

Note

Colonial Cousins: Explaining India and Canada’s Unwritten Constitutional Principles

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I. INTRODUCTION

The annals of psychological research are replete with studies of twins who, despite being separated at birth, grow up into adults with similar personalities.¹ An observer of the supreme courts of Canada and India might be forgiven for thinking that these two courts are also long lost siblings, for in the last forty years, each has independently developed an unwritten constitutional jurisprudence that bears a striking resemblance to that of the other.

There is at least a trio of similarities between the “unwritten constitutional principles” that the Supreme Court of Canada has been articulating in recent years, and the “basic structure doctrine” that has been expounded by the Supreme Court of India since the early 1970s.

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1. See, e.g., Thomas J. Bouchard, Jr., *Twin Studies of Behavior: New and Old Findings*, in *NEW ASPECTS OF HUMAN ETHOLOGY* 121, 121-40 (Alain Schmitt et al. eds., 1997).

First, there are methodological similarities in how each court has developed its unwritten constitutional jurisprudence. For the most part, the two courts have divined unwritten principles from the structure of the written constitution, though both courts are sufficiently catholic to use other interpretive methods as well.²

Second, there are the similarities between the principles themselves. While the Supreme Court of Canada has anointed (1) the rule of law,³ (2) federalism,⁴ (3) democracy,⁵ (4) respect for minorities,⁶ (5) judicial independence,⁷ and (6) the separation of powers as Canada's unwritten constitutional principles,⁸ the Supreme Court of India has determined the "basic structure" of the Indian Constitution to include the unwritten principles of (1) the rule of law,⁹ (2) federalism,¹⁰ (3) democracy,¹¹ (4) secularism,¹² and (5) judicial independence.¹³

Third, there are similarities in the way that the supreme courts of India and Canada have applied the unwritten principles. Not only have both courts used the unwritten principles listed above as a basis for striking down legislation, they have also used the unwritten principles in cases relating to the *amendment* and the *amendability* of the constitutional text.¹⁴

The similarities between the two countries' jurisprudence are especially striking since it appears that the Indian and Canadian courts each came up with their principles independently.¹⁵ In biology, the independent evolution of

2. Mark D. Walters, *The Common Law Constitution in Canada: Return of Lex Non Scripta as Fundamental Law*, 51 U. TORONTO L.J. 91, 98 (2001) (contrasting the "text-emergent" unwritten principles, which the Supreme Court of Canada has announced using structural techniques of interpretation, from the "free-standing" unwritten principles that are "exterior" to the constitutional text).

3. See, e.g., Reference re Secession of Quebec (*Quebec Secession Reference*), [1998] 2 S.C.R. 217.

4. See, e.g., *id.*

5. See, e.g., *id.*

6. See, e.g., *id.*

7. See, e.g., Reference re Remuneration of Judges (*Provincial Judges Reference*), [1997] 3 S.C.R. 3.

8. See, e.g., *id.*

9. See, e.g., *Kesavananda Bharati v. State of Kerala*, A.I.R. 1973 S.C. 1461, 1899, 1900 (Khanna J.).

10. See, e.g., *id.*

11. See, e.g., *id.* at 1860.

12. See, e.g., *id.* Secularism in the Indian context arguably plays the same role as respect for minorities in India, given the main cleavages in Indian society are intra- and inter-religious.

13. See, e.g., *id.* at 1895. Proportionality as the *Grundnorm* for the constitutional adjudication of civil and political rights claims against the state is another "unwritten principle" the two countries share in common, but for reasons discussed below, it does not meet the selection criteria for this study. Compare *State of Madras v. V.G. Row*, A.I.R. 1952 S.C. 196 (establishing a four-factor proportionality test to determine whether violations of constitutional rights are justifiable), with *R. v. Oakes*, [1986] 1 S.C.R. 103 (establishing an almost identical four-factor proportionality test in Canada, for the same purposes).

14. Compare Reference re Secession of Quebec (*Quebec Secession Reference*), [1998] 2 S.C.R. 217 (holding, in part, that Canada's unwritten constitutional principles require that the separation of a province be effected via a constitutional amendment), with *Kesavananda Bharati*, A.I.R. 1973 S.C. 1461 (holding that the "basic structure" of the Indian Constitution cannot be amended).

15. While the Supreme Court of India cites to the Canadian "Implied Bill of Rights" jurisprudence in *Kesavananda Bharati*, see *infra* Section III.C, none of the Indian cases analyzed in this Note cite to Canadian cases decided following the enactment of the Canadian Charter of Rights and Freedoms in 1982. Similarly, none of the Canadian cases discussed in Part II, *infra*, cites to an Indian case, and only one article in the LexisNexis database of Canadian law journals cites to any of the Indian

similar features in different species might count as evidence of that feature's optimality.¹⁶ The independent evolution of unwritten constitutional principles in Canada and India, however, has simply led to the independent development of a strikingly similar critical literature in both countries, which denounces this unwritten jurisprudence as opportunistic, illegitimate, and unprincipled.¹⁷

For all the sound and fury, the existing literature provides no account of why the Indian and Canadian courts are propounding these principles, or why the two sets of principles are so similar. This Note seeks to fill this gap by explaining why the supreme courts of India and Canada have developed an unwritten constitutional jurisprudence in the first place, while simultaneously exposing the differences between principles that seem so similar on the surface. In so doing, I will make three core analytical claims.

My first contention is that the development of an unwritten constitutional jurisprudence by the supreme courts of Canada and India in the last forty years is hardly surprising, for this is simply what all constitutional courts do when faced with the challenge of interpreting a new constitutional text. I will show this by reference to the early jurisprudence of the Supreme Court of the United States, which demonstrates how new constitutional texts require the articulation of unwritten principles to flesh them out.

I also contend that the development of very similar unwritten principles by the Indian and Canadian supreme courts is not altogether surprising. This is because the principles themselves are fairly anodyne, and also because the countries share structurally similar constitutions that are both products of postwar developments in constitutional theory.¹⁸

Finally, for all the surface similarities, I will show that there are important differences in the functions that the similar-sounding unwritten principles play in the Canadian and Indian polities—especially outside the realm of ordinary judicial review. Whereas in Canada the unwritten principles are a *flexibility device* permitting constitutional change without using the onerous amendment procedure, the Indian basic structure doctrine is a *stability device* that prevents the abuse of a lax formal amendment procedure. These differences are especially clear when one compares *Quebec Secession Reference*, in which the Supreme Court of Canada added a “secession clause”

cases discussed in this Note. See Lior Barshack, *Constituent Power as Body: Outline of a Constitutional Theology*, 56 U. TORONTO L.J. 185 (2006).

16. For some “turgid” prose on this aspect of evolutionary theory, see D.A. Kelly, *The Functional Morphology of Penile Erection: Tissue Designs for Increasing and Maintaining Stiffness*, 42 INTEGRATIVE & COMP. BIOLOGY 216 (2002) (explaining the independent evolution of an axial orthogonal array of collagen fibers in four branches of vertebrates as the optimal solution to maintaining penile stiffness during erection).

17. For a sample of the critical Canadian literature, see, for example, RORY LEISHMAN, *AGAINST JUDICIAL ACTIVISM* (2006); ROBERT IVAN MARTIN, *THE MOST DANGEROUS BRANCH* 116-123 (2003); and Jean Leclair, *Canada's Unfathomable Unwritten Constitutional Principles*, 27 QUEEN'S L.J. 389 (2002). For a taste of the Indian controversy, see, for example, *FUNDAMENTAL RIGHTS CASE: THE CRITICS SPEAK!* (Surendra Malik ed., 1975); Raju Ramachandran, *The Supreme Court and the Basic Structure Doctrine, in SUPREME BUT NOT INFALLIBLE* 107 (B.N. Kirpal et al. eds., 2000); and R.K.P. Shankardass, *Anomalies of the “Doctrine,” in THE SUPREME COURT VERSUS THE CONSTITUTION* 137 (Pran Chopra ed., 2006).

18. Lorraine E. Weinrib, *The Postwar Paradigm and American Exceptionalism, in THE MIGRATION OF CONSTITUTIONAL IDEAS* 84, 89-91 (Sujit Choudhry ed., 2006).

to the Canadian Constitution,¹⁹ with *Kesavananda Bharati*, in which the Supreme Court of India arrived at the paradoxical holding that constitutional amendments that undermine the document's "basic structure" are unconstitutional.²⁰

This Note is organized in three parts. The first Part will provide a basic introduction to Canadian constitutional law and explore the most important cases in which the Supreme Court of Canada has articulated its unwritten constitutional principles; the second will survey the text and history of the Indian Constitution and chronicle the development of the basic structure doctrine; and the third will deploy the evidence from the two descriptive sections to make my three analytical claims.

