issue disclosure guidelines requiring candidates for Parliament and state legislatures to disclose financial and criminal records to voters. Court's orders are based on its ruling that voters have a right to information Government responds by enacting Section 33B of the Representation of People's Act to override decision.	Strong Challenge
BJP	2003	PUCL v. Union of India (Right to Information)	PIL	Right to Information	Court invalidates Section 33B of Representation of People's Act on the grounds that Section violated voters' right to information. Orders Election Commission to issue financial and criminal record disclosure guidelines for legislative candidates. Government complies and elections are held under new Commission guidelines.	Strong Challenge

Regime	Year	Case	Proced.	Issue	Holding and Govt Response	Assertiveness
BJP	2003	T.K. Rangarajan v. Tamil Nadu	Appeal	Economic	Holding that there is no fundamental right to strike, and upholding government restrictions on state employees' ability to strike.	Strong Endorse
BJP	2003	Tehri Dam Case (N.D. Jayal v. Union of India)	PIL	Development	Petitioners' seek to stop construction of Tehri dam on the grounds that government had failed to provide proper notice to villagers in area, and on the grounds that environmental impact reports Court rules Tehri dam construction can proceed in Uttaranchal.	Strong Endorse
BJP	2003	Javed v. State of Haryana	PIL	Development	Court upholds state law restricting membership to panchayati to parents with two children or less, holding that law is not arbitrary under Article 14. Court cites need for drastic measures to curb overpopulation in upholding law.	Strong Endorse
BJP	2003	PUCL v. Union of India (POTA)	PIL	National Security	Court upholds the validity of POTA as within the legislative competency of Parliament.	Strong Endorse
BJP	2003	Centre for PIL v. Union of India	PIL	Economic	Court rules that Government cannot go through with the privatization of two state owned oil companies without the enactment/amendment of a new law in Parliament, given that these two govt companies had been established by Parliamentary legislation. However, Court ultimately holds that decision does not constitute a challenge to the policy merits of the government's economic reform policies.	Strong Challenge
BJP	2004	Best Bakery Case (Zahira Sheikh v. State of Gujarat)	Article 32	Criminal Justice/ Communal Violence	Court orders that new trial of perpetrators in Best Bakery communal riots in Gujarat take place in Bombay High Court, because of manipulation, bias, and pressure by Gujarat government in first trial. Government complies and new trial is held in Bombay High Court.	Weak Challenge
Congress (Singh)	2004	Union of India v. Naveen Jindal	Article 32	Free Speech	Court holds that government cannot prevent businessman from flying Indian flag, although government could regulate the manner in which flag was to be flown. Court rules that right to fly flag is protected under Article 19 (freedom of expression). Government complies, and petitioner is allowed to fly flag.	Weak Challenge

Regime	Year	Case	Proced.	Issue	Holding and Govt Response	Assertiveness
Congress	2005	Sarbananda Sonowal v. Union of India	PIL	Immigration	Court invalidated 1983 Illegal Migrants by Determination Tribunal Act, on the grounds that Act interfered with Centre's ability to protect states from external/internal disturbance and aggression in the state of Assam from Bangladeshi migrants. IMDT provided suspects with greater procedural safeguards and rights in tribunal hearings. Court ruled that IMDT violated Article 14, by providing less stringent rules for the detection and deportation of illegal Bangladeshi migrants entering into the State of Assam, than the national immigration laws. Under the IMDT, the burden of proof was on the complainant for establishing that a migrant had entered the country illegally. (The national laws put the burden on the migrant). Government did not comply with decision and enacted new law (Foreigners Order of 2006) that effectively restored the original IMDT regime.	Strong Challenge
Congress	2006	Sarbananda Sonowal v. Union of India II	PIL	Immigration	Court invalidated Foreigners Order of 2006 enacted in response to Sonowal I decision, on the grounds that Order violated Article 14, because it created less stringent rules for detection/detention of Bangladeshi migrants illegally entering Assam than national immigration laws. Court ruled that order flouted the Court's previous decision in Sonowal I, and orders Government to adopt stronger rules and procedures for the detection and deportation of illegal migrants in Assam.	Strong Challenge
Congress	2006	SEZ Cases	PIL	Economic	Court rejects PIL challenging Centre's policy on setting up of Special Economic Zones.	Strong Endorse
Congress	2007	I.R. Coelho v. State of Tamil Nadu	Constitutional Reference	Basic Structure	Court reasserts basic structure doctrine, holding that Court could review the validity of affirmative action laws added to the Ninth Schedule. Government does not seek review of decision and complies.	Strong Challenge

B. Assertiveness in the post-1990 Era

Deference to Economic Reform Policies

The Court continued to defer to government economic policies as India 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 productive and GDP growth. 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. 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 (Denoon 1998). Several aspects of these policies were challenged in the Supreme Court. In almost all of these cases, the Court upheld and endorsed the governments' policies of economic liberalization.

In the area of economic policy and development, the Indian 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.²⁸

In the *Delhi Science Forum* case (1996), the Court adjudicated a challenge to the Rao Congress government's adoption of the National Telecom Policy. Prior to the adoption of the new policy, the telecom sector had been under government control. Under the new policy, the Government authorized the granting of licenses to private companies to establish and maintain telecommunication systems nationwide. Pursuant to this policy, the government issued licenses to companies that made tender offers for telecom licenses.

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 parties (including the center-right Bharatiya Janata Party (BJP) and s Petitioners challenged the government's policy on two main grounds. First, 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." In challenging the legality of the policy, petitioners' also challenged the legality of the tender evaluation procedures adopted by the Central Government for granting licenses under the Telecom policy. 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 factors other than merit were considered by the Tender Evaluation Committee (which had

²⁸ 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. 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 (see Denoon 1998).

been charged with awarding licenses under the new policy).²⁹ 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. The Court upheld the National Telecom policy and grant of licenses to private companies. The majority reiterated the Court's earlier ruling in *R.K. Garg v. Union of India* (1982) that the Court must review economic policies under a deferential standard of rational basis scrutiny, and that the Court 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.”³⁰

In addition, the Court reiterated that its scrutiny of administrative decisions under the “nonarbitrariness” standard of Article 14, must also be limited to determining whether such decisions are taken in bad faith, based on irrational or irrelevant considerations, or made without following the prescribed procedures required under a statute (illegality).³¹ 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 circumstances and scenarios 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.”³²

The Court also was deferential to subsequent regimes' disinvestment policies. In *BALCO Employees Union v. Union of India* (2001), the Court upheld the BJP government's disinvestment in the Bharat Aluminum corporation and sale to a private company, Sterlite. 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).

²⁹ “SC upholds Govt decision on telecom privatization,” *Hindustan Times*, February 19, 1996; See Bal Krishna, “SC Draws Lakshman Rekha for Courts,” *Hindustan Times*, February 25, 1996.

³⁰ *Delhi Science Forum v. Union of India*, (1996) 2 SCC 405, 413.

³¹ *Id.* at 417-418.

³² *Id.* at 418.

Following an open tender process conducted with the assistance of an outside “global advisor”, Sterlite (the highest bidder) was selected, and the sale was approved by the Cabinet, and later both houses of Parliament. The petitioners in the case were the BALCO Employees’ Union, and the State of Chhattisgarh (in which BALCO’s mining and production facilities were located). The disinvestment was originally challenged in Article 32 writ petitions by the BALCO Employees’ Union, and Dr. B.L. Wadhwa³³ in the Delhi High Court (who had filed a PIL), and by another BALCO employee in the Chhattisgarh High Court.

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 the company prior to the disinvestment. As a result, petitioners’ argued that the workers’ rights to be heard (under Article 14 and 16) prior to and during the disinvestment process had been violated. Second, the petitioners’ argued that the procedure and decision-making process in the disinvestment of BALCO, were not conducted in a just, fair, and reasonable manner, because the Government had failed to take into account As a result, the petitioners’ argued, 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. In support of this latter argument, the petitioners’ argued that the Disinvestment Commission had originally recommended providing employees with an equity share in the new private venture so as to solicit worker participation and the long term success of the enterprise.³⁴ Third, petitioners’ alleged that the disinvestment process was flawed because the process was not transparent.

The *BALCO* case also had strong political overtones involving a conflict between the Congress Chief Minister of Chhattisgarh, Ajit Jogi, and the BJP Government at the Centre. Because the majority of Chhattisgarh was populated by tribal constituencies, and BALCO’s plant and facilities were located on lands that had originally belonged to local tribes, Jogi sought to politicize the BALCO dispute. Jogi publicly argued that because the BALCO aluminum plant and facilities was located on tribal lands, that the Government could only sell the enterprise to the state government or to another state-owned corporation. A similar argument was made by the State of Chhattisgarh in their pleadings before the Supreme Court. This argument was based on the Court’s earlier decision in *Samata v. State of U.P.* (1997). 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 could be transferred to non-tribals.

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. Second, the Government drew on the Court’s earlier

³³ Dr. Wadhwa is a political science professor and scholar, and has also been a frequent filer of public interest litigation writ petitions in the Indian courts.

³⁴ *BALCO v. Union of India* (2002) 2 SCC 333, 345.

decisions in *R.K. Garg* (1982) and other decisions in arguing that the “wisdom and advisability of economic policies...are not amenable to judicial review.”³⁵

The Court rejected each of petitioners’ claims and upheld the disinvestment. 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* (1982), and *Delhi Science Forum* (1996). 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.”³⁶

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. 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.³⁷

Significantly, the Court dismissed Dr. Wadhwa’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. In dismissing Wadhwa’s petition, the Court went on to criticize the abuse of PIL, and suggested the need to impose limits on PIL. According to the Court, PIL had been originally conceived as a mechanism to safeguard the human rights of the weak and marginalized classes:

“There is in recent years, a feeling which is not without any foundation that Public Interest Litigation is now tending to become publicity interest litigation or private interest litigation and has a tendency to be counter productive.”³⁸ The Court went on to note that PIL was not meant to be a “pill or panacea for all wrongs. It was essentially meant to protect basic human rights of the weak and the disadvantaged... There have been, in recent times, increasingly instances of abuse of PIL. Therefore, there is a need to emphasize the parameters within which PIL can be resorted to by a Petitioner and entertained by this Court.”³⁹

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.”⁴⁰ As a result, the Court concluded that “the decision to disinvest and the implementation thereof is purely an administrative decision relating to the economic policy of the State and challenge to the

³⁵ Id. at 349.

³⁶ Id. at 355.

³⁷ Id. at 362.

³⁸ Id.

³⁹ Id. at 358

⁴⁰ Id.

same at the instance of a busy-body cannot fall within the parameters of Public Interest Litigation.”⁴¹

National Security and Terrorism

In the post-Emergency period, the Supreme Court was also 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* (1994), and *P.U.C.L. v. Union of India* (2003).

In *Kartar Singh v. State of Punjab* (1994),⁴² the Court adjudicated a challenge to the validity of the Terrorist and Disruptive Activities Act (TADA). TADA was enacted by the Congress Government of Rajiv Gandhi in 1985 to deal with the growing threat of the Sikh militant insurgency (the “Khalistan insurgency”) in the Punjab.⁴³ 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. TADA thus created an “extraordinary” legal regime with less procedural safeguards than ordinary criminal law courts. The petitioners challenged the constitutionality of TADA on two main grounds: first, that Parliament did not have the legislative competency (authority) to enact POTA; and second, that TADA was invalid because it violated the fundamental rights provisions of the Constitution.⁴⁴ The crux of the petitioners’ challenge to the competency of Parliament to enact TADA was that it fell within the issue of domain of the states, not the Central Government.⁴⁵ Under the Indian Constitution, which provides for a federal system, the separate and concurrent legislative powers of the Central Government and state governments are delineated in the Seventh Schedule.⁴⁶ The “Union List” is contained in List I of the Seventh Schedule, List III (the “State List”) contains the list of state powers, and the areas in which Union and state governments share concurrent jurisdiction is delineated in List II (the “Concurrent List”).⁴⁷

The petitioners in *Kartar Singh* challenged Parliament’s legislative competency to enact TADA on the grounds that this issue domain fell under entry 1 of List II of the State List—“Public Order,” and did not fall under either the Union List (List I) or

⁴¹ *Id.*

⁴² (1994) 3 SCC 569

⁴³ In the early 1980s, militant Sikhs in the Punjab started a movement that called for the creation of a separate Sikh State called Khalistan within the state of Punjab. In July 1984, the Indian army invaded the Sikh Golden Temple because militants had been stockpiling weaponry in the temple; the army occupied the temple until October (Austin at 510). In retaliation, two of Indira Gandhi’s Sikh security guards assassinated Gandhi a few weeks later (*Id.*).

⁴⁴ Aditya Swarup, “Terrorism and the Rule of Law” A Case Comment on *Kartar Singh v. State of Punjab*,” Social Science Research Network (2007), 4-5, available at <http://works.bepress.com/adityaswarup/3>.

⁴⁵ *Kartar Singh*, *supra* note 10 at 626-628.

⁴⁶ Article 245 stipulates that, subject to the provisions of the Constitution,:

- (i) Parliament may make laws for the whole or any part of the territory of India and
- (ii) the legislature of a State may make laws for the whole or any part of the State.

See 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>.

⁴⁷ See *id.*

Concurrent List (or List III), when read in light of Article 246.⁴⁸ A three-judge majority (out of a five judge bench) upheld the constitutionality of all provisions of the Terrorism and Disruptive Activities Act (TADA), except Section 22, which was struck down by the Court unanimously.⁴⁹ In their 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.⁵⁰

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. However, the Court held that this provision did not violate Article 20 (protecting against self-incrimination), ruling that the mere possibility of abuse was not grounds for invalidating a law⁵¹ and that the rights of the accused were protected by the rules of evidence under the Code of Criminal Procedure. The Court also ruled that Section 15 did not violate either Article 14 (nonarbitrariness) nor Article 21 (due process), ruling that because TADA was a special law that delineated a set of procedures for a distinct class of offences (*Kartar Singh* at 673).

The Court did attempt 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.” In addition, the Court also introduced an intent requirement for the offence of “abetment” of a terrorist act in TADA, and also reformed the offence of “possession of specified arms and ammunition.”⁵² In order to save this latter provision from arbitrariness, the Court held that it could only be invoked

⁴⁸ 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 Indian ot included in a State notwithstanding that such manner is a matter enumerated in the State List.

⁴⁹ Section 22 allowed for witness identification of the accused based on a photograph, and such identifications would have the same evidentiary value as lineup identifications. The Court invalidated this provision on the grounds that photographs could be easily doctored or manipulated using modern technology. See *Kartar Singh* at 711.

⁵⁰ 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 of effective demobilization.” Schedule VII, List I, Entry I, Indian Constitution.

⁵¹ Swarup at 11.

⁵² Chief Justice Y.K. Sabharwal, *Meeting the Challenge of Terrorism-Indian Model (EXPERIMENTS IN INDIA)*, at http://www.supremecourtfindia.nic.in/new_links/Terrorism%20paper.doc.

where possession was “connected with use thereof.”⁵³ 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.⁵⁴ 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 (see, e.g. Singh 2007).

India’s battle against insurgency continued in the post-1990 period against radical terrorist groups based in Kashmir and Pakistan. In January 2001, terrorists attacked the Jammu and Kashmir Assembly building, and launched 28 suicide attacks in various cities. And less than a month after the terrorist attacks of September 11th 2001, terrorists bombed and attacked the Indian Parliament building in October 2001, and launched attacks in several other cities nationwide in 2002. In response to these attacks, the Bharitya Janata Party Government enacted the Prevention of Terrorism Act (POTA) in March of 2003. Like TADA, POTA established an extraordinary legal regime with special courts that allowed the Central Government to bypass procedural safeguards provided for under normal criminal law. Under POTA, confessions to police and telephone interceptions to be valid and admissible evidence (Singh 2007, 70). 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.

In the *P.U.C.L. v. Union of India* (2003), the People’s Union for Civil Liberties (a public interest group) invoked a similar argument as the petitioners in *Kartar Singh*. Petitioners argued that Parliament lacked legislative competence to enact the law because it fell under entry 1 of list II (Public Order), which was within the domain of state, not central government powers. However, a two-judge bench of the Court unanimously rejected the petitioner’s assertion that “terrorist activity is confined only to states and therefore state(s) only have the competence to enact a legislation” (*PUCL*, 591-593). 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.⁵⁵ The Court held that terrorism fell under a “residuary power” that was not defined in the constitution that conferred Parliament with broad powers, citing to its earlier decision in *Kartar Singh v. State of Punjab* (1994), in which the Court upheld the constitutionality of the Terrorist and

⁵³ *Id.*

⁵⁴ *Kartar Singh* at 683; *see Id.*

⁵⁵ On this point, the Court held that, “The fight against the overt and covert acts of terrorism is not a regular criminal justice endeavour. 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” (*People's Union for Civil Liberties v. Union of India* (2004) 9 SCC 580, 596)

Disruptive Activities Act of 1985.⁵⁶ Like its earlier decision in *Kartar Singh*, the Court in *PUCCL* upheld POTA and issued a strong endorsement of the Central Government's anti-terrorism policies.

The Basic Structure Doctrine

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. In 1994, a three-judge bench in *L. Chandra Kumar v. Union of India* held that a seven judge constitutional bench should be convened to review the correctness of the earlier decision of the five judge bench in *S.P. Sampath Kumar* (1986) with respect to the validity of 323A. In *L. Chandra Kumar*⁵⁷ (1997), the Court overruled *Sampath Kumar*, holding that Article 323A 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 allowing appeals to the Supreme Court) (Sathe 2002, at 88-89). The Court ruled that “power of judicial review over legislative action vested in the High Courts under Article 226 and in this court under Article 32... is an integral and essential feature of the Constitution, constituting part of its basic structure.”⁵⁸

Most recently, a nine-judge bench of the Court in *I.R. Coelho v. State of Tamil Nadu* (2007) reaffirmed the basic structure doctrine and the Court's earlier decisions in *Minerva Mills* (1980) and *Waman Rao* (1981). In 1999, an earlier five judge bench in *Coelho* dealt with a challenge to the validity of two state laws—the Tamil Nadu Janmam Act of 1969, and the West Bengal Land Holding Revenue Act of 1979—that had been added to the Ninth Schedule *after* they had been invalidated in courts.⁵⁹ These laws had been added to the Schedule by the 34th and 66th Amendments. In order to decide the issue, the five-judge bench held that the Court's earlier judgment in *Waman Rao* (1981) needed to be reconsidered in order to determine whether a law invalidated by the Courts for infringing the fundamental rights could subsequently be included in the Ninth Schedule.⁶⁰ In *Waman Rao* (1981), the Supreme Court had held that any laws added to the Ninth Schedule after April 24, 1973 could be challenged in Court. (The Court had set this cutoff date on the grounds that most laws added to the Ninth Schedule before this

⁵⁶ 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 orders of lesser gravity having and 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 the 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” (*P.U.C.L. v. Union of India*, 981).

⁵⁷ (1997) 3 S.C.C. 261.

⁵⁸ *L. Chandra Kumar v. Union of India* (1997) 3 SCC 261 at 301.

⁵⁹ In 1972, the Supreme Court invalidated the State of Tamil Nadu's Janmam Act, “insofar as it vested forest lands in the Janmam estates in the State of Tamil Nadu,” on the grounds that it “was not found to be a measure of agrarian reform protected by Article 31-A of the Constitution” (*I.R. Coelho v. State of T.N.*, (1999) 7 SCC 580, 581, citing *Balmadies Plantations Ltd. v. State of T.N.* (1972) 2 SCC 133) And in 1979, Section 2(c) of the West Bengal Land Holding Revenue Act, 1979 was struck down by the Calcutta High Court as being arbitrary and, therefore, unconstitutional (Id.)

⁶⁰ *I.R. Coelho v. State of T.N.* (1999) 7 SCC 580, 581-583.

date dealt with agrarian reforms.) In order to decide the issue in the case, the five-judge bench referred to a larger bench the question of whether laws declared invalid by courts could subsequently be added to the Ninth Schedule.

In *Coelho* (2007), the larger nine-judge bench held that any law (including laws added to the Ninth Schedule after April 4, 1973) infringing upon the fundamental rights that was found to have violated the basic structure doctrine, must be invalidated by the Court. 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. The Court noted that the original intent of the schedule was to protect only a limited number of laws related to agrarian reform. Finally, the decision reaffirmed the Court's earlier holding in *Minerva Mills* that the "golden triangle" of Articles 14, 19 and 21 was part of the "touchstone" of the basic structure of the Constitution. 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. Significantly, the Congress Government did not challenge or seek review of the Court's decision. In fact the Congress Government and party leaders accepted the judgment's finality, and leaders of the opposition BJP party praised the decision, as noted in an article in the *Statesman* newspaper:

The Union law minister, Mr H R Bhardwaj, said the power of review has been granted to the judiciary only and "this decision is a continuity of yesterday's decision on the power of judicial review of the courts...Now every government should think twice before putting any law under Ninth Schedule," he said. He, however, admitted he was yet to study the implications of the verdict. The Congress spokesperson, Mr Abhishek Manu Singhvi, said the judgment cannot be seen as a confrontation with Parliament. The BJP termed the ruling a "monumental" judgment. The former law minister in the NDA government and BJP spokesman, Mr Ravishankar Prasad, said it would open the door for the scrutiny of "vulnerable and patently flawed" laws which otherwise could not have been examined due to political pressure and had been deliberately put in the Ninth Schedule to avoid judicial scrutiny (*Statesman*, January 11, 2007).

II. Existing Public Law Theories

The Regime Politics Model

How can we explain the Court's broader shift toward activism, and the Court's selective assertiveness in fundamental rights decisions in the post-Emergency era? I suggest that existing public law theories fail to provide a complete account of these dynamics. As illustrated in Chapter 1, the regime politics model suggests that judges decide cases in line with, and to advance the partisan agenda or policy preferences of the governing coalition that appointed them (see Dahl 1957; Keck 2007; Clayton 2008). In explaining judicial decision-making in the U.S., regime politics theory suggests that political majorities advance their agenda through courts by appointing judges who share

the political ideology or partisan values or worldviews of the regime in power. Once on the Court, judges, according to this approach, decide cases in line with their ideological or partisan values, subject to the constraints of prior law and precedent.

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 (1977-1979). However, in the post-Emergency Janata years, the Supreme Court launched a new activism, and embraced and buttressed the new regime's commitment to fundamental rights, and the Janata regime's efforts to repudiate and overturn the policies of the Emergency regime. Three justices played a key role in forging a new activist approach: Justices P.N. Bhagwati, V.R. Krishna Iyer, and Chief Justice Y.V. Chandrachud (see Baxi 1980, 150).

The Court's activism and selective assertiveness in the immediate post-Emergency period appears to reflect 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 (see Keck 2007). I explore and analyze this alternate explanatory approach in Part III and suggest that elite institutionalism helps complement this model.

In addition, the regime politics model fails to provide a complete account of the Court's post-1990 activism and selective assertiveness. In this period, the Court continued to selectively challenge the power, laws, and actions of the Central Government in basic structure cases, immigration policy, and fundamental rights. And although the Court did endorse Central Government policies in the area of economic policy, development, and national security/terrorism policy, I suggest that the Court's decision-making in these cases was not solely influenced by the policy views or partisan agenda of ruling political elites. Instead, I suggest that the judges of the Court were also influenced by the prevailing policy worldviews and ideological values of legal-professional and intellectual elites in India.

The Institutional Model

The institutionalist model provides a plausible account of 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 help motivate and drive judicial behavior. Proponents of the institutional 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. As Gillman (1993) suggests, judges "may view themselves as stewards of particular institutional missions, and ... this sense of identity [may] generate motivations of duty and professional responsibility which sometimes pull against their policy preferences and partisan commitments" (Gillman 1993, 79-80).

An analysis of the court's decisions in this era reflects that the Court's activism and assertiveness in decisions like *Maneka Gandhi* (1978), and *Minerva Mills* (1980) were driven by institutional motives of judges, including a desire to rehabilitate institutional legitimacy by building support for the Court, and to bolster and protect the Court's power. Baxi (1980, 1985) and Sathe (2002) claimed that the Court's activism in

Maneka was part of the Court's attempt to atone for its earlier acquiescence to the Emergency regime in cases like *Shiv Kant Shukla*. In *Shukla*, the Court upheld the Emergency regime's suspension of access to the courts by political detainees (through habeas petitions), and overturned the decisions of several high courts granting such access.

Indeed, Justices Chandrachud and Bhagwati's motivations to pursue an expansive fundamental rights-based activism also reflected the justices' own perception of their professional standing among the Bar and political and intellectual elites as well. This was in part due to the public criticism both judges were subjected to during the controversial public debate over the Janata Government's decision to find a successor to Chief Justice Beg, who retired in 1978 (Baxi 1980). Leading members of the Bombay Bar association went so far to pen a memorandum (the "Bombay Memorandum", that publicly criticized Chandrachud and Bhagwati for upholding the Constitutionality of the Emergency regime's suspension of habeas corpus in *Shiv Kant Shukla*.

Commenting on the Court's activist decision in *Maneka*, Upendra Baxi observed that the:

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" (Baxi, 1980, 153) (italics added).

In a later article, Baxi reiterated this argument, noting that the Court's activism in *Maneka* and other decisions was

partly 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*" (Baxi 1985, 36) (italics added).

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

The Court's reassertion of the basic structure doctrine in *Minerva Mills* was also driven by institutional motives. As noted in Chapter Three, the Court in *Kesavananda* (1973) sought to assert and protect judicial power while strategically accommodating the Gandhi government in overturning its earlier decision in *Golak Nath* (1967). In *Minerva Mills* (1980), the Court again sought to consolidate its institutional power by reasserting the basic structure doctrine and invalidating Sections 4 and 55 of the 42nd Amendment.

In addition, the institutional model offers an account of the Court's reassertion of the basic structure doctrine in the *L. Chandra Kumar* (1997) and *Coelho* (2007) decisions. In both of these decisions, the Court sought to bolster and protect its

institutional strength and power against Central Government 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.

And in *Coelho*, the Court reasserted the basic structure doctrine in response to the Central Government's addition many new laws to the Ninth Schedule of the Constitution since the *Kesavananda* decision in 1973. Ramachandran (2007) 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 (see Ramachandran 2007).

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 Baxi (1980) and Dua (1983) 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 offences in the Special Courts Bill case (1978). In addition, 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 (Baxi 1985; SA-2, SA-3; SCJ-4). In decisions involving challenges to economic policies, the Court adopted a new deferential standard to reviewing economic policies in the *R.K. Garg v. Union of India* (1982) cases, in which the court announced that it would apply a much "milder" form of rational basis scrutiny to government economic policies. Several experts interviewed for this project suggested that the Court's adoption and application of a deferential standard of review in decisions involving economic and development policy cases reflected strategic motivations (SA-3, SCJ-4).⁶¹

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* (1996) (involving the Congress government's telecom liberalization policies) and *BALCO* (2002) (involving a challenge to the BJP's disinvestment in government-controlled industries). In each of these decisions, the Court has invoked earlier doctrine in justifying its application of mild rational basis review, and has upheld and endorsed government policies held that it lacks the jurisdiction and expertise to scrutinize the substantive merits of government policies.

However, as illustrated in the next section, I suggest that the Court's deference in endorsing the Central Government in the areas of economic policy, and also 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

⁶¹ Epstein (2000) has argued 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.

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 these decisions. I argue in the next section that 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.

III. Elite Institutionalism: An Alternate Account

I suggest here that the thesis of elite institutionalism provides the most compelling account of judicial motive with respect to the Court's activism and selective assertiveness in the post-Emergency era in fundamental rights cases, by illustrating how the institutional context, and the political, professional and intellectual elite atmosphere of the Court shaped the justices values and worldviews, and motivated and constrained judicial decision-making.

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, to explore how the professional and intellectual elite groups help shape judicial activism and assertiveness. Elite institutionalism also adds a key variable to existing institutionalist theories, suggesting 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.

Elite Meta-Regimes: From Liberal Democracy to Liberal Reform

I argue in this chapter that the Court's activism and assertiveness in certain governance domains can be explained by understanding the broader intellectual worldviews and policy values of the political, professional and intellectual elites that help shape judicial worldviews. During the 1977-1989 era, I suggest that the Court was influenced by the elite meta-regime of liberal democracy, 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. In the post-1990 era, the worldviews of judges' were shaped by the ideas and worldviews associated with the meta-regime of liberal reform, which reflected broader elite support for policies of economic reform and development, and for protecting the national security interests of the Indian state, and protecting the rule of law.

The Liberal Democracy Meta-Regime (1977-1989)

The Court's activism in landmark cases like *Maneka* and *Minerva Mills*, reflected a confluence of both the judges' 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 among professional and intellectual elites, and national public opinion, developed for support of strong judicial review, an expanded Court role in protecting fundamental rights and the rule of law, and enforcing limits on Parliament's amending power (see Baxi 1980; Sathe 2002). From 1977 to 1989, I argue that the Court's activism and assertiveness in fundamental rights cases was shaped and influenced by the regime of liberal democracy - a set of principles and commitments to limited government, constitutionalism, democratic rule and separation of powers, judicial review and the protection of fundamental rights, and a commitment to maintaining and enforcing 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 activism and selective 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 rights to travel, the right to liberty, a robust conception of due process, and a new doctrine of non-arbitrariness in *Maneka*, reflected a confluence of institutional and professional-intellectual elite values and worldviews in the post-Emergency era. And the Court's decisions in the *Special Courts Bill case* (1978) (upholding the constitutionality of special courts to try Emergency offences), and the *Pathak case*, reflected the Court's strong support of the Janata regime's attempts to prosecute and purge Emergency officials and political leaders.

However, I *also* suggest that legal-professional elites in the Bar, and intellectual elites also 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 the *Shiv Kant Shukla* (1976) decision. 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 (1980) 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 event 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" (Baxi 1980)

Indeed, in a public speech delivered during the Janata years, Chandrachud acknowledged that while he still believed he could not have decided the *Shiv Kant Shukla*

decision in any other way based on the facts and law, he felt that he lacked the courage to resign after the *Shiv Kant Shukla* decision (Baxi 1980, 197-198). Baxi (1980) 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.” The most prominent example of this was from Arun Shourie, the editor of the *Indian Express* newspaper. In a leading book about the Emergency published in 1978, Shourie directly criticized Chandrachud, observing:

“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 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” (Shourie, 1978, 308).

Both Baxi (1980) and Dua (1983) 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 *Shiv Kant Shukla* (Baxi 1980; Dua 1983). In building this support, Baxi (1980) 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*:

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 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 (Baxi 1980, 165).

The Court’s decision in *Maneka* thus reflected the judges’ desire to consciously build professional and intellectual elite support and bolster the legitimacy of the judge and the Court. Justice Bhagwati thus 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”. The particular nature of the Court’s activism in *Maneka* 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 corrode the foundations of liberty (*Id citing Maneka Gandhi.*).

Baxi (1983, 1985) suggested that the Court's activism in *Maneka Gandhi* (1978) 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 in the Habeas case. Commenting on the Court's activist decision in *Maneka*, Upendra Baxi observed that the:

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" (Baxi, 1980, 153).

In a later article, Baxi reiterated this argument, noting that the Court's activism in *Maneka* and other decisions was

partly 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" (Baxi 1985, 36).

Baxi's assessment of the Court's activism in *Maneka* 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. As illustrated in Chapter 2, 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. The *Hindu* newspaper issued an editorial that stated 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" (Austin, 503, citing the *Hindu*, May 12, 1980). In addition, K.K. Katyal, a *Hindu* columnist, lauded the Court for doing what the Janata was unable to get done through the Rajya Sabha in 1978 (which was under Congress Control) (Id.). And the *Hindustan Times* observed that the decision "was inevitable given the *Kesavananda* decision" and that "the Prime Minister would do well to accept the new situation" (Id., citing *Hindustan Times*, May 11, 1980).

The Rule of Law-Liberal Reform Regime: 1990-2007

While the Court's activism and selective assertiveness in the 1977-1989 era reflected the political views and beliefs associated with the meta-regime of liberal democracy and limited government, in the post-1990 era, the Court's activism and selective assertiveness was increasingly influenced by the values associated with the meta-regime of liberal reform. This meta-regime encompassed the broad 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 strong consensus of elite and national support for stronger and more effective Central Government anti-terrorism policies.

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 (1988) and other scholars have described as "deinstitutionalization". 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. In this new political environment, judges became increasingly concerned about correcting the governance failures of the state and protecting the rule of law (see Chapters 5 and 6).

Second, India transitioned from a socialist-statist economy to liberal, free market economic system in the early 1990s, as the Congress regime of P.V. Narasimha Rao launched a series of economic reforms in response to an external payments crisis in 1991 which saw decline in foreign exchange reserves, rising inflation, a decline in production, and the possibility of India defaulting on its external balance of payments obligations (Tendulkar and Bhavani 2007). 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 (IMF), and an additional \$400 million from the Bank of England in exchange for all of India's gold stocks in the spring of 1991 (*Id.*, 82). In 1991, the Congress Party won the most seats in the 1991 election and formed a coalition government. 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 (Id. at 106). As illustrated in Chapters 5 and 6, 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 to incrementally advance an agenda of economic reform and liberalization between 1991 and the present (Tendulkar and Bhavani 2007).

Support for Liberal 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. And the Court's decision in the *Second Judges' Case* (1993), in which the Court asserted primacy and final control over judicial appointments in transfers (see Chapter 5), further reinforced this shift.

At a conference of leading Senior Advocates and other legal experts entitled "Has the Judiciary Turned its Back on the Poor" in 2006, a group 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 explained the Court's decisions in the area of economic policy and development. Senior Advocate Shanti Bhushan noted that in the 1990s, the judges of the Court began to reflect the worldviews and political values of the affluent middle classes, and began to appoint judges who shared those views and values:

[In the] pre-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 (Bhushan 2006).

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 the *Delhi Science Forum* and *BALCO* (2001) cases. 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.⁶² Editorials published prior to the Court's decision in Delhi Science Forum reflected strong professional elite support for the government's liberalization policies.⁶³ And editorial coverage of the Court's decision was uniformly positive. In its editorial response, the *Hindu* observed:

“If, as it appears, the judgment has startled the Opposition parties, it is an indication of their lack of awareness of how wholly unjustified they were in expecting the Supreme Court to share their perceptions and pronounce accordingly. The Court's verdict in upholding the Government's right to induct the private sector in the basic telephone services *truly reflects its sensitivity to the winds of change blowing across the country and the rest of the third world*” (italics added).

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 “liberalization was consistent with socialism because equitable distribution first required wealth creation” (Karat 2003).

The Court's decision in the *BALCO* (2001) further reflected the influence of the broader elite meta-regime of liberal 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 the R.K. Garg decision, in ruling that it could only challenge government policies on the grounds of illegality or arbitrariness. But Justice Kirpal, in writing the opinion of the Court, went further in actually endorsing the underlying government privatization policies, in observing that:

The 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*... .Any economic reform, including disinvestment in Public Sector Enterprises (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.” (*BALCO* at 362).

⁶² Id. at 412. See Bal Krishna, “SC Draws Lakshman Rekha for Courts,” *Hindustan Times*, February 25, 1996.

⁶³ For example, a *Hindu* editorial in March 1994 (two years prior to the Court's decision) expressed strong support for the ongoing disinvestment of government-owned units in various sectors. “Disinvestment in Public Sector Units,” *Hindu*, March 19, 1994.

As illustrated in the earlier discussion of BALCO, the Court in that decision also criticized the abuse of Public Interest Litigation as counterproductive, and restricted the scope of PIL by articulating a set of advisory parameters. In rejecting the writ petition of B.L. Wadhwa, the Court ruled that PIL could not be used by “busybody” litigants to challenge the policy merits of Central Government policies.

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 observed 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” (Jaitley 2002).

Senior Advocate and legal expert Prashant Bhushan (2004) has also argued that the Court’s deference to and endorsement of government economic policies in cases like *BALCO*, *the Narmada Dam case* (2001), and the *Rangarajan* case (2003) (holding that there is no right to strike contained in the fundamental rights of the Indian Constitution), demonstrates the judges’ broader support for the ideology of economic reforms. In *BALCO*, *Narmada*, and *Rangarajan*, Bhushan argues that the Court actually restricted the scope of Article 21 that had been expanded in *Maneka*, in line with the justices’ worldviews regarding economic reforms. According to Bhushan, “the 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” (Bhushan 2004).

Indeed, the Court’s decision in *Rangarajan* (2003), 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. The Court in *Rangarajan* and other cases actually helped to advance the government’s labor 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 UPA/Congress Government of Manmohan Singh from the outside (Tendulkar and Bhavani 145-146). However, the Court, reflecting the broader ethos of liberal reform, has assisted the Government in this process by issuing decisions that have undercut the rights of labor and bolstered the rights of employers (Bhushan 2004). The *Times of India* (Delhi edition) went on to observe: “While 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 labor markets” (Tendulkar and Bhavani 2007, 148, citing *Times of India*, April 1, 2006). In fact, the *Times* in an editorial article observed that the Court had “unintentionally paved the way for both PSU and labour market reforms...if this happens the private organized sector is also certain to demand its right to exercise exit option” (*Times of India*, April 1, 2006). The Court’s decision in *Rangarajan* thus reflected the broader views of many political and economic elites.

The Rule of Law and State Security

A second key component of the elite meta-regime of liberal reform consists of the desire for political, professional, and intellectual elites for protecting the rule of law, especially in matters of national security. Several of the Court's decisions in the fundamental rights sample illustrated 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* (1994) (upholding TADA), and *PUCL v. Union of India* (2003) (upholding POTA), while attempting to impose some procedural safeguards, reflected the justices' alignment with the broader concerns of elites, as reflected in the editorial news coverage of the Court's decisions in this area. For example, as the *Hindustan Times* observed with respect to TADA:

It is true that legislation like TADA is not enacted in western democracies but such draconian laws have become necessary in this country which at times finds itself in desperate situations... Terrorism and insurgency have not subsided in India... They cannot be tackled by the ordinary law of the land... Special law may be necessary to deal with terrorists and insurgents but all those who violate some law or the other should not be tarred with the same brush. It is easy for the police to nab law-breakers under TADA but such arbitrary use of law goes against the spirit of the law" (Hindustan Times, March 14, 1994).

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. As Sabharwal observed:

At the same time it has to be granted, for the sake of future of humanity, that the States have an obligation and, therefore, are legitimately concerned about their citizens and thus must do everything that needs to be done for general protection of the society and of the national security. This gives rise to a dilemma as to how the issues arising out of terrorism - political, legal, ethical, sociological or those concerning human rights - are to be handled so as to restore the general feeling of security all round without abandoning the very values which a democratic society is avowed to protect (Sabharwal 2005)

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 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 (Editorial, *Indian Express*, December 14, 2001).

In its decision to uphold the POTA in *PUCL v. Union of India* (2003), the Court's opinion reflected the justices' embrace of the values articulated above, in recognizing the need for a stronger set of laws and Central Government powers to combat terrorism in India. 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 fight against the overt and covert acts of terrorism is not a regular criminal justice endeavour. 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 abovesaid circumstances Parliament felt that a new anti-terrorism law is necessary for a better future. This parliamentary resolve is epitomised in POTA (*People's Union for Civil Liberties v. Union of India* (2004) 9 SCC 580, 596).

Singh (2007) argued that the Court's decisions in *Kartar Singh* (1994) (upholding TADA), and *PUCL v. India* (2003) (upholding POTA) reflected not only an extraordinary degree of judicial deference, but a strong endorsement of 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. They have in the process affirmed the authority of the executive to decide on the existence of an extraordinary condition and frame specific policies including legal measures commensurate with the situation. While upholding the constitutional validity of anti-terror laws, the Supreme Court has not only endorsed extraordinary procedures on the “rationale of supreme necessity not covered by regular law”, it has also accepted and upheld the executive's delineation of “necessity” for example, public order, national security, waging war against the state, conspiracy against the state, terrorism, etc.

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” (Singh 2007, 157) (italics added).

The Court’s decisions in the *Sonowal I* and *Sonowal II* cases also reflected the broader concern among political, professional, and intellectual elites regarding the need for stronger efforts at the Central Government level for protecting national security. In contrast to the Court’s deferential decisions in *Kartar Singh and PUCL v. Union of India*, 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. Both laws provided suspected illegal migrants with greater procedural rights under a system of judicial tribunals.

The Congress Central Government enacted both laws in order to maintain the support of the large population of Muslim voters in the State of Assam, many of whom were former Bangladeshi migrants. 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. The Court in *Sonowal I* 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:

The foremost duty of the Central Government is to defend the borders of the country, prevent any trespass and make the life of the citizens safe and secure. The Government has also a duty to prevent any internal disturbance and maintain law and order. This being the situation there can be no manner of doubt that the State of Assam is facing "external aggression and internal disturbance" on account of large scale illegal migration of Bangladeshi nationals. It, therefore, becomes the duty of Union of India to 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...

The above discussion leads to irresistible conclusion that the provisions of the IMDT Act and the Rules made thereunder clearly negate the constitutional mandate contained in Article 355 of the Constitution, where a duty has been cast upon the Union of India to protect every State against external aggression and internal disturbance. The IMDT Act which contravenes Article 355 of the Constitution is, therefore, wholly unconstitutional and must be struck down (*Sonowal I*, 2005).

The Court's decision in *Sonowal II* which struck down a second law enacted by the Congress Government to override the Court's decision in *Sonowal I*, again reflected the Court's desire to protect the rule of law and state security. As an editorial in the Tribune newspaper 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 the state of 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 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. (Tribune, 2006)

The Court's assertiveness in the *Sonowal* cases thus reflected the broader ascendancy of the liberal reform regime and the rule of law values of the justices.

Conclusion

This chapter illustrated the shifts toward activism and selective assertiveness in the Indian Supreme Court. As this chapter illustrated, these shifts reflected the influence of both the institutional context of judging, as well as broader shifts in the climate of elite worldviews that help frame and shape judicial worldviews and judicial decision-making. The broader shifts toward activism and greater assertiveness in governance were driven by changes in the institutional values of justices, and by changes in professional and intellectual elite worldviews regarding the policy and legal issues adjudicated by the Court.

But where it was assertive, why was the Court able to get away with greater assertiveness in the post-Emergency era? What theoretical accounts help explain the stronger levels of judicial authority of the Court in the post-Emergency era, as compared to the pre-Emergency era? Chapter 4 analyzes these dynamics by examining the broader interactive patterns of assertiveness and the government's response to assertive decisions.

It illustrates how elite institutionalism can help provide a more compelling account of these dynamics by examining how stronger levels of elite and national support helped bolster the Court's authority in the post-1990 era.

Chapter 4

Elite Institutionalism and Judicial Authority in Fundamental Rights Decisions

Introduction

Chapter 3 of this study illustrated how the Indian Supreme Court shifted to an expanded *activism* in fundamental rights cases in the immediate post-Emergency era. However, the Court was only *selectively assertive* in challenging the Central Government in the 1977-2007 era. Chapter 3 analyzed these trends in light of existing public law theories, and illustrated how consideration of the professional and intellectual elite context of judging broadened regime politics, institutionalist, and strategic accounts of when judges are motivated toward greater activism and assertiveness. This chapter builds on that analysis by examining the Court's shift toward another dimension of judicial power -- expanded judicial *authority* in governance. Judicial *authority* refers to the extent to which the activism and assertiveness of the Court was accepted or tolerated by the Central Government (see Kapiszewski 2008).

Referencing existing public law theories of the opportunity structure for judicial power, I argue in this chapter that the strategic model fails to provide a complete account of the Supreme Court of India's shift toward greater authority in governance. The thesis of elite institutionalism advanced in this study helps complement and broaden the strategic model, by illustrating how strong levels of national support, and the support of professional and intellectual elite opinion for the Court, helped bolster the authority of the Supreme Court of India in assertive cases in the post-Emergency era. These bases of support enhanced the Court's ability to resist or overcome political backlash and attacks from the Central Government, and increased the level of public pressure for enforcement of the Court's decisions.

This chapter begins by analyzing these patterns of judicial authority in the 1977-1989, and 1990-2007 periods, and examining the Government's response to the Court's assertiveness, in order to understand overall patterns of interaction between the Court and the Government in the post-Emergency era. Next, I briefly examine case studies of the Court's basic structure decisions to examine patterns of interaction between the Court and the Central Government. Third, I illustrate how the thesis of elite institutionalism helps complement and broaden the strategic model (1) by analyzing evidence of professional and intellectual support for the Court in newspaper editorial coverage of the Court's most salient governance decisions, and (2) by examining how "governance constituencies" of the Bar and PIL lawyers and policy groups, have served to bolster the Court's authority in the post-1990 era against political backlash or attack by the Central Government in crucial governance cases.

I. Analyzing Patterns of Assertiveness and Authority in Fundamental Rights Cases: 1977-2007

This section analyzes how the Executive and Parliament within the Central Government responded to the Court's activism and assertiveness in fundamental rights cases in the post-Emergency era. Table 4.1 (pgs. 98-103) analyzes these patterns of assertiveness and authority in politically significant governance decisions in the post-Emergency era. Following a methodology similar to that employed by Kapiszewski (2008), I scored judicial authority on a scale that ranges from "very weak" to "relatively weak," to "relatively strong" to "very strong", based on an analysis of the following factors: the extent to which the Central Government complied with the Court's decision or order; the difficulty of complying with the Court's decision or order; and the level of political backlash or retribution against the Court (including both efforts to overturn the decision or attack the Court's institutional integrity or jurisdiction directly). The variable of judicial authority thus captures variation in the level of government compliance and/or acquiescence with the Court's decisions and/or orders.

An analysis of the Central Government's response to Supreme Court assertiveness reveals that the Court has exerted strong levels of authority in both the 1977-1989, the post-1990 periods. The Court exerted stronger levels of authority in 5 out of the 6 assertive decisions in the 1977-1989, and exerted stronger levels of authority in 8 out of the 9 assertive decisions in the post-1990 period. However, given that the Court issued more strong challenges in the post-1990 era (6), than in the 1977-1989 era (1), the Court exerted a stronger overall level of authority in the post-1990 period because it substantively challenged the power of the Central Government to a greater extent in this period.

In terms of the 1977-1989 period, the Court only issued one strong challenge to the Central Government of Indira Gandhi's Congress regime in the *Minerva Mills* (1980) case. The Court invalidated parts of the 42nd Amendment that had been enacted by the Gandhi Emergency regime that effectively prevented the Court from reviewing the validity of any laws enacted to advance the Directive Principles of the Constitution, and further curbed the Court's power to review the validity of constitutional amendments. The Court issued several weak challenges to the Central Government including the Court's invalidation of the government's pension scheme in *D.S. Nakara* (1982).

Table 4.1: Assertiveness and Strength of Authority of Supreme Court of India in Politically Significant Rights Cases (1977-2007)

Regime	Year	Case	Issue	Policy	Holding and Gov't Response	Assertiveness	Strength of Authority*
Janata Party	1978	Maneka Gandhi v. Union of India	Criminal Justice/Due Process	Govt order impounding passport under Passport Act	Govt modifies passport revocation order to provide hearing to Maneka Gandhi in revocation proceedings. Court upholds modified order and Passport Act, but reinterprets Articles 14, 19, and 21 broadly to create new standards of due process, nonarbitrariness.	Weak Challenge	Relatively Strong
Janata	1978	Pathak v. Union of India	Socio-economic rights	Govt's abrogation of Settlement reached between Life Insurance Corporation and its employees in Calcutta High Court.	Court orders that settlement must be enforced and bonuses paid. Government tries to nullify decision through new law, but Court passes interlocutory order refusing to stay payments pending passage of new legislation. Government complies with order.	Weak Challenge	Relatively Strong
Janata	1978	In re: Special Courts Bill	Emergency	Special Courts Bill which proposed establishing separate special courts to try emergency offences.	Under its Advisory Jurisdiction, Court upholds validity of Special Courts Bill to try emergency offences, but suggests modifications to Bill to save its constitutional validity. Government incorporates suggested modifications in legislation.	Weak Endorse*	N/A**
Janata	1978	Sanjay Gandhi Bail Case [State (Delhi Admin) v. Sanjay Gandhi]	Criminal Justice	Grant of Bail to Sanjay Gandhi	Court cancels Sanjay Gandhi's bail in light of his intimidation of prosecution witnesses in Kissa Kursi Ka case (involving Gandhi's role in conspiracy to destroy copies of an anti-Emergency film).	Weak Endorse	N/A
Congress (Indira Gandhi)	1980	Minerva Mills v. Union of India	Basic Structure	Sections 4 and 55 of the 42nd Amendment	Court invalidates Sections 5 and 44 of the 42nd Amendment, ruling that both violated the basic structure of the Constitution. These sections barred the Court from reviewing the validity of constitutional amendments and laws implementing the Directive Principles. Government decides to not to seek review of case and complies.	Strong Challenge	Very Strong
Congress	1980	V.C. Shukla Case (V.C. Shukla v. State of Delhi)	Criminal Justice	Special Courts Act; Convictions of Sanjay Gandhi and V.C. Shukla	Court upholds validity of special courts act, but overturns convictions of Sanjay Gandhi and V.C. Shukla on evidentiary grounds.	Weak Endorse	N/A

Regime	Year	Case	Issue	Policy	Holding and Gov't Response	Assertivness	Strength of Authority*
Congress	1981	R.K. Garg v. Union of India	Economic	The Bearer Bonds Act, 1981, which sought to create incentives for holders of black money to invest in government bonds.	Court upholds the constitutionality of the Special Bearer Bonds Act under Article 14 arbitrariness review.	Strong Endorse	N/A
Congress	1981	A.K. Roy v. Union of India	National Security	National Security Act of 1980	Court upholds Government's preventive detention regime established by National Security Act of 1980	Weak Endorse	N/A
Congress	1982	D.S. Nakara v. Union of India	Economic	Government's abrogation of pensions for certain employees	Court invalidates government's pension allocation scheme as violative of Article 14 nonarbitrariness standard.	Weak Challenge	Very Strong
Congress	1985	Indian Express Newspapers v. Union of India	Free Speech	Government imposition of high customs duty on newsprint	Court holds that government levy of high customs duty on newsprint violated newspaper company's right to freedom of press under Article 19. Government complies with decision and lifts levy.	Weak Challenge	Very Strong
Congress	1986	S.P. Sampath Kumar v. Union of India	Basic Structure	Administrative Tribunals Act	Court upholds the validity of the Administrative Tribunals Act, but recommends changes to law to ensure that tribunals serve as an optimal alternative to courts. Government implements changes recommended by Court.	Weak Endorse*	N/A
Congress	1987	P. Sambamurthy	Basic Structure	Administrative Tribunals Act	Court invalidates Section 371(d) (5) of the Administrative Tribunals Act.	Weak Challenge	Very Strong
Congress (Rao)	1992	LIC v. Manubhai Shai	Free Speech	Refusal of Doordarshan (state TV station) to air controversial film about Bhopal Gas Leak.	Government rules that Doordarshan (state television station) was not justified in refusing to telecast film on Bhopal gas leak; refusal violated film producer's right to free expression under Article 19. In response to Court order, Doordarshan airs controversial film.	Weak Challenge	Very Strong
Congress	1994	Kartar Singh v. State of Punjab	Nat'l Security	Terrorist and Disruptive Activities Act of 1985 (TADA)	Court upholds the validity of most of TADA, on the grounds that Parliament has competency to enact laws to protect sovereignty. Court strikes down section 22 of Act (which allowed for witness identifications of suspects on the basis of photographic evidence).	Strong Endorse	N/A

Regime	Year	Case	Issue	Policy	Holding and Gov't Response	Assertivness	Strength of Authority*
Congress	1995	Airwaves Case	Free Speech/Broadcasting	Actions by Doordarshan to interfere with private foreign broadcasters' attempts to telecast Cricket Tournament matches	Court rules that private broadcasters have right to telecast Cricket Tournaments, but holds that Doordarshan (state owned television network) still had exclusive telecasting rights, and that TWI would have to pay Doordarshan fees for broadcasting each match. Court rules that viewers of matches have a right to information.	Weak Endorse	N/A
Congress	1996	Delhi Science Forum	Economic	Disinvestment of Telecom Sector	Court upholds Government disinvestment policy in telecom sector.	Strong Endorse	N/A
Janata Dal	1997	L. Chandra Kumar v. Union of India	Basic Structure	Article 323A of the Constitution (added by 42nd Amendment)	Court invalidates Article 323 A on the grounds that it violated the basic structure by excluding the jurisdiction of High Courts under Article 226 over administrative tribunals. Government complies with decision of the Court.	Strong Challenge	Very Strong
Janata Dal	1997	PUCL v. India (Wiretapping)	Nat'l Security	Law allowing government to tap private telephones	Court upholds Government's power to tap phones, but rules that government must provide for procedural safeguards in tapping of telephones in order to safeguard the right of privacy under Article 21.	Weak Endorse	N/A
BJP	2000	Narmada Dam Case (including Arundhati Roy Contempt Case)	Development	Construction of Narmada Dam	Petitioners seek to enjoin construction of Narmada Dam on the grounds that rehabilitation and resettlement of villages was not possible, and because environmental impacts of project had not been properly considered or addressed. Court rules that construction on Narmada dam can proceed, holding that project had substantially met environmental compliance requirements.	Strong Endorse	N/A
BJP	2000	Centre for PIL v. Union of India	Economic	Sale of Government owned Oil Fields to private companies	Court upholds sale of government owned oil fields to private companies.	Strong Endorse	N/A

Regime	Year	Case	Issue	Policy	Holding and Gov't Response	Assertivness	Strength of Authority*
BJP	2001	BALCO v. Union of India	Economic	Disinvestment Policy of BJP Government	Court upholds Government policy of disinvestment in government owned aluminum company against challenge under Article 14. Court holds that economic policies must be reviewed under mild "rational basis" review and can only be reviewed for procedural illegality, and not on substantive grounds.	Strong Endorse	N/A
BJP	2003	T.K. Rangarajan v. Tamil Nadu	Economic	State regulations imposing restrictions on the right of government employees to strike	Holding that there is no fundamental right to strike, and upholding government restrictions on state employees' ability to strike.	Strong Endorse	N/A
BJP	2003	Tehri Dam Case (N.D. Jayal v. Union of India)	Development	Construction of Tehri Dam	Petitioners' seek to stop construction of Tehri dam on the grounds that government had failed to provide proper notice to villagers in area, and on the grounds that environmental impact reports Court rules Tehri dam construction can proceed in Uttaranchal.	Strong Endorse	N/A
BJP	2003	Javed v. State of Haryana	Development	State law restricting membership to panchayati (local elected bodies) to individuals with two children or less.	Court upholds state law restricting membership to panchayati to parents with two children or less, holding that law is not arbitrary under Article 14. Court cites need for drastic measures to curb overpopulation in upholding law.	Strong Endorse	N/A
BJP	2003	PUCL v. Union of India (POTA)	National Security	Prevention of Terrorism Act, 2002 (POTA)	Court upholds the validity of POTA as within the legislative competency of Parliament.	Strong Endorse	N/A
BJP	2003	Centre for PIL v. Union of India	Economic	Government's privatization of oil companies through sale of shares to private oil companies	Court rules that Government cannot go through with the privatization of two state owned oil companies without the enactment/amendment of a new law in Parliament, given that these two gov't companies had been established by Parliamentary legislation. Although Government complied with this specific decision, it proceeded to privatize a much larger government oil company—Indian Oil, because that company had not been created by an act of Parliament, but rather through a merger of two existing	Weak Challenge	Very Strong

Regime	Year	Case	Issue	Policy	Holding and Gov't Response	Assertivness	Strength of Authority*
					government companies.		
BJP	2004	Best Bakery Case (Zahira Sheikh v. State of Gujarat)	Criminal Justice/ Communal Violence	Gujarat High Court decision acquitting suspected perpetrators in Best Bakery communal riots	Court orders that new trial of perpetrators in Best Bakery communal riots in Gujarat take place in Bombay High Court, because of manipulation, bias, and pressure by Gujarat government in first trial. Government complies and new trial is held in Bombay High Court.	Weak Challenge	Very Strong
Congress (Singh)	2004	Union of India v. Naveen Jindal	Free Speech	Central government orders private businessman not to fly flag atop business.	Court holds that government cannot prevent businessman from flying Indian flag, although government could regulate the manner in which flag was to be flown. Court rules that right to fly flag is protected under Article 19 (freedom of expression). Government complies, and petitioner is allowed to fly flag.	Weak Challenge	Very Strong
Congress	2005	Sarbananda Sonowal v. Union of India	Immigration	Illegal Migrants by Determination Tribunal Act (IMDT), 1983	Court invalidated 1983 Illegal Migrants by Determination Tribunal Act, on the grounds that Act interfered with Centre's ability to protect states from external/internal disturbance and aggression in the state of Assam from Bangladeshi migrants. IMDT provided suspects with greater procedural safeguards and rights in tribunal hearings. Court ruled that IMDT violated Article 14, by providing less stringent rules for the detection and deportation of illegal Bangladeshi migrants entering into the State of Assam, than the national immigration laws. Under the IMDT, the burden of proof was on the complainant for establishing that a migrant had entered the country illegally. (The national laws put the burden on the migrant). Government did not comply with decision and enacted new law (Foreigners Order of 2006) that effectively restored	Strong Challenge	Very Weak

Regime	Year	Case	Issue	Policy	Holding and Gov't Response	Assertivness	Strength of Authority*
					the original IMDT regime.		
Congress	2005	Parliament Attack Case (N. Sindhu v. State of Delhi)	National Security	Prevention of Terrorism Act (POTA) Court's convictions and sentencing of terrorists involved in attack on Parliament	Court overturned convictions of individuals on evidentiary grounds, while upholding convictions of others convicted for role in attacks on Parliament. Government does not seek review of decision.	Weak Challenge	Very Strong
Congress	2006	Sarbananda Sonowal v. Union of India II	Immigration	Foreigners (Tribunals for Assam) Order, 2006	Court invalidated Foreigners Order of 2006 enacted in response to Sonowal I decision, on the grounds that Order violated Article 14, because it created less stringent rules for detection/detention of Bangladeshi migrants illegally entering Assam than national immigration laws. Court ruled that order flouted the Court's previous decision in Sonowal I, and orders Government to adopt stronger rules and procedures for the detection and deportation of illegal migrants in Assam.	Strong Challenge	Relatively Strong
Congress	2006	SEZ Cases	Economic	Special Enterprise Zone (SEZ) Policy	Court rejects PIL challenging Centre's policy on setting up of Special Economic Zones.	Strong Endorse	N/A
Congress	2007	I.R. Coelho v. State of Tamil Nadu	Basic Structure	Laws Added to Ninth Schedule	Court reasserts basic structure doctrine, holding that Court could review the validity of affirmative action laws added to the Ninth Schedule. Government does not seek review of decision and complies.	Strong Challenge	Very Strong

* Strength of Authority describes the level of government compliance and/or acquiescence with the Court' decisions.

** N/A = Because the Court deferred to and/or endorsed government policies or action, the Court did not have the opportunity to exert authority given that the government was not challenged or compelled to undertake specific actions or directives.

II. Case Studies of Judicial Authority

In this section, I explore in greater depth patterns in the Court's assertiveness and authority in governance, and examine how changes in the political opportunity structure help explain the stronger authority of the Court in the post-Emergency era. I illustrate how the Court's shift to greater authority in the post-Emergency era could be explained by stronger levels of support among political, legal-professional, and intellectual elites. I trace these dynamics through case studies of the Government's response to (a) the two landmark basic structure decisions of this era: *Minerva Mills* (1980), and *Coelho* (2007); (b) the pair of Court decisions invalidating successive Central Government immigration tribunal laws: *Sonowal I* (2005) and *Sonowal II* (2006); and (c) the Court's decision in *Centre for PIL v. Union of India* (2003), in which the Court invalidated the Government's attempt to privatize the Hindustan Petroleum Corporation (HPCL), on the grounds that the Government had failed to secure the requisite approval of Parliament through new legislation.

Minerva Mills: The Reassertion of Judicial Supremacy over the Constituent Power

As presented in Chapter 3, the Court in *Minerva Mills* reasserted the basic structure doctrine in invalidating two provisions of the 42nd Amendment—Sections 4 and 55. These provisions were enacted by Gandhi's Emergency regime in order to overturn the Court's landmark decision in *Kesavananda* (1973). Section 4 amended Article 31C of the Constitution. The amended Article 31C barred the Court from reviewing the validity of any laws enacted to effectuate the Directive Principles of State Policy. Section 55 barred the Court from reviewing the validity of constitutional amendments, and removed any limitations on Parliament's power to amend the Constitution under Article 368 of the Constitution. The Janata regime had been unable to repeal these provisions because the Congress Party still controlled the upper house of Parliament (the Rajya Sabha), and as a result the amending legislation failed in the Rajya Sabha.

In invalidating these two provisions, the Court held that judicial review was part of the basic structure doctrine, and that the 42nd Amendment had violated the basic structure by limiting judicial review. In addition, Justice Chandrachud's majority opinion held that Articles 14, 19 and 21 formed a "golden triangle" that served as a check on the exercise of executive power.

At the same time, the Court upheld Articles 31A and 31B (added by the First Amendment), and reaffirmed the *Kesavananda* decision in upholding Article 31 C. Court would be able to scrutinize any amendments adding new laws to the Ninth Schedule after 1973 under the basic structure doctrine. Significantly, Chief Justice Y.V. Chandrachud, who authored the majority opinion in the decision, had dissented and voted against the basic structure doctrine in the *Kesavananda* (1973) decision. Chandrachud ultimately

shifted his position in the Indira Gandhi Election Case (1976) (see Chapter 2) and voted to support the basic structure doctrine, and later reasserted it in *Minerva Mills*. Baxi (1983) suggests that Chandrachud changed his position and voted for the basic structure doctrine because of the traumatic period of Emergency rule and the eventual election of the Janata party, observing that “events, not words in judgments, the context not the text” influenced Chandrachud’s decision to support the basic structure doctrine (Baxi 1983).

What was remarkable about the Court’s decision in *Minerva Mills* was that it occurred after Indira Gandhi had returned to power in 1980, following Gandhi’s defeat of the Janata party in the 1980 elections. The Gandhi Government initially attempted to challenge the Court’s decision by filing a review petition on September 5, 1980, on the grounds that the decision “was not a judgment of the Court at all” because as Bhagwati’s dissent noted, Justice Chandrachud had not properly held a judicial conference and circulated opinions in advance of issuing the Court’s opinion. The Government also argued that Article 38 of the Directive Principles, which called for the State to pursue policies ameliorating socio-economic inequality, was also part of the basic structure of the Constitution. In addition, Law Minister Shiv Shankar had earlier publicly expressed his opposition to the basic structure doctrine as reasserted in *Minerva Mills* (Austin 1989, 503, n.14, citing *Hindustan Times*, May 11, 1980). But the Government ultimately gave up in its efforts to review the decision in 1982 (Austin 1989, 503-504, n. 23). The Court’s reassertion of the basic structure doctrine rankled the Gandhi government and prominent leaders within the Congress party (Dua 1983, 473).

What explains why the Court was able to exert such strong authority in *Minerva Mills* (1980)? In part, the Court’s authority was bolstered by the mandate of the 1977 election, in which the Janata party defeated Gandhi’s Congress party. The elections signaled a repudiation of the Emergency and the excesses of executive power (see Ramachandran 2000). And as Baxi (1983, 1985) argues, the Court was responding to the national wave of public support for the Janata party’s agenda of constitutional reform and restoration of limited government and judicial power.

Indira Gandhi’s government could not afford to challenge or attack the Court’s decision in *Minerva Mills* because the national electorate would have perceived such actions as an attempt to return to the earlier policies of the Emergency regime. As Ramachandran (2000) argued, “*Minerva Mills* represents the assertion of judicial supremacy without contest. The Mrs. Gandhi who returned to power in 1980 was a different person. After having been chastened by her defeat in the 1977 elections and having had to live down her image as a destroyer of institutions, she could not have risked being seen again as tinkering with the Constitution or confronting the judiciary...” (Ramachandran 2000, 120).

Another key to the Court’s strong authority with respect to *Minerva Mills* was that the Court separated economic issues involving property rights from the broader issue of restoring liberal democracy. Significantly, the Supreme Court did *not* invalidate the

Sick Textiles Undertakings (Nationalization) Act of 1974 in *Minerva Mills*. Chief Justice Chandrachud observed in his majority opinion that “we are not concerned with the merits of that challenge at this stage”. (In fact, the original owners of the *Minerva Mills* brought another separate challenge to the Act in 1986, but lost.) According to Austin (1999), the Janata Government actually welcomed the Court’s ultimate decision in *Minerva Mills*, because the Court had accomplished a goal that the regime had been unable to accomplish itself, without interfering with the nationalization of the Mills. It is worth noting here that although the Janata Government sought to reverse the Gandhi Emergency regime’s suspension of fundamental freedoms and constitutionalism, the regime for the most part shared the Congress party’s social and economic ideology.

The Janata Government appeared to have pursued a two-prong strategy in the case—to defend the nationalization of the Mills on property grounds, while offering a “weak” defense of the constitutionality of the impugned Emergency Amendments. As Austin notes:

The government under Charan Singh’s caretaker prime ministry seems to have been caught between millstones. Confronted with the *Minerva Mills* case, it wished to defend a public enterprise from de-nationalization. Yet, it had no love for the portions of the Forty-Second Amendment that Janata had failed to get repealed. Could it separate the two issues? Could it win on keeping the mills public property while not mind a loss on the Forty-Second Amendment—perhaps even hoping for it? Did such calculations lie behind the government’s strategy to argue that the nationalization was defensible as a property issue, while leaving the constitutional issues to Palkhivala by claiming that constitutional issues did not arise? If this was the strategy, it succeeded brilliantly, for the Supreme Court did what the government had been unable to do in the Forty-Fourth Amendment (Austin 1999, 507).

The key here is that the Court accommodated both the overarching socialist economic philosophy of both the Janata and Gandhi Governments in *not* invalidating the Act in question. Justice Chandrachud, his majority opinion in *Minerva Mills*, notes:

...The Indian Constitution is founded on the bedrock of the balance between Parts III and IV. To give absolute primacy to one over the other is disturb the harmony of the constitution...The edifice of our Constitution is built upon the concepts crystallized in the preamble. We resolved to constitution ourselves into the Socialist State which carried with it the obligation secure to our people justice – social, economic and political. We therefore put Part IV into our Constitution containing directive principles of State policy which specify the socialistic goal to be achieved. [...] Parts III and IV together constitute the core of our Constitution and combine to form its conscience. Anything that destroys the balance between the two parts will ipso facto destroy an essential element of the basic structure of our Constitution (*Minerva Mills*, paras. 53, 56-57).

The Court's authority against attacks from the Gandhi Government was also bolstered by the strong support of legal-professional and intellectual elites for the Court's decision. The media and the Bar thus served as powerful allies to the Court. Following the Court's decision in *Minerva Mills*, the *Hindu* praised the Court's decision for accomplishing invalidating the two part of the 42nd Amendment that the Janata regime had been unable to repeal. In addition, the *Hindu* editorial argued that the decision helped restore the separation of powers set forth in the Indian Constitution. The editorial suggested that had the Court upheld Sections 4 and 55 of the 42nd Amendment, it "would have been tantamount to abjuring the constitutional role of the judiciary and liquidating the separation of powers inherent in the foundation of the Indian Republic."¹ The *Statesman* argued that so long as the basic structure theory prevails, no useful purpose will be served by further rhetoric in Parliament or by any rash action." The *Statesman* editorial framed the assertion of the basic structure doctrine in terms of protecting the constitution and democracy, and advised that the best course for the government was to accept and comply with the decision. Leading Senior Advocates and legal experts were also strongly supportive of the Court's decision, as reflected in editorials published in the national papers following the decision. Many Senior Advocates and legal scholars who had originally opposed or criticized the Court's decision in *Kesavananda* defended the Court's decision in *Minerva Mills*, including H.M. Seervai, S.P. Sathe, and P.K. Tripathi.

Coelho v. State of Tamil Nadu (2007)

Although the Court was able to secure the acquiescence and compliance of the Congress Central Government of Indira Gandhi in response to its decision in *Minerva Mills* (1980), subsequent governments attempted to flout the spirit of the Court's original decision in *Kesavananda* (1973) by adding new laws to the Ninth Schedule that were unrelated to land reform. The Court's decision in *Coelho* (2007) represented a strong assertion of judicial power, as the Court reasserted the basic structure doctrine and signaled its authority to invalidate these laws.

The nine-judge bench in *Coelho* was convened in response to an earlier decision in *Coelho v. Tamil Nadu* (1999), which involved a challenge to the Union Government's enactment of the 34th and 66th Amendments. These amendments added several new laws to the Ninth Schedule. Two of these laws had previously been invalidated by the Supreme Court and Calcutta High Court.² The laws that had been invalidated by the

¹ "Salutary Check on Parliament's Amending Power," *Hindu*, May 12, 1980.

² The two laws were the Gudalur Janmam Estates (Abolition and Conversion into Ryotwari) Act, 1969 (the Janmam Act) and the West Bengal Land Holding Revenue Act (West Bengal Act). The Janmam Act was invalidated by the Supreme Court in *Balmadies Plantations Ltd. v. State of Tamil Nadu* (1972) on the grounds that it was not an agrarian land reform measure protected by Article 31-A of the Constitution. The Janmam Act vested forest lands in the Janmam estates in the State of Tamil Nadu. The West Bengal Act

Calcutta High Court and Supreme Court had been subsequently added to the Ninth Schedule. A smaller five-judge bench in *Coelho* (1999) called for a larger bench³ to determine whether laws invalidated by the judiciary could subsequently be added to the Ninth Schedule to retroactively save their validity. (The Ninth Schedule had been added to the Indian Constitution (via the First Amendment) in order to immunize zamindari abolition (land reform) laws from judicial review) (see Chapter 2).

The petitioners' in the case argued that the Ninth Schedule had been abused repeatedly by the Union Government who added hundreds of laws unrelated to land reform to the Ninth Schedule. Petitioners' argued that allowing the Government to add to the Ninth Schedule laws that had been held struck down as violative of the fundamental rights provisions, would mean an "end to all our freedoms." In response, the counsel for the Union Government, and the State of Tamil Nadu argued that the validity of the Ninth Schedule had been repeatedly upheld in previous judgments, including *Kesavananda*, *Minerva Mills*, and *Waman Rao*. Counsel for the Union and Tamil Nadu Governments also argued that Parliament had broad authority to add any laws to the Ninth Schedule, and that the possibility of abuse was not a justification for invalidating laws added to the Ninth Schedule.

The *Coelho* bench ruled that all laws added to the Ninth Schedule after April 1973 (the date of the *Kesavananda* decision) were open to scrutiny under the basic structure doctrine. In its ruling, the Court built on the *Minerva Mills* decision in holding that the rights contained in Articles 14, 19, and 21 constituted a "golden triangle" that formed the "touchstone" of the basic or essential features in Part III (the Fundamental Rights) of the Constitution. The Court held that all post-1973 laws added to the Ninth Schedule would be scrutinized under Article 14 (equality/nonarbitrariness), Article 19 (protecting the "seven freedoms"), and Article 21 (due process). In its decision, the Court echoed the arguments of the petitioners who noted that the Government had essentially abused the Ninth Schedule by adding hundreds of laws that were unrelated to land reform.

The Court exerted strong authority in *Coelho*, and the Central Government accepted and publicly endorsed the Court's decision. Significantly, the Congress-led NDA Government did not appeal or seek a review of the Court's decision, and did not seek to overturn the Court's decision. Law Minister H.R. Bhardwaj accepted the Court's decision as an assertion of the Court's power of judicial review, but observed that the decision "would have no adverse impact on the functioning of the executive."⁴ Bhardwaj also noted that state governments would have to "think twice" before requesting that the Union Government place laws in the Ninth Schedule.⁵ The decision was also welcomed

was invalidated by the Calcutta High Court on the grounds that it was arbitrary and in violation of Article 14.

³ A routine practice in the Indian Supreme Court is for smaller benches to refer difficult or complex constitutional issues (that require reconsideration of rulings of earlier constitutional benches) to a larger constitutional bench.

⁴ "Gov't in no mood to cross Supreme Court's path," *Economic Times* (Bombay), January 13, 2007.

⁵ "Judgment reiterates right to judicial review: Bhardwaj," *Hindu*, January 12, 2007.

by the leadership of the opposition BJP party.⁶ In contrast, several regional parties representing the “Other Backward Classes” or OBCs, including the DMK and PMK, expressed strong opposition to the Court’s decision, because following the *Coelho*, the Court could now review the validity of the Tamil Nadu Reservation Act of 1994, which had been added to the Ninth Schedule. The Act authorized the Tamil Nadu government to provide for 69% reservation quotas in government jobs for OBCs. In order to immunize the Act from judicial scrutiny (the Supreme Court had held that reservation quotas in excess of 50% were impermissible in the *Mandal* decision), the Act had been added to the Ninth Schedule.

Elite opinion, as reflected in newspaper editorial coverage of the decision, was universally supportive of the Court’s decision. The *Indian Express* in its editorial praised the Court’s decision as a necessary response to the Government’s abuse of the Ninth Schedule, and noted that over 280 laws had been added to the Ninth Schedule as of January 2007. The editorial in the *Indian Express* concluded that “this careless, even reckless, use of the Ninth Schedule...seems to have raised the hackles of the apex court.”⁷ Similarly, the *Hindu* also defended the Court’s decision as a “natural institutional reaction to the ouster of jurisdiction in the early years of the republic.”⁸

In general, the Court’s assertiveness in these decisions was consistent with the views of professional elites on the necessity for the Court to assert the rule of law. A recurrent theme in these cases is a clash between the Court’s role in protecting and advancing the rule of law against political parties and government actors who seek to flout the rule of law in the interest of political gain. For example, in the basic structure doctrine decisions, professional elites strongly supported the Court’s efforts to assert and entrench the constitutional protections guaranteed in the fundamental rights provisions.

As discussed in Chapter 3, both the *Golak Nath* and *Kesavananda* decisions provoked retaliation from the Gandhi government. The Government attacked the Court by superceding justices and “court packing,” and also enacted constitutional amendments to override both decisions. In contrast, in *Minerva Mills* (1980) and *Coelho* (2007), the Court was able to reassert the basic structure doctrine and secure the acquiescence of the regime in power. This suggests that the strategic model may explain this difference in compliance. Following Ramachandran (2007), the reason the Court was able to secure compliance with its decisions in *Minerva Mills* (1980) and *Coelho* (2007) was the changed political context following the defeat of the Congress (Emergency) regime, and election of the Janata party in 1977.

While the strategic political context may affect government compliance with judicial decisions, I argue here that the strategic political context does *not* entirely explain why the Court was willing to assert the basic structure doctrine both before and after the

⁶ Id.

⁷ “Basic Argument,” *Indian Express*, January 11, 2007.

⁸ “Reclaiming Jurisdiction,” *Hindu*, January 13, 2007.

Emergency rule period. Here, popular institutionalism provides an alternative explanatory account of why the Court was willing to act on its institutional values or goals in both the pre- and post-Emergency basic structure decisions. The justices not only shared the same concerns of professional, intellectual, and political elites about the Gandhi government's attempts to abrogate the fundamental rights and curb judicial power. In addition, they were also responsive to pressures from elite opinion and preferences and as a result, challenged the ruling regime in a highly salient and politically controversial issue area that ultimately provoked political backlash.

Centre for PIL v. Union of India (2003)

In *Centre for PIL*, the Court adjudicated a PIL challenging the government's privatization of government oil companies through government disinvestment in two of India's major petroleum companies -- Hindustan Petroleum Chemicals Company (HPCL) and Bharat Petroleum Chemicals Company (BPCL). HPCL had been formed through the Central Government's acquisition and merger of four oil companies pursuant to Parliament's enactment of the Esso (Acquisition of Undertaking in India) Act, 1974, and the Caltex (Acquisition of Shares of Caltex Oil Refining India Limited and all the Undertakings in India for Caltex India Limited) Act, 1977. BPCL was formed by the government's acquisition of two companies that were operated and owned by the Burmah Shell company in 1976 (*Frontline*, October 10, 2003). The effort to disinvest in these two companies was led within the NDA/BJP Government by Arun Shourie, the Minister of Disinvestment. However, the proposed disinvestment was the subject of considerable controversy, as several leaders within the BJP Government, including Petroleum Minister Ram Naik, and Defence Minister George Fernandes, expressed opposition to the policy. Naik instead urged vertical integration of these two companies, as an alternative to privatization and/or disinvestment. In addition, the opposition Congress party, which controlled a majority in the Rajya Sabha, was also opposed to the disinvestment.

In order to overcome this opposition, Shourie and the BJP leadership (including Prime Minister Vajpayee and Deputy P.M L.K. Advani), sought to craft a compromise in the Cabinet Committee on Disinvestment (CCD) to gain the support of a majority of cabinet ministers on that committee. In February, the CCD reached agreement on a policy whereby HPCL, the larger company, would be privatized through a strategic sale, while the smaller BPCL would be divested through sale of its shares to the public (*Hindu Business Line*, October 14, 2003). The Government even proceeded with a due diligence of the proposed privatization of HPCL while the PIL was pending. Following considerable criticism of the proposed deal in Parliament in December 2002, Shourie and the CCD consulted with Attorney General Soli Sorabjee to seek his advice regarding the constitutionality of divestment of these two companies without the approval of Parliament (*Frontline*, October 10, 2003). Sorabjee advised Shourie and the CCD that while Parliament's approval may not be needed "in principle" to proceed with the disinvestment of the two oil companies, it would still be necessary to review the actual

terms of the agreement entered into by the government to make a final determination on this issue (*Id.*) On January 26, 2003, the Government approved the disinvestment of both HPCL and BPCL.

The Government's decision met with considerable criticism from leading Senior Advocates, former Supreme Court and High Court judges, and other legal and constitutional experts. This was illustrated by a petition signed by over one hundred Supreme Court lawyers that was sent to Prime Minister Vajpayee challenging the Government's decision to seek the opinion and advice of the Attorney General, given that the previous Attorney General had in 1993 issued an opinion stating that all companies created by parliamentary legislation could not be privatized without the approval of Parliament ("Cheques & Balances: Transparency a Must in Sell-Off, *Indian Express*, March 17, 2003). In their petition, the lawyers alleged a "malafide intention of the central government" and "sinister design" in seeking the Attorney General's opinion. And G.V. Ramakrishna, a former chair of the disinvestment commission refuted Sorabjee's view in detail (*Id.*).

In addition, a group of some of India's top jurists, including former Justices V.R. Krishna Iyer, O. Chinappa Reddy, P.B.Sawant, Justice Rajinder Sachar (former Chief Justice, Delhi High Court) and former Law Minister Shanti Bhushan, collectively issued a public statement that was highly critical of Attorney General Sorabjee's advice to the Government. They argued that the preamble of the original acts of Parliament authorizing the government's takeover of these companies clearly delineated the legislative policy and objective of nationalization (*Id.*), namely that these companies 'should be acquired in order to ensure that the ownership and control of the petroleum products are distributed and marketed in India by the said company are vested in the State and thereby so distributed as best to subserve the common good' (*Id.*). The jurists' statement went on to note that 'it would be absurd to suggest that the government could undo the parliamentary mandate by just selling the shares of the government company and thus privatizing it,' and that "Any other way of doing it would run counter to our constitutional scheme in which the executive cannot go against the will of Parliament" (*Id.*).

The petitioners in the case were represented by some of the leading Senior Advocates of the Supreme Court Bar, including Ram Jethmalani (a member of the BJP party), The petitions echoed the statement of the jurists noted above, in arguing that government companies could not be sold off or divested without amending or repealing the laws that created these companies (*Id.*). In addition, the Centre for Public Interest Litigation argued that the two laws which gave rise to these companies were enacted in order to advance the goals of Article 39(b) of the Constitution, which called for the building a welfare state to promote social equality (*Id.*).

The Court ultimately ruled for the petitioners and invalidated the divestment of both companies on the grounds that this policy had been effected by the Executive

without securing the approval of Parliament. Both companies had been formed pursuant to legislation enacted by Parliament that required legislative approval for any changes in the character of the ownership of these companies (Centre for PIL 2003). However, the Court noted that its decision should not be construed as a rejection of the government's privatization and disinvestment policy, noting that "there is no challenge before this court as to the policy of disinvestments. The only question raised before us is whether the method adopted by the government in exercising its executive power to disinvest HPCL & BPCL without repealing or amending the law is permissible or not. We find that on the language of the act such a course is not permissible at all" (*Centre for PIL*).

The Government was divided in its reaction to the decision. Petroleum Minister Ram Naik publicly welcomed the Court's decision, while Shourie initially acknowledged that it was a significant setback for the BJP Government's divestment policy (Hindu, October 14, 2003). Shourie and the Disinvestment Ministry then proposed filing a review petition to challenge the Court's decision, but this move was blocked by the CCD, because Vajpayee's government did not want a confrontation with the Court ("Pause Button", *Telegraph*, October 9, 2003).

In addition, the Central Government was unable to pass a new law in Parliament amending or repealing the Esso and Burmah Shell laws to allow for privatization because of internal divisions and opposition with the NDA coalition government (Id.). The internal divisions within the Government, along with the support of leading members of the Bar and jurists for the Court's decision, helped to bolster the authority of the Court. Although the BJP Government was ultimately forced to comply with the Court's decision, the Government proceeded to privatize a much larger government oil company—Indian Oil, because that company had not been created by an act of Parliament, but rather through a merger of two existing government companies.

Sonowal I (2005) and Sonowal II (2006): Immigration Policy

Although the Court has been highly deferential to and endorsed Central government's policies involving national security and terrorism (see Chapter 3), the Court was highly assertive in challenging the Central government's immigration policies in two key decisions—*Sarbananda Sonowal I v. Union of India* (2005) and *Sarbananda Sonowal v Union of India II* (2006). What is noteworthy about these two decisions is that the Court departed from its traditional deference the Central Government in the area of national security policy, and invalidated two Central Government laws under the doctrine of nonarbitrariness based on Article 14 of the Indian Constitution.

The *Sonowal* decisions involved challenges to Central Government policies enacted to deal with the critical problem of illegal immigration from Bangladesh (East Pakistan) into the State of Assam. More than ten million migrants fled Bangladesh in 1971 to escape the oppression and genocide of the Pakistan Army (West Pakistan) against the Hindu Bengali population in Bangladesh, during Bangladesh's war for independence from Pakistan. Faced with a humanitarian crisis resulting from this

massive influx, the Indian Government under the leadership of Indira Gandhi declared war on Pakistan and liberated Bangladesh from the control of the Pakistani army in 1971.

However, following 1971, large numbers of illegal migrants continued to enter the states of West Bengal and Assam in India in search of jobs and economic opportunities. In Assam, this led to nativist agitation, especially among the All Assam Student Union, and the Asom Gana Parishad. Concerned with fears that these migrants were taking jobs and opportunities from native Assam residents, these groups advocated for policies aimed at deporting illegal migrants.

Until 1983, India's immigration policy was governed by the Foreigners' Act of 1940, a pre-independence law that gave virtually unlimited powers to the authorities under the Act, mainly the police, "to designate any person as a foreigner and detain and deport him. Anyone disputing his designation as a foreigner had no recourse under the Act to a judicial body" (Bhushan 2003). To provide for greater procedural protections, the Congress Government under Indira Gandhi (Parliament) enacted the Illegal Migrants (determination by Tribunals) Act, (IMDT Act). The Congress Government was in large part motivated by electoral politics and the need to appeal to Muslim voters in Assam (many of whom were recent migrants from Bangladesh). The new IMDT law provided for the creation judicial tribunals to

"adjudicate disputes about citizenship which might arise under the original Foreigners Act. In addition, the IMDT provided for an administrative screening committee that would be charged with examining the complaints under the Act and reject complaints found to be frivolous. Finally, the IMDT also for the first time, gave a limited right to any person to lodge a private complaint with the Tribunals under this Act against persons regarding whom they had information of their being foreigners. (This right did not exist under the original Foreigner's Act). The right was however limited by providing that such a complaint could only be made against a persons residing within the same local area and that persons could make a maximum of ten such complaints. Though the Act itself was for the entire country, it was initially made applicable only to Assam and was to be made applicable to other parts of the country whenever the government notified it for those parts" (Bhushan 2003).

However, in the 1990s, the Asom Gana Parishad, a nativist party, won state elections and took control of the state government in Assam. In 1998, the BJP-led NDA coalition Central Government, along with the AGP party in Assam, began advocating for revised policies aimed at expelling illegal Bangladeshi migrants, largely out of a concern that Assam would become a Muslim-majority state, and because of fears of infiltration by terrorist groups through the Bangladesh-Assam border. Both the BJP and AGP advocated for the repeal of the IMDT, on the grounds that it was interfering with the state's ability to expel illegal Bangladeshi migrants into Assam. But the BJP was ultimately unable to repeal the IMDT in Parliament because it lacked enough support from its other coalition partners in the government (Bhushan 2003).

In 2000, Sarbananda Sonowal, a member of Parliament from the AGP party, filed a writ petition in the Supreme Court seeking a declaration that the IMDT Act was unconstitutional. He argued that the Act impeded the expulsion of foreigners from Assam, as was evident from the figures of foreigners expelled using the IMDT Act. *Sonowal* also argued that the IMDT law violated the right of the Assamese people to preserve their culture. The impediments against expulsion, he argued, were placed primarily by the reversal of the burden of proof from the Foreigners Act. Also, he pleaded that the restrictions placed on the complainant (about filing a maximum of 10 complaints and that too against persons residing only in his local area) contributed to the problem. It was finally contended that the application of the IMDT Act to Assam alone was discriminatory since in other States, the authorities could resort to the Foreigners Act and throw out anyone that they wanted, without allowing recourse to a judicial Tribunal.

In July 2005, a three-judge bench of the Court allowed Sonowal's petition and held that the IMDT Act was unconstitutional. In a remarkable decision, Justice G.P. Mathur, writing for the majority, held that the IMDT Act violated Article 355 of the Constitution. Article 355 mandates that the Central government must protect the States against external aggression and internal disturbance. According to the Court, the onerous provisions of the IMDT Act made it extremely difficult for the Central and State Government to expel illegal Bangladeshi migrants from Assam, and as a result, encouraged the continued infiltration of illegal migrants from Bangladesh into Assam (*Sonowal I*). The Court held that this constituted a threat to the security of the State of Assam and India in that it constituted external aggression against the state, because many suspected terrorists were infiltrating the country through the Bangladesh-Assam border (*Sonowal I*; see Bhushan 2003). Significantly, Judge G.P. Mathur supported his decision by invoking the Government's obligation to protect national security and national borders in order to maintain order and the rule of law:

“The foremost duty of the Central Government is to defend the borders of the country, prevent any trespass and make the life of the citizens safe and secure. The Government has also a duty to prevent any internal disturbance and maintain law and order. This being the situation there can be no manner of doubt that the State of Assam is facing "external aggression and internal disturbance" on account of large scale illegal migration of Bangladeshi nationals. It, therefore, becomes the duty of Union of India to 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” (*Sonowal I*).

The Court also held that the IMDT Act violated Article 14, because the Government only notified (made the law applicable) for the state of Assam, and other states did not have to comply with the more stringent provisions of the IMDT Act before expelling illegal migrants or foreigner (Id).⁹ In addition, the Court also held that another

⁹ Bhushan (2003) argued that the Court's holding on this issue was flawed and erroneous:

provision the IMDT Act that shifted the burden of proving Indian citizenship from the person accused of being a foreigner under the Foreigners' Act) to the accuser/complainant (the new IMDT law) (Sonowal I; Bhushan 2003). The Court held that this provision was unreasonable on the grounds that the person accused of being an illegal migrant had the best means of knowing and providing evidence of citizenship and national status (Id).

The Court ordered that all new tribunals established under the IMDT be shut down, and transferred to the tribunals that had been originally constituted under the Foreigners Act of 1964. In addition, the Court ordered the Central Government, and the Assam state government “ to constitute sufficient number of Tribunals under the Foreigners (Tribunals) Order, 1964 to effectively deal with cases of foreigners, who have illegally come from Bangladesh or are illegally residing in Assam” (Sonowal I).

In 2006, on the eve of state assembly elections in Assam, the Congress/UPA Coalition Government of Manmohan Singh enacted a new amendment to the Foreigners (Tribunals) Order of 1964, that effectively reinstated the provisions of the original IMDT Act, flouting the spirit of the Court's decision in *Sonowal I*. Like the IMDT, the Foreigners (Tribunals) Order applied only to the State of Assam, and once again shifted the burden of proving that a person was a foreign national to the complainant. The enactment of the Order was also motivated by the Congress/UPA coalition's attempt to appeal to Muslim voters in Assam (Bhushan 2003).