Before launching into the main of the analysis, however, I wish to address two preliminary matters. The first is to define what constitutes an unwritten constitutional principle, and the second is to defend limiting my analysis to Canada and India. Given the wide scope for disagreement by judges and scholars as to whether something is, or should be, an unwritten principle, I limit my discussion to those unwritten constitutional principles that have been identified as such by a majority of the Canadian or Indian Supreme courts, and that have also been declared by the relevant court as being *justiciable*. The rationale for limiting the principles I examine to those that are justiciable is to distinguish the unwritten principles from the British and Canadian notion of *constitutional conventions*, which are also unwritten but not justiciable.²¹ The distinction is significant, for it is the fact that the unwritten principles are justiciable that makes them so controversial in both countries.

As for limiting the scope of the Note to India and Canada (with a frolic and detour through the United States), there are sound analytical and rhetorical reasons for not engaging with the rich tradition of unwritten constitutional jurisprudence in civil law countries. Even though the Canadian, Indian, and German constitutions share close textual affinities,²² and the unwritten constitutional jurisprudence of Canada, India, and France share a familial resemblance,²³ limiting the present study to India and Canada

19. Sujit Choudhry, *Ackerman's Higher Lawmaking in Comparative Constitutional Perspective: Constitutional Moments as Constitutional Failures?*, 6 INT'L J. CONST. L. 193, 219 (2008).

20. To be sure, the Supreme Court of India's holding in *Kesavananda Bharati* is paradoxical only because the Indian Constitution, unlike the Italian or German Constitutions, does not contain any provisions restricting its amendability. Compare INDIA CONST. pt. XX, art. 368(5) ("It is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.") with COST. art. 139 (Italy) ("The republican form of the state may not be changed by way of constitutional amendment.") and GRUNDGESETZ [GG] art. 79 (F.R.G.) ("Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.").

21. See Reference re Resolution to Amend the Constitution, [1981] 1 S.C.R. 753, 882 (explaining that in British and Canadian law, constitutional conventions do not crystallize into judicially enforceable law).

22. See, e.g., Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 U. TORONTO L.J. 383 (2007); M.P. Singh, *The Principle of Reasonableness: An Unending Field of Judicial Activism*, in JUDICIAL ACTIVISM AND SOCIAL CHANGE 291, 306-08 (K. L. Bhatia ed., 1990).

23. See generally Richard J. Cummins, *The General Principles of Law, Separation of Powers and Theories of Judicial Decision in France*, 35 INT'L. & COMP. L.Q. 594 (1986) (discussing the

provides it with the benefits of what Ran Hirschl calls the “most similar cases” logic of case selection in comparative constitutional law.²⁴ Canada and India share a great deal more in common with each other than with the European countries mentioned above, such as the common law, Westminster-style parliamentary democracy, federalism, and the presence of “two [or more] nations warring in the bosom of a single state.”²⁵ As such, the Indo-Canadian comparison comes as close as possible to “controlling for variables or potential explanations that are not central to the study . . . thereby allowing for partial substitute [sic] for statistical or experimental control.”²⁶ While I hope to broaden my sample of countries in future analyses, the power of the “most similar cases” logic to uncover the most significant differences between the similar-looking Indian and Canadian jurisprudence makes it the most appropriate methodology for the present analysis.

On the rhetorical side, the critiques of unwritten constitutionalism in India and Canada share much in common because both are informed by the “clause-bound interpretivism” that is currently the ascendant interpretive methodology in the United States.²⁷ This is due both to the prestige and influence that the United States and its Constitution enjoy in Canada and India, but also due to the fact that both countries conduct most of their legal business in English, which means that American analyses have much more purchase in Canada and India than ideas from the Continent.²⁸

For these analytical and rhetorical reasons, the comparison between Canada and India, with the American experience added for perspective, is the most fruitful one to pursue in this Note.

II. UNWRITTEN CONSTITUTIONALISM IN CANADA

This Part provides an overview of some of the unwritten constitutional principles that the Supreme Court of Canada has articulated in its recent jurisprudence, as well as a survey of the manner in which the Court has derived them. It will begin by providing a brief introduction, in Section II.A, to the form and content of the Canadian Constitution as it stood at “Confederation” in 1867,²⁹ and to the unwritten constitutional jurisprudence that developed during its first century. Section II.B then describes the

development of unwritten “general principles of law” by the French *Conseil Constitutionnel* that are broadly comparable to Canada and India’s unwritten constitutional principles).

24. Ran Hirschl, *On the Blurred Methodological Matrix of Comparative Constitutional Law*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 39, 48 (Sujit Choudhry ed., 2006).

25. The phrase is from Lord Durham’s infamous report into the causes of the rebellions that broke out in Canada in 1837-38. EARL OF DURHAM, REPORT AND DISPATCHES ON BRITISH NORTH AMERICA 8 (London, Ridgways 1839).

26. Hirschl, *supra* note 24, at 48.

27. JOHN HART ELY, DEMOCRACY AND DISTRUST 11-41 (1980).

28. It is interesting to note that the controversy in Canada over the unwritten constitutional principles is largely limited to Anglophone legal circles. For example, a LexisNexis search of Canadian law journals for “unwritten constitutional principles” turns up seventeen results, while a search for the French equivalent of this term used by the Supreme Court of Canada (“*principes constitutionnels sous-jacents*”) turns up nothing.

29. “Confederation” is the (somewhat misleading) term used in Canada to refer to the federation of the British North American possessions of New Brunswick, Nova Scotia, and the Province of Canada (Ontario and Quebec) into a new Dominion of Canada in 1867.

tremendous changes wrought by the enactment of the Charter of Rights and Freedoms (Charter) in 1982. It also reveals the interpretive moves made by the Supreme Court of Canada in its first Charter cases that have made the elaboration of unwritten constitutional principles the interpretive technique par excellence of the Charter era. Next, Section II.C will chronicle the use of structural techniques of interpretation by the Supreme Court of Canada to make the separation of powers into a justiciable unwritten constitutional principle. Finally, Section II.D will walk through two remarkable 1997 opinions in which the Supreme Court of Canada held that the rule of law, federalism, democracy, respect for minorities, and judicial independence would henceforth be justiciable unwritten constitutional principles.

A. *The BNA Act and the Implied Bill of Rights*

Prior to 1982, Canadian constitutional law was more antique British than American,³⁰ as Canada lacked a single, integrated document to which one could point as the big-C Constitution. Instead, Canadian constitutional law was a higgledy-piggledy of British and Canadian statutes, judicial decisions, and constitutional conventions dating back to the Magna Carta in which one statute was first among equals: the British North America Act, 1867 (BNA). By establishing and delimiting the powers of the federal and provincial governments, this British enactment set the terms for the union of the various British North American colonies into Canada as we know it between 1867 and 1949.³¹

Consistent with the theory of the day that blamed excessively powerful states for causing the American Civil War,³² the BNA created a powerful federal government in which was vested the residuary power,³³ as well as powers to “reserve[]” or “[d]isallow[]” provincial legislation.³⁴ Unlike its American counterpart, the BNA does not guarantee any individual rights,³⁵ but Canada’s “Fathers of Confederation”³⁶ did include a guarantee in the BNA’s preamble that Canada would have “a Constitution similar in Principle to that of the United Kingdom.”³⁷

30. With apologies to *Hamlet*’s Horatio. WILLIAM SHAKESPEARE, *HAMLET* act 1, sc. 2.

31. In a nod to the popular understanding that the BNA was in fact Canada’s big-C Constitution starting in 1867, the statute was renamed the Constitution Act, 1867 when Canada severed its last constitutional ties to Britain in 1982 (an event known in Canada as “Patriation”).

32. John A. MacDonal, Member of Parliament, Address to the Legislative Assembly of the Province of Canada (Feb. 6, 1865), reprinted in *THE CONFEDERATION DEBATES IN THE PROVINCE OF CANADA, 1865*, at 39, 45 (P. B. Waite ed., 1963) [hereinafter *CONFEDERATION DEBATES*].

33. See Constitution Act, 1867, 30 & 31 Vict. § 91 (U.K.), as reprinted in R.S.C., No. 5 (Appendix 1985).

34. *Id.* § 90.

35. Not only does the BNA fail to protect individual rights, but the idea of including a bill of rights never came up during the debates on Confederation—at least not in the Province of Canada. This is surprising given that most every other aspect of the American Constitution, from the Commerce Clause to representation in the Senate, was discussed at length by Canada’s Fathers of Confederation. See generally *CONFEDERATION DEBATES*, *supra* note 32.

36. The term “Fathers of Confederation” is the term used in Canada to describe the men (and they were all men) who attended three conferences between 1865 and 1867 at which the text of the British North America Act was drafted.