However, opposition parties at the Central Government level in the NDA/BJP alliance, and their allies in the State of Assam acted quickly to counter the UPA/Congress Government's enactment of the Order. These parties were motivated by a desire to protect the rights and interests of the native Hindu Assamese population in Assam from being overrun by the influx of illegal Bangladeshi migrants (*Frontline*, December 2006). Lacking the requisite majority in Parliament to overturn the Foreigners (Tribunals) Order (2006), the BJP party, along with the AGP party, challenged the new law in another PIL. In challenging the constitutionality of the new Order, these parties sought to force the Central Government and Assam state government to come into compliance with the Court's earlier decision in *Sonowal I* (2005).

“In saying so, the court completely overlooked the fact that the IMDT Act as such was applicable throughout India. However the government had not notified it for other parts of the country other than Assam. But that was an executive lapse and the other pending petitions sought precisely that direction from the court- that the government be directed to notify the IMDT Act for other parts of the country. The currently limited application of the Act to Assam alone was therefore not a defect in the Act, but a case of executive inaction for which the court could always issue direction to the government. Similarly, if there was any problem with the screening procedure in the Rules made under the IMDT Act or the restrictions placed on the complainants, the court could always strike down those part of the rules or direct the government to correct the procedure” (Bhushan 2003).

In December 2006, the Supreme Court in *Sonowal II* struck down the Foreigners (Tribunals) Order on the same grounds that it had struck down the IMDT Act, holding the new law to be unreasonable, arbitrary and in contravention of Article 14 of the Constitution (equality before law) since it applied only to Assam and not to other States bordering Bangladesh. The provisions of the new law, including the shifting of the burden of proof to complainants/accusers, were also held to be violative of the Centre's duty to protect the States under Article 355.

The Court's decisions invalidating the IMDT and Foreigners (Tribunals) Order in *Sonowal I and II* on the grounds of arbitrariness under Article 14, and Article 355, reflected the justice's own elite conceptions of the rule of law. The Court observed that the Government's noncompliance with its earlier order reflected a lack of political will to address the growing problem of illegal immigration, and to protect the integrity of India as a nation:

In the face of the clear directions issued in *Sonowal I*, it was for the Authority concerned to strengthen the Tribunals under the 1964 Order and to make them work. Instead of doing so, the 2006 Order has been promulgated. It is not as if the respondents have found the 1964 Order unworkable in the State of Assam; they have simply refused to enforce that Order in spite of directions in that behalf by this Court. It is not for us to speculate on the reasons for this attitude.

The earlier decision in *Sonowal*, has referred to the relevant materials showing that such uncontrolled immigration into the North- Eastern States posed a threat to the integrity of the nation. What was therefore called for was a strict implementation of the directions of this Court earlier issued in *Sonowal I*, so as to ensure that illegal immigrants are sent out of the country, while in spite of lapse of time, the Tribunals under the 1964 Order had not been strengthened as directed in *Sonowal I*. Why it was not so done, has not been made clear by the Central Government. *We have to once again lament with Sonowal I that there is a lack of will in the matter of ensuring that illegal immigrants are sent out of the country (Sonowal II)*

And as illustrated in Chapter 3, the expression of frustration on the part of the Court with the Government's failure to safeguard the rule of law and protect the nation's borders was also mirrored in the editorial coverage of both decisions in the leading newspapers. Both decisions met with almost unanimous endorsements from the editorial page of each of the leading newspapers analyzed in this study, although some leading Senior Advocates and legal scholars were critical of the Court for restricting the scope of procedural safeguards and fundamental rights protections in Article 21 for those accused of being illegal migrants (see, e.g. Bhushan 2003).

The Central Government acquiesced to the Court's decision in *Sonowal II* and did not seek to introduce another law to overturn the Court's decision. However, the Central

Government, and the Assam state government, have not expeditiously implemented the Court's decision and orders in *Sonowal II*. As a result, another PIL was filed in 2007 by the All India Lawyers Forum for Civil Liberties and the Image India Foundation in an effort to force Central Government compliance with the Court's decision. The Court ordered the Central Government require the Central Government to provide an update on the status of the implementation of tribunals and the Government's progress as to the numbers of illegal migrants identified (*Times of India*, January 16, 2009). In 2009, the Court expressed its continued frustration with the slow pace of implementation. After hearing from counsel appearing for the petitioners in this PIL, Chief Justice K.G. Balakrishnan observed that "Illegal migrants appear to get more facility than Indian nationals. It has become very difficult to control their increasing numbers" (Id.).

III. The Political Opportunity Structure and Judicial Authority

Compared to the pre-Emergency period, the Court in the post-Emergency period was able to exert stronger levels of judicial authority where it was assertive in challenging the Central Government. How can we explain the relatively high levels of judicial authority in this period?

A. The Strategic Model and the Expansion of Judicial Authority

Within the public law literature, variants of the strategic model have been advanced to help account for variation in the assertiveness and authority of courts. According to the strategic model, judges' will temper their own sincere policy or legal-institutional values or goals in judicial decisions based on their calculations about external political constraints or opportunities (see e.g. Epstein and Knight 1998; Helmke 2005). Scholars who have advanced variants of the strategic model of judicial decision-making have argued that several factors or variables determine whether judges and courts will be more assertive and authoritative:

- (1) the extent to which assertive court decisions fall within (or transgress) the "tolerance interval" bounded by ruling political authorities' strong policy preferences (Epstein, Knight, & Shvetsova 2001);
- (2) the degree to which political authorities are politically divided and hence cannot easily create a consensus to defy or retaliate against court decisions they regard as undesirable (see Cooter and Ginsburg 1996; Ginsburg 2003)
- (3) levels of popular support for enforcement of Court decisions (Vanberg 2002; Staton 2002).

An analysis of the Indian Supreme Court's shift toward greater authority in governance highlights a key weakness or shortcoming of the strategic model – its failure to pay significant attention to the role that elite opinion and the support of legal-professional elites play in broadening the tolerance intervals of political regimes and bolstering the authority of courts. I suggest that a closer examination of these variables

helps complement the strategic model in providing a complete account of the shift to greater authority in the post-Emergency Indian Supreme Court.

B. Elite Institutionalism and the Political Opportunity Structure for Judicial Power

I argue here that the thesis of elite institutionalism helps complement and enhance the strategic model by examining how professional and intellectual support for a Court, and allies within the Bar, the political regime, and other political and policy groups can bolster judicial authority vis-à-vis the Government. In order to understand the opportunity structure which shapes and constrains judicial decision-making, one must attend to the extent to which a court's activist, assertive decisions can help or hurt a court win powerful allies that can provide vocal support and protect the Court from political backlash.

Existing scholarship suggests that courts can gradually cultivate and develop deeper "reservoirs of public support" that enable courts to issue controversial decisions without threatening their legitimacy as institutions (Gibson, Caldeira, and Spence 2003). Vanberg (1998, 2001) suggested that judges and courts are more likely to be assertive and authoritative where they have a strong base of constituent support that is ready to defend the Court. For Vanberg (2001) and Staton (2002), public opinion can serve as a "baseline" for judicial power that enables courts to exert authority and secure compliance from the government in power. Vanberg (2001) and Staton (2002) identify two conditions that are necessary for courts to challenge and constrain government: (1) courts must enjoy sufficient public support; and (2) information about judicial decisions must be transparent; voters must be able to monitor legislative responses to judicial decisions effectively and reliably (Vanberg 2001, 347). In discussing the importance of this second condition, Vanberg (2001) suggested that interest groups can play a critical role as "watchdogs" that increase the transparency of the political environment. Indeed, Epp (1998) also suggested that interest groups can provide the judiciary with "active partners in the fight against opponents of implementation." Staton refers to this as a public enforcement mechanism for judicial power.

The thesis of elite institutionalism builds on these insights but rather than focusing mainly on national public opinion or national public support for courts, I suggest that levels of judicial assertiveness and authority are primarily affected by elite support (though national popular support can matter in highly controversial, highly transparent cases). I argue that the structure of elite opinion—the extent to which political, legal professional, and intellectual elites are united on a set of given issues or issues --can be a significant factor in determining the extent of a Court's authority. Elite groups also can play a crucial role in shaping and influencing national public opinion on specific issues or policies adjudicated by the Court. The national news media—particularly newspapers that closely follow courts—plays a crucial role in "broadcasting" the opinion of elites

regarding specific decisions and overall levels of, and overall support for the Court. Political regimes can look to media coverage (including editorial coverage) of the Court as a “proxy” for broader public support levels for the Court.

Building on these scholars’ insights on public support and the transparency of judicial decisions, one might expect national public opinion or national support to matter more than elite support in certain high profile, highly controversial cases in which the constitutional or political issues are relatively accessible to the public. This suggests that there may be a “sliding scale” of audiences inherent in Staton’s conception of the public enforcement mechanism of judicial power: national popular support may play a greater role in affecting judicial assertiveness and authority in certain exceptional, extraordinary cases, while elite support matters more in the vast majority of the Court’s decisions.

Elite institutionalism, then, suggests that judicial assertiveness and authority is strongly affected by how judges’ and the ruling political regime perceive the strength of the Court. The level of elite and in some cases, national, support for the court and particular judicial decisions can strongly affect the “zones of tolerance” of the regime in power. Stronger levels of elite support can effectively widen or expand regimes zones of tolerance by making political regimes more reluctant to overrule or resist judicial decisions. An important implication of elite institutionalism is that judges can gradually widen their base of popular support over time by building support among particular elite communities in specific cases and contexts. In the next section, I examine evidence of intellectual elite support for the Court. I argue that the relative strong levels of support for the Court among professional and intellectual elites, as reflected in elite editorial coverage of the Court, helped to bolster the Court’s authority against political attacks and retaliation.

The Media, and Professional and Intellectual Elite Support for the Court

As noted above, previous scholarship has suggested that levels of public support for a Court can affect judicial assertiveness and authority in high courts (see Staton 2002; Vanberg 1998, 2001). Unfortunately, there is a paucity of public opinion data on the Indian Supreme Court, and most national opinion surveys has focused on assessing support levels for the Indian judiciary as a whole (see Krishnan 2008).

In order to measure support levels for the Court in other cases, I analyzed elite news editorial coverage of the Court’s politically significant decisions in four of the major national newspapers that closely follow the Court’s decisions: the *Indian Express* (Mumbai/Delhi), the *Hindustan Times* (Delhi), the *Statesman* (Calcutta/Delhi), and the *Hindu* (Madras). Where available, I also analyzed editorial and news analysis in other newspapers and news magazines (e.g. *India Today*, and *Outlook*). Although national newspapers extensively cover major decisions of the Supreme Court, not all cases receive extensive editorial treatment in the opinion section of these newspapers. Table 4.2

summarizes editorial coverage of a small subset of the politically significant fundamental rights decisions analyzed in Chapter 5.

Table 4.2 (pgs. 120-123) illustrates that the Court has generally enjoyed strong levels of professional and intellectual elite support for its fundamental rights decisions in both the 1977-1989, and post-1990 eras. Editorial coverage of the Court's decisions in the 1977-1989 era in all of the cases that received extensive editorial coverage was favorable, including *Maneka Gandhi (1978)*, the *Special Courts Bill case (1978)*, and *Minerva Mills (1980)*. Media elites, and legal professional elites who authored editorials in these papers, were strongly supportive of the Court's decisions supporting the Janata regime's efforts to overturn Emergency regime laws and prosecute Emergency offences. And as illustrated in the case study of *Minerva Mills*, media and legal-professional elites strongly supported the reassertion of the basic structure doctrine to invalidate part of the 42nd Amendment.

Table 4.2: Media Editorial Coverage of Politically Significant Fundamental Rights Decisions - Elite Opinion Response to Court decisions (all editorials post-decision unless otherwise noted)

Case	Issue	Summary	Assertiveness	Hindu	Hindustan Times	Indian Express	Statesman
<i>Special Courts Bill (1979)</i>	Criminal	Court upholds validity of proposed Special Courts Bill, subject to certain proposed revisions to protect judicial independence and right of accused to fair trial.	Weak Endorse	Support	Support	Support	-
<i>Minerva Mills (1980)</i>	Basic Structure Doctrine	Court reaffirms basic structure doctrine in invalidating part of the 42 nd Amendment passed during the Emergency period.	Strong Challenge	Support K. Katyal: Support	Support	Support N. Palkhivala: Support Seervai: Support	Support
<i>D.S. Nakara v. Union of India (1982)</i>	Pensions	Court invalidated pension allocation scheme as violative of Article 14 nonarbitrariness requirement, requiring government to pay 510 million in additional outlays.	Strong Challenge	Support	n/a	Support	n/a
<i>Kartar Singh v. Union of India (1994)</i>	National Security	Court upholds most of Terrorist and Disruptive	Strong Endorse	Support	Support	Support	Neutral

		Activities Act (TADA). Orders government to constitute "Review Committees" to provide greater oversight and review of prosecutions under TADA.					
<i>Airwaves (Cricket Broadcasting Case) (1995)</i>	Economic	Court rules that private broadcasters have right to broadcast under Article 19. However, Court rules that Doordarshan still had exclusive telecast rights for cricket matches, given that viewers have a right to information and to view matches at low rates.	Weak Endorse	Support	Support	Support	Support
<i>Delhi Science Forum v. Union of India (1996)</i>	Economic	Court upholds government's disinvestment policy in telecom sector.	Strong Endorse	Support	Support Bal Krishna: Support	Support	Support
<i>BALCO v. Union of India (2001)</i>	Economic	Court upholds government disinvestment in Bharat Aluminum (National Aluminum company).	Strong Endorse	Support	Support	Support	Support

<i>Narmada Bachao Andolan v. India (2001)</i>	Development	Court rules that construction on Narmada Dam project can proceed.	Strong Endorse	Support Gangi Parsai: Oppose	-	Support C. Verma: Support Nandini Ramnath: Oppose	Support
<i>Union of India v. Ass'n for Democratic Reforms (2002)</i>	Right to Info Elections	Court orders Election Commission to issue disclosure guidelines re: candidates'	Strong Challenge	Pre-decision: Support Post-decision:	Pre-decision: Support Post-decision:	Pre-decision: Support Post-decision	Pre-decision: Support Post-decision

		criminal record and financial antecedents for candidates for Lok Sabha and State Legislative Assemblies. Decision implements recommendations of Law Commission's 170 th Report; Government enacts new law overturning decision		Support	Support	Support	Support
<i>PUCCL v. India (2003)</i>	Accountability; Elections	Court invalidates Section 33B of the Representation of People's Act	Strong Challenge	Support	Support	Support	Support
<i>T. Rangarajan v. Tamil Nadu (2003)</i>	Right to Strike	Court rules that there is no moral or equitable constitutional right to strike; upholds state government restrictions on gov't employees ability to strike.	Weak Endorse	Oppose A. Kuppuswami		S. Sorabjee: Oppose	Support
<i>Javed v. State of Haryana (2003)</i>	Development	Court upholds 2-child law restricting membership to panchayats (local bodies)	Strong Endorse	Weak Support		Support	n/a
<i>Centre for PIL v. Union of India (2003)</i>	Economic	Court invalidates proposed disinvestment of government oil companies (HPCL and BPCL) on the grounds that the Government failed to secure Parliamentary approval for such disinvestment	Weak Challenge	Neutral		Neutral Manoj Mitta: Oppose	n/a

<i>Best Bakery Case (2004)</i>	Criminal/ Communal Violence	Court orders new trial of perpetrators (in case involving communal riots in Gujarat) in Bombay High Court because of bias and manipulation by political elites during trial in Gujarat High Court.	Strong Challenge	Support	Support	Support	Support
<i>Sarbananda Sonowal I (2005)</i>	Immigration	Court rules that immigration law violated Art. 14 b/c it provided less stringent rules for the detection and deportation of illegal migrants in Assam than nat'l immigration laws. Gov't enacts new law, the Foreigner's Order of 2006 to override Court's decision.	Strong Challenge	Pre-decision: Support Post-decision: Support	Pre-decision: Support Post-decision: Support	Pre-decision: Support Post-decision: Support	Pre-decision: Support Post-decision: Support
<i>Sarbananda Sonowal II (2006)</i>	Immigration	Court invalidates Foreigners' order as violative of Article 14, reiterating earlier ruling in <i>Sonowal I</i> .	Strong Challenge	Support	Support	Support	Support
<i>I.R. Coelho v. State of Tamil Nadu (2007)</i>	Basic Structure	Court rules that laws added to Ninth Schedule are subject to judicial scrutiny on whether they infringe the fundamental rights provisions	Strong Challenge	Support	Support	Support	Support

Elite editorial coverage of the Court's decisions in the post-1990 era was also favorable and supportive in most decisions. As illustrated in the case study of Coelho (2007), the Court's reassertion of the basic structure doctrine in that decision had the strong support of professional and intellectual elites as reflected in unanimous support in all of the leading national newspapers. In addition, a strong majority of newspaper editorials strongly endorsed the Court's decisions upholding the government's economic reform policies in *Delhi Science Forum*, *the Airwaves*, and *BALCO* decisions. Editorial opinion also was generally supportive of the Court's decisions upholding the TADA and POTA anti-terror laws, though some elite commentators still expressed reservations about the need for incorporating greater procedural safeguards, and stronger judicial oversight of the special courts established under POTA.

However, elite opinion was divided in the Court's decision upholding and supporting the government's policy and effort to build the Narmada Dam, with many leaders of policy groups and some Senior Advocates criticizing the Court's decision for failing to accord procedural protections. Elite opinion was also divided with respect to the Court's decision in *Rangarajan* (2003), in which the Court held that there was no fundamental right to strike under the Constitution. Some newspapers, including the *Hindu*, and many legal-professional and leaders of policy groups and NGOs criticized the Court's decision as "illiberal" and as contrary to the spirit of the fundamental rights protections in the Indian Constitution. Within the subset of decisions that received extensive editorial coverage, the Court generally enjoyed strong levels of professional and intellectual support in its assertive decisions, and in most of the decisions in which it upheld government policies.

As the foregoing analysis and case studies illustrate, the strategic model does help account for the stronger authority of the Court in post-Emergency era, as compared to the pre-Emergency era. As reflected in Chapter 2, the Court was unable to exert strong authority in securing the compliance of the Central Government with its basic structure and property rights decisions in the pre-Emergency era.

As illustrated in Chapter 5, and the case study of Minerva Mills, the strategic model does appear to partly explain the Court's strong authority in fundamental rights cases in the 1977-1989 era. The elections of 1977, in which the national electorate repudiated the policies of the Emergency regime, helped alter the political opportunity structure for judicial power by widening the tolerance intervals of the government with respect to the Court's assertion of the basic structure doctrine. Indira Gandhi's government did not challenge the Court's reassertion of the basic structure doctrine in Minerva Mills because of the government's concern that the national electorate would have perceived such actions as an attempt to return to the earlier policies of the Emergency regime. As Ramachandran (2000) argued,

Minerva Mills represents the assertion of judicial supremacy without contest. The Mrs. Gandhi who returned to power in 1980 was a different person. After having

been chastened by her defeat in the 1977 elections and having had to live down her image as a destroyer of institutions, she could not have risked being seen again as tinkering with the Constitution or confronting the judiciary...” (Ramachandran 2000, 120).

However, I also suggest that the media, the Bar, and legal commentators also played a crucial role in bolstering the authority of the Court in the post-Emergency era, by helping to frame and shape public opinion regarding the Court’s decisions. As illustrated in the case study of *Minerva Mills*, the Bar and the media served as powerful allies to the Court. Leading Senior Advocates and legal experts also played a key role in helping to bolster authority for the Court’s decision in *Minerva Mills*. Nani Palkhivala, the Senior Advocate who argued the case, helped to reframe the arguments in the case beyond the legal validity and constitutionality of the nationalization of the Mills, and recast the case as one about the constitutionality of the 42nd Amendment enacted during the Emergency. By framing his arguments around the issue of repealing the Emergency and restoring liberal democracy, Palkhivala helped build public support for the basic structure doctrine.

As illustrated in the case study, the media coverage of the case closely tracked Palkhivala’s framing of the issues in the case by focusing public attention on the Emergency and the 42nd Amendment. And following the Court’s decision, newspapers strongly endorsed and defended the Court’s decision and publicly warned and cautioned the government against challenging the Court. The *Hindu* praised the Court’s decision for invalidating the two part of the 42nd Amendment that the Janata regime had been unable to repeal. In addition, the *Hindu* editorial argued that the decision helped restore the separation of powers set forth in the Indian Constitution. The editorial suggested that had the Court upheld Sections 4 and 55 of the 42nd Amendment, it “would have been tantamount to abjuring the constitutional role of the judiciary and liquidating the separation of powers inherent in the foundation of the Indian Republic.”¹⁰ The *Statesman* argued that so long as the basic structure theory prevails, no useful purpose will be served by further rhetoric in Parliament or by any rash action.” The *Statesman* editorial framed the assertion of the basic structure doctrine in terms of protecting the constitution and democracy, and advised that the best course for the government was to accept and comply with the decision. In addition, other legal elites, including Senior Advocates and legal experts, were also strongly supportive of the Court’s decision, as reflected in editorials published in the national papers following the decision.

In addition, the deinstitutionalization and weakening of political institutions, and the political fragmentation that has characterized India’s party system in the post-1989 also helped to bolster judicial authority. Because of political fragmentation at the Center, coalition Governments in the post-1990 era have had reduced political strength in the form of political majorities in Parliament for overturning judicial decisions, though

¹⁰ “Salutary Check on Parliament’s Amending Power,” *Hindu*, May 12, 1980.

Parliament did succeed in overturning a series of the Court's affirmative action decisions in the post-1990 era via constitutional amendment.¹¹

As illustrated in Chapters 5 and 6, the fragmentation and weakening of political institutions in an era of coalition governments has undermined the strength of the Executive and Parliament in the post-1990 era. The Court in this period emerged as the most trusted and credible institution of governance (see Mendolsohn 2000) as it played a critical role to fill the vacuum of responsible governance in this period. In this era of political fragmentation, the Central Government was forced to acquiesce to the Court's assertive decisions in the area of fundamental rights (and in governance cases), to maintain some level of national support by appearing to be in compliance with the rule of law. In explaining the Court's strong authority in basic structure doctrine cases, Ramachandran (2007) thus argued that "a weakened political class, anxious to show adherence to the rule of law has quietly acquiesced in judicial primacy, and the Supreme Court, armed with the ultimate power to annul amendments to the Constitution, has used the doctrine and lesser powers flowing from it, extensively" (Ramachandran 2007, 15).

I argue that media elites, and legal commentators have played a crucial role in defining and shaping elite and national conceptions of the rule of law in the Indian polity. As one leading Senior Advocate and legal expert has argued, "During the past, it was the law that provided the source of authority for democracy, which today appears to have been replaced by public opinion, with the media serving as its arbiter" (Sood 2008, citing Das 2000, 38). Another Senior Advocate and leading expert on the Court has described the national news media as "not just the fourth estate, but a constitutional agency in its own right" (Id, citing interview with Rajeev Dhavan, 2006).

Without question, internal divisions and fragmented weaker coalition governments in the post-1990 era created a hospitable political opportunity structure for the exercise of judicial power in Coelho and other decisions. But the political opportunity structure for judicial power was also affected by the power and influence of governance constituencies, including the media and the Bar, who played a crucial role in helping to build popular support for the Court and to bolster the Court's authority against political retaliation and attacks by the Central Government.

The elite media and legal commentators among the ranks of the Senior Advocates and other legal experts have thus played a crucial role in defining public perception of what constitutes the rule of law among political elites and the national public. And the

¹¹ This study did not analyze the Court's decisions in the area of affirmative action/quotas and equality. However, future research on this area would be worthwhile to explore how fragmented coalition governments can unify around high-salience political issues. Because the majority of the national electorate benefits from Central and State Government reservations/quota programs, most political parties have been forced to embrace and defend these policies, going so far as to override judicial decisions that have placed limits or restrictions on government policies in this area. For an excellent analysis of these dynamics, see Dhavan (2008).

reaction of political elites to the Court's decision in Coelho, as covered in the news media, reflected political elites desire to be perceived as being in compliance with the rule of law. Law Minister H.R. Bhardwaj's admonition to state governments, in which he observed that state governments would have to "think twice" before requesting that the Union Government place laws in the Ninth Schedule,¹² illustrates how Central Government officials in the post-1990 era are cognizant of the importance of being perceived as in compliance with the rule of law and the Court's decisions.

Governance Constituencies and Judicial Authority in Fundamental Rights Cases

The interaction between the Court and the Central Government in the *Centre for PIL case*, and the *Sonowal* cases, highlights the important role that the Bar, and opposition and regional parties can play in bolstering authority. Political fragmentation within the Indian polity actually helped bolster the authority of the Court, as it led rival and opposition parties to turn to the Court to challenge Central Government policies, and to effectively advocate for and defend the Court's authority following those decisions. Political issues involving the creation of tribunals for identifying and deporting illegal Bangladeshi migrants were transformed into legal and constitutional issues in the Court in *Sonowal I and II*, and led these parties to rush to the defense of the Court's first decision in the face of the Central Government's override of the first decision through the enactment of the Foreigners (Tribunal) Order in 2006.

Interestingly, while the *Sonowal* case illustrated how opposition parties can bolster judicial authority by challenging the majority party, the *Centre for PIL* case exposed how internal divisions within the NDA/BJP coalition government that governed India from 1998-2004 bolster the Court's authority and made it difficult for the Government to resist the Court. Internal divisions within the Cabinet between Petroleum Minister Ram Naik (who opposed disinvestment in the oil companies in *Centre for PIL*) and Disinvestment Minister Arun Shourie (who championed disinvestment), ultimately made it difficult for the Government to build a strong consensus for this policy, and following the Court's decision, these divisions made it difficult for the Government to override the Court, or to enact new laws that would have authorized the disinvestment of the companies. *Centre for PIL* also illustrated the important role played by the Bar in challenging the BJP Government's failure to properly seek authorization from Parliament, as illustrated by the strong public criticism by over one hundred Supreme Court advocates, and a public statement from a group of former Supreme Court justices and other legal luminaries. This further shaped public perception of the issue in the media, and bolstered the Court's assertiveness and authority in this case.

¹² "Judgment reiterates right to judicial review: Bhardwaj," *Hindu*, January 12, 2007.

IV. Conclusion

This chapter illustrated that the Supreme Court of India was able to assert significantly stronger levels of authority in the post-Emergency era, in contrast to the pre-Emergency era. And within the post-Emergency era time period, the Court exerted greater authority in the post-1990 era than in the 1977-1989 period. This was a result of the Court's "strategic retreat" during the 1977-1989 period, as the Court sought to rebuild public support lost during the Emergency (Baxi 1985). As Baxi and other scholars have argued, the Court was thus strategically deferential to the Central Government in fundamental rights-based challenges to government economic or national security policies. However, the Court was still selectively assertive in the 1977-1989 period in expanding the scope of judicial review in *Maneka*, and reasserting the basic structure doctrine in *Minerva Mills*. In the post-1990 era, the Court continued to be selectively assertive in endorsing government policies in the areas of economic, development, and national security policies, while challenging the Government in cases involving the basic structure doctrine, immigration policy, and free speech and civil liberties cases.

I argue in Chapter 5 that the values and worldviews of justices shifted in the post-1990s as socialism's star gradually faded away among national policy, and intellectual elites and a broader meta-regime of "liberal reform" took hold. As India moved toward a free market, liberal economy, judges, along with professional and intellectual elites, gradually accepted and supported the neoliberal economic policies of the Congress and BJP regimes. In the area of fundamental rights, judges in this period continued to act on and assert institutional values in bolstering and expanding the power of the Court, as illustrated by the Court's reassertion and expansion of the basic structure doctrine in cases like *L. Chandra Kumar* (1997) and *Coelho* (2007) (see Chapter 3). While the Court remained a selectively assertive one in the area of fundamental rights, it asserted itself on new fronts. The Court challenged Central Government policies and actions in the area of free speech and civil liberties. And the court went further than the 1977-1989 Court, and challenged the Central Government in asserting the voters' right to information in Parliamentary elections in the *Right to Information* cases (2002-2003), and also challenged the Government's immigration policy for the north-eastern states bordering Bangladesh in the *Sonowal I and II decisions* (2005-2006).

But the court continued to endorse and/or defer to the Central Government in the area of economic, development, and national security policies. However, I argued in Chapter 3 that the Court's deference in the post-1990 era was not necessarily a reflection of the justices' strategic deference to the regime. Instead, the Court's deference and restraint in these areas was largely self-imposed: judicial deference or restraint reflected the judges' embrace of existing doctrines of restraint because of the judges' own institutional norms and commitments, or reflected the judges' genuine support for the underlying government policies that they upheld. So it wasn't that the Court didn't believe it couldn't challenge the government without backlash, but rather the justices'

own embrace of existing legal standards and traditions, and their elite policy worldviews and ideology, that accounted for the Court's selective assertiveness.

The Court's activism and assertiveness in post-Emergency cases like *Maneka Gandhi* (1978), and *Minerva Mills* (1980), was thus motivated by a larger desire to "redeem" itself for acquiescing to the emergency and to build legitimacy by demonstrating its commitment to liberal democracy, constitutionalism and fundamental rights. The broader context of the judges' and Court's public image and reputation was defined by elite news media coverage of the Court. Sathe (2002) suggests that the Supreme Court of India had "learned" a valuable lesson from the pre-Emergency era—that it was unable to assert authority in this period in its basic structure doctrine cases because it lacked a broader elite base of support for it as an institution (as political and professional-intellectual elites were divided over the basic structure doctrine). The basic structure doctrine cases only developed backing and support among a very narrow range of elite interests. And during the Emergency, the Court saw its reputation and support levels badly diminished as a result of its total acquiescence to the Gandhi regime. Both Baxi and Sathe suggest that the post-Emergency Court consciously acted and was motivated by a desire to broaden the base of public support for the Court. Baxi thus suggested that the court's activism in *Maneka* and activism and selective assertiveness in other cases involving the purge of the Emergency were reflective of a larger "judicial populism."

In the post-Emergency era, and in particular, in the post-1990 period, the Court's authority was bolstered by stronger levels of intellectual and professional elite opinion, and national public support. This was because the political regimes in the post-1990 era perceived that the Court had higher levels of public support vis-à-vis the Executive and Parliament (as illustrated by elite news coverage of the Court's decisions, and news coverage of public reactions and debate within Parliament and among ministers in the Executive branch).¹³ Political regimes in this era were reluctant to attack or resist the Court's assertive judicial decisions in rights and governance cases, because of public support for the Court's relative effectiveness in ameliorating governance failures.

I argued in this chapter that the Court's strong level of authority was not only a result of the weakening of political institutions at the Central Government level. In addition,

¹³ Changes in the political opportunity structure in the post-1990 era also made it more difficult for the Central Government to override judicial decisions via the amendment process. The Constitution, in Article 368, requires only a two-thirds vote of both the Lok Sabha and Rajya Sabha houses of Parliament for most amendments. In the 1990s, Congress party strength diminished significantly, as the Janata Dal, the center-right Bharitya Janata Party, and regional parties increased in strength. Since 1989, no single political party has been able to win a supermajority in Parliament, and instead the largest parties have been forced to form coalition governments with partner parties. The simple majority requirement for amendment also limited the power of the Court early on. But as the Congress party diminished, and new opposition and regional parties gained power, the Court gained a degree of policy space as it was difficult for coalition governments to override the Court due to lack of numerical strength in Parliament.

the Court's authority has been bolstered by the elite media and leaders of the Indian Bar who have played a crucial role in framing and shaping public perception of the Court's activist and assertive decisions in cases like *Maneka Gandhi (1978)*, *Minerva Mills (1980)*, *the Centre for PIL (Oil Disinvestment) Case (2003)* the *Sonowal cases (2005-2006)*, *Coelho (2007)* and in effectively defining and elite and public conceptions of the rule of law in the Indian polity.

And in the post-1990 period, the media and other governance constituencies such as the Bar and opposition parties in the Central Government, have continued to play a crucial role as a powerful ally and advocate for the Court's activism and selective assertiveness in fundamental rights decisions. This is reflected in the strong levels of national news editorial support of most of the Court's assertive and deferential decisions in the post-1990 period. The national news media, the Bar, and opposition political parties have thus emerged as "watchdogs" (*see Vanberg 2002; Staton 2002*) that enable other elites, and the national public to monitor the Central Government's compliance with the Court's decisions in the area of fundamental rights. The thesis of elite institutionalism illustrates how media and legal elites can help constrain political actors and bolster the authority of courts, by closely scrutinizing government policies for compliance with the rule of law and constitutional norms.

Chapter 5

The Activism and Assertiveness of the Supreme Court of India in Governance: From Social Justice to Liberal Reform

Introduction

The Indian Supreme Court today is arguably one of the most powerful and influential constitutional courts in the world, and presently plays an active and leading role in governance and policy-making at the level of the Central Government.¹ As illustrated in Chapter 3, the Court in the post-Emergency era (1977-2007) dramatically expanded the scope of the core fundamental rights in Articles 14, 19, and 21, based on a new activist approach to constitutional interpretation.² Chapters 3 and 4 illustrated, however, that the Indian Court was only *selectively* assertive in the post-Emergency era in challenging the Central Government in politically significant fundamental rights decisions, endorsing the vast majority of the government's policies and actions in such areas as economic policy, national security, and development.

On the other hand, as this chapter illustrates, the Court in the post-1990 era shifted to activism and a high level of assertiveness in challenging Central Government power and authority in *governance* cases. Building on the substantive framework of rights discovered in Articles 14, 19, and 21, the Court took over governance and policy-making functions that were once the domain of the Central Government bureaucracy, the Executive (Prime Minister and Council of Ministers), and Parliament. And the Court also exerted a high level of authority, eliciting the compliance and/or acquiescence of the Central Government in response to its assertiveness in most of these cases.³ Chapter 6 analyzes the authority of the Court in governance and analyzes broader patterns of interaction between the Court and political regimes in the Central Government across both the 1977-1989, and post-1990 periods.

As noted in Chapter 1, the dependent variable in this study is change in the power of the Indian Supreme Court. As set forth in that chapter, I defined judicial power as comprising three key dimensions: activism, assertiveness, and authority. Activism refers to the extent to which the Court expansively interpreted the Constitution to support substantive outcomes. Assertiveness has two dimensions: (1) the extent to which the Court challenges the exercise of power by the elected branches of the Central

¹ See, e.g. S.P. Sathe, *JUDICIAL ACTIVISM IN INDIA* (2003); Robert Moog, *Activism on the Indian Supreme Court*, 82 *JUDICATURE* 124 (1998); Ashok S. Desai and S. Muralidhar, *Public Interest Litigation, Potential and Problems* in *SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA* (B.N. Kirpal et al. eds, 2000); *FIFTY YEARS OF THE SUPREME COURT OF INDIA: ITS GRASP AND REACH* (S.K. Verma et al., eds. 2000);

² See *Maneka Gandhi v. Union of India* (1978).

³ In some areas, including cases involving environmental pollution, the Court has had difficulty in securing immediate compliance from the Central Government bureaucracy with its orders.

Government; and (2) the extent to which the Court intervenes in politically significant governance cases by engaging in policy making and/or compelling governmental action at the Central Government level. While the first dimension focuses on the Court's assertiveness in enforcing the limits of government power based on compliance with constitutional provisions and norms, the second dimension focuses on the Court's assertiveness in intervening where the government fails to fulfill its constitutional or statutory obligations. [Moved here from a footnote].

During the late 1970s and early 1980s, the Court under the leadership of Justices P.N. Bhagwati, V.R. Krishna Iyer, and other activist judges, actively facilitated this transformation through a new activism aimed at promoting social justice for the poor and oppressed classes of India. In a series of decisions, the Court reinterpreted Article 32 to expand standing doctrine for Public Interest Litigation (PIL) claims against government illegality and governance failures.⁴ These decisions helped drive a large influx of public interest litigation claims. Responding to these procedural innovations and reforms, public interest lawyers, NGOs, journalists, and human rights advocates began to file PIL suits in order to check and correct human rights violations, governance failures, and governmental illegality. In addition, the Court also relaxed formal pleading and filing requirements and evolved new equitable and remedial powers and procedures that enabled it to assert new monitoring, oversight, and policy-making functions.⁵ In the 1977-1989 period, the Court assumed an active role in taking on bureaucratic agencies, and state and local governments in cases involving the repression of human rights and environmental degradation. During this period, however, the Court was not assertive in challenging Central Government policies or actions in governance cases.

In the post-1990 era, the Court entered a new era in which it significantly expanded its power in governance and directly challenged the power of the elected branches of the Central Government (the President, Prime Minister, Council of Ministers, and Parliament). Under the leadership of a new group of activist justices including Chief Justices M.N. Venkatachaliah (1993-1994), A.M. Ahmadi (1994-1997), J.S. Verma (1997-1998), and A.S. Anand (1998-2001), the Court built on and expanded its activism and became more *assertive* in challenging the power of the elected branches and bureaucracy of the Central Government in governance. In this "post-economic reform" era, the substantive nature of the Court's activism shifted toward championing good governance and reforms, including protecting and championing judicial independence, fighting corruption and promoting accountability, and championing a "middle class" agenda of environmental protection, development, and human rights.

This shift toward greater assertiveness in the post-1990 era is illustrated by several high profile decisions. In the 1990s, the Court in the *Second Judges' Case* (1993), and *Third Judges' Case* (1998) wrested control and final authority over judicial appointments and transfers from the executive. In doing so, the Court overruled its earlier decision in the *Judges' Case* (which had upheld the Executive's primacy in

⁴ The Court expanded standing doctrine and access to the Court in the *Judges Case* (S.P. Gupta v. Union of India (1981) Supp SCC 87 (upholding executive primacy in judicial appointments).

⁵ The Court significantly relaxed formal pleading and filing requirements in PIL cases in *Bandhua Mukti Morcha v. Union of India* (1984) 3 SCC 161.

appointments), and ruled that the Chief Justice and senior justices had final authority in the appointment and transfer process. Despite some efforts within the Central Government to override these decisions, the Central Government ultimately acquiesced and complied with these decisions.

The Court also asserted an active role in checking government corruption and illegality, as illustrated by the Court's activism and assertiveness in the *Vineet Narain* case (1997). In *Vineet Narain*, the Court intervened and took control of an investigation into the "Jain Hawala" scandal,⁶ leading to the indictment of several high-ranking government officials, including the Prime Minister. Although the Central Government initially attempted to override and block the Court's interventions in *Vineet Narain*, the Court ultimately triumphed in securing compliance and/or acquiescence with its decisions. The Court's intervention helped undermine support for the Congress government and helped contributed to that government's defeat in the 1996 national elections.⁷

In environmental policy, the Court continued its earlier activism, and became more assertive in challenging the policies, actions and inaction of the Central Government and state governments. For example, in the *Godavarman* (the "Forest Bench") litigation (1996-present), the Court virtually assumed the functions of the Ministry of Forests, and asserted jurisdiction and policy-making authority with respect to the management and protection of India's forests.⁸ This was in response to the Government's failure to arrest massive deforestation nationwide. The Central and state governments repeatedly attempted to resist the orders of the *Godavarman* bench, but the Court has exerted a significant level of authority in this litigation.

How can we explain these extraordinary shifts in activism and assertiveness? Referencing existing theories of public law, this chapter analyzes these shifts in terms of theories of judicial motive and the political opportunity structure for power. I argue that the thesis of elite institutionalism helps supplement existing theoretical accounts and provides the single most compelling explanation of the Court's activism and assertiveness.

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 a source of the judges' values and motivations. Elite institutionalism, however, supplements existing institutionalist theories by situating judicial decision-making within the larger intellectual milieu and

⁶ Jain Hawala was the largest and most significant scandal in India's political history. It involved an \$18 billion bribery and corruption scam involving businessmen, bureaucrats, and over 100 leading political leaders (from both the Congress and BJP). As part of the scam, a group of businessmen channeled money to Kashmiri terrorist groups and leading politicians through illicit transactions.

⁷ See *Vineet Narain v. Union of India* (1998) 1 SCC 226 (Court issues directives blocking Prime Minister's office from controlling the Central Bureau of Investigation (CBI) inquiry into Jain Hawala scandal, directions to Central Bureau of Investigation).

⁸ *T.N. Godavarman Thirumulkpad v. Union of India* (1997) 2 SCC 267.

political context of high court judging. It seeks to understand how the broader currents of intellectual elite opinion shape judge's policy worldviews and judicial activism and assertiveness. I argue that 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. I illustrate in this chapter how the institutional context interacted with broader meta-regimes of political, professional, and intellectual elite worldviews and currents in shaping judicial worldviews, and driving activism and assertiveness.

Part I of this chapter provides a descriptive analysis of shifts in the post-Emergency Court's activism and assertiveness across the 1977-1989 and post-1990 eras. Part II examines how existing public law theories of motive fail to provide a complete account of these dynamics. Part III examines how the thesis of elite institutionalism helps supplement existing public law theories in providing a compelling account of the shift toward greater activism and assertiveness. Part IV concludes.

I. The Expansion of Judicial Power: Judicial Governance in The Post-Emergency Era (1977-2007)

A. Activism and Assertiveness in the 1977-1989 Era

This section analyzes broader shifts in two dimensions of judicial power in governance cases in the 1977-1989 era. As I laid out in Chapter 1, this study focuses its analysis on a smaller subset of politically significant decisions. Politically significant decisions refer 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, and/or those which directly affected the scope of the power of the Central Government.

This methodology also allowed me to identify important *activist* decisions of the Court in terms of constitutional interpretation. Many of the experts I interviewed confirmed that some of the most activist decisions of the Court did *not* meet my definition of political significance. These decisions were nevertheless significant in terms of the gradual expansion of the court's involvement in governance, and broader shifts in the expansion of the Court's equitable and remedial powers and adoption of non-adversarial procedures.

As illustrated below, an analysis of the Court's decision-making in this period highlights two crucial facets of the Court's activity in governance. First, the Court was an extraordinarily activist one in expanding the scope of fundamental rights and developing the Public Interest Litigation (PIL) regime in a series of decisions involving the repression of human rights and malgovernance. Second, the Court was *not* assertive in challenging Central Government policies or actions in the domain of governance. Instead, the Court limited its assertiveness to taking on state and local government actors, and bureaucratic agencies in cases involving human rights repression and malgovernance.

Activism and the Birth of PIL

The extraordinary scope of the Supreme Court of India's power in governance today

can be traced to the expansive new activism of the Court in the immediate post-Emergency era. The election of the Janata party coalition in 1977 signaled the restoration of liberal democracy and constitutionalism. Fundamental rights emerged as a salient issue as the Janata regime moved to repeal the Emergency and restore protections for fundamental rights. As part of this new shift, the Supreme Court of India launched a new activism to expand the scope of fundamental rights in decisions like *Maneka Gandhi* (1978) (see Chapter 3). But in order to make these rights accessible to the vast majority of the Indian population, the Court, led by Justices V.R. Krishna Iyer, Justice P.N. Bhagwati, and with the support of Chief Justice Chandrachud and other judges, embraced a new phase of procedural activism in Public Interest Litigation (PIL). The Court's activism consisted of three key innovations. First, the Court expanded popular access to the Court by liberalizing formal pleading and filing requirements, and widening standing for PIL suits. Second, the Court innovated new court-led, non-adversarial procedures involving fact-finding and investigative powers. Third, the Court widened its equitable and remedial powers.

The Expansion of Popular Access: The Judges' Case

Between 1978 and 1981, the Court gradually built the foundations for an expanded doctrine of standing for public interest claims in a series of decisions that liberalized formal pleading and filing requirements. Most of these early decisions involved prisoner's rights, bail and the right to legal aid, and state repression of human rights. This activism reflected the social-egalitarian policy values and worldviews of the senior judges of the Court, including Justice V.R. Krishna Iyer, Justice P.N. Bhagwati, Chief Justice Y.V. Chandrachud, Justice D.A. Desai, and other judges.

In 1981, a seven-judge Constitutional Bench of the Court in *S.P. Gupta v. Union of India* (The Judges' Case)⁹ formally incorporated the liberalization of standing for public interest litigation claims into legal doctrine. The case involved a challenge to the Gandhi Government's mass transfer of High Court judges. In the Judges' Case, the Court adjudicated a group of claims from a transferred judge, and senior advocates in several states challenging the government's transfers on the grounds that the Government had bypassed normal consultation procedures and transferred many judges without their consent. The Government challenged the locus standi of the petitioners, arguing that they lacked standing because they did not suffer a legal harm or injury as a result of the transfers, and that only the judges themselves could bring claims. The Court rejected the Government's standing objections, ruling that the advocates had a strong interest in maintaining the independence of the judiciary, and that the challenged transfers dealt directly with the issue of judicial independence. As Justice Bhagwati noted in his opinion:

⁹ (1981) Supp. S.C.C. 87

The profession of lawyers is an essential and integral part of the judicial system and lawyers may figuratively be described as priests in the temple of justice... The are really and truly officers of the court in which they daily sit and practice. They have, therefore a special interest in preserving the integrity and independence of the judicial system and if the integrity or independence of the judiciary is threatened by any act of the State or any public authority, they would naturally be concerned about it, because they are equal partners with the Judges in the administration of filing the writ petition.¹⁰

In upholding the petitioners' standing to bring the suits, the Court proceeded to layout a new, expanded conception of legal standing based on exceptions to standing rules under both United States, British and Indian common law,¹¹ and case law in India.¹²

While broadening the standing doctrine and allowing the advocates claims, the Court's ultimate decision in *the Judges' Case* endorsed the Executive's actions and the Government's position in the case, with five out of the seven justices voting to uphold the primacy of the Executive in matters of judicial transfers and judicial appointments.¹³ The majority of the Court held that the term "consultation" under Article 124(2) and 222(1), while requiring that the Executive consult with at least one Justice of the Supreme Court, and one High Court judge, in addition to the Chief Justice of India, did not mean that the Executive was required to follow the opinion or advice of these judges. According to several scholars, and multiple experts interviewed for this project, the decision in the case was heavily influenced by the strategic political context and pressure from an aggressive government seeking which to impose its will on the judiciary (SCJ-5; SA-2; Dua 1983; Baxi 1985). Although several judges emphasized the importance of judicial independence in their opinions, the Court's desire to advance that goal was inhibited by a hostile political climate and concerns about the political backlash the Court would face in response to a more assertive decision.

¹⁰ See *S.P. Gupta* at 220 (Bhagwati, J.).

¹¹ See *S.P. Gupta* at 206-207, 216, citing *Queen v. Bowman*, 1898 1 QB 663 (holding that any member of the public had right to be heard in opposition to an application for a license); *Attorney-General v. Independent Broadcasting Authority* ("The McWhirter case"), (1973) 1 All E.R. 689 (CA) (holding that McWhirter had sufficient interest and standing to bring action against Broadcasting Authority for threatening to show film that did not comply with statutory requirements as television viewer); *K. Ramadas Shenoy v. Chief Officers, Town Municipal Council, Udipi* (1974) 2 S.C.C. 506 (holding that a ratepayer can question the action of the municipality in granting a cinema license to an individual); *Vardarajan v. Salem Municipal Council*, A.I.R. 1973 Mad. 55 (recognizing right of ratepayer to challenge misuse of funds by municipality).

¹² See *Municipal Council, Ratlam v. Vardichan*, (1980) 4 S.C.C. 162 (holding that local residents had standing under Section 133 of the Code of Criminal Procedure to bring suit against municipality to force them to carry out statutory duty of constructing a drain pipe to carry sewage on a certain road).

¹³ UPENDRA BAXI, COURAGE, CRAFT AND CONTENTION, THE INDIAN SUPREME COURT IN THE EIGHTIES, (1985), 38.

The Court's decision in the *Judges' Case* was a strategic *Marbury v. Madison*-type decision, in that the Court sought to expand its own jurisdiction in public interest litigation cases, but also endorsed the Government's position in recognizing the supremacy of the Executive in transfers and appointments. Significantly, the Court in the *Judges' Case* effectively redefined the role of courts as forums in which public interest litigants could challenge the failures of Government in terms of statutory non-enforcement, violations of the Constitution or breach of public duty. As Bhagwati noted in his opinion:

We would hold therefore, hold that any member of the public having sufficient interest can maintain an action for judicial redress for public injury arising from breach of public duty or from violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision. This is absolutely essential for maintaining the rule of law, furthering the cause of justice and accelerating the pace of realization of the constitutional objectives.¹⁴

The Supreme Court thereby asserted an expanded oversight and accountability function through which it would subsequently expand its power in reviewing the actions of national and state government entities. Following this decision, the Court witnessed a dramatic increase in the number of public interest claims filed in the 1980s.¹⁵

Continuing Mandamus: Hussainara Khatoon

The Court expanded the scope of its equitable and remedial power in a series of human rights cases during the late 1970s and early 1980s. One of the earliest examples of this was the Court's decision in *Hussainara Khatoon v. Union of India* (1979). In *Hussainara*, a three-judge bench of the Court allowed attorney Kapila Hingorani to bring a habeas petition on behalf of thousands of "undertrial" prisoners in the state of Bihar. Undertrial prisoners were prisoners who had served time in jail awaiting trial because they were unable to afford bail. Hingorani filed the petition based on a series of articles published in the *Indian Express* about the plight of undertrial prisoners in the state of Bihar and other states. In many cases, these prisoners had been in jail longer than the actual sentence that would have accompanied a conviction for the crime they were accused of committing.

The Court in *Hussainara* broke new ground in developing the procedural innovation of "continuing mandamus." In addition, the Court issued relief in the form of orders and directives, without issuing dispositive judgments, in order to retain jurisdiction over the matter. This enabled the Court to monitor the progress of the litigation. In a

¹⁴ *S.P. Gupta* at 218.

¹⁵ The Supreme Court Registrar officially started tracking the total number of letter and writ PIL petitions in 1985. In that year, the Court received over 24,000 letter petitions, and the Court has received an average of over 17,000 letter petitions between 1985 and 2007. Since 1985, the Court has logged an average of 159 PIL writ petitions per year. See SUPREME COURT OF INDIA, ANNUAL REPORT, 2006-2007.

series of orders (*Hussainara* I through VI), the Court laid down new guidelines for reforming in the administration of bail. These new guidelines stipulated that the government was required to inform all undertrials of their entitlement to bail, and that the government would have to release undertrials if their period of incarceration exceeded the maximum possible sentence for the offences for which they had been charged (see Mendolsohn 2000, 110). The Court ordered the release of the undertrials that had been mentioned and identified in the news article (Baxi 1980a, 3). The Court helped to end the practice of “protective custody” through orders mandating the release of thousands of prisoners in Bihar.

Through the innovation of continuing mandamus, the Court indefinitely retained jurisdiction over PIL matters by issuing orders and directives without issuing final dispositive judgments. Clark Cunningham referred to this procedural innovation as “remedies without rights,”¹⁶ which was invoked in many subsequent governance cases: “*Hussainara* thus set a pattern which the Supreme Court has followed in many public interest cases: immediate and comprehensive interim relief prompted by urgent need expressed in the writ petition with a long deferral of final decision as to factual issues and legal liabilities.”¹⁷ An example of this is the ongoing *Godavarman* “forest bench” case. Although this PIL was first filed in 1995 to address deforestation in one protected forest in South India, the Court has broadened and extended its jurisdiction in this case to effectively take over the day-to-day management and governance of all of India’s forests, including issues related to mining and tribal use of forest lands.

Epistolary Jurisdiction and Non-Adversarial Proceedings: BMM (1984)

A few years after the Court’s decision in the Judges’ Case, the Court further relaxed formal pleading and filing requirements to expand access to the Court in *Bandhua Mukti Morcha v. Union of India*¹⁸ (“BMM”). In BMM, a three-justice bench of the Court consisting of Justice P.N. Bhagwati, R.S. Pathak, and A.S. Sen, initiated a PIL in response to a letter petition filed by Swami Agnivesh, the head of a Bandhua Mukti Morcha. The Court in BMM held that it would accept as letters from individuals, journalists, or third parties as writ petitions under Article 32,¹⁹ initiating what Upendra Baxi referred to as “epistolary jurisdiction”²⁰ in PIL cases. As Justice Bhagwati stated in his opinion in BMM:

Where the weaker sections of the community are concerned...who are helpless victims of an exploitative society and who do not have easy access to justice, this Court will not insist on a regular writ petition to be

¹⁶ Clark Cunningham, *Public Interest Litigation in the Indian Supreme Court: A Study In Light of the American Experience*, 29 *Journal of the Indian Law Institute* 494 (1987).

¹⁷ *Id* at 512.

¹⁸ (1984) 3 SCC 161.

²⁰ See Upendra Baxi, “Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India”, in *THE ROLE OF THE JUDICIARY IN PLURAL SOCIETIES*, NEELAN TIRUCHELVAN & RADHIKA COOMARASWAMY, eds. (New York: St. Martin’s Press, 1987).

filed by the public-spirited individual espousing their cause and seeking relief for them. But it must not be forgotten that *procedure is but a handmaiden of justice* and the cause of justice can never be allowed to be thwarted by any procedural technicalities....²¹

In their letter, BMM alleged (1) large number of migrant laborers from other states were working in inhumane conditions in stone quarries located in Faridabad (a town outside of Delhi), including toxic dust, the lack of potable drinking water, and other basic amenities; and (2) that many of these workers were “bonded laborers”—which referred to laborers who were forced to work little or nominal wages because of a debt incurred by the laborer or their ancestors, and were compelled to relinquish their freedom to work for another employer.²² Through this PIL, BMM petitioned the Court to order enforcement and implementation of existing constitutional provisions and statutory law, in light of the government’s failure to rein in the bonded labor system. BMM also petitioned the Court to also issue orders aimed at improving the working and living conditions of these laborers, and to free them from bonded labor.

In addition, the Court in *BMM* further expanded the Court’s own equitable and remedial powers, and role in fact-finding and investigation in PIL cases. The Court broke new ground and in appointing two advocates as commissioners, and a doctor, with the charge of visiting certain quarries and interview and identify bonded laborers, and to investigate the working and living conditions. Moreover, the Court adopted a broad interpretation of Article 32 in adopting a new mode of non-adversarial procedures in PIL cases. According to Justice Bhagwati, Article 32(1) did not mandate adversarial proceedings for suits brought in enforcement of the fundamental rights, given that that article stipulates: “The right to move the Supreme court by *appropriate proceedings* for the enforcement of the rights conferred by this Part is guaranteed.” Bhagwati noted that the framers of the Indian Constitution, in using the term “appropriate proceedings”:

...deliberately did not lay down any particular form of proceeding for enforcement of a fundamental right nor did they stipulate that such proceeding should conform to any rigid pattern or strait-jacket formula as, for example, in England, because they knew that in a country like India where there is so much of poverty, ignorance, illiteracy, deprivation and exploitation, any insistence on a rigid formula of proceeding for enforcement of a fundamental right would become self-defeating because it would place enforcement of fundamental rights beyond the reach of the common man...²³

²¹ *Id.* at 170.

²² *Id.* at 203. The system of bonded labor antedated Indian independence and led the Constituent Assembly to include Article 23 in the Constitution, which outlawed all forms of forced or bonded labor. Article 23 was not given effect or implemented until 1976, when the Government finally enacted the Bonded Labour System (Abolition) Act, but this legislation was still unsuccessful in eradicating the practice nationwide

²³ *Bandhua Mukti Morcha* at 207.

Bhagwati held that the Court was free under Article 32 to depart from the “Anglo-Saxon system of jurisprudence” in adopting novel, non-adversarial procedures that included court-led fact finding through appointed commissions.

The Role of the News Media and Public Interest Groups

As noted earlier in this chapter, the activism of the Indian Supreme Court in PIL was in large part driven both by the social-egalitarian values of Justices Bhagwati and V.R. Krishna Iyer (see Baxi 1985; interviews with Justices Krishna Iyer and Bhagwati), and by a desire among these and other judges in the post-Emergency era to bolster the institutional legitimacy of the Court (Baxi 1980, 1985). PIL was also bolstered by the national media’s increased its coverage of these cases, and the expanding number of public interest groups that began filing PILs to address social injustice and governance failures.²⁴

In addition to an internal activist push within the Court, PIL was also bolstered by increased media coverage of poor conditions in state institutions, and the repression of human rights in the post-Emergency period (see Baxi 1985). This included greater coverage of the Court’s role in PIL cases, which helped raise the profile and standing of the Court in the public eye. As the Court’s activity in smaller PIL cases became more newsworthy, this further fueled the Court’s push for support building. According to Baxi (1985), the news media played a critical role in the immediate post-Emergency years in focusing national attention on government lawlessness and repression of human rights (37). National newspapers such as the *Indian Express* published investigative reports on the excesses of the Emergency period. In addition, these papers also highlighted atrocities committed by state and local police, the abhorrent condition of prisons, and abuses in the system of protective custody (mental homes for women and children). Indeed, this heightened media salience on the Court’s role in rights and governance can be traced back to the immediate post-Emergency period. Leading scholars such as Baxi (1985) and Sathe (2002) observed that newspapers for the first time since independence began to devote significant coverage to the plight and concern of human rights abuses and suffering in India. In addition, the leading national daily newspapers also provided extensive coverage of the investigation of the Shah Commission, which had been charged by the Janata regime with investigating the excesses and crimes of the Gandhi regime.²⁵

During the early years of PIL, public interest organizations such as the People’s Union for Civil Liberties, the People’s Union for Democratic Rights, Bandhua Mukti Morcha, Common Cause, and others began to use PIL to litigate claims involving prisoners rights, bonded laborers, unorganized labor, homeless street dwellers, and other

²⁴ See Baxi, *infra* note 70.

²⁵ My analysis of news coverage in *the Indian Express*, *the Hindu*, *the Times of India*, and *the Statesman* newspapers during selected months (January-February of 1978) confirms that each of these newspapers carried stories covering the Shah Commission’s investigation, including Indira Gandhi’s testimony before the Commission, on their front page for several weeks.

exploited or disadvantaged groups.²⁶ Baxi argued that the “nexus” between the media and social advocacy groups in PIL cases further reinforced the populist nature of the Court’s activism and assertiveness. This shift in media attention “enabled social action groups to elevate what were regard as petty instances of injustices and tyranny at the local level into national issues, calling attention to the pathology of public and dominant group power” (37). In commenting on the importance of the media in bolstering PIL, Baxi (1985) observed:

All this enhanced the visibility of the court and generated new types of claims for accountability for wielding of judicial power and this deepened the tendency towards judicial populism. Justices of the Supreme Court, notably Justices Krishna Iyer and Bhagwati, began converting much of constitutional litigation into SAL, through a variety of techniques or juristic activism (Baxi 1985, 38).

2. *Assertiveness in the 1977-1989 Era*

This section analyzes patterns in the assertiveness of the Court in directly challenging the executive and Parliament in the 1977-1989. Table 5.1 (p. 12) provides an overview of this subset of cases.²⁷ Following a methodology similar to that employed by Kapiszewski (2008), I scored levels of judicial assertiveness on a scale that ranged from “endorse” to “weak compel” to “strong compel” to “strong challenge.” Assertiveness as a variable captures the strength of the Court’s demands or actions vis-à-vis government actors (e.g. the level of intrusiveness, the costliness of compliance). The label “endorse” describes judicial deference to (including explicit endorsement of) central government policies, actions, or the exercise of central government power. The terms “weak compel” and “strong compel” describe judicial decisions in which the Court ordered or compelled the Central Government to take actions such as adopting or implementing a set of policies or regulations. “Strong Challenge” describes judicial decisions in which the Court directly challenged the power or authority of the executive and/or Parliament within the Central Government by invalidating government laws, and/or taking away or assuming powers that were previously wielded by the elected branches

An analysis of this subset of decisions reveals that the Court was not highly assertive in challenging the Central Government in governance in the 1977-1989 period. The Court was highly deferential to the Central Government in the two governance decisions involving direct challenges to the policies or actions of the Executive and/or Parliament—*Sheth* (1977) and the *First Judges’ Case* (1981).

The Court, however, did attempt to compel action from central government agencies and state and local government actors in a series of cases involving human rights (e.g. *Hussainara*) and the environment. The Court’s push toward activism in these decisions that did not involve “high stakes” or politically controversial policies or issues could be understood as part of a strategic enterprise on the part of the justices of the

²⁶ See SATHE, *supra* note 12 at 208-209.

²⁷ Tables 5.1 and 5.2 are based on Appendix 5.1, which provides an overall summary and analysis of the entire of sample of the most politically significant governance decisions adjudicated by the Court from 1977-2007).

Court. Baxi (1985) suggests that the Court’s gradual approach to expanding power through “small fry” PIL cases was part of a larger strategy that sought to maintain a sense of institutional comity with the Lok Sabha and the Executive, while expanding the frontiers of the fundamental rights, standing doctrine, and the Court’s own powers. The distinction between activism and assertiveness is therefore a crucial one in terms of the Indian Court’s post-Emergency power.

Table 5.1: Assertiveness of Supreme Court of India in Selected Politically Significant Governance Cases: 1977-2007

Issue Areas of Decisions in Governance Sample	Regime	Decisions	Description	Assertiveness
Judicial Appointments	Janata	Sheth v. Union of India (1977)	Court upholds the power of the Central Government to transfer high court judges without judges’ consent, subject to the public interest. Court rules that executive is required to consult with the Chief Justice prior to making transfers, and that such consultation must be “effective”.	Endorse
Judicial Appointments	Congress (Indira Gandhi)	First Judges Case (1981) (S.P. Gupta v. Union of India)	Court upholds the executive’s power to transfer of high court justices, and also rules that executive has primacy and final say in judicial appointments and transfers. Court recognizes standing of advocates to challenge transfer, and expands standing doctrine through activist interpretation of Article 32.	Endorse
Environmental Policy	Congress (Rajiv Gandhi)	M.C. Mehta v. India (1990) (Vehicular Pollution)	In response to PIL charging that existing environmental laws required the Central and Delhi governments to take steps to reduce air pollution in Delhi, the Court ordered the Government to set up a fact-finding commission to determine the status of air quality in Delhi (1985).	Weak Compel
		M.C. Mehta v. India (1987, 1988-1992) (Ganges River)	Court issues directives ordering tanneries to adopt new pollution-reducing technology to curb pollution of Ganges river, and ordering the closure of those tanneries that did not adopt technologies.	Weak Compel

		Pollution)		
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This dynamic is well illustrated in the Court’s intervention in environmental cases. During this period, Senior Advocates such as M.C. Mehta brought numerous environmental PILs, including the *Delhi pollution case*,²⁸ the *Ganges River Pollution case*, and the *Taj Mahal Pollution case*.²⁹ In these and other cases, the Court held that the right to life contained in Article 21 included the right to clean air and water and a healthy environment and that pollution and industrial hazards infringed upon this right (*see* Rosencranz and Jackson 2003).³⁰ The Court was activist in developing new standards and legal rules to enable the Court to enforce existing environmental laws. The Court effectively developed a new doctrine of tort law, adopted the doctrine of strict liability, and invoked equitable and remedial powers to enforce existing statutory laws dealing with environmental degradation. In the *Ganges River Pollution case* (1988), the Court held that polluters must provide compensation to those affected by the damage to the environment.

The Court in these cases sought to compel the Central and State governments to take actions to enforce and implement a set of environmental regulations and laws governing air and water pollution enacted by Parliament in the early to mid 1980s. In 1985, the Central Government of Rajiv Gandhi created the Ganges River Authority, which was charged with developing a “Ganges Action Plan” for cleaning the river and reducing pollution. The Plan that was developed called for the construction of new sewage treatment plants along the river and its main tributaries.

In 1986, the Government enacted the Environmental (Protection) Act of 1986. The Act empowered the Central Government to issue regulations governing polluting industries, and to shut down those facilities that did not comply with those new environmental regulations. The Act built on earlier laws enacted by Parliament in the 1970s and early 1980s that established Pollution Control Boards (PCBs) at the Central and State government level under the Department of Environment. In addition, the Act helped expand and strengthen the Department of Environment into a new Ministry of Environment and Forests (MoEF), and charged MoEF with responsibility for coordinating the promulgation and implementation of environmental regulations nationwide. In 1987, additional amendments to the Act empowered the Pollution Control Boards to shut down non-complying polluting operations.

In the *Ganges River Pollution case* (1988), the Court adjudicated a PIL brought by M.C. Mehta challenging the Central and State government’s failure to fully implement the Ganges Action Plan and address and curb pollution of the Ganges River by tanneries near the city of Kanpur. In addition to invoking statutory law, the Court also held that the pollution of the river violated the fundamental rights of individuals to clean water under Article 21 of the Constitution (the right to life). The Court issued directives

²⁸ *M.C. Mehta v. Union of India* (1996) 4 S.C.C. 750.

²⁹ *M.C. Mehta v. Union of India* (1996) 4 S.C.C. 351; (1996) 4 S.C.C. 750.

³⁰ *M.C. Mehta v. Union of India* AIR 1988 S.C. 1037 (1988).

ordering tanneries to adopt new pollution-reducing technology to curb pollution of Ganges river, and ordering the closure of those tanneries that did not adopt technologies. In addition, the Court held that polluters must provide compensation to those affected by the damage to the environment.

In the Ganges River Pollution case, and in other cases, the Court also developed constitutional doctrine and new standards and legal rules to support its efforts to enforce existing environmental laws. The Court held that the right to life contained in Article 21 included the right to clean air and water and a healthy environment and that pollution and industrial hazards infringed upon this right (*see* Rosencranz and Jackson 2003).³¹ The Court effectively developed a new doctrine of tort law, adopted the doctrine of strict liability in the Shriram Oleum Gas Leak Case (1986), and invoked equitable and remedial powers to enforce existing statutory laws dealing with environmental degradation

In the *Vehicular Pollution case* (1985), the Court interpreted the right to life in Article 21 broadly so as to include the right to clean air in dealing with the carcinogenic effect of diesel pollution in New Delhi.³² However, the Court was passive in this case during the early years following the filing of this PIL. It mainly focused on ordering the Central and Delhi state government to file affidavits reporting on the status of government policies and actions, and to establish fact-finding commissions to analyze air quality in Delhi and issue recommendations for improving air quality. In two orders issued in 1986 and 1990, the Court ordered the Delhi Administration to file an affidavit detailing measures taken to deal with controlling vehicle emissions, and also held that heavy vehicles such as trucks and buses were the main sources of air pollution in Delhi (Rosencranz and Jackson 2003). As illustrated in the next section, during the post-1990 era, the Court was far more assertive in challenging the Central Government bureaucracy in both the Ganges River and Vehicular Pollution cases, as well as other environmental cases.

B. The Post-1990 Era: Activism and Assertiveness in Governance

In the post-1990 era, as India shifted away from the one-party dominance of the Congress party to the rise of a more fragmented system, the Indian Supreme Court continued its activism and became bolder and more assertive in directly challenging the Executive and Parliament. The Court broadened its jurisdiction and adjudicated a broader array of governance issues, asserting an expanded role in policy-making and governance.³³

³¹ *M.C. Mehta v. Union of India* AIR 1988 S.C. 1037 (1988).

³² *M.C. Mehta v. Union of India* (Matter regarding diesel emissions) (1999) 6 S.C.C. 9.

³³ In interviews conducted for this project, two experts suggested that there were two main phases in the Court's governance jurisprudence. These experts stated that in the first phase (during the 1980s), PIL was still being "developed as a tool" for expanding access to the legal system and providing judicial recourse for the poor and disadvantaged, and the focus was largely on two kinds of issues: human rights (including prisoner's rights, the rights of the mentally ill, bonded labor) and environmental protection. In the second phase (the post-1990 era), these experts suggested that the Court shifted its emphasis to focus on issues of corruption and accountability, and public servants, though the Court continued to play an active role in human rights and environmental policy cases (SA-1, SA-2).

Table 5.2 (p. 146-147) provides a summary of some of the most politically significant governance decisions in this period. In the 1990s, as the Indian political system transitioned from one-party dominance by the Congress Party, to a fragmented multi-party system in which opposition regional and caste-based parties grew in power, the Indian Court became more assertive in challenging the power of the Central Government by in governance cases.³⁴ I analyze the activism and assertiveness of the Court together as inter-related dynamics in this section, given that almost all of the Court's assertive decisions in this era were also activist.

The Court's activism in the post-1990 era represented in some ways a continuation of trends in the 1977-1989 era, with the Court expanding upon many of the procedural innovations developed in PIL cases in that earlier period. In both periods, the Court was concerned about good governance and protecting the rule of law. The Court's activism in PIL in the 1980s was motivated by the judges' desire to advance cause of social justice and to take on malgovernance in state and local governments and bureaucratic agencies. The activism of justices in the post-1990 era was motivated by a desire to address critical governance failures of the Executive and Parliament. As illustrated in Table 5.2 (page 146-147), the Court challenged the Central Government in the following areas: judicial administration, corruption, environmental policy, and human rights. The next section analyzes examples of the Court's activism and assertiveness in each of these areas,

³⁴ See Upendra Baxi, *Exploring the Geographies of [In]justice*, in S.K. VERMA et al. (eds.), *FIFTY YEARS OF THE SUPREME COURT OF INDIA: ITS GRASP AND REACH* (2000).

Table 5.2: Assertiveness of Supreme Court of India in Selected Politically Significant Governance Cases: 1990-2007

Issue Area	Regime	Decisions	Description	Assertiveness
Judicial Appointments	Congress	<i>Second Judges' Case</i> (1993)	Supreme Court asserts authority over judicial appointments; Chief Justice and collegium of two justices have primacy over executive.	Strong Challenge
	BJP	<i>Third Judges' Case</i> (1998)	Court affirms Second Judges Case in holding that Chief Justice has primacy over executive in judicial appointments and transfers; Court enlarges collegium of justices Chief Justice must consult with from two to four justices.	Strong Challenge
Corruption	United Front (1997-1998) BJP (1998-)	Vineet Narain (1996-1998)	Court orders that CBI must be delinked from political oversight/interference and made autonomous; orders that investigation proceed in Jain Hawala case and begins monitoring investigation. Court invalidates "single directive" law that allowed Prime Minister's Office to block CBI investigations into high-level ministers and government officials.	Strong Challenge/ Strong Compel
Environmental Policy	United Front	<i>Godavarman</i> (1996-present) (Forest Bench)	Court redefines definition of "forests" under Forest Conservation Act to cover all forests in India, establishes high powered committee to oversee and monitor mining and forestry activity. Court issues orders to restrict mining and logging in certain forests nationwide.	Strong Compel
		M.C. Mehta (1991-2003) (Vehicular Pollution)	In orders issued between 1996 and 2002, Court orders that gov't vehicles, including city buses, and autorickshaws, must be converted to Compressed Natural Gas (CNG).	Strong Compel
		M.C. Mehta v. India (1992) (Taj Mahal case)	Court issues directives to industries to adopt cleaner fuels to reduce pollution and degradation of Taj Mahal, and orders non-complying industries to shutdown and/or relocate.	Strong Compel
Human Rights		<i>Vishaka</i> (1997)	Court promulgates statutory guidelines on sexual harassment against women in the workplace, in line with international treaty on women's rights that India was a signatory to, to fill the vacuum until the government enacted a law.	Weak compel

Police Reform		<i>D.K. Basu</i> (1996-2003)	Court issues directives re: police guidelines and procedures governing police's handling of those in its custody (to reduce custodial violence)	Strong compel
		<i>Prakash Singh</i> (2006)	Court issues guidelines and recommendations for police reform and accountability nationally, including recommending establishment of a national police commission.	Strong compel

Judicial Appointments

In 1993, the Court in *Supreme Court Advocates-on-Record Ass'n v. Union of India*³⁵ (the “*Second Judges’ Case*”) revisited whether the *First Judges’ Case* had properly interpreted the Constitution’s provisions for judicial appointment procedures. The case was referred to a nine-judge constitutional bench by an earlier bench in *Subhash Sharma v. Union of India* (1987). The reference directed a larger bench to adjudicate two key issues: (1) whether the Chief Justice had primacy (vis-à-vis the Executive) in the judicial appointments process; and (2) whether fixation of judge strength in the High Courts was a justiciable matter³⁶ under Article 216.³⁷ Recall that in the *First Judges’ Case*, the Court had interpreted the term “consultation” in Articles 124, 217, and 222, as requiring executive consultation in judicial transfer and appointment decisions, but leaving the executive with primacy and final authority in these matters. The Court in the *First Judges’ Case* also ruled that fixation of judge strength in High Courts was not a justiciable matter.

In the *Second Judges’ Case*, the Court in a 7-2 verdict overturned the *First Judges’ Case* in holding that the Chief Justice of India, not the Executive, had primacy in judicial appointments and transfers. The Court also overturned the *First Judges’ Case* in ruling that the fixation of judge strength in the High Courts was a justiciable matter. The petitioners’ in the *Second Judges’ Case* alleged that the executive had failed to properly discharge its duties in filling judicial appointments in the High Courts in a timely manner, and in failing to select the most qualified judges. These failures had detrimentally affected the High Courts’ ability to function efficiently and effectively. The majority in the *Second Judges’ Case* recognized these failings, in observing that

The need for judicial determination of this controversy has arisen only because the warning of Dr. Rajendra Prasad does not appear to have been duly heeded by the functionaries entrusted with the constitutional obligation of properly composing the higher judiciary, and ensuring its satisfactory functioning, for the administration of justice in the country. It is well known that the appointment of superior Judges is from amongst persons of mature age with

³⁵ (1993) 4 S.C.C. 441.

³⁶The fixation of judge strength refers to the requirement that the government must ensure that vacancies on the High Courts are filled in an efficient and expeditious manner.

³⁷ Article 216 of the Indian Constitution reads as follows. **216. Constitution of High Courts.**—Every High Court shall consist of a Chief Justice and such other Judges as the President may from time to time deem it necessary to appoint.

known background and reputation in the legal profession....

The collective wisdom of the constitutional functionaries involved in the process of appointing superior Judges is expected to ensure that persons of unimpeachable integrity alone are appointed to these high offices and no doubtful persons gain entry. It is not unlikely that the care and attention expected from them in the discharge of this obligation has not been bestowed in all cases. It is, therefore, time that all the constitutional functionaries involved in the process of appointment of superior Judges should be fully alive to the serious implications of their constitutional obligation and be zealous in its discharge in order to ensure that no doubtful appointment can be made. This is not difficult to achieve (*Second Judges Case*, 468).

In turning away from the decision in the *First Judges' Case*, the Court adopted an activist interpretation of the constitutional provisions governing selection of judges, in line with their own desire to advance judicial independence, integrity, efficiency, and the professional excellence of the judiciary. This is illustrated by several of the majority opinions' concerns about judicial favoritism and nepotism (see Justice Pandian's opinion). According to Justice Verma's opinion, preserving judicial independence, integrity, and the professional excellence of the judiciary were all essential for protecting the rule of law and good governance, and allowing the Chief Justice to have primacy in appointments would advance these goals.³⁸

Writing in dissent, Justice Ahmadi held that conferring primacy on the Chief Justice in appointments and transfers required the enactment of a constitutional amendment, given the text of the Constitution and the original intent of the framers. Justice Punchhi's dissenting opinion also concluded that under the Constitution's appointment provisions, the Chief Justice should not have primacy in appointments, but rather should play a participatory and collaborative role with the executive in the appointment process.

The Court in the *Second Judges' Case* recognized an important shift in its institutional function in securing accountability in governance matters, including the administration of the judiciary itself, and the Bar's important role as a vigilant "constituency" of the Court. Through PIL, the Court has continued to assert its independence and control over judicial administration in a series of decisions dealing with state level appointments and administration.³⁹ The Government acquiesced to the

³⁸ *Id.*

³⁹ See *All India Judges Association v. Union of India* (1994) 4 S.C.C. 288 (prescribing minimum qualifications for appointment in state courts); *All India Judges Association v. Union of India* (1994) 4 S.C.C. 727 (issuing directions dealing with the provision of residential accommodation to all judicial officers, libraries, vehicles and recommending the establishment of an All India Judicial Service); *All India Judges Association v. Union of India* (2002) 4 S.C.C. 247 (issuing directions regarding pay scales of High Court judges and subordinate judiciary).

decision.

The Third Judges' Case (1998)

In 1998, the BJP Government and Chief Justice Punchhi clashed over appointments to the Court. The BJP Government opposed several of Chief Justice Punchhi's appointments, and the Government's Law Ministry alleged that during the eight months of Chief Justice M.M. Punchhi's tenure,⁴⁰ the Chief Justice had not properly consulted with two of his colleagues as required under the *Second Judges' Case* (Andhyarujina 2002, 12).

The Chief Justice denied this assertion and allegedly suggested that the Law Ministry could not inquire into the consultations of the Chief Justice (*Id.*). In response, the BJP Government brought a presidential reference to the Court, asking for clarification on the procedures for appointment. As part of its larger argument and reference, the Attorney General contended that the Chief Justice should be required to consult with a larger collegium of four judges so as to further check the individual discretion of the Chief Justice in making appointment decisions. Significantly, however, the Government noted in its pleadings that it "is not seeking a review or reconsideration of the judgment in the Second Judges case and that the Union of India shall accept and treat as binding the answers of this Court to the questions set out in the Reference" (*Id.*) In the *Third Judges Case* (1998), the Court ruled that the Chief Justice must consult with a collegium of the four (instead of two) senior-most justices on the Court, reducing the discretion of the Chief Justice, but preserving judicial primacy in appointments and transfers.⁴¹ Although the Court ultimately endorsed the Government's position in this case, the Government ultimately acquiesced to the primacy of the judiciary in appointments.

Corruption and Accountability

The Court in the mid-1990s also became more assertive in intervening in corruption cases involving high-level officials in the Central Government and state governments as illustrated by the Court's activism and assertiveness in the *Vineet Narain* case (1997). In *Vineet Narain v. Union of India*,⁴² the Court adjudicated a PIL challenging the failure of the Central Bureau of Investigation (CBI) to investigate and prosecute several prominent politicians who had been implicated in the Jain Hawala scandal. These politicians had been named in the "Jain diaries" that had been discovered during an investigation into illegal financing of terrorist groups through a series of illicit transactions that involved politicians and corrupt bureaucrats. The Court effectively began taking over monitoring and control of the CBI's investigation, noting that "the continuing inertia of the agencies to even commence a proper investigation could not be tolerated any longer"⁴³ (*Vineet Narain* at 237).

⁴⁰ Punchhi replaced Chief Justice Verma as Chief Justice in January 1998.

⁴¹ See *supra* note 75.

⁴² *Vineet Narain v. Union of India* (1998) 1 SCC 226.

⁴³ See S. Muralidhar, *India: Public Interest Litigation, Survey 1997-1998*, 33-34 ANNUAL SURVEY OF INDIAN LAW 525 at 533 (1997-1998), citing *Vineet Narain* at 237.

The Court relied on Articles 32 (which allowed the Court to depart from traditional adversarial proceedings) and Article 142 for authority to issue a set of directives to delink the CBI from political control to ensure it more autonomy. Article 142 authorizes the Court to pass such "decree or order as may be necessary for doing complete justice between the parties." According to Verma's opinion, the power to issue directives and orders which have the effect of law had in a series of cases "been recognized and exercised, if need be, by issuing necessary directions to fill the vacuum till such time the legislature steps in to cover the gap or the executive discharges its role" (*Vineet Narain*, 245). Justice Verma also justified the Court's assertiveness based on an activist interpretation of Article 14 of the Indian Constitution, which guarantees the right of equality. According to Verma, an obligation to uphold the rule of law was embedded within the concept of equality in Article 14. As Verma observed:

The faith and commitment to the rule of law exhibited by all concerned in these proceedings is the surest guarantee of the survival of democracy of which rule of law is the bedrock. The basic postulate of the concept of equality, "Be you ever so high, the law is above you," has governed all steps taken in these proceedings. (*Vineet Narain* at 235).

According to Verma, the Court was obligated to issue directions under Article 32 and Article 142 to implement the rule of law. Justice Verma's activist interpretation of Articles 14, 32 and Article 142 in this case helped to lay the foundation for an even further widening of the scope of the Court's power in future PIL cases. Invoking these provisions, the Court asserted the power of "continuing mandamus" to assert a continuing jurisdiction over the case, enabling the Court to monitor the CBI. The Court dramatically reorganized and altered the structure of the CBI and the Enforcement Directorate, ordering them to directly report to the Court, in light of evidence of political tampering with the investigation. In fact, the Court established a new oversight body—the Central Vigilance Commission—to monitor the CBI. Finally, the Court, in a bold move, invalidated the "single directive" protocol, which required that the CBI receive prior authorization from a government official before proceeding with an investigation against high ranking government officials. Despite some resistance and non-compliance with the Court's initial orders, including an attempt to enact a new ordinance to bring back the single directive, the Government acquiesced (see Chapter 6 for full discussion of government response). The result of the Court's intervention into the CBI's investigation was the filing of 34 chargesheets against 54 persons including leading cabinet ministers and other government officials. Ultimately, the Congress government of Prime Minister Rao was defeated in the elections of May 1996 that year, as a result of the Court's intervention. In 2003, the BJP Government enacted a new Central Vigilance Act. The Act did confer statutory status on the Central Vigilance Commission in compliance with the court's directives in *Vineet Narain*. However, the Act also brought back the single directive provision, flouting the spirit of the Court's decision. The Act was challenged

in 2005 in *Subramanian Swamy v. CBI*, and the Court in that case referred to the matter for adjudication by a larger constitutional bench. The matter is still pending adjudication today.

Human Rights

The post-1990 Court also asserted an interstitial policy-making and legislation function to address crucial governance failures involving human rights, environmental policy, police custodial violence, and police reform—areas in which the Central Government failed to legislate or set guidelines. One of the most prominent examples of this dynamic is illustrated in *Vishaka v. State of Rajasthan* (1997).⁴⁴ In *Vishaka*, the Court promulgated new guidelines and regulations governing sexual harassment. The Court held that sexual harassment violated the rights of gender equality and the right to life and liberty under Articles 14, 15, and 21 of the Constitution, and held that until Parliament adopted a law implementing the Convention on the Elimination of All Forms of Discrimination Against Women (to which India was a signatory), the Court would adopt the guidelines of the Convention and thereby make them enforceable.⁴⁵

In *PUCL v. Union of India* (2001-present), the Court recognized that the right to food was part of the right to life in Article 21 and therefore justiciable, and that the government had a positive duty to help prevent malnutrition and starvation.⁴⁶ Since 2001, the Court has issued a series of orders directing state governments to implement a series of Central Government welfare programs, including national grain subsidies for the poor, a mid-day meal program in schools, and the Integrated Childhood Development Services plan (ICDS). The ICDS includes immunization, nutrition and pre-school education programs (see Robinson 2009). The Court appointed commissioners to help oversee these orders, and recently ordered that the Indian Government pay 1.4 million rupees to help combat starvation and malnutrition through implementation of the Integrated Child Development Services plan.⁴⁷ Compliance with these orders has been uneven across states.

The Court has also been active in taking on the cause of police custodial violence and police reform. In response to PILs documenting widespread cases of custodial violence and killing by police, the Court in the *D.K. Basu* cases (1997-2003), established a set of national guidelines governing how police take suspects into custody and interrogate suspects, and then issued orders to state governments to implement these guidelines. Compliance with these orders has been poor, as the state has faced significant resistance from state governments and police bureaucracies. In the *Prakash Singh case* (2006), the Court issued guidelines for national police reform, and ordered the creation of a National Police Commission to oversee the implementation of these guidelines. Again, however, the Court has faced significant resistance from state governments and bureaucracies in the implementation of these directives.

⁴⁴ *Vishaka v. State of Rajasthan* (1997) 6 S.C.C. 241.

⁴⁵ See Desai and Muralidhar (1998) at 178.

⁴⁶ *People's Union for Civil Liberties v. Union of India* (2007) 1 S.C.C. 728 (ordering state governments and union territories to implement the Integrated Child Development Scheme)

⁴⁷ *People's Union for Civil Liberties v. Union of India* (2007) 1 S.C.C. 719.

Environmental Policy

In addition, the Court continued its activism in the areas of air and water pollution and exercised broad remedial powers, closing factories and commercial plants found to be in violation of environmental laws, and also developed the practice of maintaining these cases on the docket to enable monitoring of such cases to ensure compliance.⁴⁸ In the *Taj Mahal Pollution* case, the Court, after monitoring the situation for over three years, ordered that 292 industries either switch to natural gas as an industrial fuel, or relocate from the Taj Mahal “Trapezium” area.⁴⁹ The Court was able to secure strong compliance with its orders in the *Taj Mahal* case.

In the *Delhi Vehicular Pollution* cases, the Court ordered that autorickshaws, buses, and other vehicles convert to Clean Natural Gas to help reduce pollution in Delhi. Despite early and persistent resistance from the Central and Delhi Governments during the early 1990s, the Court was ultimately able to secure a great deal of compliance in this case from the Central and Delhi governments. This was in part due to the emergence of a strong movement for clean air led by a coalition of advocacy groups, and aided by extensive media attention to the problem of pollution in India (see Bell et al 2005; see Chapter 6).

The Court’s expanding role in compelling governmental action and compliance have in some cases actually displaced the role of Central government agencies. In the *Godavarman* litigation⁵⁰, the Court adjudicated a PIL challenging the Central and state governments’ failure to arrest rampant deforestation across India. In 1996, the Court banned logging nationwide, and began an effort to reform the system of licensing and regulation of forest-based industries (Rosencranz and Lele 2008). In a series of orders thereafter, the Court created a Centrally Empowered Committee (CEC), which was charged with monitoring and overseeing the Court’s orders regarding use of forest lands and also created a compensatory afforestation fund—the NPV. As a result of these orders and the Court’s assertiveness, the Court and the CEC have effectively become the de facto ministry of forests (Dhavan 2007).

The Central Government formally accepted these rulings, but over the past several years, the Government has attempted to rein in the Court in this area through the creation of its own commission—the Forest Advisory Council, and through advancing proposals to create rival government “green courts”. In *Godavarman* and other PIL cases, the Court has also used the procedural device of “continuing mandamus” to keep a matter pending to allow the Court and its advisory committees to continue monitoring government agencies.⁵¹ The Court has faced significant resistance from some state governments in the implementation of many of its directives and orders, though the Court has had moderate success in arresting deforestation nationwide.

⁴⁸ *Id.*

⁴⁹ *M.C. Mehta (Taj Trapezium Matter) v. Union of India* (1997) 2 S.C.C. 353 (court orders factories to shift to cleaner fuels or relocate to arrest degradation to the Taj Mahal caused by pollution).

⁵⁰ *T.N. Godavarman Thirumulkpad v. Union of India* (1997) 3 S.C.C. 312.

⁵¹ *See Vineet Narain v. Union of India* (1998) 1 S.C.C. 226 at 237.

II. Explaining Activism and Assertiveness in Governance: Existing Public Law Theories

How can we explain the broader shifts in the Court's activism and assertiveness in governance in the post-Emergency era? As this section illustrates, existing public law theories provide a good starting point for analyzing these dynamics, but fail to provide a complete account of these dynamics. As illustrated in Chapter 1, the regime politics model suggests that judges decide cases in line with, and to advance the partisan agenda or policy preferences of the governing coalition that appointed them (see Dahl 1957; Peretti 1999; Keck 2007; Clayton 2008). Arguably, the Court's activism and its assertiveness in many areas of governance can be viewed as consistent with the regime politics model. The Court in the immediate post-Emergency period was led a group of judges selected by the Gandhi regime during the 1970s based on their social-egalitarian ideology or worldviews. This was a product of the Gandhi regime's departure from the professionalized "consultative" model that had governed appointments from 1950 through the early 1970s. Prior to the 1970s, the appointment process had emphasized professional criteria or merit, though it also allowed for consideration of some other factors, such as regional considerations (representation on the Court from most of the states) and religious background (assuring some degree of religious diversity) (see Dhavan and Jacob 1978, Krishna Iyer 1993). During the 1950s and 1960s, the Chief of Justice of India was selected on the basis of seniority on the Supreme Court.

Beginning in 1971, the Gandhi regime began selecting judges that were perceived to share the political ideology and constitutional worldview of Gandhi (see Austin 1994, 269; Dhavan and Jacob 1978). In addition, the Gandhi regime challenged the seniority norm in superceding three senior judges who were all in line to become Chief Justice following the *Kesavananda* (1973) decision, because they had all voted in the majority in that decision. Gandhi effectively packed the Court in replacing these judges with Justices P.N. Bhagwati, V.R. Krishna Iyer, and later Justice P.K. Goswami (SA-2; Austin 1994).

The social-egalitarian populism of PIL was arguably consistent with Indira Gandhi's own political values and agenda. In addition, the Court also sought to support the political regime by seeking to enhance the compliance of the Central government bureaucracy and state and local governments with constitutional mandates, and statutory law. PIL in the 1980s served the interests of the Central Government, in that the Court began to perform the role of an "agent" in focusing on reigning in lawlessness and arbitrariness of *state* and *local* governments and the bureaucracy, rather than challenging the Central Government's policies directly (Baxi 1985, 47). And the Court has continued to play this role in the post-1990 era, as illustrated by the Court's support of the Central Government's development policies, and its assertiveness in the areas of police reform and other human rights cases.