37. Constitution Act, 1867, 30 & 31 Vict., pmb. (U.K.), as reprinted in R.S.C., No. 5 (Appendix 1985).

Using this textual hook, the Supreme Court of Canada began crocheting an “Implied Bill of Rights” protecting such basic political rights as freedom of speech and freedom of the press with its 1938 decision in the *Reference re Alberta Statutes*.³⁸ Reasoning that the mother country was a democracy at the time of Confederation, and further reasoning that “[d]emocracy cannot be maintained without its foundation: free public opinion and free discussion throughout the nation of all matters affecting the State,” the Court determined that an Alberta provincial law forcing newspapers to publish corrections to articles that misapprehended government policies was *ultra vires* the provincial legislature.³⁹

The Implied Bill of Rights doctrine was affirmed in *Saumur v. City of Quebec*, which declared *ultra vires* a municipal bylaw requiring pamphleteers to register with the police,⁴⁰ and again in *Switzman v. Elbling*, in which the preamble’s “similar-in-principle” guarantee was used to impugn a Quebec law punishing the advocacy of communism.⁴¹ Writing for the majority in *Switzman*, Justice Ivan Rand made the structural argument that “the political theory which the [BNA] Act embodies is that of parliamentary government, with all its social implications,” which include “the condition of a virtually unobstructed access to and diffusion of ideas.”⁴²

The Implied Bill of Rights reached its limits in the 1970s, however, when in *A.G. (Canada) and Dupond v. Montreal* the Supreme Court of Canada upheld a Montreal by-law imposing a month-long ban on street protests.⁴³ Writing for an 8-1 majority, Justice Jean Beetz held that “the right to hold public meetings on a highway or in a park is unknown to English law: consequently it cannot have become part of the preamble of the *B.N.A. Act*.”⁴⁴

The *Dupond* ruling was widely seen as a disappointment,⁴⁵ but it was only a temporary setback, for in the 1980s the Canadian Supreme Court would decide a series of cases laying the interpretive groundwork for the elaboration of many more unwritten constitutional principles in the 1990s. The first cases to arise under the new Charter of Rights and Freedoms would provide the venue for the laying of these foundations.

B. *The Charter Revolution and Early Charter Cases*

Receiving royal assent in 1982, and coming into full force in 1985, the enactment of the Canadian Charter of Rights and Freedoms marks the single greatest change to the Canadian constitutional order since Confederation in 1867. The road to the Charter was long and arduous, with the first proposals to constitutionalize the protection of individual rights having been floated in the 1950s. Parliament took a half measure in 1960 when it enacted the Canadian

38. *Reference re Alberta Statutes*, [1938] S.C.R. 100.

39. *Id.* at 146.

40. [1953] 2 S.C.R. 299.

41. [1957] S.C.R. 285.

42. *Id.* at 306.

43. [1978] 2 S.C.R. 770.

44. *Id.* at 772.

45. See, e.g., Eric Cline & Michael J. Finley, Comment, *Whither the Implied Bill of Rights?*, 45 SASK. L. REV. 137 (1980).

Bill of Rights,⁴⁶ but as an ordinary statute it proved ineffective in preventing newer, inconsistent statutes from superseding its minimal rights guarantees.⁴⁷

Following two decades of constitutional discussions with the provinces (during whose pendency Quebec held its first secession referendum), the federal government and nine provinces agreed in November 1981 to a package of amendments that would enact the Charter of Rights, patriate the Canadian Constitution from Britain, and set out a general amending formula for future constitutional amendments. The separatist government of Quebec, which thought the package was both procedurally suspect⁴⁸ and substantively defective, refused to give its assent—thereby setting the stage for the Canadian constitutional melodrama that continues to this day.

No sooner had the Charter come into force than the Supreme Court of Canada began announcing unwritten principles in interpreting it. One early case in point is the 1985 opinion of then-Justice Antonio Lamer in *Reference re B.C. Motor Vehicle Act*.⁴⁹ In this reference, the Supreme Court was called to rule on the constitutionality of a British Columbia (B.C.) provincial law authorizing imprisonment for an absolute liability offence (a “strict liability” offence in American parlance). The case turned on the meaning of the guarantee in Section 7 of the Charter that individuals would not be deprived of life, liberty, or security of the person “except in accordance with the principles of fundamental justice.”⁵⁰ The B.C. government presented evidence from the Special Joint Committee⁵¹ on the Constitution suggesting that the framers of Section 7 believed “fundamental justice” to mean the same thing as “natural justice” in pre-Charter jurisprudence—a term roughly equivalent to the concept of “procedural due process” in the United States.⁵²

In deciding that the B.C. law violated Section 7, Justice Lamer made the crucial move of ruling that evidence of the framers’ understanding as to the meaning of the constitutional text should be accorded minimal weight. He stated two rationales for this decision. First, since the Charter was “not the product of a few individual public servants . . . but of a multiplicity of individuals . . . the comments of a few federal civil servants [could not] in any way be determinative” of its meaning.⁵³ Second, if such evidence was treated as conclusive, then “the rights, freedoms and values embodied in the *Charter* in effect become frozen in time to the moment of adoption with little or no possibility of growth, development and adjustment to changing societal

46. Canadian Bill of Rights, S.C. 1960, ch. 44.

47. See, e.g., *Canada (A.G.) v. Lavell*, [1973] S.C.R. 1349 (upholding gender discriminatory portions of the Indian Act despite the gender equality guarantee in the Canadian Bill of Rights).

48. The Premier of Quebec, René Lévesque, was not invited to the impromptu late-night meeting at which Prime Minister Pierre Trudeau and the nine other provincial premiers hammered out the final constitutional package. In Quebec nationalist circles, this incident has been given the absurdly dramatic moniker of “The Night of the Long Knives.” PETER H. RUSSELL, *CONSTITUTIONAL ODYSSEY: CAN CANADIANS BECOME A SOVEREIGN PEOPLE?* 128 (3d. ed. 2004).

49. [1985] 2 S.C.R. 486.

50. *Id.* at 494.

51. *Id.* at 504. The Special Joint Committee on the Constitution was a committee of the Canadian House of Commons and Senate that held nation-wide hearings into the Trudeau government’s constitutional renewal proposals during 1980 and 1981.

52. See, e.g., *THE PHILOSOPHY OF LAW: AN ENCYCLOPEDIA* 573 (Christopher B. Gray ed., 1999).

53. *Reference re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. at 508.

needs.”⁵⁴ This of course would be at odds with the Canadian tradition of treating the Constitution as a “‘living tree’ . . . [with] the possibility of growth and adjustment over time.”⁵⁵

Justice Lamer’s decision that the B.C. law violated the Charter relied upon a structural analysis of Sections 7 through 14 of that document, which together define the “legal rights” of Canadians. By his reasoning, if the Section 7 fundamental justice guarantee were to be read as the equivalent of natural justice, “it would mean that the (s. 7) right to liberty would be narrower than the right not to be arbitrarily detained or imprisoned (s. 9), and the right to security of the person would have less content than the right to be secure against unreasonable search or seizure (s. 8).”⁵⁶ To avoid this untenable result, Justice Lamer reasoned that Sections 8 through 14 must be “illustrative of deprivations of those rights to life, liberty and security of the person in breach of the principles of fundamental justice,”⁵⁷ as this would be “consistent with the wording and structure of s. 7, the context of the section, i.e., ss. 8 to 14, and the character and larger objects of the *Charter* itself.”⁵⁸

In an ironic twist, Justice Beetz, who had repudiated the Implied Bill of Rights in *Dupond*, would be among the first to embrace the interpretive framework propounded by Justice Lamer in the *Motor Vehicles Act Reference*. Writing for the majority in *Ontario Public Service Employees’ Union v. Ontario (A.G.)*, Justice Beetz ruled that since “the basic structure of our Constitution . . . contemplates the existence of certain political institutions . . . [which] derive their efficacy from the free public discussion of affairs,” therefore, “neither Parliament nor the provincial legislatures may enact legislation the effect of which would be to substantially interfere with the operation of this basic constitutional structure.”⁵⁹

C. *The Separation of Powers*

As the Court’s use of structural interpretation techniques continued to develop during the 1980s, Canadians received the first indications as to what unwritten constitutional principles Justice Lamer’s interpretive technique might uncover. A good candidate for the first post-Charter opinion to discern unwritten principles beyond the text is Justice Bertha Wilson’s concurrence in *Operation Dismantle v. The Queen*, in which she ruled that Section 1 of the Charter “embodies through its reference to a free and democratic society the essential features of our constitution including the *separation of powers, responsible government, and the rule of law.*”⁶⁰

Later in the 1985 term, Chief Justice Brian Dickson would hold in *Fraser v. Public Service Staff Relations Board* that “[t]here is in Canada a separation of powers among the three branches of government—the legislature, the executive and the judiciary. In broad terms, the role of the

54. *Id.* at 509.

55. *Id.*

56. *Id.* at 502.

57. *Id.*

58. *Id.* at 503.

59. [1987] 2 S.C.R. 2, 57.