As illustrated in this chapter, the post-1990 Indian Supreme Court began to directly challenge party regimes in the Central Government. In each of these cases, the Court asserted new governance and policy-making functions and authority that had previously been held by the Executive or Parliament. The regime politics model fails to provide a compelling account of this development.

The Court's activism and assertiveness in each of these cases reflected the assertion of the judge's own institutional and policy values, that were distinct from the partisan or policy agenda of the political regime. This shift toward greater assertiveness of the judges' independent institutional values and policy worldviews was reinforced by a shift away from the Gandhi regime's politicization of judicial appointments. Following the Court's decision in the *Second Judges' Case* in 1993, the Court asserted control over the judicial appointments process, by granting primacy to the Chief Justice and a collegium of senior judges. As a result, the politicized nature of judicial appointments gradually faded away in the 1990s. But the shift in the Court's assertiveness occurred *before* this shift to an apolitical professionalized model of appointments dramatically altered the composition of the Court.

The Strategic Model

According to the strategic model, judges' will temper their own sincere policy or legal-institutional values or goals in judicial decision-making, based on calculations about external political constraints or opportunities (Murphy 1964; Epstein and Knight 1998; Helmke 2005). Scholars who have advanced variants of the strategic model of judicial decision-making have argued that judges' will consider several external factors in making decisions including the policy preferences of the elected branches, the intensity of those preferences and "tolerance intervals" of the elected branches (Helmke 2005; Epstein et al 2002), as well as public opinion (Staton 2003). Strategic approaches posit that judges' will "trim their sails" in order to ensure a greater likelihood of compliance with their decisions (and avoid political override by the legislative and/or executive branches), and/or to avoid political backlash or attack from the elected political branches (see Helmke 2005).

Baxi (1985) argues that the Court, motivated by institutional preservation considerations, *did* act strategically in the late 1970s and early 1980s in deferring to the Central Government. In *Sheth* (1977) and the *First Judges' Case* (1981), the Court deferred to the Janata and Gandhi Governments with respect to the ultimate power of judicial transfers and appointments. As illustrated in the discussion of both *Sheth* and the *Judges' Case* in Chapter 6, the Court's decisions held that the executive had primacy and final authority in judicial transfers and appointments. And as illustrated in Chapter 3, the Court was deferential to the political regime in other policy domains including economic policy and national security. At the same time, the Court was strategic in asserting a new governance-accountability function in monitoring and policing government lawlessness and arbitrariness, as illustrated by the Court's decisions in *Hussainara* (1979) and *BMM* (1984). As Baxi (1985) astutely observed, the

...steady growth of SAL appears to me⁵² as a master strategy: give the Executive not even a pretence of complaint on the distribution of political

⁵² Baxi (1985) preferred the use of term Social Action Litigation ("SAL") to the term PIL, to emphasize the important differences between these movements in India and the United States. According to Baxi, SAL in India represented the judiciary's response to state repression and government lawlessness, while American PIL "sought to represent 'interests without groups; such as consumerism or environment,'" focused on "civic participation in governmental decision-making" and "involved innovative uses of the law, lawyers and courts to secure greater fidelity to the parlous notions of legal liberalism and interest group pluralism in

power in the constitutional scheme...having accomplished this much, go Concorde-speed in undoing injustices and unmasking tyrannies...Leave to politicians their opium dreams of the omnipotence of their power and influence; but bit by bit prevent them from single-minded excesses of power (Baxi 1985, 47).

During the 1977-1989 period, the Court's "strategic retreat" arguably reflected both the justices' desire to protect and consolidate the Court as an institution, and the justices' recognition of how the broader strategic political environment could affect the integrity of the Court. As illustrated earlier in this chapter, the Court was under intense external political pressure prior to its decision the *First Judges' Case*, as the Gandhi Government attempted to exert control over the Court through the use of judicial transfers and appointments. The Court's strategic retreat in this case illustrates how institutional motives can be understood as being "nested" within or interrelated to strategic decision-making.⁵³

The Institutional Model

The institutionalist model provides a plausible account of the Court's shift toward activism and greater assertiveness between the 1977-1989 and post-1990 era. According to this model, institutional norms, jurisprudential traditions, and other institutional factors help motivate and drive judicial behavior. Proponents of the institutional 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. As Gillman (1993) suggests, judges "may view themselves as stewards of particular institutional missions, and ...this sense of identity [may] generate motivations of duty and professional responsibility which sometimes pull against their policy preferences and partisan commitments" (Gillman 1993, 79-80).

The Court's activism and assertiveness in early PIL cases was driven not only by the social-egalitarian values of the leading justices on the Court, but also by the justices' desire to increase support for the judiciary (see Baxi 1980; Sathe 2002; SA-2, SA-3). The Court sought to "atone" for its acquiescence to the Gandhi regime during the Emergency rule period in the *Shiv Kant Shukla* decision (Baxi 1985; Sathe 2002). In *Shiv Kant Shukla*, the Court upheld the regime's suspension of access to the courts by political detainees (through habeas petitions), and overturned the actions of several high courts (see Neuborne 2003, 482). These high courts had decided to hear several habeas petitions of detainees, notwithstanding the declaration of Emergency rule. Baxi (1985)

an advanced industrial capitalistic society" (Baxi 1985, 33). The Indian version of PIL stood in marked contrast from the decentralized model of American "adversarial legalism" (Kagan 2001). PIL in India was "judge-led" or "judge-induced", related to the "active assertion of judicial power to ameliorate the miseries of the masses" and was more hierarchical and centralized in terms of fact-finding, equitable remedies, and Court jurisdiction—PIL writs could only be filed in the Supreme Court and State High Courts pursuant to Articles 32 and 226 of the Indian Constitution (Baxi 1985, 35).

⁵³ In Chapter 6, I analyze in greater depth how elite institutionalism helps complement existing strategic models in providing a fuller account of the shift to greater assertiveness and authority in governance.

suggests that the Court's activism in PIL was partly "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" (Baxi 1985, 36). Baxi observed that during the late 1970s and early 1980s, the Court was "seeking legitimacy from the people and in that sense (loosely) there are elements of populism in what it is now doing" (Baxi 1980, 126).

The institutional model or approach may also provide insight into the Court's activism and assertiveness in the *Second* and *Third Judges' Cases*, in which the Court asserted control over judicial appointments and transfers. According to an analysis of these decisions, and interviews with experts, these decisions were motivated by the justices' concerns regarding continued interference and politicization of the process by the government in the decade following the Court's decision in the *First Judges' Case*, and the adverse impact of that politicized process on judicial independence, the integrity of judges, and the functional efficiency of high courts.

However, the institutionalist model does not entirely account for the Court's activism and assertiveness in other governance areas, because it fails to explain the sources of judges' policy values in those domains. A major shortcoming of the institutionalist model, then, is that it doesn't 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.

III. Elite Institutionalism and the Expanded Power of the Court in Governance

I argue here that the thesis of elite institutionalism helps provide the most compelling motivational account of the expansion of judicial power in India, by illustrating how the institutional context (including judges' education and professional training, socialization), *and* the professional and intellectual elite atmosphere of courts are not only a source judges' institutional values and policy worldviews, but also motivate and constrain judicial decision-making. 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, to explore how the professional and intellectual elite groups help shape judicial activism and assertiveness. Elite institutionalism also adds a key variable to existing institutionalist theories, suggesting 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.

Elite Meta-Regimes: From Social Justice to Liberal Reform

I argue in this chapter that the Court's activism and assertiveness in certain governance domains can be explained by understanding the broader intellectual worldviews and policy values of the political, professional and intellectual elites that help shape judicial worldviews. As illustrated in Chapter 1, Indian Supreme Court judges have generally come from upper middle-class backgrounds and have a significant level of professional education (see Gadbois 1967; Dhavan 1970). The appointment process for Supreme Court judges has primarily emphasized professional criteria and characteristics

(although the Gandhi regime did depart from this system during the 1970s and early 1980s). Without question, then, Indian Supreme Court judges are elite actors drawn from the upper strata of Indian society. And as illustrated in Chapter 1, the justices of the Court interact with political elites and many other elite groups on a regular basis, including the media, legal advocacy and policy groups, legal scholars and academics.

The development and endorsement of PIL by Indian Supreme Court judges, and the activism and heightened assertiveness of the post-1990 Court in the areas of judicial appointments, corruption, and environmental policy, and human rights and development in the post-1990 era can be understood by examining the judges' alignment with the worldviews of "elite meta-regimes".⁵⁴ I argue here that the Court's activism in governance in the post-Emergency progressed through two phases: a "social-egalitarian/social-justice regime" in the 1980s, and a "liberal reform" regime in the post-1990 era.

The Meta-Regime of Social Justice

In addition to the institutional motivations for activism highlighted by Baxi (1985) in the previous section, the Court's activism during this period was also reflective of the broader meta-regime of "social justice" that dominated the political and intellectual debates and discourse of the time both within the Court and in professional and intellectual circles. This meta-regime reflected the broader desire among political, professional, and intellectual elites for radical reforms within the legal and constitutional system to ameliorate social injustice and inequality in Indian society.

The activism of the Indian Supreme Court in developing and endorsing PIL in the 1980s reflected a larger populist ethos of social egalitarianism and social justice within the Gandhi-led Congress party, and among the professional and intellectual elite classes. PIL reflected the goals and ideals of the legal aid movement that had been launched during the 1970s under the regime of Indira Gandhi, and represented a significant component of Gandhi's social-egalitarian Twenty-Point Programme⁵⁵ (Baxi 1985, 36). Supreme Court Justices V.R. Krishna Iyer and P.N. Bhagwati, both appointees of the Gandhi regime, were leading advocates for policies and programs expanding legal aid. As Chief Justice of the Gujarat High Court, Bhagwati chaired the state legal aid committee of that state, which issued recommendations for broadening legal aid and access to justice (see Government of Gujarat, Report of the Legal Aid Committee (1971)). Similarly, Justice Krishna Iyer chaired a Central Government commission that issued a report that called for restructuring the legal system (see Government of India, Ministry of Law,

⁵⁴ Within the existing public law literature, there are two other concepts that are related, yet distinct from the concept of regimes of judicial activism. The first is Richards and Kritzer's description of "jurisprudential regimes" which are legal/doctrinal constructs that shape subsequent decision-making by judges (see Richards and Kritzer 2007). The other is Tushnet's description of a "constitutional order" which refers to "the set of institutions through which a nation makes its fundamental decisions over a sustained period, and the principles that guide those decisions" (Tushnet 1999).

⁵⁵ Gandhi's Twenty Point Program largely focused on economic policies, and include proposals for: provision of land reforms, rural housing, the abolition of bonded labor, fighting tax evasion and smuggling, expanding worker participation in the industrial sector, and combating rural indebtedness (see Klieman 1981, 251).

Justice and Company Affairs, Report of the Expert Committee on Legal Aid: Processual Justice to the People (1973)).

Both Iyer and Bhagwati, then, helped lead efforts prior to and during the Emergency to expand legal aid and access to justice, by organizing legal aid camps in villages, encouraging high court justices to adjudicate grievances in villages, and establishing legal aid camps and people's courts (*lok adalats*). In May of 1976, Iyer and Bhagwati were appointed as co-chairs of the Judicare committee. The committee was charged with developing recommendations for reforming India's legal aid system. The committee produced a comprehensive report on legal aid in 1977. Among other recommendations, the report recommended the development and use of Public Interest Litigation as a mechanism for expanding access and promoting reform. However, the report was ignored by both the Janata government in 1977, and the post-1980 Gandhi Congress government.

In interviews, both Justices Bhagwati and Justice Krishna Iyer stated that they were motivated by aspirational motives in advancing the PIL regime. Justice Bhagwati stated that he was motivated by a sincere desire to uplift the poor by activating the public interest jurisdiction of the Court, after witnessing the extreme poverty of poor adivasis (lower caste individuals) who came to the Gujarat district court during his tenure as Chief Justice of the Gujarat High Court in the 1960s.⁵⁶ As a Justice of the Supreme Court, Bhagwati toured the country and held several open meetings, noting:

“I saw stark naked poverty, and the utter helplessness of the people, they came and attended their meetings and looked upon me with awe, but they never tasted the fruits of this whole system of justice—justice was far far removed from them—then I realized that justice I was administering in the courts was hollow justice—never reached the large masses of my own people...I realized I needed to address the three As which prevent them from accessing justice—the lack of awareness, lack of availability of machinery, and the lack of assertiveness...So I said I must evolve a method by which they can come to court and what was preventing them was our whole doctrine of locus standi or standing. Because any NGO or other person could not bring a litigation on their behalf under the system as it then prevailed.”⁵⁷

Justice Krishna Iyer also similarly recounted his own past experience as a young lawyer who was thrown into jail (under the existing preventive detention laws) for defending Communists and other dissident groups in the 1950s. Iyer had first hand experience as a prisoner, and later, as the home minister and minister for law, power, prisons, irrigation and social welfare in the Communist state government of Kerala, Iyer spearheaded prison reform as one of his main goals.⁵⁸ In an interview for this project, Justice Krishna Iyer noted “for others, PIL was about law. For me, PIL was about life.” Bhagwati and Iyer's

⁵⁶ Id.

⁵⁷ Interview with former Supreme Court Chief Justice P.N. Bhagwati, January 2007, New Delhi, India.

⁵⁸ Interview with former Supreme Court Justice V.R. Krishna Iyer, February 2007, Kochi, India.

endorsement of Public Interest Litigation can be viewed as consistent with the view of the political party leader, Indira Gandhi, who advanced their judicial career.

Although PIL was consonant with the social-egalitarian reform agenda of Gandhi and the Congress party, the larger ethos of social egalitarianism and social justice that animated the Indian Supreme Court's activism in PIL also had roots within the broader professional and intellectual discourse of the legal reform among judges, lawyers, and scholars at the time. One illustration of this dynamic was a conference that was held in 1984 that was entitled "Role of Law and Judiciary in Transformation of Society: India-GDR Experiments." At the conference, Justices of the Supreme Court, including Justice P.N. Bhagwati, D.A. Desai, and O. Chinnappa Reddy, Energy Minister Shiv Shanker, High Court judges, Senior Advocates, legal scholars, and judges from the German Democratic Republic presented speeches and papers on the role of the judiciary in transforming society.

At the conference, participants addressed the need to reform law and the legal system in order to create a more social-egalitarian order and advance the cause of social justice on behalf of the poor and oppressed in India. Energy Minister Shiv Shanker, who had played a key role in advising Indira Gandhi regarding judicial appointments in the 1970s, advocated for the need for judicial activism that fulfilled the social-egalitarian goals of the Directive Principles, and argued that the Directive Principles should not be subordinated to the fundamental rights. Shiv Shanker proceeded to argue that judges in the pre-Emergency era had not adopted a more radical activism based on social equality and social justice because of the elite characteristics of judges and lawyers:

"Reasons for an approach which in effect neutralizes desirable alterations of status quo may perhaps be grounded more deeply in the very system which we inherited and adopted in 1950 at the commencement of the Constitution and elitist class character of those who manned it. I have a feeling that our judiciary has unwittingly allowed itself to be unduly obsessed by static jurisprudential concepts, procedural technicalities and rules of construction born and grown in foreign soil and appropriate to other developed societies. They did not consciously give a thought to chartering a new course of evolving a jurisprudence which was truly Indian in keeping with the essential radical spirit of our own Constitution and the revolution of rising expectations." (Desai 1984, 16).

The conference recognized that a broader shift had taken place in the prevailing social and economic ideology of the country. In his remarks, Justice Bhagwati noted that the "law which we are now administering is the ... law of a social welfare state which is moving in the direction of socialism, law which is designed to serve the interest of the weaker sections of the community including peasants and workers" (Desai 1984, 27). Bhagwati went on to comment on what he envisioned to be the social-egalitarian goals of the Indian judiciary, in observing that "...the entire culture of the judicial process has to be geared to the goal of social justice which is the objective of the Constitution and irrespective of whether the politicians fulfill this objective or not, it has to be fulfilled by the courts...Social justice is a constitutional fundamental right and a socialist order, an

economic imperative” (Desai 1984, 31). Other panelists at the conference spoke about the role the judiciary could play in promoting equality and social change.

Writing in 1980, Upendra Baxi summarized the larger shift toward support for the meta-regime of social justice within the judiciary as follows:

The Court is thus emerging as a populist, elite group. Such groups emerge in developing “Third World” countries where intellectuals feel “frustrated and humiliated” at the backwardness and injustice in society (citations omitted). The Court is such a group of middle-class intellectuals who can aim to achieve, through the exercise of the judicial power, a cure for the backward and static colonial character of the Indian legal system (Baxi 1980b).

Baxi here recognized that the Court’s unique brand of judicial populism was rooted in the judges’ worldviews as professional and intellectual elites. In addition, as noted in Chapters 3 and 4, Baxi (1980, 1985) argued that the Court’s populism was part of a larger “quest” for institutional legitimation in the post-Emergency period. But as I suggest here, the character of the Court’s populist activism was shaped through the prism and lens of justices’ own worldviews as professional and intellectual elites with specialized legal education and training.

The Liberal Reform Regime (1990-2007)

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 (see Chapter 3). Although professional and intellectual elites generally supported the new policies of economic reform, they grew increasingly frustrated with (and increasingly at odds with) increasing levels of governance failures and corruption in the Central government. In part, the decline in responsible governance can be traced to macro-level shifts in the Indian polity. India shifted from a one-party Congress-dominant system to an era of heightened political fragmentation in the post-1990 era in which opposition parties, including the BJP, leftist, and regional caste-based parties all grew more powerful (see Chhibber and Kollman 2004; Jaffrelot 2005).

Scholars of Indian politics have suggested that since 1989, there has been an overall weakening of many of the nation’s political institutions—a phenomenon that Kohli (1988), Migdal (1998), and Kothari (1995) have referred to as “deinstitutionalization.” Rudolph and Rudolph (2001), and Mendelsohn (2002) suggest that the power of weakened coalition governments at the Center was further diminished by systemic corruption, as illustrated by the Jain Hawala scandal that took down the Congress coalition government of Prime Minister Narasimha Rao in 1996. This led to a decline in public trust and confidence in the Executive and Parliament, and provided the Court with the opportunity to cleanse and reform the political system and establish itself as the most trusted and credible institution in Indian politics (Mendelsohn 2000). Moog (2002) suggests that the weakening of these institutions, coupled with growing distrust, meant that the political branches posed less of a threat to the courts, and “ironically, more reliant on them as a possible source of legitimacy” (Moog 2002, 270).

Within the Court, there was a profound shift in institutional conceptions about the proper role of judges and the Court in securing the rule of law and promoting good governance. A new group of activist judges including Chief Justices Venkataramiah, J.S. Verma, A.S. Ahmadi, and Justice Kuldeep Singh embraced a much more assertive role for the Court in governance matters (see Dhavan 2000). In part, this reflected the Court's embrace and defense of the robust activist framework of fundamental rights and procedures pioneered by the Court during the 1980s (see interview with SA-1; Sabharwal 2003). As illustrated in many of the Court's decisions in cases involving environmental policy and human rights, the Court justified its assertiveness on the grounds that it had an obligation to protect the right to life in Article 21.

The post-1990 Court also embraced a more assertive role based on the need to safeguard and protect the rule of law in cases where the Executive or Parliament had failed to effectively function and perform their constitutional obligations. Justice Verma's opinion in *Vineet Narain* (1998) recognized this dynamic, observing that "it is the duty of the executive to fill the vacuum by executive orders...and where there is inaction even by the executive...the judiciary must step in, in exercise of its constitutional obligations...till such a time as the legislature acts to perform its role by enacting proper legislation to cover the field" (*Vineet Narain* at 266). Many of the other governance decisions analyzed in this chapter invoked this rationale in justifying assertiveness in other domains. In this and many other decisions, the Court cited to and invoked many of the Court's earlier activist PIL decisions in the 1980s in asserting policy-making or executive functions.

Several news reports and journal articles suggest that the unique characteristics of Justice Verma as a courageous and resolute judge cannot be ignored in understanding the Court's assertiveness in *Vineet Narain* (see Mendelsohn 2000, 115). However, as Mendelsohn (2000) argued, Verma was joined by two other judges on the bench, and the *Vineet Narain* decision had been preceded by other activist and assertive decisions in the 1990s, such as the environmental PIL decisions of Justice Kuldeep Singh and his "green bench."⁵⁹ Mendelsohn thus suggests that a more complex explanation that accounts for both institutional factors, as well as public opinion, is necessary to account for the court's heightened assertiveness in this period:

Deeper explanations therefore have to be sought in the institutional history of the Supreme Court, the Bar, constitutional politics and public opinion. Perhaps the most powerful explanation is to be found in the idea of *an institutional momentum built up by previous judicial activism*, together with *an intensification of public distaste at high-level corruption and its political practitioners*. When the Supreme Court intervened, it rekindled a sense of probity and public morality that many had despaired of ever revisiting (Mendelsohn 2000, 115).

⁵⁹ Justice Singh's most famous PIL decisions included the Taj Trapezium matter, in which the Court forced industries surround the Taj Mahal in Agra to either shift to cleaner, non polluting fuels, or relocate to an area far from the Taj, and the Ganges River matter, in which Singh's bench ordered industries that had been polluting in the Ganges to adopt cleaner technologies or be shut down.

Mendelsohn's insightful observation supports the larger thesis of elite institutionalism. The Court in *Vineet Narain* was responding to the frustration of professional and political elites, and of the electorate, with efforts by Congress and UF governments to block the CBI's investigations into the affairs of high-ranking government officials, and to control the CBI to serve the political interests of the regime in power.

This internal institutional shift in the judges' own role perceptions was complemented by the ideas and values of the broader elite meta-regime of "liberal reform." This meta-regime encompassed the broad support among political, professional and intellectual elites for far-reaching systemic reform of India's political system, and for policies advancing the cause of good governance and accountability. Gradually, the professional, institutional and intellectual context that shapes judicial worldviews and judicial decision-making in India shifted to the meta-regime of "liberal reform". This encompasses a shift in the climate of professional and intellectual opinion from backing socialist-statist policies in the 1970s and early 1980s, to support for policies of economic liberalization and reform that were championed by coalition governments beginning in 1991. In the post-1990 era, the judges on the Court reflected these broader shifts and endorsed the Congress and BJP governments' policies of economic reform and liberalization in fundamental rights cases challenging those policies (see Chapter 3).

But this meta-regime also encompassed support among elites for far-reaching systemic reform of India's political system, protecting the environment, promoting good governance, and protecting the rule of law and human rights. This shift in worldviews was a response to the decline in responsible governance in the Executive branch (Prime Minister and Council of Ministers) and Parliament, the Central Government bureaucracy, and state and local governments. Judges' in this period were exposed to and influenced by the intellectual worldviews associated with the meta-regime of liberal reform through several mechanisms. First, the Court was influenced by the briefs and arguments of the leading PIL lawyers and Senior Advocates, NGOs, and public interest groups that filed the majority of the governance claims adjudicated by the Court.

Second, I suggest that the worldviews and perspectives of judges were also influenced by the news media coverage of the policies and issues involved in the cases before it, and by public advocacy by political, policy, and intellectual elites in the media. Throughout the post-1990 era, journalists, leading lawyers, policy elites, intellectuals, legal commentators, and retired judges have each played an active role in analyzing and shaping elite and public opinion on key issues adjudicated by the Court through editorials and other articles in the national newspapers. Most elite advocates and commentators have strongly supported the Court's activism and assertiveness in governance, though a small, but growing minority of elites have criticized the Court for judicial overreach and encroachment on the powers of the other branches. Chapter 6 explores this dynamic in greater detail by analyzing newspaper editorial coverage of key governance decisions of the Court in greater depth, and examining how elite support of Court decisions helped bolster judicial authority.

Third, the Court has been influenced by the recommendations of government and court-appointed fact-finding commissions and other government agencies. This is

illustrated by the Court's decision in *Vineet Narain* (in which the Court effectively adopted the recommendations of the Independent Review Commission (IRC) for reform of the CBI in the Court's orders and directives), and in several other decisions in which the Court has relied on the expert advice or recommendations of government commissions or specialized committees.

Along with other professional and intellectual elites, justices became increasingly concerned about increasing levels of corruption and governance failures, and embraced activism and assertiveness to prevent the erosion of the rule of law and promote good governance. This included direct challenges to the power of the executive in judicial appointments, the monitoring of CBI investigations into high-level government officials, taking over administration of India's forests and environmental policy involving clean air and clean water regulations, and championing the cause of police reform and human rights. In the process, the Court moved to the forefront of reform movements on a host of issues. Legal correspondent Manoj Mitta highlighted this shift in a 1995 article on the Court's activism in *India Today*: "By subjecting the political process to a judicial scrutiny more intense than ever before, the Supreme Court, in the process, has also begun to set a fresh agenda for political reform" ("Supreme Court: Setting the Agenda," *India Today*, February 15, 1996).

Indeed, an analysis of the justices' own opinions in governance cases, as well as their own extrajudicial speeches and writings, highlights how judges' role conceptions changed in line with the broader ideas and views associated with the meta-regime of liberal reform. Chief Justice Verma, who helped drive the Court's activism and assertiveness in decisions like the *Second Judges' Case*, *Vineet Narain*, and *Godavarman*, defended the need for judicial intervention as follows: "So if judicial intervention activates the inert institutions and covers up for the institutional failures by compelling performance of their duty. . . then that saves the rule of law and prevents people from resorting to extra-legal remedies"(Sood 2008, 846, citing Interview with J.S. Verma). In an interview with the *Indian Express*, Verma observed: ". . . There is no lasting solution in the courts but in society. A lot needs to be done. It can't be changed overnight. A beginning has to be made and I don't think anyone has any doubt that not only a beginning (has been made) but a long stride has been taken. It was the people's perception – which cannot be called unreasonable—that there was inaction on the part of the executive and the legislature. It's a perception shared by the judiciary" (*Indian Express*, January 23, 1998)

Other judges have also justified the Court's assertive role in governance on similar grounds. In a speech delivered in 1996, then Chief Justice Ahmadi argued that the Court's assertiveness in governance was necessary given the decline in the functioning and performance of the Executive branch and Parliament (Ahmadi 1996). In fact, Ahmadi suggested that the Court's activism was not a case of over-reach, but rather a natural by-product of a minority of citizens raising important constitutional and policy issues that were not being addressed by the elected branches of the Central Government (Id).

These perspectives reflected the worldviews of many Senior Advocates of the Court, as well as much of the professional and intellectual elite commentators in the news media (see Chapter 6). In 1996, Senior Advocate and Environmental Activist M.C. Mehta observed "The Indian political system has collapsed...Only the Supreme Court is functioning any more." (Wall Street Journal, 1996). Even critics of judicial activism have recognized why the Court became more assertive in the post-1990 era. Senior Advocate Nani Palkhivala observed that while it was not within the traditional role of the Court to assert itself in executive and legislative matters, the justices felt they had no choice but to intervene to fill a vacuum of responsible governance:

The streets of Delhi are dirty. Who has to initiate a clean-up? The judiciary. Or the streets would remain dirty. There is a financial scandal. If you don't ask the investigative agencies to do it, they would remain uninvestigated. I don't remember a time when the country was so badly governed...I don't think we had ever reached a state where there was such a lack of functioning by the executive and the legislature. (*Outlook*, March 1996)

Conclusion

The Indian Supreme Court dramatically expanded its power in governance in the post-Emergency period, building on a new activist approach that dramatically expanded popular access to the Court through the development of the Public Interest Litigation regime. As this chapter illustrated, the Court's expanded role in this area reflected the influence of both the institutional context of judging, as well as broader shifts in the climate of elite worldviews that help frame and shape judicial worldviews and judicial decision-making. The broader shifts toward activism and greater assertiveness in governance were driven by changes in the institutional role-conceptions of judges, and by changes in professional and intellectual elite worldviews regarding the policy and legal issues adjudicated by the Court.

But why was the Court able to get away with greater assertiveness in governance in the post-1990 era? What theoretical accounts help explain the shift to greater judicial authority in governance? Chapter 6 analyzes these dynamics by examining the broader interactive patterns of assertiveness and the government's response to assertive decisions. It illustrates how elite institutionalism can help provide a more compelling account of these dynamics by examining how elite news media coverage of the Court, and the development and emergence of elite "governance constituencies" helped alter the strategic political opportunity structure for judicial power, by providing strong bases of support that bolstered the Court's assertiveness and authority in the post-1990 era. Chapter 6 concludes by analyzing the broader patterns of interaction between the Court and the Central Government.

Chapter 6

The Expansion of the Supreme Court of India's Authority in Governance:

The Role of Elite Opinion and Governance Constituencies

Introduction

In the late 1970s and early 1980s, the Indian Supreme Court dramatically expanded standing doctrine and popular access to the Court, and also asserted new equitable and remedial powers in Public Interest Litigation (“PIL”) cases involving human rights and malgovernance. Building on its initial activism in PIL, the Indian Supreme Court gradually expanded its power in governance¹ in the post-Emergency era (1977-2007).² In the post-1990 era, the Court shifted to a high level of assertiveness in challenging the elected branches of the Central Government, by asserting policy-making and oversight functions in several politically salient governance domains: judicial appointments and administration, corruption, environmental policy, and human rights and development. Chapter 5 analyzed these trends in light of existing public law theories, and illustrated how consideration of the professional and intellectual elite context of judging broadened regime politics and institutionalist accounts of the motives drove activism and assertiveness in this period. This chapter builds on that analysis by examining the shift toward expanded judicial authority in governance in the post-Emergency era. Judicial authority refers to the extent to which the activism and assertiveness of the Court was accepted or tolerated by the Central Government (*see* Kapiszewski 2008).

Referencing existing public law theories of the opportunity structure for judicial power, I argue in this chapter that the strategic model fails to provide a complete account of the Supreme Court of India's shift toward greater authority in governance. The thesis of elite institutionalism advanced in this study helps complement and broaden the strategic model, by illustrating how the support of professional and intellectual elite opinion for the Court, and the emergence of “governance constituencies,” bolstered the authority of the Supreme Court of India. Elite support and governance constituencies enhanced the Court's ability to resist or overcome political backlash and attacks from the Central Government, and increased the level of public pressure for enforcement of the Court's decisions.

This chapter begins by analyzing these patterns of judicial authority in these two periods, and examining the Government's response to the Court's assertiveness, in order to understand overall patterns of interaction between the Court and the Government in the post-Emergency era. Next, I briefly examine case studies of the Court's most assertive

¹ In Chapter 5, I defined “governance decisions” as those decisions in which the Court asserted a policymaking, executive, or oversight function, compelling the government to act to fulfill constitutional or statutory obligations.

² See Chapter 5 of this project for a descriptive analysis of the Court's expanding role in governance.

governance decisions in order to closely examine patterns of interaction between the Court and the Central Government. Third, I illustrate how the thesis of elite institutionalism helps complement and broaden the strategic model by (1) analyzing evidence of professional and intellectual support for the Court in newspaper editorial coverage of the Court's most salient governance decisions, and; (2) examining how "governance constituencies" of PIL lawyers, policy groups, and bureaucratic agencies and court-appointed commissions, have served to bolster the Court's authority in the post-1990 era by political backlash or attack by the Central Government in crucial governance cases. Fourth, the chapter concludes by analyzing and identifying patterns of overall assertiveness and authority across the two time periods examined in this chapter.

I. Analyzing Patterns of Assertiveness and Authority in Governance Cases: 1977-2007

This section analyzes how the Executive and Parliament within the Central Government responded to the Court's activism and assertiveness in governance cases in the post-Emergency era. Table 6.1 (pages 168-170) analyzes these patterns of assertiveness and authority in politically significant governance decisions in the post-Emergency era. Following a methodology similar to that employed by Kapiszewski (2008), I scored levels of judicial assertiveness on a scale that ranged from "endorse" to "weak compel" to "strong compel" to "strong challenge."

Assertiveness as a variable captures the strength of the Court's demands or actions vis-à-vis government actors (e.g. the level of intrusiveness, the costliness of compliance). The label "endorse" describes judicial deference to (including explicit endorsement of) central government policies, actions, or the exercise of central government power. The terms "weak compel" and "strong compel" describe judicial decisions in which the Court ordered or compelled the Central Government to take actions such as adopting or implementing a set of policies or regulations. "Strong Challenge" describes judicial decisions in which the Court directly challenged the power or authority of the executive and/or Parliament within the Central Government by invalidating government laws, and/or taking away or assuming powers that were previously wielded by the elected branches. In some cases (such as *Vineet Narain* (1997-1998) or the *PUCL v. Union of India* (2003) (*Right to Information II*) decisions, the Court both issued a strong challenge and a strong compel in the same decision.

I scored judicial authority on a scale that ranges from "very weak" to "relatively weak" to "relatively strong" to "very strong", based on an analysis of the following factors: the extent to which the Central Government complied with the Court's decision or order; the difficulty of complying with the Court's decision or order; and the level of political backlash or retribution against the Court (including both efforts to overturn the decision or attack the Court's institutional integrity or jurisdiction directly). The variable of judicial authority thus captures variation in the level of government compliance and/or acquiescence with the Court's decisions and/or orders.

An analysis of the Central Government's response to Supreme Court assertiveness reveals that the Court, in relative terms, exerted a stronger overall level of authority vis-à-vis the Central Government in the post-1990 era, than in the 1977-1989 era. This was

largely a function of the relatively low level of assertiveness of the Court in the 1977-1989 era, a product of the Court's strategic deference to political regimes in the 1977-1989 era (see Chapter 5; Baxi 1985). Because the Court was not assertive in directly challenging the Executive and Parliament in this first period, it did not have the opportunity to exert or wield significantly high levels of authority vis-à-vis the Central Government. However, this strategy allowed the Court to build the foundations for the Court's subsequent authority later. The Court sought to rehabilitate legitimacy and gradually build support through activism in PIL cases, while avoiding direct challenges to the Central Government's policies and actions in highly salient areas such as judicial appointments and transfers (see the Court's decisions in *Sheth* (1977) and the *First Judges' Case* (1981) (see Baxi 1980, 1985).

In the mid to late 1980s, the Court launched a new activism in environmental PIL cases, and challenged the Central and state government's failures to enforce Central Government laws aimed at curbing air and water pollution. However, the Court's record of securing compliance and the strong support of the Central Government (including the Ministry of Environment and Forests) in environmental decisions was mixed. Although the Court did have some success in closing down tanneries or requiring them to adopt water treatment technology, in the Ganges River Pollution case (1988), it still faced significant non-compliance from many industries (see Court's orders in *M.C. Mehta v. Union of India (Ganges River Pollution)* (1998-1992).

The Central Government's Ministry of Environment and Forests, and the Central and State Pollution Control Boards, were thus unable to secure full compliance from the private sector with the Court's orders. In addition, the Central Government did not strongly support the Court's orders with new actions. As Senior Advocate M.C. Mehta noted, the Ganges River Pollution case did help in reducing pollution from the Kanpur Tanneries, but ultimately did not result in the implementation of a comprehensive "Ganges Action Plan" from the Central Government to systematically reduce pollution in the River.

The Court's initial orders in the *Vehicular Pollution case* in the late 1980s and early 1990s sought affidavits from the Delhi State government on its efforts to arrest air pollution, and failed to lead to effective government regulations. Between 1990 and 1993, the Central and Delhi State Government's initial efforts to impose penalties on polluters, and to develop emission regulation standards, proved to be ineffective in addressing the problem of vehicular pollution (see Bell et al 2004). These regulations were met with significant levels of non-compliance from the automobile industry, and were effectively "slowed or watered down to the point of being ineffective" (Bell et al 2004).

Table 6.1: Strength of Authority of the Supreme Court of India in Politically Significant Governance Decisions (1977-2007)

Regime (Prime Minister)	Decision	Issue Area	Summary of Court's Decision/Orders/Directives	Court Action	Strength of Authority*
iJanata (Desai/Singh)	Sheth v. Union of India (1977)	Judicial	Court upheld the power of the Central Government to transfer high court judges without judges' consent, subject to the public interest.	Endorse	N/A**
Congress (Indira Gandhi)	S.P. Gupta v. Union of India (First Judges' Case) (1981)	Judicial	Court upheld the executive's power to transfer high court justices without judges' consent, and also rules that executive has primacy and final say in judicial appointments and transfers. Court recognizes standing of advocates to challenge transfer, and expands standing doctrine through activist interpretation of Article 32.	Endorse	N/A
Congress (Rajiv Gandhi)	M.C. Mehta v. Union of India (Delhi Air Pollution Case) (1986, 1990)	Environment	PIL filed in 1986 claimed that existing environmental laws required the Central and Delhi governments to take steps to reduce air pollution in Delhi. Court directed Delhi Government to file affidavit specifying steps it had taken for reducing vehicle emissions (1986). In 1990, pursuant to a report of the Ministry of Environment and Forests, the Court found that heavy vehicles were main contributors to air pollution in Delhi.	Weak Compel	Relatively Weak
Congress (Rajiv Gandhi)	M.C. Mehta v. Union of India (Ganges River Pollution Case) (1988)	Environment	Court issued directives ordering industries to adopt new pollution-reducing technology to curb pollution of Ganges river.	Weak Compel	Relatively Weak
Janata Dal (V.P. Singh/Chandrashekar)	Delhi Air Pollution Case (1992-1996)	Environment	In 1994, Court, mandates phasing out of lead from all fuel in India's four largest cities—Delhi, Mumbai, Calcutta, and Madras. In 1996, the Court held that all government vehicles in Delhi be converted to Clean Natural Gas (CNG) technology. Court orders the establishment of a commission to develop policy recommendations for reducing vehicular pollution.	Weak Compel	Relatively Weak
Congress (Rao)	MC Mehta v. India (Taj Trapezium matter) (1992)	Environment	Court issues directives to industries to adopt cleaner fuels to reduce pollution and degradation of Taj Mahal	Compel	Very Strong
Congress (Rao)	Second Judges' Case (1993)	Judicial	Court rules that Chief Justice has primacy over executive in judicial appointments and transfers	Strong Challenge	Very Strong
Congress (Rao)-Janata Dal (Deve Gowda/Gujral)	Vineet Narain v. Union of India (1996-1998)	Corruption	Court orders that CBI must be delinked from political oversight/interference and made autonomous; orders that investigation proceed in Jain Hawala case	Strong Challenge Strong Compel	Relatively Strong

Janata Dal (Deve Gowda/Gujral)	Petrol Pumps Allotment Case (Petrol Pumps) also 1999 (Satish Sharma case) (1996,99)	Corruption	Court cancels allocation of petrol pumps by Minister of Petroleum to the Minister's employees, family members, politicians, and other bureaucrats.	Weak Challenge / Compel	Relatively Strong
Janata Dal (Deve Gowda/Gujral)	Shiv Sagar Tiwari v. Union of India (1996)	Corruption	Court responds to out-of-turn allocation of government housing by Minister of Urban Development Kaul to friends and colleagues through issuance of procedures for eviction and transfer. In the wake of the fallout from the Court's decision, Kaul was dropped as minister.	Weak Challenge / Compel	Stronger
Janata Dal (Deve Gowda/Gujral)	Godavarman v. Union of India (Forest Bench) (1996-2007)	Environment	Court redefines definition of "forests" under Forest Conservation Act to cover all forests in India, establishes high powered committee to oversee and monitor mining and forestry activity.	Strong Compel	Relatively Strong
Janata Dal (Deve Gowda/Gujral)	Dinesh Trivedi v. Union of India (1997)	Corruption	Court directs that Vohra Report on the criminalization of politics be made public	Endorse Weak Compel	Weaker*
UF/Janata Dal (Deve Gowda/Gujral)	Vishaka v. State of Rajasthan (1997)	Human Rights/ Criminal Justice	Court enacts statutory guidelines on sexual harassment against women in the workplace, in line with international treaty on women's rights that India was signatory to.	Compel	Relatively Strong
UF/Janata Dal (Deve Gowda/Gujral)			Court issues directives re: police guidelines and procedures governing police's handling of those in its custody (to reduce custodial violence)		
BJP (Vajpayee)	DK Basu v. Union of India (1997-2003)	Human Rights/ Criminal Justice		Compel	Relatively Weak
BJP (Vajpayee)	M.C. Mehta v. Union of India (Vehicular Pollution/Indus try Pollution) (1998-2003)	Environment	In orders issued between 1998 and 2002, Court orders that gov't vehicles, including city buses, and autorickshaws, must be converted to Compressed Natural Gas (CNG) technology	Compel	Very Strong
BJP (Vajpayee)	In re Presidential Reference of 1998 (Third Judges' Case) (1998)	Judicial	Court holds that Chief Justice of India must consult with a collegium of four justices (instead of two) in judicial appointments and transfers	Weak Challenge Compel: Policy- making	Stronger
BJP (Vajpayee)	In re Interlinking of Rivers Case (2002)	Development	Court directs Central Government to initiate new project to interlink the major rivers of India	Strong Compel	Very weak

BJP (Vajpayee)	Ass'n for Democratic Reforms v. Union of India (2002)	Accountability /Elections	Court orders Election Commission to issue disclosure guidelines re: candidates' criminal record and financial antecedents for candidates for Lok Sabha and State Legislative Assemblies. Decision implements recommendations of Law Commission's 170 th Report	Strong Compel	Relatively weak
BJP (Vajpayee)	PUCL v. Union of India (2003)	Accountability /Elections	Court holds that voters have a right to information, and invalidates Representation of People Act (enacted to overturn Assn for Democratic Reforms case). Court holds that candidates for Lok Sabha must disclose their financial antecedents and prior criminal records during campaign.	Strong Challenge	Very strong
BJP (Vajpayee) / Congress (Singh)	PUCL v. Union of India (2001-2006)	Human Rights	Court orders Central and State Governments to introduce cooked mid-day meal program in all primary schools, expand Integrated Childhood development Services program (ICDS), and release food for famine stricken region through AWCS program.	Strong Compel	Moderate
Congress (Singh)	Prakash Singh v. India (2006)	Human Rights	Court issues guidelines and recommendations for police reform and accountability nationally, including recommending establishment of a national police commission, as well police commissions within each state.	Strong Compel	Very Weak

* Strength of Authority describes the level of government compliance and/or acquiescence with the Court' decisions.

** N/A = Because the Court deferred to and/or endorsed government policies or action, the Court did not have the opportunity to exert authority given that the government was not challenged or compelled to undertake specific actions or directives.

In the post-1990 period, the Court was more assertive and authoritative vis-à-vis the Central Government as it expanded both the scope and range of its intervention in governance, across multiple governance domains, in response to an influx of PIL claims. As illustrated in Table 6.1, the Court exerted moderate to strong levels of authority in 11 out of the 17 decisions in the sample. In 8 out of those 11 decisions, the Court directly challenged the power and authority of the Executive and Parliament in highly salient governance domains. This included the Court's decisions in the *Second and Third Judges' Cases*, the *Vineet Narain* case, the *Right to Information* cases and the *Godavarman* case (Forest Bench litigation).

As illustrated in the case studies section, the Court exerted moderate to strong authority in each of these cases, though the Central Government did attempt to resist or override the Court's decisions. As such, it should be noted that in the most salient governance cases, the Court usually confronted some degree of resistance from the Central Government. As the case studies section illustrates, the Court's authority was bolstered by the influence and power of intellectual elite opinion as reflected in editorial media coverage, and elite constituencies. These constituencies made it difficult for the Government to override or counter the Court's decisions in these cases.

In the three other cases in which the Court enjoyed moderate to strong authority -- the *Taj Mahal Pollution case (1992)*, the *Delhi Vehicular Pollution Case (1998-2003)*, and the *Right to Food to case (2001-present)*, the Court was eventually able to secure the

support of the Central and state governments to enact policies or take actions in support of the Court's orders. The Court's ability to assert greater authority in these three cases was in large part made possible by the support of strong allied governance constituencies. As Bell et al (2004) suggest, the Court's success in securing compliance with its decisions in the late 1990s and early 2000s in the *Vehicular Pollution case* was made possible because of the efforts of Senior Advocate M.C. Mehta who brought multiple claims as part of the PIL, and CSE, an NGO which helped lead a public education and advocacy campaign regarding the impact of air pollution on the health of Delhi citizens. In addition, the Court itself publicly criticized and condemned the Central and State governments' inaction and resistance in the 1990s to its earlier orders, and issued notices in the newspapers to build public pressure for the compliance of the government (*see* Bell et al 2004; *M.C. Mehta v. Union of India orders*, 1998-2002).