60. [1985] 1 S.C.R. 441, 491 (emphasis added).

judiciary is, of course, to interpret and apply the law; the role of the legislature is to decide upon and enunciate policy; the role of the executive is to administer and implement that policy."⁶¹

Although both Chief Justice Dickson and Justice Wilson's declarations on the existence of a separation of powers in Canada are dicta, these structural arguments would form the holding of a concurrence by then-Justice Beverley McLachlin in *Harvey v. New Brunswick*.⁶² The issue in *Harvey* relates to the constitutionality of sanctions imposed by the New Brunswick legislature upon a legislator convicted of an electoral offence. As punishment, the legislature voted to expel the petitioner and ban him from holding elected provincial office for five years. The Court was unanimous in upholding the constitutionality of both measures; but unlike the majority, which conducted a searching review of the legislature's actions, Justice McLachlin thought "the separation of powers . . . inherent in British parliamentary democracy . . . precludes the courts from trenching on the internal affairs of the other branches of government."⁶³

As of 1996, the separation of powers was the only unwritten constitutional principle that the Supreme Court had used as a basis for deciding a case. In each of the next two years, however, the Supreme Court handed down a judgment in a landmark constitutional case that turned several more unwritten principles into the law of the land.

D. *The Landmark References*

The first of these two landmark cases was the 1997 *Provincial Judges Reference*, in which the Supreme Court used its first unwritten principle (the separation of powers) to elaborate a second: judicial independence.⁶⁴ At issue in this case was the constitutionality of measures by various provinces to cut the salaries of provincial court judges. Before addressing the merits, Chief Justice Lamer began his opinion with a restatement of the approach to constitutional interpretation he had followed since drafting the *Motor Vehicles Act Reference*. His core premise was that the preamble to the BNA "identifies the organizing principles of the [Constitution] . . . and invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text."⁶⁵ On this view, "the express provisions of the Constitution should be understood as elaborations of the underlying, unwritten, and organizing principles found in the preamble."⁶⁶ This is true even in the case of the newly enacted Charter, "since the Constitution is to be read as a unified whole."⁶⁷

61. [1985] 2 S.C.R. 455, 469-70.

62. [1996] 2 S.C.R. 876.

63. *Id.* at 916. This concurrence by Justice McLachlin is a major volte-face, for two years earlier she had written that "[t]here is no general 'separation of powers' in the Constitution Act, 1867 . . . [that] insist[s] that each branch of government exercise only 'its own' function." MacMillan Bloedel v. Simpson, [1995] 4 S.C.R. 725 (McLachlin, J., dissenting).

64. [1997] 3 S.C.R. 3.

65. *Id.* at 75.

66. *Id.* at 76.

67. *Id.*

Turning to the merits, the Chief Justice found the various provincial measures unconstitutional on the basis of Section 11(d) of the Charter, which guarantees “[a]ny person charged with an offence” the right “to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.” Reasoning that “the depoliticization of the relationships between the legislature and the executive on the one hand, and the judiciary on the other . . . [is] fundamental to the separation of powers, and hence to the Canadian Constitution,” the Chief Justice ruled that textual provisions of the Constitution, such as Section 11(d) “must be interpreted in such a manner as to protect this principle.”⁶⁸

The very next year, the Supreme Court followed up on the *Provincial Judges Reference* by delivering what is arguably the most important opinion in its history: the *Quebec Secession Reference*.⁶⁹ From a political perspective, the Court’s per curiam opinion was inspired: the Solomonic judgment satisfied all sides of Canada’s bitter national unity debate, and the Court’s soothing logic helped lower the political temperature in the aftermath of the near-miss Quebec referendum of 1995.

From a legal perspective, however, the legacy of this opinion is rather more contentious. In arriving at its judgment requiring both sides to negotiate in good faith should a clear majority of Quebecers ever say “oui” to a clear question about secession, the Supreme Court put forth four principles that it identified as underlying the written text of the Constitution (namely democracy, federalism, respect for minorities, and the rule of law). In doing so, the Court stated the following views on the nature of the Canadian Constitution:

Our Constitution is primarily a written one [But] [b]ehind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles. These principles inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based.⁷⁰

Although these underlying principles are not explicitly made part of the Constitution by any written provision . . . it would be impossible to conceive of our constitutional structure without them Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations . . . which constitute substantive limitations upon government action. The principles are not merely descriptive, but . . . binding upon both courts and governments.⁷¹

The significance of these sentences cannot be underestimated, for they make explicit what rulings since *Operation Dismantle* have implied: that Canada’s Constitution is not a series of fully integrated texts, but rather a combination of written text and unwritten principles, both of which have binding legal force. In so concluding, one could say that the Court has invited litigants who find the constitutional text unsatisfactory to bring forth cases based on what they believe to be “the vital unstated assumptions upon which the text is

68. *Id.* at 91.

69. [1998] 2 S.C.R. 217.

70. *Id.* at 247.

71. *Id.* at 248-49.

based,” since these assumptions may give rise to “substantive legal obligations” that provide grounds for relief.⁷²

Parties have seized upon this invitation with alacrity, though the Court has proven quite reluctant to find new constitutional principles since the *Quebec Secession Reference*. Indeed, the only cases brought on unwritten rights theories that have succeeded have been those implicating either the separation of powers or judicial independence. For example, *Mackin v. New Brunswick* continued the string of high court decisions striking down money-saving provincial judicial reforms for undermining judicial independence (in this case, a requirement that “supernumerary” judges either retire or work a minimum number of hours).⁷³ By contrast, the Supreme Court denied leave to appeal to the Anglophone-majority Montreal suburb of Baie d’Urfé, which sought to challenge a Quebec government plan to amalgamate it into the City of Montreal, on the basis that it showed insufficient respect for the unwritten principle of respect for minorities.⁷⁴

At least one justice has attempted to get the Court to recognize a further unwritten constitutional principle beyond the six that have been adopted so far.⁷⁵ In *R v. Demers*, Justice Louis LeBel argues in a concurring opinion that a new unwritten principle of respect for human rights should inform the future jurisprudence of the Supreme Court.⁷⁶ What is particularly striking about Justice LeBel’s opinion is that he explicitly characterized his argument as structural and further stated that:

Structural analysis . . . is not new and is often implicit in our federalism jurisprudence In order to determine what result in a particular case is dictated by the Constitution, structural analysis looks to the relationships created by the Constitution among various levels and branches of government, and also between the state and the individual.⁷⁷

III. UNWRITTEN CONSTITUTIONALISM IN INDIA

At about the same time as the Supreme Court of Canada was developing its Implied Bill of Rights, what may fairly be described as the most ambitious experiment with democratic constitutionalism to date was getting under way half a world away. This Part will show how the Indian experiment with democratic constitutionalism is as much unwritten as it is written, owing to the development by the Supreme Court of India of its controversial “basic structure doctrine.”

I begin in Section III.A with an account of the framing of the Indian Constitution, and a look at its most important provisions for the purposes of the present analysis. These are the guarantees of “Fundamental Rights” in Part

72. In the United States, by contrast, the articulation of “fundamental legal principles” is left to law professors. See Patrick M. McFadden, *Fundamental Principles of American Law*, 85 CAL. L. REV. 1749 (1997).

73. [2002] 1 S.C.R. 405.

74. *Baie d’Urfé (Town) v. Quebec (A.G.)*, [2001] R.J.Q. 2520 (Que. C.A.), *leave to appeal denied*, [2001] 3 S.C.R. xi.

75. Once again, the principles are the separation of powers, judicial independence, federalism, democracy, the rule of law, and respect for minorities.

76. [2004] 2 S.C.R. 489, 535.

77. *Id.* at 537.

III of the Constitution, the “Directive Principles of State Policy” set out in Part IV, and the amending formula contained in Part XX.

Section III.B then briefly examines some of the leading cases of the Supreme Court of India during the Constitution’s infancy and adolescence. While at first the justices of the Supreme Court were part of an elite consensus that took the supremacy of Parliament for granted, the consensus frayed during the 1960s, as the Court began to flex its muscles in checking the most extraordinary abuses by Parliament of its power to amend the Constitution.

The battle royal came in 1973, when the Supreme Court announced the famous “basic structure doctrine” in the seminal case of *Kesavananda Bharati v. State of Kerala*. Section III.C is devoted entirely to parsing the ironic holding in *Kesavananda*—that constitutional amendments can sometimes be unconstitutional, even when the amending formula is followed—while Section III.D briefly surveys the post-1973 cases that have allowed the basic structure doctrine to become well-settled law.

A. *The Framing, the Text, and the “First Unwritten Constitution”*

With some 395 articles and over 117,000 words, the Indian Constitution has the distinction of being the world’s longest national constitution. It may also be the world’s most amended national constitution, with eighty-three amendments having been made in its fifty-eight-year history.⁷⁸

1. *The Framing*

The drafting of the Indian Constitution is a remarkable story that deserves much more scholarly attention than it has received. Suffice it to say for the purposes of this Note that the text is the product of four years’ work of an indirectly elected Constituent Assembly that also served as independent India’s first Parliament.⁷⁹

The members of the Assembly⁸⁰ seem to have had two overarching goals in framing the text. The first was to make the Constitution a tool for achieving what Granville Austin has called “social revolution”—that is, a complete transformation of Indian society that would break the old bonds of caste, prejudice, and superstition in order to modernize every aspect of India’s political economy.⁸¹ The leading indicators of this constitutional commitment to social revolution are the ban on untouchability and caste discrimination,⁸²

78. The title for the world’s longest and most amended constitution goes to Alabama, whose denizens must surely take southern comfort in a constitution containing approximately 357,000 words and 799 amendments.

79. The Constituent Assembly was elected in 1946 by the members of British India’s elected provincial legislatures. RAMACHANDRA GUHA, *INDIA AFTER GANDHI* 115-36 (2007).

80. The 296-member Assembly featured representation from India’s diverse religious, linguistic, caste, and socioeconomic groups, and included nine women among its ranks. Owing to the unwieldiness of having such a large group working on a legal text, the task of drafting the text was delegated to a Drafting Committee of thirteen members, though its draft provisions were hotly debated by the full Assembly. See GRANVILLE AUSTIN, *THE INDIAN CONSTITUTION* 17-20 (2d ed. 1999).

81. See *id.* at 26-49.

82. INDIA CONST. art. 17.

explicit provision for affirmative action (“reservation”),⁸³ and the specification of directive principles laying out goals for the state to pursue.⁸⁴

At the same time, however, the Indian framers also saw the protection of individual rights⁸⁵ as a *sine qua non* of their Constitution.⁸⁶ This is hardly surprising given the many abuses perpetrated by the British colonial regime,⁸⁷ though it deserves mention that the British-educated lawyers who led the independence movement—including Jawaharlal Nehru and Mahatma Gandhi—turned their back on the classic British contention that democracy afforded the best protection for rights, in favor of the American idea of guaranteeing rights in writing.

2. *The Text*

The textual expression of this commitment to individual rights can be found in Part III of the Constitution, which guarantees certain “Fundamental Rights” against state action. Part III alone contains twenty-four articles, and is nearly as long as the U.S. Constitution without its amendments.⁸⁸ Fortunately, its core can be reduced to just four articles. Articles 13⁸⁹ and 14⁹⁰ are the direct Indian analogues to the American Supremacy and Equal Protection Clauses, and they are phrased in quite similar terms. Article 21 is the Indian counterpart to the American Due Process Clause, although its text only guarantees that “[n]o person shall be deprived of his life or personal liberty except according to *procedure established by law*.”⁹¹

This brings us to the most important article in Part III, Article 19, which establishes and delimits the “right to freedom” of every Indian citizen. At the time of the framing, Article 19(1) guaranteed every citizen seven basic freedoms, to wit, (a) speech, (b) assembly, (c) association, (d) movement and

83. *Id.* art. 16.

84. *Id.* pt. IV.

85. *See id.* pt. III.

86. AUSTIN, *supra* note 80, at 58-61.

87. In fairness to the British, the last constitutional statute of the British colonial era—the Government of India Act, 1935—did contain a limited set of rights guarantees. *See* S. P. SATHE, *JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS 2* (2d ed. 2002).

88. Part III contains approximately 4200 words, whereas the first seven articles of the U.S. Constitution contain approximately 4600 words.

89. Article 13 of the Indian Constitution states:

(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

INDIA CONST. art. 13.

90. Article 14 of the Indian Constitution provides that “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.” *Id.* art. 14.

91. *Id.* art. 21 (emphasis added). In a slow succession of cases, the Supreme Court of India eventually decided that the phrase “procedure established by law” meant exactly the same thing as the American “due process of law” formulation—despite there being ample drafting history suggesting the Indian framers specifically avoided the due process language to avoid getting caught up in the procedural versus substantive due process thicket. *See generally* Vivek Krishnamurthy, *Proportionality in Indian Constitutional Law* (Mar. 17, 2008) (unpublished manuscript, on file with the *Yale Journal of International Law*).

(e) settlement anywhere in India, (f) private property ownership,⁹² and (g) to carry on any occupation, trade or business. Each of these freedoms is subject to a corresponding limitations clause specified between Article 19(2)-(6), which allows for “laws” imposing “reasonable restrictions” on the Article 19(1) rights for purposes enumerated in the text. For example, Article 19(2) allows for the imposition of reasonable restrictions on the Article 19(1)(a) freedom of speech “in the interests of . . . public order, decency or morality,” amongst other purposes.

While Part III is concerned with the Fundamental Rights of individuals, Part IV, which lays out the “Directive Principles of State Policy,” is directed at achieving the social revolution that the Indian Constitution’s framers had in mind. The Directive Principles are essentially a series of exhortations instructing all Indian governments to endeavor to promote gender equality,⁹³ humane working conditions,⁹⁴ and a living wage for all,⁹⁵ among other laudable goals.⁹⁶ Over the last six decades, the Directive Principles have been observed mainly in the breach, for Article 37 at the outset of Part IV states that the principles are not enforceable in any court.

3. *The First Unwritten Constitution*

It is in cases dealing with the interaction of Parts III and IV of the Constitution with the amending formula laid out in Part XX that the Supreme Court of India would articulate its basic structure doctrine.

It took some time for the tensions between these provisions to become manifest, for in the early years after independence, the leading lights in Parliament and on the Supreme Court had all participated in the framing and shared the same basic understandings of the new constitutional order—understandings that Upendra Baxi calls “India’s first unwritten constitution.”⁹⁷

Two of the more important aspects of the “first unwritten constitution,” namely, obsequious judicial deference to Parliament, and a stilted textualism in constitutional interpretation, are evident in the early jurisprudence of the Supreme Court of India. This is especially true of the first cases interpreting

92. Property rights protections were repealed by The Constitution (Forty-fourth Amendment) Act, 1978. See The Constitution (Forty-fourth Amendment) Act, No. 88 of 1978; INDIA CODE (1993), v. 65.

93. INDIA CONST. art. 39.

94. *Id.* art. 42.

95. *Id.* art. 43.

96. More controversially, one of the Directive Principles (Article 44) calls for a Uniform Civil Code for all Indians, rather than separate codes for Hindus and Muslims that conform to each community’s religious law, and another (Article 48) calls for a ban on the slaughter of “milch and draught cattle”—ostensibly in recognition of the Hindu belief that cows are sacred. *Id.* arts. 44, 48. Fifty-eight years after the framing of the text, both of these Directive Principles remain dead letters.

97. UPENDRA BAXI, COURAGE, CRAFT AND CONTENTION 64-65 (1985). To be sure, the fact that the framers of a constitution dominate the various branches of government in the early years of a new constitutional order is no guarantee of inter-branch consensus. For example, the Supreme Court of Canada rejected the evidence of several living, breathing framers of the *Charter of Rights and Freedoms* when interpreting its provisions in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, 511. See *supra* Section II.A. Likewise, in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), Chief Justice Marshall, who did not sign the 1787 Constitution, essentially condemns as unconstitutional the actions of Secretary of State James Madison, who was both a draftsman and a signatory at Philadelphia. See *infra* Section IV.A.

Part III of the Constitution, which guarantees such "Fundamental Rights" as the freedoms of speech and association. For example, in *A.K. Gopalan v. State of Madras*, the Supreme Court ruled that any law duly enacted by a competent legislature, regardless of its procedural or substantive dubiousness, satisfies the Article 21 guarantee that constitutional rights shall not be deprived except by a "procedure established by law."⁹⁸

Another key element of the "first unwritten constitution" was a notion of parliamentary sovereignty,⁹⁹ which was not defensible given India's federal nature and the Article 13(1) declaration that the Constitution is supreme. The fact that Article 368 in Part XX allows most constitutional provisions to be amended by a two-thirds majority in both houses of Parliament reinforced this fallacious notion.¹⁰⁰ But at least until the end of Jawaharlal Nehru's premiership in 1964, by which time fifteen housekeeping amendments had been passed, the "first unwritten constitution" can be said to have held.

B. *The Fraying of the "First Unwritten Constitution"*

Despite the elite consensus in New Delhi, ordinary Indians challenged the "first unwritten constitution" in lawsuits that impugned the legality of many of the first fifteen constitutional amendments. The first such challenge was brought in 1951 with respect to the First Amendment enacted earlier that year.¹⁰¹ By and large, the First Amendment was an omnibus that corrected various errors that had crept into the 117,000-word text, but it also brought one substantive change in effectively prohibiting feudal landowners from mounting legal challenges against land reform laws. Specifically, the First Amendment deprived landowners of the ability to challenge land reform legislation for violating their Article 19(1)(f) right to own property subject only to "reasonable limitations," or for violating their Article 31 right to receive "adequate compensation" for the "compulsory acquisition" of property by the government.¹⁰²

In *Shankari Prasad v. Union of India*, the constitutionality of the First Amendment, which was enacted pursuant to Parliament's Article 368 amending power, was challenged as violating the Article 13(2) "Supremacy Clause" guarantee that "the State shall not make any law which takes away or abridges rights conferred by this Part" (i.e., Part III of the Constitution, declaring the Fundamental Rights).¹⁰³ The petitioner's core contention—that a constitutional amendment under Article 368 is a law like any other, and is therefore subject to the strictures of Article 13(2)—was unanimously rejected by the Supreme Court of India.