In contrast, in most of the 6 decisions where the Court exerted weaker levels of authority, the Court ordered the Central Government to take on and remedy difficult systemic governance problems such as reform of India's police system nationwide, and high levels of custodial violence in police stations nationwide. In part, the Court's low authority here had to do with the nature and scope of the governance issue, and the strong bureaucratic inertia and resistance to the Court's orders in state and local governments. I argue that this dynamic reflects two distinct conceptions of judicial authority—the Court's political authority vis-à-vis the political branches of the Central Government, versus its bureaucratic authority versus the Central and State Government bureaucracy and state and local governments.

Second, where the Court intervened and asserted a national policy-making role vis-à-vis the Central and state government bureaucracies, it often faced significant obstacles and uneven compliance across different jurisdictions. This is illustrated by the Court's decisions in the *D.K. Basu v. State of Bengal* (1996-2003) case, in which the Court sought to impose national standards for taking accused into police custody, and the *Prakash Jain* (2006) case, in which the Court ordered the establishment of a national police commission and the adoption of police reforms nationwide. While the Court exerted significant political authority in governance decisions in the post-1990 era, the Court's level of bureaucratic authority was uneven vis-à-vis state and local bureaucracies. However, examining this separate measure of Court compliance – securing a set of policy outcomes, is beyond the scope of this dissertation. The focus of this study is on analyzing the Central Government's compliance and/or acquiescence to the Court's assertiveness in direct challenges to the Central Government.

II. Case Studies: Understanding Patterns of Judicial Authority in Governance

In this section, I explore in greater depth patterns in the Court's assertiveness and authority in governance, and examine how changes in the political opportunity structure help explain shifts in the Court's assertiveness and authority in governance cases. I illustrate how the Court's shift to greater authority in the post-1990 era could be explained by (a) the shift toward greater political fragmentation in the Central Government; and (b) the emergence of governance constituencies as powerful allies and a stronger base of support for the Court's authority and legitimacy.

I trace these dynamics through case studies of the Government's response to the Court's decisions in the three "Judges" cases involving the role of the executive and the judiciary in judicial appointments in transfers: the *First Judges Case* (1981), the *Second Judges Case* (1993), and the *Third Judges Case* (1998). Next I examine the government response to the Court's intervention in the CBI's investigation into the Jain Hawala scandal in the *Vineet Narain* case (1996-1998). Finally, I fully analyze the Court's assertiveness, and the government's response in the landmark Right to Information Cases—*Association for Democratic Reforms v. Union of India* (2002), and *PUCL v. Union of India* (2003). In these cases, the Court asserted that voters had a fundamental right to information under the Constitution, and ordered the Election Commission to promulgate guidelines requiring that candidates for Parliament and the State legislatures disclose information about their own financial assets and criminal records.

The First Judges' Case (1981): Strategic Retreat and Institutional Protection

As illustrated in Chapter 5, the Court in the Judges' Case (1981) faced significant political pressure from the Central Government of Indira Gandhi. Gandhi's Congress Party had been returned to power by the Indian electorate in the 1980 elections that were held from January 3 to January 6.; Congress soundly defeated a fragmented Janata party coalition that had splintered during the 1977-1979 period. Prior to the decision the Gandhi Government sought to assert greater control over the judicial appointment and transfer process. The Government went as far as proposing adoption of a presidential system in which the judiciary would be "stripped of its power to review legislation" and subordinated to a political council of some type (Dua 1983, 475; see Austin 1989). In an effort to appoint more loyal supporters of the Congress regime and to "weed out" 115 High Court judges, half of whom had been appointed as temporary additional judges by the Janata Government, Law Minister P. Shiv Shankar announced the adoption of a new appointment and transfer policy in 1981 (Id.).

Despite initial resistance, Chief Justice Chandrachud acceded to the Government's proposed transfers, under significant pressure from the Law Ministry (see Baxi 1983).¹ As part of this policy, the Government ordered the transfer of several Chief Justices and judges. In addition, the government in early 1981 also broke with earlier conventions² in confirming additional judges, but only providing them with "last-minute short-term extensions" or refusing to reappoint them altogether (Dua, 476). Law Minister P. Shiv Shanker also issued a circular to the various state chief ministers that asked all additional judges to provide an undertaking stipulating that they had no objection to being transferred to other jurisdictions to be appointed to permanent positions (Id.). The circular stated that the goal of the regime was that one third of judges of a high court should be from other states, and that transfers would be used to help "further national integration and to combat narrow parochial tendencies bred by

¹ Baxi (1983); Dua (1982). Both Baxi and Dua indicate that the Chief Justice Chandrachud's decision to transfer two Chief Justices appeared to be a product of pressure from the Gandhi government.

² Prior the Emergency period, under well-established conventions, the Government generally would extend the term of additional judges per the workload requirement of the Court, or confirm them as permanent judges to fill vacancies in the High Courts (Dua 1983, 476).

caste, kinship and other local links and affiliations.”³ Although the circular initially asked ministers to secure from all additional judges and other High Court judges consent to be transferred or appointed to other state high courts, the circular stated that “the furnishing of the consent or the indication of a preference does not imply any commitment on the part of Government either in regard to their appointment or in regard to accommodation in accordance with the preferences given.”⁴ Finally, in June of 1981, the Government also refused to extend the term of additional judges O.N. Vohra, (who had convicted Gandhi’s son Sanjay in the Kissa Kursi Ka case), and S.N. Kumar (who had been recommended for appointment by Chandrachud against the wishes of the Chief Justice of the Delhi High Court) (Dua, 476).

In *the Judges’ Case*,⁵ a seven-judge bench⁶ of the Supreme Court led by Justice Bhagwati, heard a group of petitions by advocates challenging the circular, the transfer of High Court judges by the government, and the Government’s failure to extend the term of Judge S.N. Kumar. The Government won, by narrow majorities, on each of the major claims/issues before the Court, except on the issues of standing, and privilege.⁷ Overall, the Court was highly deferential to the regime on the specific claims at issue, and deferential to the broader exercise of executive power generally. The majority of justices issued opinions that effectively endorsed the policy goals and agenda of Gandhi’s regime in judicial appointments and transfers.⁸

As noted in Chapter 5, the Court did uphold the standing of several advocates to bring claims in this case, and helped lay the doctrinal foundations for Public Interest Litigation. But the Court also expanded the Executive’s power in judicial appointments in ruling that the executive had primacy and final authority in judicial appointments and

³ Union Law Minister Shiv Shankar’s Circular to Chief Ministers, March 18, 1981, in Baxi, *Courage, Craft, and Contention*, Appendix A.

⁴ *Id.*

⁵ *S.P. Gupta v. Union of India*, 1981 Supp(1) SCC 87,

⁶ In addition to Bhagwati, the bench consisted of Justices A.C. Gupta, S. Murtaga Fazal Ali, V.D. Tulzapurkar, D.A. Desai, R.S. Pathak, and E.S. Venkataramiah. All of the judges on the bench had been Gandhi appointees, except Tulzapurkar and Desai, who were appointed under the Janata regime. Although Chief Justice Chandrachud constituted the bench in the Judges’ Case, he recused himself because of his role in the transfers.

⁷ A majority of six justices (Fazal Ali, dissenting) held that the correspondence between the Law Minister and the State Chief Justices involved in the transfer of Justice Kumar was not privileged, and ordered the government to release this to the petitioners. The Court also held that correspondence between the Law Minister and Chief Justice was not privileged and ordered production of those materials as well (*Id.*).

⁸ In fact, what was remarkable about the Judges’ Case was the extent to which a majority of justices endorsed the Government’s argument of the need to “value-pack” the judiciary, either in their decisions and/or in later interviews (see Dua 1983, 475). In his opinion, Bhagwati noted: “We need judges who are alive to the socio-economic realities of Indian life, who are anxious to wipe every tear from every eye...” (*Judges Case* at 223). Bhagwati later observed that the “judiciary has a socio-economic destination” given that the Constitution is “*not* a non-aligned document” (*italics added*) (see Dua 1983, 475, citing *Statesman Weekly*, January 16, 1982). Justice Desai also defended the virtues of value-packing in his opinion, and after the decision observed that “The three organs of the Government must march in step. All must be imbued with the same values. Judges must be value-packed.” (*Id.*, citing *Statesman Weekly*, January 23, 1982). Finally, Justice Venkataramiah suggested that virtues of “people’s judges” who “could fit into the scheme of popular democracy.” (*Id.*; *Tribune*, Dec. 31, 1981)

transfers, after both the constitutional text and original intent as evidenced by the debates of the Constituent Assembly support the reading of “consultation” as not signifying “concurrence” with the opinion of the Chief Justice. As suggested in Chapter 5, the Court did not challenge the Central Government in the *First Judges’ Case* because of the judges’ concerns about institutional preservation (which included a fear of potential backlash and attack from the Government).

Elite reaction to the initial proposals for transferring high court justices was mixed. The Bar Council of India expressed their opposition to transfers by the executive as they posed a threat to judicial independence (Austin 1989, 519). The editors of the *Indian Express* also opposed transfers, arguing that “the public would not trust the executive with unrestricted powers to transfer High Court judges against their wishes” (*Id.*, citing *Indian Express*, July 25, 1980 editorial). Other leading legal commentators including S. Sahay, K. Katyal, and A.G. Noorani also expressed their opposition to transferring judges (*Id.*) The *Hindu*, however, supported the policy of transferring judges in order to advance the cause of national integration and prevent these courts from being swayed by “regional passions,” in line with their earlier editorial response to the *Sheth* decision (*Id.*, citing *Hindu* editorial, July 26, 1980). The *Hindustan Times* also supported the government’s transfer policies. Thus, some editorials (like the *Hindu* and *Hindustan Times*) strongly supported the policy and goals of transfers by the Government, while others viewed the Government’s policies and actions as an unacceptable attack on judicial independence.

In addition, the chairman of the Law Commission, former Justice H.R. Khanna, had also supported the idea of having one-third of judges in each High Court brought in from other states through appointments and transfers, in the commission’s *Eightieth Report* (Austin, 520). However, Khanna’s report also called for safeguards for judicial independence, suggesting that judges should not be transferred without their consent, unless the Chief Justice of India and the four next senior-most justices found “sufficient cause” for the transfers (Austin, 520, n. 16, citing to Khanna, *Eightieth Report*, August 10, 1979). In the fall of 1980, at the National Seminar on Judicial Appointments and Transfers, the Bar Council of India shifted its position and expressed support of transfers, provided that the power of transfer “remains only with the judiciary” (Austin 1999, 520-521, n. 17). The Council thus recommended that appointments and transfers should be initiated by a collegium of three senior High Court judges and two members of the Bar, and that selection of High Court chief justices should be handled by a collegium of the Chief Justice of India and two senior justices, two state chief justices, and two Senior members of the Bar⁹ (Austin 1999, 521).

Shankar’s circular, and the Government’s actions met with opposition from prominent legal rights groups like the People’s Union for Civil Liberties, and from leading jurists like Soli Sorabjee, the former Janata Government solicitor general. According to the PUCL, the “non-confirmation of Justices S.N. Kumar and Justice O.N. Vohra of the Delhi High Court” and short extensions to other judges constituted an

⁹ Austin suggests that the Law Commission’s proposal was superior to the Bar Council’s, given that the Council’s proposal “risked increasing the effect of bar politics on selections.” (Austin 1999, 521).

“assault on the independence of the judiciary,” and the Law Minister’s “circular on transfer of additional judges tends to rationalize punishment to certain inconvenient judges in the form of transfers.”¹⁰ The PUCL suggested that the circular represented an attempt on the part of the Government to circumvent the consultation procedures delineated in the *Sheth* decision, by going straight to the Chief Ministers with the proposal to transfer the additional judges.¹¹

Although some professional and intellectual elites were opposed to the government’s proposed transfer policy, the Court arguably lacked a strong enough base of elite support, and allied constituencies, to be assertive and authoritative in challenging a strong and unified Government in the Judges’ Case. In fact, Soli Sorabjee observed at a PUCL conference in April 1981 that in his view, “never has there been a greater threat to the judiciary than now and what was worse is that the people are taking the daily assault on the dignity of the judiciary without a protest.”¹² Indeed, Sorabjee and others were highly critical during this period of the Congress governments “daily vilification” of judges, and viewed the Law Minister’s circular as “shocking” and a clear threat that judges “must consent to be transferred or face the prospect of not being confirmed.”¹³ Other legal commentators agreed with Sorabjee. S. Sahay suggested that Shiv Shanker “had a grand design . . . to dilute the independence of the judiciary and thereby make it more amenable to the wishes or hints of the ruling party.”¹⁴ And Kuldip Nayar wrote that since Gandhi’s return to power in 1980, she “has wanted the executive to exercise the power (of transfers) without reference to the Chief Justice of India.”¹⁵

Elite reaction to the Court’s decision was mixed. The *Hindu* and *Hindustan Times* issued editorials were supportive of the Court’s decision. In contrast, the *Indian Express* and the *Statesman* disapproved of the Court’s decision. Elite legal commentators, including S. Sahay (writing in the Journal of the Bar Council of India), N. Madhava Menon, A.G. Noorani, H.M. Seervai, and V.S. Deshpande also expressed their dissatisfaction with the Court’s decision. After the Gandhi Government in January 1983

¹⁰ People’s Union for Civil Liberties, “Judiciary Under Executive Assault,” PUCL Bulletin, July 1981 at <http://www.pucl.org/from-archives/81july/judiciary.htm>.

¹¹ *Id.*

¹² Remarks of Soli Sorabjee at “Transfer of Judges” conference organized by the Citizens for Democracy and the People’s Union for Civil Liberties, New Delhi, April 1, 1981, as reported in P.U.C.L. Bulletin, May 1981 at <http://www.pucl.org/from-archives/may81/judiciry.htm>.

¹³ *Id.* In fact, during this period, several members of Congress delivered remarks highly critical of the judiciary in the Lok Sabha. Kamal Nath, a Congress MP stated “I would like to say that various pronouncements of the Supreme Court and the high courts in the recent pas are nothing but trespassing into the executive function and into the legislative functions. . . .Vanity somehow seems to have clouded the vision of the judiciary. It seems that the judiciary has a score to settle with our executive and that its main task is not to uphold justice but to uphold it’s own supremacy over the executive. Until now all criticism has been that the executive and the politicians have been tampering with the judiciary but now I think that a stage has come when the judiciary is tampering with the executive and is trying to usurp the powers of the executive.” People’s Union for Civil Liberties, “Judiciary Under Executive Assault,” PUCL Bulletin, July 1981 at <http://www.pucl.org/from-archives/81july/judiciary.htm>.

¹⁴ Austin, 524, citing S. Sahay, “Shiv Shankar’s Grand Design” *Statesman*, New Delhi, April 11, 1981.

¹⁵ Austin, 524, n. 27, citing K. Nayar, “Unfortunate Confrontation,” *Tribune*, July 30, 1981.

announced that it would begin implementing their transfer policies, editorial reaction was “predominantly negative” (Austin, 531). Thus, the *Statesman* observed that Shiv Shankar’s original transfer proposals “were born in original sin” and the Court “handed to the government, on a platter as it were, the final powers in judicial appointments” (*Id.*, citing *Statesman*, February 1, 1993). S. Sahay went further, in suggesting that Shiv Shankar, and Justices Bhagwati and Desai had a “great insidious design” to socialize the judicial system (*Id.* at 531, n. 54).

The Court’s endorsement of, and deference to the Central Government’s transfer policies in the *First Judges Case*’ suggests that institutional preservation concerns that reflect the broader strategic political context can often override the assertion of other goals or values, such as advancing judicial independence. The justices of the Supreme Court were unable to assert independence in challenging the Central Government, largely because of fears that worldviews the support of some professional and intellectual elites may not be able to be a strong enough counterweight where the political regime is strong and unified. Gandhi’s Congress Party controlled 351 out of the 545 seats in the Lok Sabha, and her allied parties controlled an additional 23 seats. And in contrast to the Central Governments in the *Second and Third Judges Cases* in the post-1990 era, the executive was fairly unified in its support of the underlying policies challenged in the *Judges’ Case*. In addition, the Court arguably had not yet cultivated a strong base of elite and broader national support and governance constituencies at this point in time, given that the Court had just begun to develop PIL in the *Judges’ Case* and other cases. As a result, existing levels of elite support, and the relatively weak body of governance constituencies, had little ability to dramatically alter or change the “tolerance intervals” of the Gandhi regime in the area of judicial appointments and transfer policy.

The Second Judges’ Case (1993): Asserting Institutional Control and Strong Authority

In the 1990s, the Court became more aggressive in asserting control over judicial appointments and transfers, and asserting judicial independence vis-à-vis the executive. In 1990, the Court in *Subhash Sharma v. Union of India* heard a PIL brought by several advocates seeking a mandamus to the Union of India to fill up vacancies of judges in both the Supreme Court and High Courts. The Government in that case challenged the petitioners’ claims on the grounds that filling up vacancies in the superior courts was not a justiciable matter. The three judge Bench in Sharma noted that the Parliament was considering the Sixty-Seventh Amendment Bill, which proposed creation of a National Judicial Commission for appointments and transfers of judges in order to deal with arbitrariness and delay (Sharma at 588). Citing to the proposed amendment, the Court noted that even within the government there was a strong basis for criticism of the “arbitrariness on the part of the Executive and the modality adopted following S.P. Gupta ratio has led to delay in the making of appointments” (*Id.*). Accordingly, the Sharma bench ruled that “correctness of the majority view in *S.P. Gupta*” should be considered by a larger bench.¹⁶

¹⁶ *Subhash Sharma v. Union of India* (1990) 1991 Supp(1) SCC 574 at 582.

The Court in 1993 instituted a nine-judge bench to deal with these issues in *Supreme Court Advocates-on-Record Ass'n v. Union of India*¹⁷ (the “*Second Judges’ Case*”). The arguments of leading Senior Advocates Fali Nariman, Kapil Sibal, and S.V. Gupte can be summarized as follows: First, the petitioners argued the holding in the *First Judges’ Case* that the issue of judge-strength was not justiciable was incorrect, because the appointment of judges “is not a matter of discretion resting with the executive” but rather a constitutional obligation under Article 216 which is enforceable in a court of law” (*Second Judges Case* at 497-498). This was especially important given that the delivery of justice depended on properly staffed courts (*Id.*). Second, the requirement of “consultation” with the judiciary in matters of appointment in Articles 124, 217, 222, and 233, was included by the framers of the Indian Constitution in order to safeguard judicial independence. Because “neither Article 124(2) nor Article 217 indicates that any of the constitutional authorities named therein has primacy in the process of making appointments” the issue of primacy must be decided independently of the text of these provisions and “in conformity with the principle that all appointments to the superior judiciary shall be free from executive influence” (*Id.* at 497). Therefore, the Chief Justice and senior justices of the Supreme Court must have primacy in the initiation of appointments in order to advance the cause of judicial independence, “ensure the timely filling up of vacancies,” and “ensure effective consultation with the executive” (*Id.*).

In a 7-2 decision, the majority of the Court overturned *S.P. Gupta* in holding that the Chief Justice of India (in consultation with a collegium of two senior justices), not the Executive, had primacy and the final say in judicial appointments and transfers and in holding that judge strength was a justiciable matter. The Court in the *Second Judges’ Case* thus recognized an important shift in its institutional function in securing accountability in governance matters, including the administration of the judiciary itself, and the Bar’s important role as a vigilant “constituency” of the Court.¹⁸ As illustrated in Chapter 5, the Court in the *Second Judges’ Case* sought to advance institutional values and goals. The Court’s decision was motivated by the justices’ concerns regarding continued interference and politicization of the process by the government in the decade following the Court’s decision in the *First Judges’ Case*, and the adverse impact of that politicized process on judicial independence, the integrity of judges, and the functional efficiency of high courts.

In contrast to the more aggressive tenor of the Gandhi Congress regimes, the Congress Government of P.V. Narasimha Rao did not retaliate against the Court and acquiesced to the Court’s decision. In December of 1993, Prime Minister Rao chaired a meeting of the state chief justices and the Chief Justice of India, which “decided that one-sixth of high court chief justices and one-third of judges be from out of state” (Austin, 532-533). In line with the *Second Judges’ case*, Chief Justice M.N. Venkatachaliah

¹⁷ (1993) 4 S.C.C. 441.

¹⁸ In *In re Special Reference No. 1 of 1998* (1998) 7 S.C.C. 739 (the “*Third Judges’ Case*”), the Court revisited its decision in the *Second Judges Case* and ruled that the Chief Justice must consult with a collegium of the four (instead of two) seniormost justices on the Court. See Ashok H. Desai and S. Muralidhar, Public Interest Litigation: Potential and Problems, in B.N. KIRPAL ET AL, EDS., *supra* note 13 at 188, n. 81.

established a peer committee of two Supreme Court judges, two high court chief justices, and the chief justice of the high court from which judges were transferred, in order “to finalize norms” for transfers (*Id.* at 533, n. 57, citing *Hindustan Times*, Apr. 15, 1994). In April of 1994, President S.D. Sharma announced that the government was transferring fifty judges at the High Court level (Austin 1999, 533). Although some bar associations were critical of the government’s announced transfers, many groups and most editorials reacted favorably to the new procedures (*Id.*). In its editorial, the *Hindu* suggested that the new procedures had helped to limit arbitrariness and was hopeful that this would continue in the future (*Id.*, citing *Hindu*, Apr. 17, 1994).

In addition, efforts on the part of subsequent regimes to counter or overturn the Court’s decision were ultimately unsuccessful. After the Congress party was defeated in 1996, and the United Front (Janata Dal) coalition came to power, the UF government considered proposals to counter the Court’s decision. In March of 1997, Prime Minister Deve Gowda’s Law Ministry (under Law Minister R. Khalap) drafted the 82nd Constitution Amendment Bill, which would have overridden the Court’s decision by taking the power to appoint justices away from the Chief Justice. The proposed bill provided in its statement of objects: “It is felt that the majority view of the Supreme Court does not seem to be in consonance with the letter and spirit of the language and scheme of the Constitution.” Although this effort was initially supported by the BJP, the BJP changed its position “at the eleventh hour and the bill had to be withdrawn.” United Front Prime Minister I.K. Gujral (who took over in April 1997 after Deve Gowda lost a no confidence motion) suggested that the bill had been put on the backburner because the BJP was divided. In fact, BJP President L.K. Advani observed that “everyone is dissatisfied with the 1993 judgment” and the solution involved charging a National Judicial Commission with the job of judicial appointments.¹⁹

Internal divisions within the government enhanced the power and influence of PIL lawyers and Senior Advocates within the government. This is evidenced by the Central Government’s inability to reach a consensus on a proposal for a National Judicial Commission that would be charged with final authority in judicial appointments. Divisions between the Bar and the Government also blocked such efforts. As an article in the magazine *India Today* in July 1997 noted: “There isn’t the remotest possibility of a consensus on the commission’s composition emerging soon—given the tough stands taken by pro-PIL lawyers on one hand and the executive on the other.”²⁰

From a strategic perspective, one could argue that a key shift in the political environment—from a dominant one-party system to a weak coalition party system—created an opportunity for the Court to assert itself in the *Second Judges’ Case*. The decline of the strength of the Congress party was accompanied by a rise to power of opposition parties, including the Hindu right BJP, and the Janata Dal. The Congress Party was defeated by the Janata Dal coalition (a coalition of left-leaning opposition parties) in 1989. Congress came back to power, winning the largest number of seats (244) in Parliament (a decline from its 400+ seat share in the late 1980s under Prime Minister

¹⁹ Sumit Mitra and S. Chakravarthy, “Judiciary versus Executive: Locking Horns,” *India Today*, July 1997.

²⁰ *Id.*

Rajiv Gandhi), and for the first time in the history of the party was forced to form a minority government. Moog (2002, 275) argued that the “weakness of the political branches, and the *relatively high level of credibility* of the Supreme Court were significant factors” that enabled the Court to “flex its muscles.”

One could thus argue that a stronger consensus among political and professional elites for Court action to limit executive interference with judicial appointments and transfers had developed by the time the Court adjudicated the *Second Judges’ Case*. In addition, the Court had evolved new interpretive techniques and traditions of activism between 1981 and 1993 in PIL cases that provided a foundation for the court’s decision in 1993. One expert suggested that the Court’s deference in *S.P. Gupta* and assertiveness in the *Second Judges Case* could be explained by both institutional factors and public opinion. Senior Advocate Rajeev Dhavan suggested that the Court was “hedged in” by the text of the constitution, as well as existing interpretative methods, and that “the winds of public opinion were not totally billowing their sails” in 1982 (Correspondence with Senior Advocate Rajeev Dhavan, November 10, 2008). Dhavan thus suggested that the “consent” argument advanced by the dissenters in *Sheth* and the *First Judges’ Case* was “all they thought they could impose” (Id.).

The Third Judges’ Case (1998): Consolidating Institutional Power and Strong Authority

The battle over judicial appointments did not end after the *Second Judges’ Case*. Although the Central Government was unable to overturn the Court’s decision in the *Second Judges’ Case*, it still attempted to assert and challenge the Court’s primacy in judicial appointments, by attempting to limit the discretion of the Chief Justice in appointments and transfers. In 1998, the BJP Government and Chief Justice Punchhi clashed over appointments to the Court. The BJP Government opposed several of Chief Justice Punchhi’s appointments, and the Government’s Law Ministry alleged that during the eight months of Chief Justice M.M. Punchhi’s tenure,²¹ the Chief Justice had not properly consulted with two of his colleagues as required under the *Second Judges’ Case* (Andhyarujina 2002, 12). In a series of letters exchanged between the Chief Justice and the Law Ministry, the Chief Justice denied this assertion and allegedly suggested that the Law Ministry could not inquire into the consultations of the Chief Justice (Id.).

In response, the BJP Government brought a presidential reference to the Court, asking for clarification on the procedures for appointment. Significantly, the Government noted in its pleadings that it “is not seeking a review or reconsideration of the judgment in the *Second Judges case* and that the Union of India shall accept and treat as binding the answers of this Court to the questions set out in the Reference.” (Id.) The Court upheld the primacy of the Court in appointments, but also ruled that the Chief Justice must consult with a collegium of the four (instead of two) seniormost justices on the Court, reducing the discretion of the Chief Justice, but preserving judicial primacy in

²¹ Punchhi replaced Chief Justice Verma as Chief Justice in January 1998.

appointments and transfers.²² In addition, the Court also laid out detailed guidelines for the Chief Justice and collegium to follow in making appointments and transfer decisions.

In response, the BJP Government brought a presidential reference to the Court, asking for clarification on the procedures for appointment. As part of its larger argument and reference, the Attorney General contended that the Chief Justice should be required to consult with a larger collegium of four judges so as to further check the individual discretion of the Chief Justice in making appointment decisions. Significantly, however, the Government did not challenge judicial primacy in appointments, and noted in its pleadings that it “is not seeking a review or reconsideration of the judgment in the Second Judges case and that the Union of India shall accept and treat as binding the answers of this Court to the questions set out in the Reference” (Id.)

In the *Third Judges Case* (1998), the Court ruled that the Chief Justice must consult with a collegium of the four (instead of two) senior-most justices on the Court, reducing the discretion of the Chief Justice, but preserving judicial primacy in appointments and transfers.²³ In addition, the Court also laid out detailed guidelines for the Chief Justice and collegium to follow in making appointments and transfer decisions. Although the Court ultimately endorsed the Government’s position in this case in limiting the discretion of the Chief Justice, the BJP Government acknowledged the primacy of the judiciary in appointments.

However, in the 1999 elections, each of the major parties—the BJP, the Congress (I), and the Left parties each included a call for the creation of a National Judicial Commission that would be charged with final authority in making judicial appointments the Supreme Court and High Court and with decisions to transfer of High Court judges (*Frontline*, June 6, 2003). The BJP won the most seats in the 1999 elections, and formed a coalition government—the National Democratic Alliance. Pursuant to the recommendations of the National Commission to Review the Working of the Constitution (NCRWC), the BJP Government in 2003 introduced the Constitution (98th Amendment) Bill, in the Lok Sabha during the Budget session, seeks to constitute a National Judicial Commission (NJC). The bill sought to restore a strong role for the executive in judicial appointments:

According to the Bill, the NJC would consist of the CJI, who would be its chairperson; two Judges of the Supreme Court next to the CJI in seniority; the Union Minister for Law and Justice; and one eminent citizen to be nominated by the President in consultation with the Prime Minister, who will hold office for a period of three years. The Bill envisages that in the case of appointment or transfer of a High Court Judge, the Chief Justice of that court and the Chief Minister of that State (or the Governor, if the State is under President's Rule) shall be associated with the NJC. The Bill aims to provide the effective participation of both the executive and the judiciary through the NJC. It cites the recommendation of the National Commission to Review the Working of the Constitution (NCRWC) that an NJC be established for the appointment of Judges to the

²² See *supra* note 75.

²³ See *supra* note 75.

Supreme Court (*Frontline*, June 6, 2003)

However, again, due to a lack of a strong consensus with the Executive and Parliament for the bill, and disagreement and opposition to the bill from the Bar and the CJA and other lawyers' groups such as the PUCL, the bill lapsed. Some critics, including the People's Union for Civil Liberties and former Justice V.R. Krishna Iyer opposed the legislation on the grounds that it did not allow for members of opposition parties to sit on the NJC. In addition, the Committee on Judicial Accountability, an influential bloc of PIL lawyers and leading Senior Advocates of the Supreme Court Bar, criticized the bill for including representation from the executive and from current judges, and suggested appointing panel consisting of retired judges, top Senior Advocates, and legal experts: The Committee on Judicial Accountability (CJA), a body of eminent legal experts, has criticized the Bill for what it lacks. The CJA has consistently demanded the creation of an NJC. However, in the CJA's view, the NJC should not include any member of the judiciary or the executive... "The NJC should consist of former Judges, eminent advocates, and legal experts. Only then can it ensure objectivity and transparency in the process of selection of Judges and disciplining Judges accused of misconduct," said Supreme Court advocate and a spokesperson for the CJA, Prashant Bhushan." (Id).

Despite multiple calls for a National Judicial Commission, the BJP Government, and later the Congress Government of Manmohan Singh (2004-present) have been unable to overturn the system of judicial appointments established in the Court's decisions in the *Second and Third Judges' Cases*. Pro-PIL lawyers, leading Senior Advocates, and other groups within the Supreme Court Bar have emerged as a powerful force for judicial independence and accountability, and have helped to oppose and defeat efforts by the executive to assert a stronger political check on the appointment process. As a result, the ensuing stalemate has ensured that the status quo—the appointment system adopted in the *Second and Third Judges' Case*—remains the law of the land.

Vineet Narain (1997): An Assertive Court; Moderate to Strong Authority

In the post-1990 era, the Central Government was engulfed in a series of corruption scandals that weakened political support for the Government and created opportunities for the Indian Supreme Court to intervene to restore probity and accountability. In October 1993, former Home Secretary N.N. Vohra submitted a report to the Government that examined the rampant criminalization of politics, and highlighted "the nexus between the criminal gangs, police, bureaucracy and politicians" in various regions of India (Vohra Report, Part 3.3, 1993). During this period, the Supreme Court asserted an expanded role in monitoring and policing investigations into corruption cases, in response to several PILs.

Arguably the most significant case involving corruption and criminality in Indian politics in the 1990s was the *Vineet Narain* case, in which the Court intervened in the

investigation of the “Jain Hawala” scandal. The *Vineet Narain* case is a prototypical example of the Court’s assertion of new equitable powers in action in the areas of corruption and government accountability. *Vineet Narain* was originally filed in October 1993 by journalist Vineet Narain, a second journalist, and two PIL lawyers (including Senior Advocate Prashant Bhushan), seeking action against the Central Bureau of Investigation (“CBI”) for its failure to investigate a scandal involving illegal payments made by the Jain brothers to several high-level politicians, in return for the award of government contracts (Muralidhar 1998, 8). The politicians involved had been named in the “Jain diaries,” discovered in a raid in an investigation into illegal financing of terrorist groups through a series of illicit transactions in a scandal that involved politicians and corrupt bureaucrats (Id.).

As noted in Chapter 5, the new bench adopted a more aggressive and zealous approach, and immediately ordered the Director of the CBI to attend the next hearing of the Court; the Court harshly criticized the Director for the lack of progress in the investigation, and issued its first order on December 5, 1994, requiring the director to personally supervise the investigation and submit reports periodically to the Court in the form of secret in camera meetings with the bench (Mendelsohn 2000, 114; Muralidhar 1998, 8). The Verma bench thus continued to monitor the case between 1994 and December 1997, when it issued its judgment in the case.

As recounted in the Court’s own decision and opinion in 1997 judgment, the Court in *Vineet Narain* issued a series of directives and rulings that were novel in the scope of assertiveness. First, the Court noted that it had effectively began taking over monitoring and control of the CBI’s investigation since 1994, noting that “the continuing inertia of the agencies to even commence a proper investigation could not be tolerated any longer.” (*Vineet Narain* at 238). In addition, Justice Verma noted that the Court was forced invoke the procedural innovation of “continuing mandamus” to counter inertia in the CBI bureaucracy. Since “merely issuance of a mandamus directing the agencies to perform their task would be futile,” the Court proceeded to “issue directions from time to time and keep the matter pending requiring the agencies to report the progress of the investigation... so that the court retained seisen of the matter till the investigation was completed and the chargesheets were filed in the competent court for being dealt with thereafter, in accordance with law” (see Muralidhar 1998, citing *Vineet Narain* at 237).

Second, the Court replaced the petitioners who brought the PIL in *Vineet Narain* and a related case, *Anukul Chandra Pradhan v. Union of India*, with a senior advocate appointed as amicus curie to assist the Court in the matter. As a result of the Court’s intervention above, the CBI filed 34 chargesheets against 54 individuals in early 1996, many of whom were prominent politicians or government officials. The Court’s aggressive actions drove the CBI to be equally zealous in its prosecution of the *Vineet Narain* scandal. As Muralidhar (1997) suggests, the intense pressure placed by the Court on the CBI may have resulted in the filing of chargesheets “irrespective of the evidence gathered” (Muralidhar 1997, 9). Thus, another bench of the Supreme Court ultimately upheld a decision of the Delhi High Court discharging some of the accused in the case (Id.).

Third, the Court took steps to delink the CBI from political interference from the executive by directing “that the CBI would not take any instructions from, report to, or furnish any particulars to any authority personally interested in or likely to be affected by the outcome of the investigations into any accusation” (*Vineet Narain*, January 3, 1996 order, (1997) 4 SCC 778 at 779). Pursuant to the recommendation of the Independent Review Committee (IRC), the Court ordered that the CVC be conferred with independent statutory status. The Court ordered that the Government reorganize the CBI and Enforcement Directorate, which were both under the control of the Indian Police Service, by placing them under the supervision of the Central Vigilance Commission, an arm of the Indian Administrative Service (IAS) (India’s civil service bureaucracy).²⁴ In addition, the Court issued directives changing the rules and procedures for the appointment and transfer of the Central Vigilance Commissioner, the director and officers up to the rank of joint director of the CBI and the director of the Enforcement Directorate. The Court also charged a committee consisting of the Prime Minister, Home Minister, *and* the leader of opposition with the task of selecting the head of the CVC, in an attempt to prevent the ruling party from politicizing the investigative processes of the CBI and ED.

Finally, the Court invalidated the “single directive” law that had been promulgated by the Central Government in 1988 (Singh 2003). The single directive had been enacted largely to provide high-level political officials and civil servants with immunity from prosecution, through two main provisions. The single directive required that the CBI receive prior authorization from the ministry or department concerned prior to beginning an inquiry. And per the single directive, in order to initiate an investigation against a cabinet secretary, the CBI was required to secure the authorization of the Prime Minister’s Office. The Attorney General defended the Single Directive on the grounds that it helped ensure that the CBI functioned “according to the mandate of the Central Government” and that “officers at the decision-making level need this protection against malicious or vexatious investigations in respect of honest decisions taken by them” (*Vineet Narain* at 247). Finally the Government argued that the Single Directive was valid because the Government had control and authority over the CBI pursuant to Section 3 of the Police Act, and Sections 3 and 4 of the Delhi Special Police Establishment Act.²⁵

²⁴ Sumit Mitra, “Supreme Court Judgment: Reining in the Raiders,” *India Today*, December 29, 1997.

²⁵ Section 3 of the Police Act, 1861 provides as follows:

“3. Superintendence in the State Government.—The superintendence of the police throughout a general police district shall vest in and shall be exercised by the State Government to which such district is subordinate, and except as authorized under the provisions of this Act, no person, officer or court shall be empowered by the State Government to supersede or control any police functionary.”

Sections 3 and 4 of the Delhi Special Police Establishment Act, 1946, stipulate as follows:

“3. Offences to be investigated by SPE.—The Central Government may, by notification in the Official Gazette, specify the offences or classes of offences which are to be investigated by the Delhi Special Police Establishment.

4. Superintendence and administration of SPE.—(1) The superintendence of the Delhi Special Police Establishment shall vest in the Central Government.

The Court rejected these arguments, and ruled that the term “superintendence” in Section 4 of the Prevention of Corruption Act did not extend to control over CBI investigations. Anil Divan, the Court appointed amicus, argued that the Government’s IRC report was flawed in that it largely was supportive of the status quo, given that it sought to defend the Single Directive requirement. According to Divan’s own written submission before the Court the IRC report was a “special pleading for the Government’s case on the investigative agencies. It is a report to perpetuate the existing control of the politicians and the top bureaucrats on the investigative agencies”.

It should be noted that the Court’s intervention in the *Vineet Narain* decision between 1994 and 1997 occurred in the midst of tumultuous change in the political environment at the national level. The spate of corruption scandals in this period ultimately led to the Congress Party’s worst electoral defeat in history, and Prime Minister Rao was forced to resign from the leadership of the Congress party because of corruption charges. In the May 1996 Lok Sabha elections, the Hindu-right BJP party won a plurality of seats (161 out of 545), but was unable to form a coalition government. As a result, the Janata Dal-led coalition of opposition parties formed the “United Front” government, with the external support of the Congress party. In 1997, the Congress party withdrew its support of the United Front coalition government, which led to the fall of the at government and new elections. In 1998, the BJP won the national elections and formed a coalition government with the support of the AIADMK (a southern regional party). The AIADMK, however, withdrew its support of the BJP, forcing new elections in 1999. (The BJP won the most seats again in 1999, and was able to form a new coalition government under the “National Democratic Alliance” banner, and held power until 2004, when the NDA was defeated by the Congress-led United Progressive Alliance.)

The Government Response

Although the Court’s intervention in the *Vineet Narain* case was partly successful in that the CBI filed of 34 chargesheets against 54 political officials, the CBI was unable to secure the convictions of any of the accused as a result of evidentiary problems. Thus, in *CBI v. VC Shukla* (1998), the Delhi High Court dismissed charges against some of the accused because of evidentiary problems with the diaries, and an appellate bench of the Supreme Court held that the entries in the diaries of the Jain Brothers constituted inadmissible evidence. The Supreme Court in *CBI v. V.C. Shukla* thus overturned all charges against the accused in the Jain hawala case.

The level of government compliance with the Court’s orders and decisions varied across different regimes. The weak coalition United Front Government of Prime Minister Deve Gowda, which came to power in June 1996, considered several measures to try to counter and rein in the Indian Court in this period. For example, the UF government initially sought to widen the scope of the Single Directive to immunize former and present ministers from CBI investigation/prosecution. However, this proposal faced strong opposition in the United Front’s Parliamentary steering committee and as a result, was scuttled.²⁶ Additionally, the Law Ministry in 1997 attempted to propose

²⁶ Charu Lata Joshi, “Government: Desperate Moves,” *India Today*, March 1997.

legislation in order to limit the explosion of PIL in the courts. A proposed bill required that PIL petitioners must have a “legal interest” in the matter in order to be heard, and that all PIL petitioners would be required to put down a deposit of 100,000 rupees for every petition filed in the Supreme court, and 50,000 for each filed in the High Courts. However, as a result of opposition to the proposed PIL legislation from parties on the Left and the BJP, the Government was forced to backtrack on the issue.²⁷

After the Congress party (led by its President Sitaram Kesri) withdrew its support of Prime Minister Deve Gowda in a no-confidence vote in April of 1997, the United Front was forced to replace Gowda, and selected External minister I.K. Gujral as the new leader and Prime Minister. Under strong pressure from Kesri and Congress, Gujral transferred the Director of the CBI, Joginder “Tiger” Singh, to the Home Ministry as the “special secretary in charge of pension and freedom fighters” on June 30, 1997, in part because of Singh’s aggressive investigation of the Bofors, Jain Hawala, Bihar Fodder and other scandals involving Congress leaders and UF allies. The government appointed R.C. Sharma to replace Singh, in part because Sharma had a “reputation for putting sensitive cases into cold storage.”²⁸ The transfer of Singh hurt Gujral’s reputation as leaders within the UF and in the opposition, who suggested that Gujral was a weak leader who had bowed to the will of Kesri and the Congress in sacking Singh. In response, Gujral launched an anti-corruption campaign in a speech on independence day on August 15, 1997, in an attempt to counter the widespread perception among political elites that he was blindly kowtowing to the Congress agenda.

Significantly, following the Court’s final December 1997 judgment, the United Front Government of I.K. Gujral announced that it would *not* seek a review of the Court’s decision within the 30 day statutory time period. One government official thus noted “In fact, all that was emphasized was how the government has no choice but to implement the judgment.”²⁹ The Gujral government responded to the decision by referring the matter to a special committee that would be charged with issuing recommendations for legislation in conformity with the Court’s decision.³⁰ However, the UF collapsed in November 1997 following a report issued by the Jain Commission that revealed that one of the United Front’s allied parties had played a role in the conspiracy to assassinate former Prime Minister Rajiv Gandhi in 1991. As a result, the Congress party withdrew its support of the United Front government, and the UF was effectively a caretaker (or “lame duck”) government until elections were held in 1998, and therefore the UF government was unable to take action in passing such legislation:

After coming to power in 1998, the BJP Government demonstrated its unwillingness to comply with the new decision. First, the BJP government transferred M.K. Bezboruah, the Director of the Enforcement Directorate, to a state government post in Delhi, in violation of the Court’s decision requiring that

²⁷ Id.

²⁸ H. Bawera, J. Ansari and P. Chawla, “Tilting at Sleaze,” India Today, September 1, 1997.

²⁹ “Panel to Study SC Order on CBI Autonomy,” Indian Express, December 24, 1997.

³⁰ Id.

CBI and ED officials had to be protected “against, inter alia, external pressure, arbitrary withdrawals or transfers of personnel.”³¹ The transfer provoked reaction from the opposition Congress party. In addition, the transfer was challenged in another PIL, in which petitioners alleged that the transfer was effected to “scuttle the prosecution of [Tamil Nadu Chief Minister] Jayalalitha whose support was crucial for the present Government’s survival”. This reflected the unique pressures faced by the UF government, which had to accommodate the interests of its coalition partners.³²

The Court was highly critical of the transfer in an August 13 order, in which a three-judge bench suggested that the transfer smacked of “arbitrariness”; the Court thus ordered the government to reinstate Bezbaruah.³³ Bowing to pressure from the Court and public opposition to the transfer, the Government revoked the transfer and reinstated Bezbaruah as Director of the ED. However, the BJP Government transferred Bezbaruah a second time in December 1998.

In August 1998, the BJP Government openly circumvented the Court’s 1997 decision by enacting a CVC ordinance that brought back the single-directive that had been invalidated by the Court. In addition, the ordinance also provided that only bureaucrats could be selected for appointment to the CVC, and the CVC would consist of a four member panel that included the Personnel Secretary (who helped draft the ordinance). This again went against the Court’s decision, which called for a single-member CVC who could be chosen from a panel of distinguished civil servants and “others”—allowing the Government to consider judges and other eminent public persons for the position.³⁴

The enactment of the ordinance reflected a “hijacking” of the CVC by the bureaucracy. Originally, the Government committee charged with considering proposed drafts of a CVC ordinance asked the Law Commission to draft a proposed CVC bill in April of 1998. The Commission produced a draft ordinance that substantially conformed to the Court’s 1997 order. However, Arvind Verma, the Personnel Secretary, along with other bureaucrats, suppressed the Law Commission draft and drew up an alternative draft of the CVC Ordinance, and this draft was ultimately enacted into statute. Three of the

³¹ “A Political Setback,” *Frontline*, 15(20), Sept. 26-Oct 9, 1998

³²As an article in *India Today* observed in March 1997:

Given the minority status of the United Front (UF) Government, the backlash was expected. It was triggered partly by the inner compulsions of the government, whose partners in Bihar and Tamil Nadu are already facing a no-nonsense judiciary in the fodder scam and Indian Bank cases. But the UF’s dependence on the Congress for survival in power has also played its part. The Congress has the largest share of politicians involved in court-monitored cases. And with the CBI seeking the help of the courts in investigating Congress bigwigs like Satish Sharma and Sheila Kaul, the fear in the Congress ranks is understandable. Argues former minister of state for personnel Margaret Alva: “There is a widespread feeling that the government is being run by the judiciary. Otherwise where is the legal provision for a minister to be fined?” “A Political Setback,” *Frontline*, 15(20), Sept. 26-Oct 9, 1998.