Many similar challenges were launched against other amendments in the first fifteen years of the Indian Constitution, but none of them had any

98. A.I.R. 1950 S.C. 27, 28.

99. Pran Chopra, *The Supreme Court Versus the Constitution*, in *THE SUPREME COURT VERSUS THE CONSTITUTION*, *supra* note 17, at 22, 27.

100. The exception is for amendments that curtail the enumerated powers of the states, in which case half of the states must assent as well.

101. The Constitution (First Amendment) Act, 1951.

102. *Id.* §§ 3, 5, 14.

103. A.I.R. 1951 S.C. 458.

purchase with the Supreme Court until the 1965 decision in *Sajjan Singh v. State of Rajasthan*.¹⁰⁴ The gravamina of the petitioners' complaints in *Sajjan Singh* and *Shankari Prasad* were more or less identical, except that in *Sajjan Singh* the impugned provision was the Seventeenth Amendment of 1964, the explicit purpose of which was to immunize various state land reform laws from judicial review.¹⁰⁵

As in *Shankari Prasad*, the petitioners in *Sajjan Singh* argued that it was *ultra vires* the power of Parliament under Article 368 to amend the Constitution in a manner that eroded the Fundamental Rights guaranteed by Part III, given the language of Article 13(2). The Court again rejected the contention and upheld the amendment, but this time only by a 3-2 majority. In the view of then-Justice Mohammed Hidayatullah, one of the dissenters:

It is true that there is no complete definition of the word "law" in the article [Art. 13] but it is significant that the definition does not seek to exclude constitutional amendments which it would have been easy to indicate in the definition by adding "but shall not include an amendment of the Constitution."¹⁰⁶

Meanwhile, the second dissenting judge, Justice J.R. Mudholkar, went even further in attacking cases such as *A.K. Gopalan* and *Shankari Prasad* as being built on a fallacious view of the sovereignty of the Indian Parliament. In the words of Justice Mudholkar:

The fact, however, remains that unlike the British Parliament our Parliament, like every other organ of the State, can function only within the limits of the powers which the Constitution has conferred upon it. This would also be so when, in the exercise of its legislative power, it makes an amendment to the Constitution or to any of its provisions.¹⁰⁷

Just two years later, the view of the dissenters in *Sajjan Singh* would become the law of the land in *Golak Nath v. State of Punjab*,¹⁰⁸ which dealt with the constitutionality of yet another land reform scheme. While leaving alone any reforms that had already been completed, the Supreme Court of India prospectively overruled *Shankari Prasad* and its progeny by a 6-5 majority, and held that in the future, Parliament may not use Article 368 to amend away the Fundamental Rights because the strictures of Article 13(2) applied to the amending power.¹⁰⁹

Drawing upon Justice Hidayatullah's dissenting opinion in *Sajjan Singh*, Chief Justice K. Subba Rao's majority opinion held that there is no principled ground by which to exclude the Article 368 amending power from the requirements of Article 13(2), for a constitutional amendment, like any other parliamentary enactment, is *intra vires* only insofar as the general provisions governing parliamentary procedures specified in Articles 118-22 are

104. A.I.R. 1965 S.C. 845.

105. The Constitution (Seventeenth Amendment) Act, 1964.

106. A.I.R. 1965 S.C. 845, 860 (Hidayatullah, J., dissenting).

107. *Id.* at 863 (Mudholkar, J., dissenting).

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

109. *Id.* It should be noted that the *Golak Nath* majority draws extensively upon the prospective remedies jurisprudence of the Supreme Court of the United States in prospectively overruling *Shankari Prasad*. See *id.* at 1666-68 (Subba Rao, C.J.) (discussing the prospective remedies granted by the Supreme Court of the United States in *Linkletter v. Walker*, 381 U.S. 618 (1965)).

followed.¹¹⁰ As such, it makes little sense to think of Article 368 as a “complete code” that is interpreted independently of the Constitution’s other provisions.¹¹¹

The Chief Justice did consider an argument raised by the petitioners that there must be implied limitations on the Article 368 amendment power, based on the truism that the power to amend the Constitution does not embrace the power to destroy it.¹¹² The Chief Justice and the majority reserved their judgment on this theory, as they believed that the interaction they had discovered between Article 368 and Article 13(2) allowed them to dispose of this case on narrower grounds.¹¹³

The *Golak Nath* majority was quick to reject, however, the government’s contention that excluding the Fundamental Rights guaranteed by Part III from the Article 368 amendment procedure imposes a sort of constitutional mortmain by frustrating even overwhelming popular demand for change. In a passage clearly identified as dicta, Chief Justice Subba Rao opined that in such an unlikely circumstance, Parliament might use its residuary power under Article 248 to convene a new “Constituent Assembly” that would have the authority and legitimacy to amend any such provisions.¹¹⁴

What explains the Supreme Court of India’s embrace in *Golak Nath* of a theory it had rejected just two years before in *Sajjan Singh*? According to Upendra Baxi, the volte-face is best explained in terms of the erosion of India’s “first unwritten constitution” owing to generational change.¹¹⁵ With the death of Jawaharlal Nehru in 1964, and the sudden death of his successor, Lal Bahadur Sastri, in 1966, the generation of leaders that had won India’s independence and framed its constitution was fast disappearing from the political stage. These leaders took to their funeral pyres the centrist hegemony of the Congress Party over federal and state politics, which gave way to a more fragmented and ideological politics centered on caste, class, and regional identity.¹¹⁶

No figure exemplifies the breakdown of India’s “first unwritten constitution” more than Jawaharlal Nehru’s daughter, Indira Gandhi, who was elevated to the premiership by the Congress Party’s power brokers who

110. *Golak Nath*, A.I.R. 1967 S.C. at 1659.

111. *Id.*

112. *Id.* at 1664.

113. *Id.* The notion that there are “interactions” between different parts of the Constitution is one of the hallmarks of the Supreme Court of India’s jurisprudence in the late 1960s and early 1970s. Just as the Court interpreted Article 368 in the light of Article 13(2) in *Golak Nath*, in 1970 the Court overruled its odious holding in *A.K. Gopalan* by finding a series of interactions between Articles 14, 19, and 21 that serve as the equivalent of the American substantive due process doctrine—even though the Indian framers had explicitly considered and rejected including such a clause. See R.C. Cooper v. Union of India, A.I.R. 1970 S.C. 564; see also P. ISHWARA BHAT, FUNDAMENTAL RIGHTS: A STUDY OF THEIR INTERRELATIONSHIP 86 (2004). Finally, one cannot help but remark at the similarities between the “interactions” of the Supreme Court of India, and the “penumbras” discovered by the Supreme Court of the United States in cases such as *Griswold v. Connecticut*, 381 U.S. 479 (1965)—especially since Justice Douglas was such a keen student of Indian constitutional law. See, e.g., WILLIAM O. DOUGLAS, FROM MARSHALL TO MUKHERJEA: STUDIES IN AMERICAN AND INDIAN CONSTITUTIONAL LAW (1956).

114. *Golak Nath*, A.I.R. 1967 S.C. at 1670.

115. BAXI, *supra* note 97, at 68.

116. See generally GUHA, *supra* note 79, at 417–44.

thought she was a “dumb doll” that they could easily control.¹¹⁷ Needless to say, she proved them wrong. After a poor showing in her first electoral outing in 1967, Gandhi found her calling as a tribune for India’s underclass, fighting against the vested political and economic interests using all available means. Her ambitious reform program, which included the nationalization of the banking and insurance sector, the abolition of the “privy purse” pensions paid to India’s former maharajahs and nawabs, and a redoubled commitment to land and agricultural reform, brought her into conflict with the Supreme Court—which opposed her at every turn for riding roughshod over the Fundamental Rights. Frustrated by the Court’s decisions in cases such as *Golak Nath* and *R.C. Cooper v. Union of India*,¹¹⁸ Gandhi used the massive parliamentary majority she won in the 1971 election to pass a set of constitutional amendments that set the stage for the ultimate conflict with the Supreme Court.¹¹⁹

C. Kesavananda Bharati v. State of Kerala

While reasonable people can disagree as to whether the Supreme Court of India’s ruling in *Kesavananda Bharati v. State of Kerala*¹²⁰ is the first or second most important case decided by a constitutional court in the twentieth century (alongside *Brown v. Board of Education*), there can be little doubt that *Kesavananda Bharati* is the longest appellate decision handed down in the last century. Weighing in at some 420,000 words—the equivalent of over 800 single-spaced pages—the paper required to reproduce this decision must surely have reduced law reporter publishers who sell flat-rate subscriptions to tears.

Much the same can be said for lawyers trying to make sense of this ruling, for of the thirteen Supreme Court justices who sat through *four months* of oral argument in this case,¹²¹ all but two saw it fit to write separate opinions. Fortunately, the opinion of Justice H.R. Khanna neatly straddles the 7-6 divide on the Court, and thus it is Justice Khanna’s opinion, supplemented by the opinion of Chief Justice S.M. Sikri, that forms the basis of the following analysis.¹²²

At issue in *Kesavananda Bharati* was the legality of three constitutional amendments enacted by Parliament to overrule *Golak Nath* and protect the Gandhi government’s economic reform program from further judicial interference. The first of the terrible trio is the Twenty-Fourth Amendment of 1971, which undoes *Golak Nath* by amending Article 13(2) to state that it does not apply to the Article 368 amending power;¹²³ the second is the Twenty-Ninth Amendment of 1972, which like the Seventeenth Amendment

117. *Id.* at 445.

118. A.I.R. 1970 S.C. 564 (holding Indira Gandhi’s bank nationalization program unconstitutional).

119. See generally GUHA, *supra* note 79, at 445-65.

120. A.I.R. 1973 S.C. 1461.

121. Fali Nariman, *The “Doctrine” Versus Majoritarianism, in THE SUPREME COURT VERSUS THE CONSTITUTION*, *supra* note 17, at 79, 85.

122. *Id.* at 86.

123. The Constitution (Twenty-Fourth Amendment) Act, 1971.

at issue in *Sajjan Singh*, immunizes various land reform statutes from judicial review;¹²⁴ and the third is the Twenty-Fifth Amendment of 1971, which insulates any statute that federal or state governments declare as advancing the "Directive Principles of State Policy" from judicial review.¹²⁵

While the Court beat a strategic retreat on the first and second issues, it stood its ground in the third and used the opportunity to embrace the basic structure doctrine rejected in *Golak Nath*. Indeed, the new Chief Justice, S.M. Sikri, rejected the holding of his predecessor in *Golak Nath*, and held in *Kesavananda Bharati* that it is indefensible to impose a categorical bar on Parliament's ability to amend the Fundamental Rights.¹²⁶

Justice Khanna's opinion is even more cutting on this score, denouncing the *Golak Nath* holding as "presumptuous," "myopic," and "vain."¹²⁷ He thought it was implausible that the Constituent Assembly would have intended to impose a categorical bar against amending the Fundamental Rights, given the sorry history of unamendable constitutions past, and absent any clear textual indication of such an intent.¹²⁸ He saved his sharpest criticism, however, for former Chief Justice Subba Rao's contention in *Golak Nath* that Parliament could convene a Constituent Assembly using its Article 248 residuary powers if it wanted to amend the Fundamental Rights.¹²⁹ In Khanna's view, this was tantamount to suggesting that Parliament can use extralegal means to achieve what it cannot do under the constitutional procedure laid down by Article 368.¹³⁰

Justice Khanna's ruling as to the legality of the Twenty-Ninth Amendment (the second issue) need not detain us long, as it simply reiterates the narrow holding of *Shankari Prasad* and *Sajjan Singh* that there is nothing per se unconstitutional about immunizing certain statutes from judicial review (i.e., what Americans might call jurisdiction-stripping).¹³¹

This brings us to Justice Khanna's opinion on the crucial third issue: the constitutionality of the Twenty-Fifth Amendment, which he begins with a meditation on the meaning of the word "amend." While Khanna was quick to pillory the categorical bar on amending the Fundamental Rights imposed in *Golak Nath*, he could not accept the contention of his six dissenting colleagues that the Article 368 amending power is plenary. He finds a middle ground between these two positions in the notion that the use of the word "amend" in Article 368 implies certain limitations on the power of Parliament to change the Constitution. In Justice Khanna's words:

The word "amendment" postulates that the old constitution survives without loss of its identity despite the change and continues even though it has been subjected to alterations.

124. The Constitution (Twenty-Ninth Amendment) Act, 1972.

125. The Constitution (Twenty-Fifth Amendment) Act, 1971.

126. *Kesavananda Bharati v. State of Kerala*, A.I.R. 1973 S.C. 1461, 1552.

127. *Id.* at 1849.

128. *Id.* at 1851.

129. *Id.* at 1851-52.

130. *Id.* at 1859.

131. *Id.* at 1896.

As a result of the amendment, the old constitution cannot be destroyed and done away with; it is retained though in the amended form.¹³²

Using rather more dramatic language, Khanna continues:

Provision regarding the amendment of the Constitution does not . . . embody the death wish of the Constitution or provide sanction for what may perhaps be called its lawful harakiri. Such subversion or destruction cannot be described to be amendment of the Constitution as contemplated by Article 368.¹³³

The government's solicitors conceded as much at oral argument, but this of course raises the question of "what is the minimum of the existing constitution which should be left intact in order to hold that the existing constitution has been retained in an amended form and not done away with."¹³⁴ Khanna's enigmatic answer is that it requires "retention of the *basic structure* or framework of the old constitution," meaning that "it is not permissible to touch the foundation or to alter the basic institutional pattern" using the Article 368 amending power.¹³⁵

Khanna's view garnered seven votes on the Court, and the seven judges in the majority all agree that federalism, rule of law, separation of powers, secularism, and judicial independence are part of the basic structure of the Indian Constitution, but there is no consensus on how exactly one determines whether one principle or another is part of the basic structure.

While Chief Justice Sikri, like Chief Justice Lamer in the *Provincial Judges Reference*, thought that the basic structure can be discerned via structural interpretation of the Preamble,¹³⁶ Justice Khanna saw preambular interpretation is fraught with difficulties—not least because the Preamble can be amended out of shape or out of existence.¹³⁷

Unfortunately, Khanna never provided an affirmative theory as to how one is supposed to discern the basic structures of the Constitution, beyond a vague, Potter Stewart-esque notion that judges can tell a basic structure when they see one.¹³⁸ Chief Justice Sikri's opinion also rests on a similar proposition, concluding that the basic structure is best found in the "common understanding that the fundamental features of the Constitution, namely, secularism, democracy and the freedom of the individual would always subsist in the welfare state."¹³⁹

As for the legality of the Twenty-Ninth Amendment, Justice Khanna and his colleagues in the majority ultimately struck it down for violating what they held to be the basic structural features of separation of powers and judicial independence, for the amendment would allow Parliament and the state

132. *Id.* at 1860.

133. *Id.*

134. *Id.*

135. *Id.* (emphasis added).

136. *Id.* at 1493 ("[U]pon a comparison of the preamble with the broad features of the Constitution it would appear that the preamble is an epitome of those features . . .").

137. *Id.* at 1876. Justice Khanna was prescient, as the Preamble was amended in 1976 to declare India a "sovereign *socialist secular* democratic republic." The Constitution (Forty-Second Amendment) Act, 1976.

138. *Kesavananda Bharati*, A.I.R. 1973 S.C. at 1861; *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart J., concurring).

139. *Kesavananda Bharati*, A.I.R. 1973 S.C. at 1534.

legislatures to block the judicial review of statutes by simply stating that they serve to advance the Directive Principles.¹⁴⁰

D. *The Basic Structure as Constitutional Law*

The newly minted structure doctrine faced its first real test in 1975, during one of the darkest episodes in the history of India after independence. Two years earlier, an eccentric opposition candidate in Indira Gandhi's constituency named Raj Narain (popularly known as the "clown prince of India")¹⁴¹ brought suit against the Prime Minister for alleged misconduct in the 1971 election. It took the Allahabad High Court two years to decide the case, but when it did, it found Gandhi guilty on one count of electoral misconduct, annulled the result of the 1971 election, and banned her from elected office for six years.¹⁴² Rather than wait for the Supreme Court to grant an emergency stay, Gandhi invoked the emergency provisions of Article 352 of the Constitution, giving herself and her cabinet wide powers. The abuses committed during the two-year "Emergency" that followed are well-documented¹⁴³ and generally beyond the scope of this Note, but what is relevant is that Gandhi's government used its parliamentary majority (enhanced by the arrest of opposition leaders) to pass the Thirty-Ninth Amendment in September 1975, which insulated the election results of the Prime Minister and the Speaker of the Lok Sabha (lower house of Parliament) from judicial review.

Despite this parliamentary coup having reduced the Allahabad High Court's ruling to a nullity, Gandhi decided to appeal the ruling to the Supreme Court as a means of challenging the troublesome basic structure doctrine.¹⁴⁴ Having stacked the Court with handpicked appointees since at least 1973, Gandhi had reason to be confident of success.¹⁴⁵ Her confidence proved misplaced, however.

In *Indira Gandhi v. Raj Narain*,¹⁴⁶ as before in *Kesavananda Bharati*, the majority of the Court came up with a finely balanced judgment that neatly advanced the Court's own agenda. While the five-judge panel unanimously reversed the ruling of the Allahabad High Court and thereby reinstated Indira Gandhi's election results, four judges also ruled that the Thirty-Ninth Amendment was unconstitutional because it was inconsistent with the basic structure doctrine. In so doing, however, the majority judges could not agree on which basic structural principle(s) the Thirty-Ninth Amendment offended. Chief Justice A.N. Ray, a handpicked appointee of Indira Gandhi's and one of the dissenters in *Kesavananda Bharati*, thought the Thirty-Ninth Amendment

140. *Id.* at 1897-99 (Khanna, J.); *id.* at 1557-58 (Sikri, C.J.).