³³ “Bezbaruah back as ED chief,” *The Tribune*, Sept. 10 1998.

³⁴ Sudha Mahalingam, “Issues for Vigilance,” *Frontline*, 15(19), Sep. 12-25, 1998.

four cabinet ministers who were originally charged with clearing the final draft, including Urban Affairs Minister Ram Jethmalani, objected to the Verma-bureaucrat version of the Ordinance. Jethmalani also alleged that Verma had initially suppressed and later doctored the Law Commission draft (to remove the word “others”) to prevent the ministerial committee from reviewing the Commission version. In fact, Jethmalani and another minister Thambidurai threatened to resign if Prime Minister A.B. Vajpayee did not reject the draft produced by Verma’s Personnel Department. But ultimately, Vajpayee acceded to the demands of the bureaucrats and ignored the ministerial committee. The bureaucrats in the BJP Government were thus able to outmaneuver Jethmalani and the other ministers in enacting a CVC Ordinance that flouted the court’s 1997 order.

However, in September, the new ordinance was challenged in yet another PIL. On September 22, the Court ordered the Government not to implement the new CVC ordinance pending the adjudication of the PIL challenge in October. During the hearings on the PIL in October, the Government finally agreed to amend the CVC ordinance to substantially comply with the Court’s 1997 order in *Vineet Narain*. While retaining the four-member CVC, the government amended the ordinance to allow for the appointment of non-bureaucrats, and also dropped the offending single directive provision.³⁵ Finally, in 2003, the BJP Government enacted a new Central Vigilance Act. The Act did confer statutory status on the Central Vigilance Commission in partial compliance with the court’s directives in *Vineet Narain*. However, the Act also brought back the single directive provision, flouting the spirit of the Court’s decision. The Act was challenged in 2005 in *Subramanian Swamy v. CBI*, and the Court in that case referred to the matter for adjudication by a larger constitutional bench. The matter is still pending adjudication today.

The patterns of interaction between the Court and the Government in the *Vineet Narain* case illustrate the complex power dynamics of fragmented and weak party regimes at the Central Government level. From the perspective of the strategic model, one might argue that political fragmentation in the form of weak minority Congress and United Front Governments provided a more hospitable opportunity for the assertion and exercise of judicial power. However, the above case study paints a more complex and nuanced picture of judicial authority.

First, the Court’s assertiveness in *Vineet Narain* helped dramatically alter the political opportunity structure for judicial power. The Court’s decisions in *Vineet Narain* helped to focus elite and national attention on the Jain Hawala scandal, and the CBI’s filing of chargesheets in the Jain hawala case, and the media’s coverage of the activity of the Court and the CBI, helped undermine support for Rao’s Congress Government, which was defeated in the May 1996 elections. According to *India Today*, although many of the accused were discharged by the Delhi High Court, the “incident, hyped up by the media, changed the configuration of politics by leaving its mark on the outcome of the 1996 election.”³⁶ A series of weak coalition minority governments would take control

³⁵ “Government amends CVC ordinance: Non-bureaucrats included,” *The Tribune*, October 29, 1998.

³⁶ “CBI: Silencing a Loose Cannon,” *India Today*, December 9, 1997.

between 1996 and 1998, and these governments lacked the unity or strength to completely flout or override the Court's decisions.

However, the limited resistance of the United Front governments to the Court's directives, including the attempts to transfer CBI officers, were actually driven by UF government's tenuous hold on power. The Court's decision and orders in *Vineet Narain* placed the minority government of United Front Prime Minister I.K. Gujral in a tenuous position. Although the United Front had campaigned on an anti-corruption agenda against the Congress and BJP in 1996, the UF Coalition was dependent on the outside support of the Congress party, as well coalition's as parties in Bihar and Tamil Nadu, and the UF coalition was also dependent on outside support from the Congress party. Because of Court-directed investigations into a series of scandals such as the Bihar Fodder scam, the Indian Bank case (involving leaders in Tamil Nadu), as well as cases involving a large number of Congress officials, the minority coalition Government of I.K. Gujral was placed in a precarious "Catch-22" situation. If the government failed to take steps to challenge and resist the Court's efforts to investigate and prosecute these cases, the UF risked losing the political support of its allies. But if they did indeed attempt to challenge and resist the Court and the investigative bureaucracy, the Government risked losing national public support. In fact, the United Front's reliance on its allied parties in some ways created incentives for the Government to be less compliant with the Court's decision, in that it faced pressure to thwart the court's investigations into its political allies. This drove the Gujral government to initially transfer CVC director Tiger Singh.

Second, the *Vineet Narain* case illustrates how the top-level bureaucrats within the Executive branch exerted significant power in the context of a fragmented and weak coalition government, and that some of the resistance to the Court was driven by bureaucrats desire to consolidate power. In fact, the case illustrated that it was Cabinet Ministers such as Ram Jethmalani who sought to ensure greater compliance with the Court's directives. In contrast, bureaucrats such as Personnel Secretary Arvind Verma were intent on enacting an ordinance that served their own interests but flouted the Court's decision. In this sense, political fragmentation actually created pockets of resistance to the Court's decision by empowering bureaucrats vis-à-vis politicians. This suggests that theories of judicial power that posit that political/party fragmentation is conducive to the exercise of judicial power are problematic in that they do not account for the power of the bureaucracy in fragmented and weak coalition regimes.

At the same time, other bureaucrats in the law-enforcement agencies also exerted significant power against the Executive, and in a sense, served as strong allies for the Court in *Vineet Narain*. An article analyzing the Gujral Government's activity in this period drives home this point:

In the olden days of Congress and Gandhi family monopoly on power, the high-powered law-enforcement agencies of the Government were a handmaiden of the ruling coterie. But in an age of fragmentation of the polity, the Singhs and Biswases and Bezboruahs [heads of the CVC, CBI, ED] have emerged as power players. Gujral's hesitant, if not hamhanded, attempt to show them their place

may carry a steep price tag because his own grip over the government is slippery.”³⁷

The analysis of the government’s compliance in the section above suggests another important insight in the Indian context--that political leaders and cabinet ministers have been more sensitive and responsive to the Court’s adverse decisions than bureaucrats within the Government. In a sense, the bureaucrats in this case appear to operate under less external constraints and pressures than the political leaders and cabinet ministers, a product of fragmented accountability structures under coalition governments. Ironically, the political leaders and cabinet ministers within the Government found that they could utilize the Court’s decisions to rein in the bureaucrats, as they did in response to the PIL challenge to the CVC ordinance of the BJP.

Accountability and the Right to Information

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. 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. 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. Following the release of the report, a national “Right to Information” campaign was launched by civil society organizations. Among other reforms, the RTI campaign demanded new financial and criminal records disclosure regulations for candidates for Parliament and the state legislature.

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.”³⁸ According to the Election Commission, 40 out of the 545 members of Parliament, and 700 of the 4,072 members of legislative assemblies had a criminal background.³⁹ 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 in order 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.”⁴⁰ In May of 1999, the Law Commission submitted its 170th report recommending electoral reforms to the Law Ministry. The Law Commission recommended in its report that candidates convicted of certain criminal offences be barred from contesting seats in the Lok Sabha. In addition, the report also recommended that all candidates for the Lok Sabha be required to disclose prior criminal records, as well as a statement of the financial assets owned by the candidate and the candidates’ family. However, the BJP Government failed to take any action in implementing the Law Commission report recommendations.

³⁷ Id.

³⁸ “EC focus on crime-politics ties,” *Indian Express*, August 21, 1997.

³⁹ “The unholy nexus,” *Indian Express*, August 22, 1997.

⁴⁰ *Ass’n For Democratic Reforms v. Union of India* (2002) 5 SCC 294.

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. 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. Accordingly, the Delhi High Court directed the Election Commission to require that candidates for the Lok Sabha and State Legislative Assembly be required to disclose any prior criminal record and a record of financial assets. In addition the Court ordered the Election Commission to require disclosure of 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 which 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.”⁴¹ The BJP Government challenged this decision on appeal in the Supreme Court, and the Congress Party also intervened in the action. In the appellate matter, the People’s Union for Civil Liberties also joined the action, filing a PIL writ petition in support of heightened disclosure requirements.⁴² 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, 1951 and Election Commission rules.

The Supreme Court rejected the arguments of the Government and the Congress Party, in ruling that per its earlier ruling in *Vineet Narain* and other decisions, the Court had the power to “issue directions to fill the vacuum” of legislation “till such time the legislature steps in to cover the gap or the executive discharges its role.” The Court thus upheld the decision of the Delhi High Court, and subject to some minor modifications in the disclosure requirements,⁴³ the Supreme Court issued directions to the Election Commission to promulgate these revised disclosure requirements. In June of 2002, the Election Commission issued disclosure requirements in conformity with the Court’s decision.⁴⁴

However, in August of 2002, the Government enacted the Representation of the People (Amendment) Ordinance. Section 33B of the Act was directly aimed at

⁴¹ Ass’n For Democratic Reforms v. Union of India (2002).

⁴² The PUCL thus sought a directive to be issued to the Election Commission (a) to bring in such measures which provide for declaration of assets by the candidate for the elections and for such mandatory declaration every year during the tenure as an elected representative as MP/MLA; (b) to bring in such measures which provide for declaration by the candidate contesting election whether any charge in respect of any offence has been framed against him/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 Assn’ for Democratic Reforms v. Union of India (2002) 5 SCC 294.

⁴³ The Court, in modifying the High Court’s proposed disclosure requirements, effectively followed the recommendations contained in the EC’s submissions to the Court. 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.

⁴⁴ “Ruling for reform,” *The Hindu*, March 15, 2003.

overturning the Court's earlier decision in *Association for Democratic Reforms* (2002). Section 33B provided as follows:

“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.”

In addition, the new Act included a watered-down version of those in the Court's 2002 order, as candidates under the Act were not required to disclose cases in which they were either acquitted or discharged of criminal offences, their assets and liabilities, and their educational qualifications. 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.

In *PUCL v. Union of India* (2003), the Court invalidated Section 33B of the Act as unconstitutional, ruling that Section 33B went beyond the legislative competence of Parliament, as the Court had held that voters had a fundamental right to know the antecedents of candidates under Article 19(1)(a). Significantly, the Court did acknowledge that the amended Act (but for Section 33B) was a step in the right direction, in that the Government did adopt some of the disclosure requirements. However, the Court noted that the new legislation did not require disclosure of cases involving cases of acquittal/discharge, assets and liabilities, and educational qualification, and the Court ordered that the Election Commission must also require disclosure of these items. In addition, in an important concession to the Government, the Court held that the Election Commission would be required to revise its previous instructions stipulating that candidates would be disqualified for non-compliance with the with the disclosure requirements, or for filing a false affidavit with the Election Commission.⁴⁵ Subject to this caveat, the Court effectively reissued a similar order to its 2002 decision, and again ordered the Election Commission to issue new guidelines. On April 1, 2003, the Election Commission issued new guidelines in line with the Court's 2003 decision.

Across the board, elite opinion leading up to both decisions was universally supportive of the reforms that were ultimately endorsed by the Court and contained in the Election Commission's June 2002 order. 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 Supreme Court decisions. All of the leading newspaper editorials praised the Court for seeking to promote the rule of law and to rein in criminality and corruption in government. These editorials reflect the frustrations of professional and intellectual elites, and the middle

⁴⁵ 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 officers (EC officers in the field) to make determinations as to the integrity of the affidavits submitted by candidates in such a compressed time period. The affidavit could only be challenged after the election in a High Court under the new guidelines. Rajindar Sachar, "Avoid Confrontation," *The Hindu*, April 14, 2003.

classes, with political corruption. For example, in response to the Court's initial decision in the *ADR* (2002) decision, the *Hindu* observed:

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 terrorize 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 (*Hindu*, 2002).

National public opinion was also firmly behind the Court. As one of the leaders of Lok Satta, a leading reform group that was part of the Right to Information movement observed, "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 favor of full disclosure of criminal records and financial details of candidates. The parties too exhibited an impressive unity of purpose in thwarting disclosures."⁴⁶ The Court was ultimately able to secure compliance with its 2003 decision. Thus, the Election Commission held elections for State Assembly in Madhya Pradesh, Chattisgarh, Rajasthan, Delhi, and Mizoram in November and December of 2003. In 2004, the national Lok Sabha elections were also held using the new disclosure/accountability guidelines.

The Court's assertiveness in the *Association for Democratic Reforms* and *PUCI* cases is problematic from the lens of strategic models, in that the Court challenged the Government and major political parties in an intensely salient issue domain. Because each of the political parties had large numbers of elected officials with criminal records, or were allied with state and regional leaders who had been convicted of corruption or other charges, the Court's decisions in 2002 and 2003 were politically controversial and potentially destabilizing to the entire political class in India, including the ruling BJP regime. And yet, the Court still challenged the Government *twice*, triggering a backlash to its first decision, and reasserting itself a second time.

Instead, I argue that the Court's assertiveness in both cases can be explained by the Court's responsiveness to elite and national public frustration with rampant corruption and criminality in the government and political sector. The Government's attempt to override the court's decision in 2002 suggests that even in an era of political fragmentation, the Government still had the will and ability to resist and try to override the Court because of the salience of the issue to all elected government officials. In this

⁴⁶ Jayaprakash Narayan, "Time to respond to the people," *The Hindu*, Aug. 27, 2002.

sense, strategic models are partly useful in that they can help explain why it may be difficult for courts to secure compliance in certain salient issue areas. However, the Right to Information/Accountability cases demonstrate that courts can serve as focal points for coordinated national movements. In issue areas in which courts have strong elite and/or national popular support, it becomes increasingly difficult for the government to rein in or circumvent the authority of the Court.

III. The Strategic Model and the Expansion of Judicial Authority

How can we explain these patterns in the Court's assertiveness and authority? Within the public law literature, variants of the strategic model have been advanced to help account for variation in the assertiveness and authority of courts. According to the strategic model, judges' will temper their own sincere policy or legal-institutional values or goals in judicial decisions based on their calculations about external political constraints or opportunities (Murphy 1964; Epstein and Knight 1998; Epstein, Knight and Martin 2001; Helmke 2005). Scholars who have advanced variants of the strategic model of judicial decision-making have argued that several factors or variables determine whether judges and courts will be more assertive and authoritative:

- (1) the extent to which assertive court decisions fall within (or transgress) the "tolerance interval" bounded by ruling political authorities' strong policy preferences (Epstein, Knight, & Shvetsova 2001);
- (2) the degree to which political authorities are politically divided and hence cannot easily create a consensus to defy or retaliate against court decisions they regard as undesirable (see Cooter and Ginsburg 1996; Ginsburg 2003)
- (3) levels of popular support for enforcement of Court decisions (Vanberg 2002; Staton 2003).

Changes in the Indian political system in the post-1990 era *did* alter the political opportunity structure for judicial power. Since 1989, there has been an overall weakening of many of the nation's political institutions—a phenomenon that Kohli (1988), Migdal (1998), and Kothari (1995) have referred to as "deinstitutionalization." Rudolph and Rudolph (2001), and Mendelsohn (2002) suggest that the power of weakened coalition governments at the Center was further diminished by systemic corruption, as illustrated by the Jain Hawala scandal that took down the Congress coalition government of Prime Minister Narasimha Rao in 1996. Still, I suggest that this strategic account is incomplete, in that it fails to examine factors in the political opportunity structure other than the strength or power of the political regime that might affect judicial assertiveness and authority.

An analysis of the Indian Supreme Court's shift toward greater authority in governance highlights a key weakness or shortcoming of the strategic model – its failure to pay significant attention to the role that elite opinion and elite governance constituencies play in broadening the tolerance intervals of political regimes and bolstering the authority of courts. I suggest that a closer examination of these variables helps complement the strategic model in providing a complete account of the shift to greater assertiveness and authority in the post-Emergency Indian Supreme Court.

III. Elite Institutionalism and the Political Opportunity Structure for Judicial Power

I argue here that the thesis of elite institutionalism helps complement and enhance the strategic model by examining how professional and intellectual support for a Court, and allies within the Bar, the political regime, and other political and policy groups can bolster judicial authority vis-à-vis the Government. In order to understand the opportunity structure which shapes and constrains judicial decision-making, one must attend to the extent to which a court's activist, assertive decisions can help or hurt a court win powerful allies that can provide vocal support and protect the Court from political backlash.

Existing scholarship suggests that courts can gradually cultivate and develop deeper "reservoirs of public support" that enable courts to issue controversial decisions without threatening their legitimacy as institutions (Gibson, Caldeira, and Spence 2003a; 2003b). Vanberg (1998, 2001) suggested that judges and courts are more likely to be assertive and authoritative where they have a strong base of constituent support that is ready to defend the Court. Staton's (2002) study of judicial politics in Mexico posited that judges were more likely to be assertive where they perceived that they would have strong levels of national public support for their decisions, and that judges may even have some control over the level of support through use of public media campaigns.

For Vanberg and Staton, public opinion can serve as a "baseline" for judicial power that enables courts to exert authority and secure compliance from the government in power. Staton refers to this as a public enforcement mechanism for judicial power. Vanberg and Staton identify two conditions that are necessary for courts to challenge and constrain government: (1) courts must enjoy sufficient public support; and (2) information about judicial decisions must be transparent; voters must be able to monitor legislative responses to judicial decisions effectively and reliably (Vanberg 2001, 347). In discussing the importance of this second condition, Vanberg (2001) suggested that interest groups can play a critical role as "watchdogs" that increase the transparency of the political environment. Indeed, Epp (1998) also suggested that interest groups can provide the judiciary with "active partners in the fight against opponents of implementation." Staton refers to this as a public model of enforcement.

In order to fully understand how elite institutionalism affects the political opportunity structure for judicial power, one must also define which groups or interests are part of the relevant professional, political, and intellectual elite groups that shape and constrain judicial activism, assertiveness, and authority. Drawing on insights from Halliday et al's conceptualization of the legal complex (2008), and Baum's analysis of the importance of judicial audiences (2006), I suggest that several groups maybe be part of the cluster of elite constituencies and elite opinion that affect judicial decision-making and judicial authority. This includes the judges' peers on the Court, members of the Bar and Supreme Court advocates, political leaders and government officials within relevant government agencies that interact extensively with the Court, (including ministries of law, law commissions, and other departments), the media and legal journalists, legal scholars and academics, and professional policy groups (including NGOs and public interest organizations).

The thesis of elite institutionalism builds on these insights but rather than focusing mainly on national public opinion or national public support for courts, I suggest that levels of judicial assertiveness and authority are primarily affected by elite support (though national popular support can matter in highly controversial, highly transparent cases). I argue that the structure of elite opinion—the extent to which elites are united on a set of given issues or issues --can be a significant factor in determining the extent of a Court’s authority. Elite groups also can play a crucial role in shaping and influencing national public opinion on specific issues or policies adjudicated by the Court. The national news media—particularly newspapers that closely follow courts—plays a crucial role in “broadcasting” the opinion of elites regarding specific decisions and overall levels of, and overall support for the Court. Political regimes can look to media coverage (including editorial coverage) of the Court as a “proxy” for broader public support levels for the Court.

Building on Vanberg and Staton’s insights on public support and the transparency of judicial decisions, one might expect national public opinion or national support to matter more than elite support in certain high profile, highly controversial cases in which the constitutional or political issues are relatively accessible to the public. This suggests that there may be a “sliding scale” of audiences inherent in Staton’s conception of the public enforcement mechanism of judicial power: national popular support may play a greater role in affecting judicial assertiveness and authority in certain exceptional, extraordinary cases, while elite support matters more in the vast majority of the Court’s decisions.

Elite institutionalism, then, suggests that judicial assertiveness and authority is strongly affected by how judges’ and the ruling political regime perceive the strength of the Court. The level of elite and in some cases, national, support for the court and particular judicial decisions can strongly affect the “zones of tolerance” of the regime in power. Stronger levels of elite support can effectively widen or expand regimes zones of tolerance by making political regimes more reluctant to overrule or resist judicial decisions. An important implication of elite institutionalism is that judges can gradually widen their base of popular support over time by building support among particular elite communities in specific cases and contexts.

In the next sections, I examine evidence of intellectual elite support for the Court, as well as the development of governance constituencies. I argue that the relative strong levels of support for the Court among professional and intellectual elites, as reflected in elite editorial coverage of the Court, helped to bolster the Court’s authority against political attacks and retaliation. In addition, I suggest that in specific cases, powerful “governance constituencies” played a crucial role as allies in defending the Court against potential retaliation and political backlash.

The Media, and Elite and Popular Support for the Court

As noted above, previous scholarship has suggested that levels of public support for a Court can affect judicial assertiveness and authority in high courts (see Staton 2000; Vanberg 1998, 2001). Unfortunately, there is a paucity of public opinion data on the Indian Supreme Court, and most national opinion surveys has focused on assessing support levels for the Indian judiciary as a whole (see Krishnan 2008). However, this

measure is inherently problematic and imperfect, in part because it captures individual levels of affect or support for local courts, and unlike comparable measures in the U.S. and other countries, does not specifically reference or mention the Supreme Court explicitly in the question wording. Because the lower district courts are highly ineffective, inefficient, and often corrupt institutions, measures of affect toward the judiciary as a whole are flawed as they fail to disaggregate or separate the negative affect towards lower courts, from the generally high esteem that the Supreme Court and High Courts are held in (Galanter and Krishnan 2004).

Outlook Magazine conducted a series of polls in 1996 prior to and during the *Vineet Narain* litigation in the Supreme Court of India, that asked specific questions about the Court's role in fighting corruption in the Indian polity. A poll conducted in February 1996 found that 89 percent of respondents in urban metropolitan areas believed that the judiciary was doing "a commendable job" and 94 percent believed that the judiciary "should continue to cleanse the system" (*Outlook*, March 6, 1996, "Judiciary is Doing a Great Job"). 87 percent of respondents believed that the Judiciary "had to step in as the government was not fulfilling its responsibilities, and 69 percent disagreed with the statement that the "judiciary is going beyond what it is supposed to do" (Id). In addition, respondents indicated that the judiciary was the most trusted institution among national institutions. 39 percent trusted the Judiciary the most, compared to 31 percent for the Press, 19 percent for the Government (the Executive), and 11 percent for Parliament. An October 1996 poll reported similar results, with 75 percent of respondents indicating that most politicians were corrupt, and 73 percent indicating that they believed that the Court was proceeding fairly against politicians (*Outlook*, October 23, 1996). This data illustrates that there was broad national support among the urban middle classes for the Court's assertiveness in the *Vineet Narain* case.

In order to measure support levels for the Court in other cases, I analyzed elite news editorial coverage of the Court's politically significant decisions in four of the major national newspapers that closely follow the Court's decisions: the *Indian Express* (Mumbai/Delhi), the *Hindustan Times* (Delhi), the *Statesman* (Calcutta/Delhi), and the *Hindu* (Madras). Where available, I also analyzed editorial and news analysis in other newspapers and news magazines (e.g. *India Today*, and *Outlook*). Although national newspapers extensively cover major decisions of the Supreme Court, very few cases receive extensive editorial treatment in the opinion section of these newspapers. Table 6.2 (pgs. 192-193) summarizes editorial coverage of a small subset of the politically significant governance decisions analyzed in Chapter 5.

As the table illustrates, elite support for the Court's decisions in the 1980s was mixed. Although there was generally a consensus of elite support for the Court's decision in *Sheth*, elite reaction was mixed in response to the Court's decision in the *First Judges Case*. As illustrated in the case study of the *First Judges' Case*, there was not a clear consensus of elite support in support of systematic transfers of High Court judges without their consent prior to the Court's decision. Following the decision, elite editorial reaction was divided, and some editorials were critical of divisions that were exposed during the case on the bench, and suggested that the Court's decision had been affected by political pressure from the Central Government.

In the post-1990 era, the Court has generally enjoyed strong levels of professional and intellectual elite support for its governance decisions in the post-1990 era in the media. Editorial coverage of the Court's decisions in all of the cases that received extensive editorial coverage, including *the Second and Third Judges' Cases*, *Vineet Narain*, *Shiv Sagar Tiwari*, *the Right to Information cases*, and the *Prakash Singh case*, was favorable and supportive. As illustrated in Chapter 5, intellectual elite opinion as reflected in news editorials, was strongly supportive of the Court's assertion of judicial independence in the Second and Third Judges case. All of the leading national newspapers issued editorials that were supportive of the Court's intervention and assertiveness in *Vineet Narain* to cleanse the political system of corruption and restore the rule of law. And editorials also were strongly supportive of the Court's activism and assertiveness in the Right to Information case as necessary to help advance the cause of transparency and accountability in elections.

Appendix 6.2: - Media Editorial Coverage of Governance Decisions (all editorials post-decision unless otherwise noted)

Case	Issue	Summary of Issues/Action	Challenge/Endorse	Hindu	Hindustan Times	Indian Express	Statesman
<i>Sheth v. Union of India</i> (1977)	Judicial Transfers and Appointments	Court upholds power of Government to transfer judges without consent, subject to the public interest.	Endorse	Support	-	-	Weak Support
<i>S.P. Gupta v. Union of India</i> (First Judges' Case) (1981)	Judicial Transfers and Appointments	Court upholds executive power to transfer high court judges without their consent to promote national integration; upholds primacy of the executive in appointments and transfers	Endorse	<u>Pre-decision:</u> Support government transfer K. Katyal: Oppose <u>Post-decision:</u> Support	<u>Post-Decision:</u> Weak Support <u>Post-Decision:</u> Oppose	<u>Pre-decision:</u> Oppose govt transfer of judges <u>Post-Decision:</u> Oppose	<u>Pre-decision:</u> S. Sahay: Oppose govt transfers <u>Post-Decision:</u> Oppose
<i>Second Judges' Case</i> (1993)	Judicial	Court rules that it has final say in judicial appointments	Strong Challenge	Support	HT: Support Sahay: Support	IE: Support Mahajan: Partially oppose/question	Support
<i>Vineet Narain</i> (1996, 1997)	Corruption	Court issued orders that CBI must be delinked from political oversight/interference and made autonomous, sets forth guidelines for the creation of a CVC to oversee CBI; issues orders that investigation proceed in Jain Hawala case; invalidates Single Directive.	Strong Challenge/ Strong Compel	Support	Support	Support Shefali Misra: Support Madhav Godbole: Partly Oppose	Support

<i>Shiv Sagar Tiwari (1997)</i>	Corruption	Court cancels allocation of petrol pumps by Minister of Petroleum to the Minister's employees, family members, politicians, and other bureaucrats.	Strong Challenge	Support	Support	Support	Support
<i>Third Judges Case (1998) (In re Presidential Reference of 1998)</i>	Judicial	Court modifies ruling in Second Judges Case and rules that Chief Justice must consult with a collegium of 4 justices (instead of two) in the appointment process for new judges to the Court. Appointment decisions require a majority of the five-judge collegium.	Strong Challenge			Support	
<i>Narmada Bachao Andolan v. India (2001)</i>	Development	Court allows for completed construction of Narmada Dam project	Defer	Mild support Gangi Parsai: Oppose		Support C. Verma: Support Nandini Ramnath: Oppose	
<i>Union of India v. Ass'n for Democratic Reforms (2002)</i> <i>PUCL v. India (2003)</i>	Corruption; Elections	Court orders Election Commission to issue disclosure guidelines re: candidates' criminal record and financial antecedents for candidates for Lok Sabha and State Legislative Assemblies. Decision implements recommendations of Law Commission's 170 th Report	Challenge/ Compel	Support	Support	Support	Support
<i>Prakash Singh v. Union of India (2006)</i>	Police Reform	Directing Centre and the States to set up commissions for selection/appointment of personnel and to ensure complete autonomy in police administration. Also directed centre and states to create watchdog/accountability commissions to monitor reform.	Compel	Support		Support	

Governance Constituencies and the Expanded Authority of the Court

The previous section illustrated that the Court's assertive governance decisions in the post-1990 era have generally been well received and supported by intellectual elite opinion, as reflected in the elite editorial coverage of some of the most significant governance cases. While the media has played an important role in helping to bolster judicial authority through its generally favorable and supportive coverage of the Court's activist and assertive decisions, I suggest here that another factor that helped contribute to the strong authority of the Court in the post-1990 era was the emergence of "governance constituencies."

As the foregoing analysis and case studies illustrate, the strategic model does help account for the shift in the Court's assertiveness and authority. Without question, internal divisions and fragmented weaker coalition governments in the post-1990 era made it more difficult for the Central Government to resist and overturn the Court's decision in the Second Judges' Case, because there was a lack of consensus within the Congress, United Front, and BJP governments about alternate mechanisms of judicial appointment. But the political opportunity structure for judicial power was also affected by the power and influence of governance constituencies, including the PIL lawyers within the Supreme Court Bar, policy groups, and the commissions and advisory structures the Court has itself created or relied on in implementing its decisions

The Pro-PIL Bar

As illustrated in the case studies in this chapter, the influence and clout of PIL lawyers both within and outside the government also helped to bolster the Court's authority. The Executive and Parliament were unable to advance alternate legislation for a National Judicial Commission to replace the system of appointments adopted by the Court in the Second and Third Judges' Case because of internal divisions in the government, *and* because of resistance from PIL lawyers who strongly supported and defended judicial independence and the Court's activism and assertiveness in PIL governance claims. PIL lawyers emerged as a powerful and influential bloc in this era as the Court became more assertive in taking the executive and Parliament in governance cases in this era.

In part, this reflected a fundamental shift in the Indian polity. Parliament had effectively ceased to function effectively as an institution and forum for opposing the policies of the Executive in this era and for policy making. Andhyarujina (1992) suggested that the Court's expanded power and authority in governance was a direct consequence of the "collapse of responsible government" (Andhyarujina 1992, 35-36).

The executive has come to control the legislature; legislatures have ceased to be forums for any legislative debate at all, much less reasoned debate. The executive and bureaucracy have become alienated from the electorate and are easily amenable to power-brokers, pressure groups or influence of money. Law enforcement agencies have become demoralized, corrupt and indifferent. In short, whilst Westminster forms of Parliamentary government are maintained, there is a failure of responsible government

all around. In proportion to the failure of responsible government by the political branches, the void is sought to be filled in by the community by resort to the courts. Despairing of correction from the political branches, the community easily judicializes individual grievances, social and political ills and problems of maladministration and brings them to the courts for their solution (Andhyarujina 1992, 36).

And as V.P. Patil, an Advocate in Maharashtra observed, “If the Government was working, citizens wouldn't be running to courts. Even the Opposition in the Assembly and Parliament doesn't question the Government. PILs police the Government” (India Today, January 28, 2010). To fill this governance vacuum, elites in the 1990s turned to PIL lawyers to take on the cause of challenging the failures of the executive and of Parliament.

As a result, the Executive now had to reckon with the power and influence of a new crop of PIL lawyers, including M.C. Mehta, Vineet Narain and Prashant Bhushan and others. Because these lawyers As illustrated in the case studies of the *Second and Third Judges' Cases*, groups of leading Senior Advocates and PIL lawyers emerged as a powerful lobby that has challenged attempts by the executive and Parliament to reign in the power and independence of the Court. One of the most powerful blocs of lawyers that has played a crucial role in bolstering the authority of the Court is the Committee for Judicial Accountability, a group of some of the leading PIL lawyers and top Supreme Court Senior Advocates in the nation. The CJA emerged as powerful force during the mid-1990s, and was described by one newspaper as a “phalanx of anti-Establishment lawyers that include... Ram Jethmalani, Shanti Bhushan, V.M. Tarkunde and Indira Jaisingh. Its two secretaries, Kamini Jaiswal and Prashant Bhushan, are well-known champions of Public Interest Litigation (PIL)” (India Today, October 6, 1997, Sumeet Mitra).

As a result of this shift in dynamics, the executive and Parliament arguably operate in “fear” of many of the PIL lawyers, who have the power to launch corruption challenges against key leaders of the government, and as illustrated in the *Vineet Narain* case, to even topple governments as a result of those challenges. The Court has played an active role in this dynamic. A 1996 article in the India Today highlighted this dynamic:

“What is worse, the courts seem to have closed their eyes on the political consequences of their treatment of PIL. For instance, Congress President Sitaram Kesri is now caught in a web of PIL petitions, all based on hearsay evidence. Kesri calls the petitions the handiwork of some chalbaaz (trickster), but as the cases remain alive under court order, the *United Front* Government, supported from outside by the Congress gets wobblier by the day” (India Today, December 9, 1997)

The *India Today* article also highlighted part of a secret note issued by the Law Ministry to the Cabinet that was highly critical of the Court. The note observed “The present-day situation is that the judiciary is cooperating, encouraging and promoting PIL. The

judiciary has digressed from its traditional duties...and has entered into a field in which it has no competence or safe standards for judicial action” (Id).

Policy and Advocacy Groups

In the *Right to Information Cases* (2003-2003), elite policy and advocacy groups, including the Association for Democratic Reforms, filed the initial PILs in the Delhi High Court that ultimately led the Supreme Court on appeal in 2002 to affirm the Delhi High Court’s decision ordering the Election Commission to issue regulations requiring legislative candidates to disclose information regarding their financial assets and criminal background (*see ADR v. Union of India* (2002)). Parliament sought to overturn the decision through the enactment of amendments to the Representation of People’s Act. In another PIL, *PUCCL v. India* (2003), the Supreme Court invalidated the new law and reinstated its original decision in ADR.

The Government was unable to rein in or overturn the Court following its second decision in *PUCCL* (2003). Elite policy and advocacy groups, such as the Association for Democratic Reforms, Lok Satta The ADR and other accountability/transparency organizations were able to build strong national popular support for the national Right to Information campaign, which helped bolster the Court’s authority in the second decision of the Court. A similar dynamic was illustrated by the Court’s assertiveness in the Vehicular Pollution case. Although the Court initially struggled to secure compliance with its orders in the early 1990s, the efforts of NGOs and elite policy groups to spotlight the threat of pollution to health ultimately built public support for the Court’s decisions, and made it difficult for the Central and Delhi State governments to resist the Court’s orders.

Bureaucrats, Government Commissions and Advisory Structures

The case study of the *Vineet Narain* decision illustrates how divisions within the government can empower bureaucrats, both in terms of resisting the Court, and in supporting the enforcement of the court’s judgments. Bureaucrats have emerged as powerful actors in an era of fragmented and weak coalition governments, and have played key roles both as allies of the Court, and as a source of resistance to judicial assertiveness. While some bureaucrats tried to resist the Court, others within the government, including the Law Commission, the Law Minister, and certain Cabinet Ministers, sought to bring the government in compliance with the Court’s decision in *Vineet Narain*. Interestingly enough, resistance to the Court’s came from within the bureaucracy in the Prime Minister’s office, while high-ranking cabinet officials (who were also Senior Advocates and lawyers) were more supportive of compliance with the Court’s directives in the case.

Finally in several of the Court’s decision and orders involving commands to the Central and state bureaucracies, the Court experienced success much later after the initiation of litigation, after the Court was able to cultivate and develop elite and/or popular support for its interventions, and/or to develop advisory support structures in the form of commissioners, high powered committees, and specialized taskforces etc. This is evident in several of the cases, including the *Vehicular Pollution case*, the *Godavarman case*, and the *Right to Food Litigation*.

Conclusion: Analyzing Broader Patterns of Assertiveness and Authority in Governance

In analyzing variation and overall patterns of the Court's assertiveness and authority, I suggest that the expanded assertiveness and authority in India can be described as shifting from two phases of assertiveness/judicial authority: consolidating institutionalism and expansive institutionalism.

Consolidating Institutionalism (1977-1989)

In the post-Emergency era (1977-1989), the Court's activism and selective assertiveness could be described as "consolidating institutionalism." This phase was characterized by a more politicized judiciary that was acutely conscious of its diminished public reputation (a result of Gandhi's court packing and of the public critique of the court's acquiescence to Emergency rule). The court was intensely concerned about rehabilitating its reputation, and gradually rebuilding its power through building support with the governing regime, intellectual elites, and the national public. To do so, the Court asserted a new rights based activism and the development of Public Interest Litigation (PIL) primarily in cases in which it took on government illegality and governance failures against bureaucratic agencies and state and local governments. At the same time, the Court "strategically retreated" in not directly confronting or challenging *Central* Government policies/actions/power largely to protect itself. While the Court succeeded in building popular support by asserting a greater role in policing and protecting human rights from local governments and in forcing the bureaucracy to enforce environmental protection laws, the justices of the Court perceived that they could only go so far because of the lack of a hospitable political opportunity structure--a dominant one-party Congress government in the 1980s that was intent on controlling and resisting the judiciary whenever it threatened that regime's political or policy priorities. As a result, the judges sought to avoid conflict with the executive and legislative branches of the Central Government. Nevertheless, in the 1980s, by attacking human rights suppression by state and local governments and bureaucracies, the Court gradually built support and authority among professional, intellectual, and political elites nationally, and helped cultivate distinct sets of "governance constituencies" who viewed the Court as their primary forum for redressing government illegality and governance failures.

"Expansive" Institutionalism (1990-2007)

In the post-1990 era, the Court's activism and heightened assertiveness/authority can be described as "expansive institutionalism." The Court continued to be conscious about its public image and its institutional role. A more favorable political opportunity structure—fragmented and weaker coalition governments and bureaucracies--allowed the court to become more aggressive in asserting and expanding rights and challenging the Central Government in rights cases. The Court reasserted itself in this phase in challenging the Central Government by taking it to task for widespread corruption that threatens to undermine the polity. The Court took over wholesale governance functions, including monitoring investigation of corruption, and asserting a policy-making and oversight function in the areas of environmental policy, human rights and development, and rationalized those interventions as necessary to save the rule of law. This included

the Court's assertion of power over judicial appointments in the *Second and Third Judges' Cases*, its intervention to monitor and oversee CBI investigations in the *Vineet Narain* case and other corruption cases, and its assertion of a Right to Information and ordering the promulgation of disclosure guidelines for legislative candidates.

Bolstered by intellectual and professional elite opinion, and public opinion, the justices of the Court now act boldly in asserting/maximizing both institutional values (consolidating control of judicial appointments and judicial administration), as well as rule of law values (fighting corruption, promoting good governance). The Court exerted a higher level of authority than the two previous periods analyzed in this study. This was because the political regimes in the post-1990 era perceived that the Court had higher levels of public support vis-à-vis the Executive and Parliament (as illustrated by elite news coverage of the Court's decisions, and news coverage of public reactions and debate within Parliament and among ministers in the Executive branch). Political regimes in this era were reluctant or unable to attack or resist the Court's assertive judicial decisions in rights and governance cases, because of public support for the Court's relative effectiveness in ameliorating governance failures, and because governance constituencies played a role in blocking or making it more difficult for the Government to attack or override the Court's decisions.

Chapter 7

Conclusion and Theoretical Implications: Elite Institutionalism and the Expansion of Judicial Power in India

Introduction

The Supreme of Court of India today is currently one of the most powerful constitutional courts in the world today (Andhyarujina 1993; Sathe 2002). The power of the Court today is a far cry from the relatively limited role of the Court during the early years of the Indian Republic. This dissertation has analyzed the dynamics by which the Indian Supreme Court expanded its role, by focusing on broader shifts in the Court's activism, assertiveness, and authority over the past four decades, since the end of the Emergency rule era.

The Court today has developed the extraordinary power to review the validity of constitutional amendments enacted by Parliament by deciding whether they accord with “the basic structure” of the Indian Constitution. The Court first asserted this power first asserted in the pre-Emergency era, and later consolidated and strengthened over the last thirty years (*see* Chapters 2-3). The Court also now controls and has final authority over judicial appointments, a power it first asserted and took over from the executive in the early 1990s (*see* Chapter 5). And through its activism, the Court has played a leading role in expanding and protecting the scope of fundamental rights and civil liberties since the post-Emergency era (*see* Chapters 3, 5).

Since the end of the Emergency rule period (1975-1977), the Court has also dramatically expanded its function as a mechanism for policing and promoting the rule of law, accountability and good governance. The Court has taken over large swaths of governance while taking the executive branch and Parliament to task for governance failures. In the mid-1990s, the Court asserted an expanded role in policing and monitoring investigation into high-level corruption in the Central and State governments, and in promoting greater levels of accountability and transparency (*see* Chapters 5 and 6). And building on its activism in the 1980s, the Court expanded its role as an institution of policymaking and governance in environmental policy, education, and human rights and development.

The path to judicial power in India was not an easy one in which the Court steadily and independently expanded the scope of its power and authority. Rather, a closer investigation of the expansion of the Court's role in Indian politics in the late 1970s and early 1980s illustrates a much more complex, nuanced story—a story of an activist but cautious and only selectively assertive Court that gradually built legitimacy and power over time

The Court accomplished this first by fighting in the pre-Emergency and Emergency periods (1967-1976) to protect its own institutional power, and indeed, its very survival as an institution. Throughout this period, the Court asserted the basic structure doctrine and limits on the constituent power of amendment in order to challenge the social-egalitarian reform agenda of Indira Gandhi's Congress Party regimes. Ultimately, the Court was forced to acquiesce to the Gandhi regime in the face of direct attacks on the court's jurisdiction. In a strategic retreat, in the *Indira Gandhi Election*

case (1976), the Court upheld the legality of Indira Gandhi's contested parliamentary election (while still reasserting the basic structure doctrine), and it upheld the constitutionality of the Emergency itself in the Habeas Corpus decision (*ADM Jabalpur v. Shiv Kant Shukla*) (1976). Finally, the chastened Court saw its power and jurisdiction dramatically curbed and limited by the Emergency regime's enactment of the 42nd Amendment (see Chapters 2 and 3).

Following the defeat of Gandhi by the Janata Party coalition in 1977, the Court sought to rebuild and restore its legitimacy and solidify its institutional strength. In *Maneka Gandhi* (1978), the Court dramatically expanded the scope of fundamental rights and of judicial review of governmental arbitrariness and illegality. In *Minerva Mills* (1980), it reasserted the basic structure doctrine in invalidating the part of the 42nd Amendment that the Janata regime had been unable to rescind. And in the 1980s, the Court expanded popular access to the Court by widening standing for public interest litigation claims against governmental illegality. At the same time, however, in the 1977-1989 era, the Court was strategically deferential to the policies of the Janata and Congress Government's (including the regimes of Indira Gandhi and her son Rajiv), particularly in high-stakes controversies concerning judicial appointments, economic and national security policies. The Court thus avoided political backlash or attacks while through its selective activism, it gradually cultivated broader support nationally among professional and intellectual elites, political elites, and "governance constituencies" (see Chapter 6). This ultimately enabled the Court to become more assertive in the post-1990 era and to exert a higher level of authority in that era of weaker Central government coalition governments.

Elite Institutionalism: An Alternative Perspective

How can one explain the expansion of the power of the Indian Supreme Court? Referencing existing public law theories, this study sought to provide an explanatory account of this shift by analyzing both the *motives* that drove judicial activism and assertiveness and the *opportunity structure* for judicial power. The interaction of these two factors have been examined through close analysis of the Court's decision-making in politically significant rights and governance decisions¹, through field interviews with retired judges, legal scholars and other experts on the Court, and through the study of news editorial coverage of these decisions.

To understand the expansion of judicial power, this dissertation has looked both *within* the Court, highlighting the sources of the judges' institutional values and policy worldviews, and *outside* the Court to understand how the broader political environment limited or facilitated the assertiveness and authority of the Court. I have argued that the Court's shift toward activism, selective assertiveness, and greater authority in rights and

¹ Per Chapter 1, I defined politically significant decisions as highly salient controversial decisions in which the Central Government had a strong stake in the outcome of the decision, and/or decisions which had a major impact on the political and constitutional system.

governance cases can most adequately be explained by the thesis of “elite institutionalism.”

According to the thesis of elite institutionalism, the unique institutional environment and intellectual atmosphere of the Court shaped the institutional perspectives and policy worldviews that drove activism and selective assertiveness in rights and governance decisions. I found that the identity of judges as members of the Supreme Court and judicial branch, and their professional alignment with the Court as an institution was a source of the judges’ values and motivations in key decisions. Indeed, much of the Court’s activism and assertiveness was driven by the judges’ desire to protect constitutionalism and fundamental rights and the Court’s role in protecting both, and later, a drive in the post-Emergency era to build popular support to bolster the Court’s legitimacy. This is in line with “historical new institutionalist” scholarship (e.g. Gillman 1993) suggests that judges may be motivated by a unique “institutional mission” that flows from their membership and identification with the judicial branch (see Gillman 1993; Keck 2008).

Elite institutionalism, however, differs from existing institutionalist theories by situating judicial decision-making within the larger intellectual milieu and context of Indian judging. I argued in this study that judges’ institutional mission or outlook/identity is a subset or part of a judges’ overall intellectual identity and worldviews, which judges tend to share with professional and intellectual elites in India. The Indian judiciary—the judges of the Indian Supreme Court and High Courts—is a microcosm of professional and intellectual elite opinion nationally. Consequently, to understand and explain the complete range and scope of judicial activism and assertiveness, one must also understand the source of judges’ policy values

In the foregoing chapters, I also analyzed editorial reaction and coverage of the Court’s decisions in the leading national newspapers of India as a “lens” into the outlook and worldviews of professional and intellectual elites, and judges, in India. I found that for the most part, elite editorial coverage aligned with and strongly supported the vast majority of the Court’s decisions in the area of fundamental rights and governance. Judges, as members of the professional and intellectual elite class, more often than not shared the policy values and views of elites on key issues involving fundamental rights and governance in India. The Court was on the “leading edge” of elite opinion on many of the crucial, politically salient issues it adjudicated. In many ways, the elite news media helps serve as a reflection of broader elite opinion.

In Chapters 3 and 5, I also traced shifts in the climate of professional and intellectual elite opinion through different eras. I suggested that the justices of the Court were part of, and influenced by broader elite “meta-regimes”—the collective values or currents of professional and intellectual elite opinion on a set of constitutional or political issues.² In the pre-Emergency period, the Court’s basic structure doctrine decisions were

² In Chapters 2, 3 and 5 of this study, I examined a combination of the justices’ own extrajudicial writings and speeches, news editorial coverage of the Court’s decisions, debates in the Lok Sabha regarding constitutional issues, and political, intellectual, and judicial conferences on constitutional issues and the judiciary as evidence supporting the influence of elite meta-regimes on the Court’s decision-making. Examples include the lecture delivered by German professor Dieter Conrad “Implied Limitations of the

shaped and influenced by a larger intellectual and political debate about the need to assert greater limits on Parliament's constituent power of amendment—a debate between the dominant meta-regime of “parliamentary supremacy” and the “constitutionalist” meta-regime.

In the post-Emergency era, 1977-1989) the Court's activism and selective assertiveness in fundamental rights and governance cases reflected the ascendance of two meta-regimes among Indian political and legal elites— “liberal democracy” and “social justice.” The Court in this era sought to bolster and consolidate liberal constitutionalism and fundamental rights, while advancing an agenda of social-egalitarian reform through the mechanism of PIL. In the post-1990 era, as India transitioned to an era of coalition governments the Court's activism and selective assertiveness in rights and governance cases reflected the national political elite's shift toward the meta-regime that emphasized “liberal reform.”³

And as illustrated in Chapters 3 and 5, structural and institutional changes within the Court—the expansion of the size of the Court from 14 in 1960, to 18 in 1986, to 26 in 1986--also created and expanded opportunities for individual judges to act on and maximize their own sincere policy values. As the Court expanded in size, judges increasingly adjudicated matters in smaller benches of 2 or 3 judges, with higher rates of unanimous decisions.

But the judges of the Indian Supreme Court were also constrained by outside forces. As illustrated in the foregoing chapters, elite institutionalism is a dynamic concept that is “nested” within the broader strategic political opportunity structure and environment that judges must consider in their decision-making processes. In the Indian case, justices acted to advance their own institutional values and elite policy worldviews in the pre and post-Emergency eras where *possible*. The external political environment—the policy preferences and “zones of tolerance” of the regime in power, and elite and public opinion--significantly shaped and constrained judicial activism and assertiveness. The Court was effectively forced into deference and submission by a hostile and threatening political environment during the Emergency rule period by Gandhi in 1975, as evidenced by the Court's accommodating decisions in the *Indira Gandhi Election Case* (1976), and the *Habeas Corpus Case (ADM Jabalpur v. Shiv Kant Shukla)* (1976). Judges' were forced to defer to the Emergency regime, because they feared that assertiveness on their part would have led to attacks that would have undermined and destroyed the Court as an institution (*see* Austin 1994; Interview with Justice Y.V. Chandrachud).

However, changes in the political opportunity structure may not only allow judges to act on and assert their own institutional and policy values, but indeed *compel* them to do so. The Court's activism and assertiveness in cases like *Maneka Gandhi* (1978), the *Special Courts Bill Case* (1978), and *Minerva Mills* (1980), was motivated by a larger

Amendment Power” in 1965, the “First Convention on the Constitution” (1967) (debating the *Golak Nath* decision and the proposed Nath Pai Bill which sought to overturn it), and the Proceedings of the First All India Indo-GDR Law Seminar on “The Role of Judiciary in Transformation of Society--India-GDR Experiments” held in Delhi January 21-23, 1983.

³ See Chapters 3 and 5.

desire to “redeem” itself for acquiescing to the emergency and to build legitimacy by demonstrating its commitment to liberal democracy, constitutionalism and fundamental rights. The broader context of the judges’ and Court’s public image and reputation was defined by elite news media coverage of the Court.

After the election of Indira Gandhi’s Congress regime to power in 1980, the Court was forced again to strategically “trim its sails” given the inhospitable political opportunity structure. Judges, therefore, were only *selectively* assertive in acting on institutional and/or policy values and challenging the political regime in power so as to preserve and protect the Court. However, as the political opportunity structure for judicial power became more hospitable in the post-1990 era, the Court was able to become more assertive in advancing the judges’ institutional and policy values in rights and governance cases, though the Court continued to be a selectively assertive Court. In this latter era, the Court’s selective assertiveness was less a reflection of the strategic political environment, and more a function of the justices’ embrace of existing legal-institutional traditions as well as a reflection of their sincere policy worldviews.

The thesis of elite institutionalism also suggests that courts will have more authority where they enjoy stronger levels of support among professional and intellectual elites (which includes the media, the Bar, and other groups), and among the national public. The national public does not necessarily closely follow the Court’s decision-making, though elites (especially the professional and intellectual elite constituencies and classes who follow the Court’s decisions through news coverage) do. Elite opinion of the court, as reflected in the media, is viewed by political elites as a proxy for general levels of public support. Political elites are less likely to take on a court that is perceived as having stronger levels of support.

Patterns of Assertiveness and Authority in the Indian Supreme Court (1967-2007)

In analyzing variation and overall patterns of the Court’s assertiveness and authority, I argue that the story of the expansion of judicial power in India can be described through the following phases of assertiveness/judicial authority.

Combative Institutionalism (1967-1976)

The pattern of judicial assertiveness and authority in the pre-Emergency era illustrated the dynamic of what might be called “combative institutionalism.” Combative institutionalism was characterized by several factors—a highly professionalized and independent judiciary, a high level of the judicial assertiveness, but low levels of judicial authority. The pre-Emergency Court did battle with the Gandhi regime by asserting the basic structure doctrine in its fight for constitutionalism and the Court’s own institutional role as a guardian of the Constitution. Influenced by their own institutional values and desire to protect the Constitution, the justices of the Court directly challenged Parliament’s supremacy and the Gandhi regime’s social-egalitarian agenda of redistribution.

The Court however enjoyed a low level of authority, in part because it did not have yet a strong level of public (as opposed to elite) support vis-à-vis a strong Gandhi Congress Government. Gandhi had racked up strong wins in the 1971 election by campaigning against the Court on a campaign of social egalitarian redistribution. As a

result, the Gandhi Government was able to attack the Court and overturn its decisions via amendments, court packing, and ultimately the declaration of an internal emergency. In the short term, the Court lost the battle because it could not overcome a very inhospitable political opportunity structure.

Consolidating Institutionalism (1977-1989)

In the post-Emergency era (1977-1989), the Court's activism and selective assertiveness could be described as "consolidating institutionalism." This phase was characterized by a more politicized judiciary that was acutely conscious of its diminished public reputation (a result of Gandhi's court packing and of the public critique of the court's acquiescence to Emergency rule). The court was intensely concerned about rehabilitating its reputation, and gradually rebuilding its power through building support with the governing regime, intellectual elites, and the national public. To do so, the Court asserted a new rights based activism and PIL, primarily in cases in which it rules against state and local governments. At the same time, the Court "strategically retreated" in not directly confronting or challenging Central Government policies/actions/power largely to protect itself. While the Court succeeded in building popular support by asserting a greater role in policing and protecting human rights from local governments and in forcing the bureaucracy to enforce environmental protection laws, the justices of the Court perceived that they could only go so far because of the lack of a hospitable political opportunity structure--a dominant one-party Congress government in the 1980s that was intent on controlling and resisting the judiciary whenever it threatened that regime's political or policy priorities.

As a result, the judges sought to avoid conflict with the executive and legislative branches of the Central Government. Nevertheless, in the 1980s, by attacking human rights suppression by state and local governments and bureaucracies, the Court gradually built support and authority among professional, intellectual, and political elites nationally, and helped cultivate distinct sets of "governance constituencies" who viewed the Court as their primary forum for redressing government illegality and governance failures.

"Expansive" Institutionalism (1990-2007)

In the post-1990 era, the Court's activism and heightened assertiveness/authority can be described as "expansive institutionalism." The Court continued to be conscious about its public image and its institutional role. A more favorable political opportunity structure—fragmented and weaker coalition governments and bureaucracies--allowed the court to become more aggressive in asserting and expanding rights and challenging the Central Government in rights cases. The Court continued to be selectively assertive, though this was largely based on the judges' embrace of the Court's own legal-institutional traditions and the justices' own policy values.

The Court reasserted itself in this phase in challenging the Central Government by taking it to task for widespread corruption that threatens to undermine the polity. The Court and basically took over wholesale governance functions with the rationale of saving the rule of law. Bolstered by intellectual and professional elite opinion, and public opinion, the justices of the Court now act boldly in asserting/maximizing both

institutional values (consolidating control of judicial appointments and judicial administration), as well as rule of law values (fighting corruption, promoting good governance). And as illustrated in Chapters 4 and 6, the Court exerted a higher level of authority than the two previous periods analyzed in this study. This was because the political regimes in the post-1990 era perceived that the Court had higher levels of public support vis-à-vis the Executive and Parliament (as illustrated by elite news coverage of the Court's decisions, and news coverage of public reactions and debate within Parliament and among ministers in the Executive branch). Political regimes in this era were reluctant to attack or resist the Court's assertive judicial decisions in rights and governance cases, because of public support for the Court's relative effectiveness in ameliorating governance failures.

Theoretical Implications and Concluding Thoughts

The thesis of elite institutionalism advanced in this study draws on insights from two key public law theories—the institutionalist and strategic models. As illustrated in this dissertation, the institutional context and environment had a profound role in shaping the Indian Court's activism and assertiveness in rights and governance cases. However, the post-Emergency Court's activity also illustrated that the strategic political context mattered as a constraint on the Court's activism and assertiveness in both the 1977-1989, and post-1990 eras. An analysis of the expansion of the role of the Indian Supreme Court suggests that institutionalist models may be “nested” within the strategic model to provide a compelling account of variation in judicial assertiveness and authority.

A key shortcoming of this hybrid of both models, however, is the failure to situate judicial decision-making within the larger intellectual and normative currents of elite opinion in India. In the pre-Emergency era, the basic structure doctrine was effectively a product of larger intellectual debate and inquiry among legal scholars and the Bar over the nature and scope of constitutionalism in India. In the post-Emergency era, the critique of the Court's acquiescence to the Emergency among political and intellectual elites helped drive and support the Court's unique activism in expanding the scope of fundamental rights, and expanding the scope of the court's role through the development of PIL. The Court's selective assertiveness in rights cases, and its assertion of an expanded role in a vast array of governance domains in the late 1980s and post-1990 era, reflected the call among professional and intellectual elites nationally for reforms and action in the areas of corruption, accountability, environmental policy, and human rights.

An analysis of the expansion of the Indian Supreme Court's role in this study highlighted the limitations of existing public law theories. The legal model, which posits that judges' largely follow precedent and seek to make good law, does not provide a compelling account for the expansion of judicial role in the Indian Supreme Court. Without question, judges of the Indian Supreme Court do seek to apply existing precedent and make good law in their decision-making. But much of the Court's activism in the basic structure cases in the 1970s, the Court's shift toward an expansive approach to constitutional interpretation in *Maneka Gandhi* (1978), and the PIL revolution reflected an abandonment of existing precedent and doctrine. In the late 1980s and post-1990 era,

subsequent benches of the Court did embrace these earlier doctrines or frameworks in subsequent cases.

However, the legal model does not offer a compelling account—either in terms of judicial motive or opportunity structure—of the Court’s shift toward greater activism and selective assertiveness in the time periods studied in this dissertation. First, the pure legal model fails to account for the influence of the larger institutional context on judging. Justices often subordinated legal precedent in order to advance their own institutional values, as illustrated in the basic structure cases. Second, the legal model fails to account for the influence of the justices’ own sincere policy values. In governance cases, the Court often based its decision-making mainly on the judges’ own policy preferences and views on issues. In addition, the legal model fails to account for the selective assertiveness and variable authority of the Court in the time period studied here, because it fails to address the strategic political environment or context of judging. The attitudinal model offers important insights on judicial decision-making in India, given that the elite policy values of judges did play a significant role in the Court’s activism and selective assertiveness in rights and governance decisions. But like the legal model, the attitudinal model does not account for the influence of the institutional context and worldviews, nor does it account for the influence of the strategic political context.

Revisiting the Regime Politics Model?

According to the “regime politics” model that has dominated the public law literature in recent decades, judges act to advance the policy agenda of the regime in power, the political leaders who appointed them, or in line with a broader consensus of public opinion. This model does appear to provide a partial explanatory account of the Court’s post-Emergency activism. The Court endorsed and advanced the agenda of the Janata party following the 1977 elections, supporting a purge of the Emergency and restoration of liberal democracy in a series of decisions (as evidenced by the Court’s decisions in the *Special Courts Bill*, *Maneka Gandhi*, and *Minerva Mills* cases, which effectively condemned the Emergency and bolstered fundamental rights and liberal democracy). And the Court arguably advanced the social agenda of Indira Gandhi by supporting the development and expansion of PIL in the 1980s.

However, the Court in the pre-Emergency period (1967-1973) was anything but a regime court—it challenged the regime based on the justices’ own institutional worldviews and values in asserting the basic structure doctrine. And the post-Emergency Court’s activism and selective support of Central Government policies and actions was driven by the judges’ desire to build public support, and bolster the Court’s institutional solidity and legitimacy. Finally, in the post-1990 era, the Court’s direct challenges to the Government in some areas of rights and governance did not necessarily reflect regime agendas or national public opinion. Rather, the Court’s assertiveness reflected the justices’ own institutional values and elite policy worldviews, and of the broader meta-regime of “liberal reform.”

This highlights a fundamental problem with the regime politics model—namely that it’s not entirely clear what constitutes the “regime” at any given time in a polity. The thesis of elite institutionalism advanced in this study suggests an alternate conception of

the regime—the “metaregime”—which refers to the broader consensus of professional and intellectual elite opinion on given issues or policies, of which judicial worldviews are a subset. Given the specialized nature of constitutional law and legal processes, elite institutionalism offers a more nuanced conception of the regime that accounts for the realities of the institutional and intellectual context of judging.

Conclusion: Elite Institutionalism and the Countermajoritarian Dilemma

This dissertation illustrated why elite institutionalism offers a compelling, alternate account of the expansion of judicial role in India. I demonstrated that the Court’s shift toward activism and selective assertiveness from 1967 to 2007 reflected the judges’ own institutional values, identity, and alignment with the Court as an institution, as well as their own elite policy values and worldviews. The Court, across the three time periods analyzed in this study, consistently sought to bolster and consolidate its institutional solidity, and in the post-Emergency period, to enhance its legitimacy, by asserting its role as a protector of constitutionalism, fundamental rights, and the rule of law. I argued however, that the judges’ own institutional values and beliefs were but a subset of their larger elite policy worldviews, and that judicial decisions were also a reflection of the broader “meta-regimes” of elite opinion. However, the Court’s activism and selective assertiveness in the post-Emergency era illustrated that strategic political considerations tempered the Court’s assertiveness in this era.

I suggest that this study of the expansion of judicial power in India reveals a critical insight about institutionalism: the assertiveness of the Indian Supreme Court’s in challenging Central Government did not necessarily reflect a “counter-majoritarian” judiciary. Rather, the judges’ activism and selective assertiveness was a product of the judges’ own institutional and elite policy worldviews. In some decisions, judges’ worldviews were in alignment with those of the political regime in power; in others, they were in opposition to the regime. Elite institutionalism suggests that judicial activism and assertiveness in courts around the world need not be viewed through the narrow lens of the countermajoritarian versus majoritarian debate regarding role of courts. Rather, I contend that the roots of judicial activism and assertiveness can be better understood by looking to the institutional context, and professional and intellectual elite atmosphere of judicial decision-making in courts around the world.

Works Cited

- Atiyah, P. and R. Summers. 1987. *Form and Substance in Anglo-American law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions*. Oxford: Clarendon Press.
- Advani, Poornima. 1994. Justice P.N. Bhagwati,” in Poornima Advani, *Indian Judiciary: A Tribute* (Harper Collins, New Delhi 1994)
- Andhyarujina, T.R. 1992 *Judicial Activism and Constitutional Democracy in India* Bombay: N.M. Tripathi.
- Austin, Granville. 1966. *The Indian Constitution: Cornerstone of a Nation*. Oxford: Clarendon Press.
- _____. 1999. *Working a Democratic Constitution: A History of the Indian Experience*. New Delhi, Oxford Univ. Press.
- Baxi, Upendra. 1978. “Some Reflections on the Nature of Constituent Power” in Jacob et al, eds. *Indian Constitution, Trends and Issues*.
- _____. 1974. The Constitutional Quicksands of Kesavananda Bharati and the Twenty-Fifth Amendment. (1974) 1 SCC (Journal) 45.
- _____. 1980. *The Indian Supreme Court and Politics*. Delhi: Eastern Book Company.
- _____. 1984. *Courage, Craft and Contention: The Indian Supreme Court in the Eighties*. Bombay: N.M. Tripathi.
- _____. 1985. “Taking Suffering Seriously—Social Action Litigation in the Supreme Court of India,” in R. Dhavan, et al. (eds) *Judges and the Judicial Power: Essays in Honor of Justice V.R. Krishna Iyer* (London: Sweet and Maxwell; Bombay: N.M. Tripathi).
- Baum, Laurence. 2006. *Judges and Their Audiences: A Perspective on Judicial Behavior*. Princeton: Princeton University Press.
- Beller, Gerald. 1983. “Benevolent Illusions in a Developing Society: The Assertion of Supreme Court Authority in Democratic India,” *The Western Political Quarterly* 36(4): 513-532 (Dec. 1983).
- Chhibber, Pradeep and Ken Kollman. 2005. *The Formation of National Party Systems: Federalism and Party Competition in Canada, Great Britain, India, and the United States*. Princeton: Princeton Univ. Press.
- Clayton, Cornell. 2007. “The Supreme Court and the Political Regime: The Role of the Supreme Court in American Democracy.” Paper presented at the symposium, “Seeking a Democratic Foundation for the Judiciary: Judicial Politics and Judicial Philosophy in the U.S.,” Kyoto University, March 17-18, 2007.

- Conrad, D. 1970. "Limitation of Amendment Procedures and the Constituent Power"; *Indian Year Book of International Affairs*, 1966-1967, Madras, pp. 375-430.
- Cooter, Robert D., and Tom Ginsburg. 1996. Comparative Judicial Discretion: An Empirical Test of Economic Models. *International Review of Law and Economics* 16 (3): 295-313.
- Cunningham, Clark D. 1987. 'Public Interest Litigation in the Indian Supreme Court: A study in the light of American experience', 29 *Journal of Indian Law Institute* 494
- Dahl, Robert. 1957. "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker." *Journal of Public Law* VI (2): 279-295.
- Das, Gobind. 2000. "The Supreme Court: An Overview," in B.N. Kirpal et al, eds. *Supreme But Not Infallible: Essays In Honour Of The Supreme Court Of India* 288 .New Delhi: Oxford Univ. Press.
- Desai, D.A. 1984. *Role of Law and Judiciary in Transformation of Society: India-GDR experiments*. New Delhi: Kalamkar Prakashan.
- Desai, Ashok, and S. Muralidhar. 2000. "Public Interest Litigation: Potential and Problems," in B.N. Kirpal et al., eds., *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India*. New Delhi: Oxford Univ. Press: 163.
- Denoon, David. 1998. "Cycles in Indian Economic Liberalization." *Comparative Politics*. Vol. 31 (1): 43-60.
- Dhavan, Rajeev. 1977. *The Supreme Court of India: A Socio-legal Critique of its Juristic Techniques*. Bombay: N.M Tripathi.
- _____. 1976. *The Supreme Court of India and Parliamentary Sovereignty: A Critique of its Approach to the Recent Constitutional Crisis*. New Delhi: Sterling Publishers.
- _____. 1994. "Law as Struggle: Public Interest Law in India," *Journal of the Indian Law Institute* 36: 302-328.
- _____. 2000. "Judges and Indian Democracy," in Francine Frankel et al. eds. *Transforming India*. Delhi: Oxford Univ. Press.
- _____. 2008. *Reserved!: How Parliament Debated Reservations 1995-2007*. New Delhi: Rupa
- Divan, Shyam, Armen Rosencrantz, eds. 2001.. *Environmental Law and Policy in India: Cases, Materials and Statutes*. New Delhi: Oxford Univ. Press 2001.
- Dua, Bhagwan, D. 1983. "A Study in Executive-Judicial Conflict," *Asian Survey* 23(4): 463-483 (1983).

Epp, Charles. 1998. *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press).

Epstein, Lee. & Jack Knight. 1998. *The Choices Judges Make*. Washington DC: Congressional Quarterly Press.

Epstein Lee Epstein, Jack Knight, Olga Shvetsova. 2001. The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government. *Law & Society Review* 35 (1):117-164.

Gadbois Jr., George H. 1968. "Indian Supreme Court Judges: A Portrait," *Law and Society Review*, Vol, 3, No. 2/3: 317-336.

Gajendragadkar, P.B. 1972. *The Indian Parliament and Fundamental Rights* (Calcutta: Eastern Law House).

Galanter, Mark. 1984. *Competing Equalities: Law and the Backward Classes in India*. Berkeley: University of California Press.

_____. *Law and Society in Modern India*. 1989. Oxford: Oxford Univ Press.

Galanter, Mark, and Jayanth Krishnan. 2004. Bread for the Poor: Access to Justice and the Rights of the Needy in India, *Hastings Law Journal* 55: 789.

Gibson, James L., Caldeira, Gregory A., and Baird, Vanessa A. 1998. "On the Legitimacy of National High Courts." *American Political Science Review* 92(2): 343-358.

Gibson, James L., Gregory A. Caldeira, and Lester Kenyatta Spence. 2003a. "Measuring Attitudes toward the United States Supreme Court." *American Journal of Political Science* 47(2): 354-67.

_____. 2003b. "The Supreme Court and the Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?" *British Journal of Political Science* 33(4): 535-56.

Gillman, Howard. 1993. *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence*.

_____. 1999. Gillman, Howard, and Cornell Clayton. 1999. *The Supreme Court in American Politics: New Institutional Interpretations*. (Lawrence: University Press of Kansas).

_____. 2002. "How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States 1875-1891." *American Political Science Review* 96: 511-524 (2002).

- Ginsburg, Tom. 2003. *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*. Cambridge, Cambridge University Press.
- Graber, Mark A. 1993. "The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary." *Studies in American Political Development* 7: 35.
- _____. 2003. "Establishing Judicial Review: Marbury and the Judicial Act of 1789," 38 *Tulsa L.J.* 609
- _____. 2005. "Constructing Judicial Review." *Annual Review of Political Science* 8: 425-51.
- Halliday, Terence, Lucien Karpik, and Malcolm M. Feeley. 2007. "The Legal Complex and Struggles for Political Liberalism," in Halliday et al. *Fighting for Political Freedom: Comparative Studies of the Legal Complex and Political Liberalism*
- Helmke, Gretchen. 2005. *Courts under Constraints: Judges, generals, and presidents in Argentina*. Cambridge: Cambridge Univ. Press.
- Iyer, V.R. Krishna, and Bhagwati, P.N. 1977. *Report on National Juridicare: Equal Justice-Social Justice*. Government of India, Ministry of Law, Justice and Company Affairs.
- Jacobsohn, Gary. 2003. *The Wheel of Law*. Princeton: Princeton Univ. Press.
- Kagan, Robert A. 2001. *Adversarial Legalism: The American Way of Law*. Cambridge,: Harvard Univ. Press.
- Kagan, Robert A., B. Cartwright, L.M. Friedman, S. Wheeler. 1978. "The Evolution of State Supreme Courts." *Michigan Law Review* 76(6): 961-1005.
- Karat, Prakash. 2003. "Supreme Court in Liberalised Times". *Countercurrents*. August 9, 2003.
- Kommers, Donald. 1994. "The Federal Constitutional Court in the German Political System." *Comparative Political Studies* 26(4): 470.
- Kapiszewski, Diana. 2007. *Challenging Decisions: High Courts and Economic Governance in Argentina and Brazil*. PhD Dissertation, Political Science, University of California, Berkeley.
- Keck, Thomas A. 2007a. "Party Politics or Judicial Independence? The Regime Politics Literature Hits the Law Schools." *Law and Social Inquiry* 32(2): 511-544 (Spring 2007).
- _____. 2007b. "Party Policy, or Duty: Why does the Supreme Court Invalidate Federal Statutes?" *American Political Science Review* 101(2): 321 (May 2007).

Kmiec, Keenan D., *The Origin and Current Meanings of "Judicial Activism"*, 92 Calif Law Rev. 1441 at pp. 1444-50 (2004),

Kochanek, Stanley. 1986. "Regulation and Liberalization Theology," Asian Survey, 26(12) 1284 at 1286 (1986).]

Kohli, Atul. 1988. State-Society Relations in India's Changing Democracy," in Kohli, A. ed. *India's Democracy* (Princeton, N.J.: Princeton Univ. Press, 1988)

Kothari, Rajni. 1995. "Interpreting Indian Politics: A Personal Statement," in U. Baxi and Parikh (eds). *Crisis and Change in Contemporary India*. New Delhi: Sage Publications.

Krishnan, Jayanth K., "Lawyering for a cause and experiences from abroad", 94 *California Law Review* 575 (March 2006)

Limaye, Madhu. 1994. *Janata Party Experiment: An Insider's Account of Opposition Politics: 1975-1977*, Vols. 1 and 2.

Madhava Menon, N.R. 1982. "Public Interest Litigation: A major breakthrough in the delivery of social justice", *Journal of Bar Council of India* 9: 150

Mate, Manoj. 2010. "The Origins of Due Process in India: The Role of Borrowing in Personal Liberty and Preventive Detention Cases." *Berkeley Journal of International Law* 28: 216.

Mendolsohn, Oliver. 2000. The Supreme Court as the Most Trusted Public Institution in India, *Journal of South Asian Studies*

Merillat, H.C.L. 1970. *Land and the Constitution in India*. New York: Columbia Univ. Press.

Migdal, Joel. 1988. *Strong Societies and Weak States*. Princeton: Princeton Univ. Press.

Muralidhar, S. 1998. "India: Public Interest Litigation Survey 1997-1998". *Annual Survey of Indian Law* 525 (33-34).

Noorani, A.G. 1982. *Public Law in India*. New Delhi: Vikas Publishing House.
_____. 2001. "Behind the Basic Structure Doctrine," *Frontline*, Volume 18 - Issue 09, Apr. 28 - May 11, 2001

Palkhivala, N. 1971. "Defend the Constitution and Protect the Common Man." *Swarajya*, Annual Number.

Moog, Robert. 1998a. "Elite-Court Relations in India: An Unsatisfactory Arrangement," 38 Asian Survey 38(4) (1998): 420-423

- _____. 1998b. "Activism on the Indian Supreme Court", *Judicature* 82(3):124.
- _____. Moog, Robert. 2002. "Judicial Activism in the Cause of Judicial Independence," *Judicature* 85(6): 268 (May-June 2002).
- Neuborne, Burt. "The Supreme Court of India", *Int'l. Journal of Constitutional Law* 2003 1: 476-510
- Robinson, Nick. 2009. Expanding Judiciaries: India and the Rise of the Good Governance Court, *Washington University Global Studies Law Review* 8(1): 1
- Rosencranz, Armin & Michael Jackson, "The Delhi Pollution case: The Supreme Court of India and the limits of judicial power", 28 *Columbia Journal of Environmental Law* 223 (2003)
- Rudolph, Lloyd I., and Susanne Rudolph. 2001. "Redoing the Constitutional Design: From an Interventionist to a Regulatory State, in *The Success of India's Democracy*, Atul Kohli, ed. Cambridge: Cambridge Univ. Press.
- Sabharwal, Y.K. 2006. "Meeting the Challenge of Terrorism-Indian Model (Experiments in India), available at http://www.supremecourtfindia.nic.in/new_links/Terrorism%20paper.doc.
- Seal, A. 1971. *The Emergence of Indian Nationalism: Competition and Collaboration in the Later Nineteenth Century*. Cambridge: Cambridge Univ. Press.
- Segal, Jeffrey A., and Harold J. Spaeth. 1993. *The Supreme Court and the Attitudinal Model*. New York: Cambridge University Press.
- _____. 2002. *The Supreme Court and the Attitudinal Model Revisited*. New York: Cambridge University Press.
- Shapiro, Martin. 1981. *Courts: A Comparative and Political Analysis*. Oxford Univ Press.
- _____. 2002. "The Success of Judicial Review and Democracy", in Martin Shapiro and Alec Stone Sweet, *On Law, Politics, & Judicialization*, London: Oxford (2002), 150 at 163-164
- Sathe, S.P. 2002. *Judicial Activism in India: Transgressing Borders and Enforcing Limits*. New Delhi: Oxford Univ. Press.
- Seervai, H.M. 1991 *Constitutional Law of India*, Vol. 2, 3rd ed. at 2635; see _____ . 1973. Fundamental Rights Case at the Crossroads, LXXV *Bombay Law Reporter (Jour.)* 47 (1973)
- Shourie, Arun. 1978. *Symptoms of Fascism*. New Delhi: Vikas Publishers.

Singh, M.P. 2001. "Bridging Legal Traditions" in *Frontline*, Volume 18 - Issue 18, Sep. 01 - 14, 2001

Singh, Ujjwal. 2004. "POTA and Federalism" 39 *Economic and Political Weekly* 1793-1797.

_____. 2007. *The State, Democracy, and Anti-Terror Laws in India*. New Delhi: Sage Publications.

Smith, Rogers. 1988 Political Jurisprudence, The New Institutionalism, and the Future of Public Law. *American Political Science Review* 82(1): 89-108.

Spevack, E. 1997. "American pressures on the German constitutional tradition: Basic Rights in the West German constitution of 1949." *International Journal of Politics, Culture, and Society* 10 (3).

Sood, Avani Mehta. 2008. "Gender Justice through Public Interest Litigation: Case studies from India" ,*Vanderbilt Journal of Transnational Law* 41: 833 (May 2008)

Staton, Jeffrey K. 2002. *Judicial Decision-Making and Public Authority Compliance: The Role of Public Support in the Mexican Separation of Powers System*. Ph.D. diss., Washington University, St. Louis.

_____. 2006. "Constitutional Review and the Selective Promotion of Case Results." *American Journal of Political Science* 50(1): 98–112.

Staton, Jeffrey K. and Georg Vanberg. 2008. "The Value of Vagueness: Delegation, Defiance, and Judicial Opinions." *American Journal of Political Science*, 52(3): 504–519.

Subba Rao, K. 1967. "Freedoms in Free India." Speech at Nagpur University College of Law, September 23, 1967. AIR (1968) Journal Section: 21.

_____. 1971. "Can Parliament Change?" *Motherland*. July 26, 1971.

Tate, C. Neal and T. Vallinder. 1995. *The Global Expansion of Judicial Power*. New York: New York Univ Press.

Tendulkar, Suresh and T.A. Bhavani. 2007. *Understanding Reforms: Post-1991 India*. New Delhi: Oxford Univ. Press.

Tushnet, Mark. 1999. "Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration," *Harvard Law Review* 113:29.

Verma, Justice J.S. 1997. 'The Constitutional Obligation of the Judiciary – R.C. Ghiya Memorial Lecture', (1997) 7 *Supreme Court Cases* (Journal section), p. 1

Wheeler, S., B. Cartwright, R.A. Kagan, L.M. Friedman. 1987. "Do the Haves Come Out

Ahead Winning or Losing in State Supreme Courts: 1870-1970.” *Law and Society Review* 21: 403.

Whittington, Keith. 2005. “Interpose Your Friendly Hand: Political Supports for the Exercise of Judicial Review by the United States Supreme Court.” *American Political Science Review* 99:4-38.

_____. 2000. “Once More Unto the Breach: PostBehavioralist Approaches to Judicial Politics,” *Law & Social Inquiry* (2000), 601-632.

Appendix A: Analysis of Data from Overall Sample of Politically Significant Judicial Decisions in the Supreme Court of India: 1977-2007

Characteristics of the Overall Sample

This section examines the types cases present in the overall sample, and distinguishes the profile of the overall sample from the profile of the total number of reported decisions. The Indian Supreme Court decides tens of thousands of cases each year (*see* Epp 1994, 90). Because it lacks case selecting discretion, the Court's caseload has dramatically increased since 1950. Between 1950 and 1960, the Court decided an average of 2113 cases per year (Supreme Court Annual Report 2006-2007, 74-76). By comparison, the Court decided an average of 46,705 cases between 1996 and 2006 (*Id.*). Because the Court lacks cases selection discretion, the number of cases in "pendency" (cases that the Court is unable to decide) has also dramatically expanded.¹ Only a small percentage of the Supreme Court's decisions are published/reported in the official Supreme Court reporters.

The decisions in the overall sample are drawn from the universe of reported decisions contained in *Supreme Court Cases Online* ("SCC Online"), the largest database of published Supreme Court decisions available in India.² In his study of the Supreme Court, Epp (1994) distinguished between the Court's "routine agenda" which refers to the tens of thousands of unpublished decisions, and the "public agenda" of decisions published in the law reports. Within the SCC Online database, there are 28,111 decisions. The vast majority of these decisions involved appeals (24,212 cases or 86% of the total). A much smaller percentage of cases reach the court through writ petitions filed directly with the Court. Only 1,321 cases or roughly 4.5 % of the reported decisions were filed as Article 32 writ petitions (fundamental rights). An even smaller number of reported decisions were filed as public interest litigation cases ("PILs")—only 540 decisions, or 2 percent of the total reported decisions of the Court.

Like many high courts, a significant percentage of decisions decided by the Indian Supreme Court involve routine appellate matters, such as criminal and civil cases, that do not implicate politically controversial issues. Out of the approximately 28,111 reported Supreme Court decisions in the 1977-2007 period, only 4 percent involved fundamental rights matters brought directly to the Court under Article 32 writ jurisdiction (*see* Table 3.2). An even smaller—less than 2 percent—were filed as public interest litigation (PIL) suits.³

¹ The number of pending cases was 690 in 1950, 2,656 in 1960, to 8,653 in 1970, 37,851 in 1980, and 109,277 in 1990. This data is from the "Statement of Institution, Disposal, and Pendency of Cases in the supreme Court of India from 1950 to 12.13.2006" that was provided to me by the Registrar of the Supreme Court of India in February 2007.

² I assume that all politically controversial decisions of the Indian Supreme Court are contained within the "public agenda." This assumption is informed by and based on my interviews with leading Senior Advocates of the Supreme Court of India (SA-1, SA-2, SA-4, SA-6).

³ The distinction between Article 32 writ jurisdiction and PIL cases is a bit tenuous. Article 32 cases involved cases in which a party filed a writ where that party's own fundamental rights were implicated. PIL matters are also brought under Article 32, but by third parties in the public interest.

Table A-1: Legal Proceeding Classification, Reported Supreme Court Decisions (1977-2007)

Procedure	Total	Percentage
Appeals	24487	86%
Article 32	1568	4%
PIL	534	2%
Original Jurisdiction	675	2%
Other	847	6%

(Source: SCC Online, Eastern Book Company, New Delhi: India (2007)).

In contrast, cases filed under Article 32 and PIL constituted a much larger percentage of the cases in the overall sample, while appellate matters only comprised 19.5 percent of the overall sample (see Table 3.3 on page 28). Most of the cases in the overall sample did *not* involve appellate matters involving routine criminal or civil matters, but involved suits brought *directly* to the Court either under Article 32 or via the Court’s original or advisory jurisdiction. An additional 6.5 percent of the cases consisted of original jurisdiction or advisory jurisdiction matters. In total, roughly 80 percent of the reported decisions involved non-appellate matters brought directly to the Supreme Court, compared to roughly 20 percent for appellate. This breakdown is nearly the mirror image of the public agenda and reveals an important insight about the overall sample of politically significant decisions: unlike the universe of reported decisions, most politically significant decisions in the overall sample involve cases of first impression, not appeals.

Table A-2: Legal Proceeding Classification of Decisions in “Overall Sample” (1977-2007)

Procedure	Total (n=93)	Percentage
PIL	39	42%
Article 32	27	29%
Appeal/Transfer/SLP	13	14 %
Original Jurisdiction/ Other	14	15 %

Let us now examine the various categories of decisions within the overall sample. Appendix 2 is a spreadsheet summarizing the 93 most politically significant decisions decided by the Court in the post-Emergency era within the overall sample (not appended to this chapter). This sample captures the wide range of politically salient policies/issues that the Indian Supreme Court has adjudicated in the post-Emergency period. Table 3.4 on page 29 summarizes the various categories of decisions in the overall sample, and by type of legal proceeding. Significantly, the two largest categories within the overall sample were fundamental rights decisions involving a challenge to the validity of government policies or actions, and governance cases in which the Court asserted a policy-making or governance role, compelling government actors or agencies to act. The category “fundamental rights” captures a broad array of issue areas, including national security, economic policy, free speech and civil liberties. The category “governance” covers Court intervention in several issue areas: judicial appointments and administration, corruption, environmental policy, and educational policy. The decisions within the governance group were unique from the other categories in that the Court

assumed policy-making functions and/or and compelled government actors to take specified actions.

Table A-3: Characteristics of Overall Sample of Politically Significant Decisions: 1977-2007

Case Type	Legal Proceeding								Total	Percentage
	Appeal/ Transfer from Lower Court		Article 32		PIL		Original/Advisory/ Other			
	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%		
Rights	4	17%	12	33%	14	39%	6	11%	36	42%
Governance	1	4%	2	9%	18	78%	2	9%	23	26%
Aff Action			7	80%	2	20%	1	10%	10	12%
Federalism	2	28.5%	2	28.5%	1	14%	2	28.5%	7	8%
Religion	2	50%	0	0	0	0	2	50%	4	4%
Elections	1	25%	1	25%	1	25%	1	25%	4	4%
Pol Ques.	1	33%	1	33%	1	33%			3	4%
Corruption (State)			1	33%	2	67%			3	4%
Other (State)	2	67%	1	33%					3	4%
Totals	13	16%	27	30%	39	42%	14	15%	93	100%

The presence of a large number of fundamental rights and governance cases in the total sample was not surprising. These two groupings accounted for roughly 62 percent of the overall sample: there were 36 fundamental rights cases (39% of the overall sample) and 22 governance cases (23% of the overall sample) in the sample.⁴ In addition, there were 10 affirmative action cases (10% of the overall sample), 7 federalism cases (8 percent), 4 Religion cases, and 3 “Political Question” cases.

⁴ These numbers are consistent with existing scholarship on the Indian Court, which has highlighted both the activist turn in fundamental rights jurisprudence, as well as the expansion of standing (through an activist interpretation of Article 32), to allow for public interest litigation claims against governance failures and government arbitrariness (see Baxi 1985; Sathe 2002).

Supreme Court Assertiveness in Overall Sample

This section analyzes the Court’s assertiveness in the overall sample of decisions. Earlier in this chapter, I defined assertiveness as “the degree to which courts challenge the validity of legislation and executive orders and other policies, *and* the extent to which the Court takes over policy-making or governance functions” (*see* pages 4-5 for discussion). Table 3.6 (on page 24) summarizes the Court’s assertiveness in the overall sample. Out of the 93 cases in the overall sample, the Court challenged or compelled⁵ the Central Government in 46 cases (49 % of the overall sample) and endorsed Central Government policies or action in 35 cases (38%). Only a small number of decisions involving challenges to state governments were politically significant and included in the overall sample: the Court challenged or compelled state governments only in 9 cases (11%), and deferred to state governments only in 3 cases. Again, this overall sample is but a small subset of the decisions, given that I excluded decisions involving challenges to state governments that were not politically salient at the *national* level.

Table A-4: Supreme Court Assertiveness in Politically Significant Decisions (Overall Sample): 1977-2007

Level of Assertiveness	Total	Subtotal of Decisions (Central Government)	Subtotal of Decisions (Central Government) 1977-1989 (n=21)	Subtotal of Decisions (Central Government) 1990-2007 (n=59)
Challenge or Compel (Central or Central and State)	46 (49%)	46 (54%)	8 (36%)	38 (66%)
Endorse (Central or Central and State)	35 (38%)	35 (46%)	14 (64%)	21 (34%)
Challenge (state only)	9 (10%)			
Endorse (state only)	3 (3%)			
	93	81	22	59

Excluding cases involving challenges to state and/or local governments, the Court challenged and/or the Central Government in 46 out of 51 decisions (or 54% of the total). In analyzing the Court’s assertiveness by time period, I find that the Court has become more assertive in the post-1990 era. In the period from 1977 to 1989 (the “pre-1990 period”), the Court challenged the Central Government in only 8 out of 22 decisions (36%), and endorsed the Central Government in 14 out of 22 decisions (64%). However, in the post-1990 period, the Court challenged the Central government in 38 out of 59 decisions (66%), and deferred to the Central Government in 21 decisions (34%). This dramatic increase in the Court’s assertiveness can be attributed to the Court’s expanded role in governance in the post-1990 period. As illustrated in Chapters 5 and 6, the Court was highly assertive in assuming policymaking and oversight functions in these cases.

Although there are few benchmarks in the public law literature on measuring or gauging levels of judicial assertiveness, I suggest that these percentages demonstrate that the Indian Court has been highly assertive in challenging the Central government in the post-Emergency period. Previous scholarship examining high court assertiveness in the United States and other countries suggests that high courts generally tilt toward deference to government actions and policies. Wheeler et al. (1987) found that the government had

⁵ I use the term compel to describe the Court’s issuance of directives or orders (usually through the power of mandamus under Article 32) to force the government to take specified actions in cases.

a high success rate of 60.2% in state supreme court decisions (combining state victory as both appellant and respondent), and this was higher than comparable rates for businesses and individuals. Government actors tend to have high win rates because legal doctrine usually requires some degree of deference to them, and because the government as a repeat player tends to settle most losing cases (see Galanter 1974; Wheeler et al 1987).

These findings of high levels of activism and assertiveness are also consistent with earlier scholarship on the Indian Court. Galanter (1984) documented the Court's activism and assertiveness in challenging state affirmative action policies between 1950 and the late 1970s. Dhavan (1977) highlighted the activism of the Court's decisions in the area of property rights in the pre-Emergency period, and the shift toward a rights-based activism in the post *Golak Nath* (1967) era, in which the Court openly challenged the political power of the Government through the assertion of the basic structure doctrine. Similarly, Baxi (1980, 1983), Sathe (2002), and Jacobsohn (2003) all analyzed the Court's shift toward activism in the post-Emergency period (from 1977 onward).