141. KATHARINE FRANK, *INDIRA* 357 (2002).

142. *Id.* at 372.

143. *See, e.g.*, P.N. DHAR, *INDIRA GANDHI, THE "EMERGENCY," AND INDIAN DEMOCRACY* (2000); KULDIP NAYAR, *THE JUDGEMENT* (1977). For the leading work of historical fiction about the Emergency, see ROHINTON MISTRY, *A FINE BALANCE* (1995).

144. BAXI, *supra* note 97, at 78-79.

145. *Id.*

146. A.I.R. 1975 S.C. 2299.

was suspect because it offended the basic structural principle of rule of law,¹⁴⁷ and Justice Y.V. Chandrachud concurred with the Chief Justice's diagnosis.¹⁴⁸ Justice Khanna, who penned the most important ruling in *Kesavananda Bharati*, thought the problem was with the democracy principle, as the amendment frustrated the holding of free and fair elections.¹⁴⁹ For his part, Justice K.K. Mathew thought that the Thirty-Ninth Amendment should be struck down because it offended the basic structural principles of judicial independence and judicial review.¹⁵⁰

For all the confusion as to what unwritten principles the Thirty-Ninth Amendment offended, the Supreme Court's ruling in *Raj Narain* contributes to the understanding of how basic structure principles are to be uncovered in two ways. First, at least one more judge backed Justice Khanna's view in *Kesavananda Bharati* that the basic structure should not be discerned from the preamble, given its susceptibility to amendment.¹⁵¹ Second, Justice Chandrachud staked out an interpretive position similar to the Canadian Supreme Court's view in the *Quebec Secession Reference*, in holding that the basic structural principles propounded in any particular case cannot be exhaustive, since "the theory of Basic Structure has to be considered in each individual case, not in the abstract, but in the context of the concrete problem."¹⁵²

E. *Minerva Mills and Subsequent Cases*

Any remaining doubts about the viability and vitality of the basic structure doctrine after *Raj Narain* were put to rest by the Supreme Court of India's decision in *Minerva Mills v. Union of India*.¹⁵³ This case dealt with the last of the plethora of self-serving constitutional amendments enacted during Indira Gandhi's tumultuous premiership, and as such it bookends the line of doctrinal development that began with the *Sajjan Singh* dissent.

Under review in *Minerva Mills* was the constitutionality of the Forty-Second Amendment of 1976, which, inter alia, attempted to strip the jurisdiction of all courts to review any constitutional amendment made using Article 368 powers for any reason whatsoever. The five judge bench of the Supreme Court had little difficulty in finding the amendment unconstitutional for violating the basic structural principle of judicial review, given that its scope extended even to whether the procedural requirements of Article 368 were followed.

In the view of at least one commentator, the holding in *Minerva Mills* seemed to establish a new basic structural principle that a minimum core of

147. *Id.* at 2315.

148. *Id.* at 2468-69.

149. *Id.* at 2351.

150. *Id.* at 2380; see also GRANVILLE AUSTIN, WORKING A DEMOCRATIC CONSTITUTION, 314-27 (1999).

151. *Raj Narain*, A.I.R. 1975 S.C. at 2386 (Mathew, J.).

152. *Id.* at 2466-67 (Chandrachud, J.).

153. (1980) 2 S.C.C. 591.

judicial jurisdiction is inviolate.¹⁵⁴ This notion has gained credence following the Supreme Court of India's more recent ruling in *L. Chandra Kumar v. Union of India*,¹⁵⁵ which held that the jurisdictional grant to the Supreme Court and the High Courts in Articles 32, 226, and 227 of the Constitution are themselves basic principles, and as such, this jurisdiction cannot be delegated to administrative tribunals.

Finally, one further recent development that must be noted is the extension of the basic structural principal of secularism first announced in *Kesavananda Bharati*, from the constitutional amendment context to the review of day-to-day government activities. In the politically charged case of *S.R. Bommai v. Union of India*,¹⁵⁶ the Supreme Court held that the failure of several state governments to treat all religious communities equally during the communal violence that erupted following the demolition of the Babri Mosque by Hindu extremists in 1992, was a violation of the basic structural principle of secularism that justified New Delhi's use of its Article 356 power to sack several state governments for "failure of constitutional machinery in states."¹⁵⁷

IV. THE COLONIAL COUSINS COMPARED: THREE CLAIMS

What should be made of the striking similarities between the unwritten constitutional jurisprudence of the Canadian and Indian supreme courts? In this Part, I will advance the three core analytical claims set out in the Introduction. These are that (1) every court interpreting a new constitution has developed an unwritten jurisprudence; (2) similar principles are to be expected in two countries whose constitutions share structural similarities; and (3) the similar principles play very different roles in Canada and India (enabling amendments in the former, but sandbagging them in the latter).

Prior to examining these claims in detail, however, it might be useful to summarize the most important similarities between the Canadian and Indian constitutional courts from the preceding survey.

First, both courts routinely rely on unwritten constitutional principles not just for rhetorical effect, but also as *outcome-determinative* principles of constitutional law, in lieu of deciding cases using the constitutional text.

Second, both courts are eclectic in the interpretive methods they use to uncover unwritten principles, although structural interpretation—and in particular structural interpretation that uses the preamble as a starting point—is common in both countries.

Third, and most striking of all, both courts have articulated a virtually identical set of unwritten principles in handing down what are widely acknowledged to be the most important cases in the histories of each court

154. R.K.P. Shankardass, *Anomalies of the "Doctrine,"* in THE SUPREME COURT VERSUS THE CONSTITUTION, *supra* note 17, at 137, 144-45.

155. (1997) 1 S.C.J. 552.

156. A.I.R. 1994 S.C. 1918.

157. For the leading analysis of the ruling in *S.R. Bommai*, see GARY JEFFREY JACOBSON, THE WHEEL OF LAW: INDIA'S SECULARISM IN COMPARATIVE CONTEXT 161-88 (2003).

(*Kesavananda Bharati* in India, and the *Quebec Secession Reference* in Canada).¹⁵⁸

The similarities between the unwritten constitutional jurisprudence of the Canadian and Indian supreme courts, not to mention the fact that both courts are engaged in a similar jurisprudential enterprise, presents at least two major analytical puzzles. One is why both courts have resorted to articulating unwritten principles at all—especially in highly controversial cases such as *Kesavananda Bharati* and the *Quebec Secession Reference*, when both courts could have instead decided the cases based on the text, or declined to hear them altogether using a prudential doctrine such as the American political questions doctrine.¹⁵⁹ The Supreme Court of India's basic structure doctrine presents the more difficult challenge in this regard. It stands to reason that the longer and more detailed the constitutional text, the greater the range of situations it must cover, and thus the need for resorting to unwritten constitutional principles for whatever reason should be consequently lower. In the words of one Indian scholar, “[g]iven the fact that the Constitution is a lengthy document and as detailed as an administrative manual, it seems *prima facie* to warrant only a narrow, technical and literal interpretation.”¹⁶⁰

Second, assuming that the use of some unwritten principles is sometimes justified, the question then arises as to why both courts have announced so many principles so soon after the inauguration of new constitutional orders in both countries. While the Supreme Court of Canada opined in the *Provincial Judges Reference* that two of the major purposes of the unwritten principles are to fill gaps in the written text and provide for interpretive flexibility,¹⁶¹ one wonders just how many gaps could have arisen within twenty-five years in Canada, and just under sixty years in India. Is it really necessary for the Canadian and Indian supreme courts to rely upon unwritten principles to fill in so many gaps at this early juncture, especially when both of these constitutions, unlike their American counterpart, were (re)drafted in an era of jet planes, atomic weapons, and global telecommunications? Does this not suggest a major “failure of the founding fathers” to create a constitution for the ages? Or worse, might we not have an example of unconstrained judicial activism?

A. *John Marshall's Journey*

Far from constituting illegitimate judicial activism or a failure of the founding fathers, the articulation by a high court of unwritten constitutional principles is in fact central to the whole enterprise of democratic

158. It is, however, both an open and a chicken-and-egg question as to whether important cases lead to the articulation of unwritten principles, or whether cases that articulate unwritten principles become important as a result.

159. Neither Canada nor India currently has a political question doctrine, much to the chagrin of some Canadian scholars. See D. Geoffrey Cowper & Lorne Sossin, *Does Canada Need a Political Questions Doctrine?*, 16 SUP. CT. L. REV. 343 (2002).

160. T.S. Rama Rao, *Supreme Court and the “Higher” Logic of Fundamental Rights*, 25 J. INDIAN L. INST. 186, 193 (1983) (paraphrasing the views of H.M. Seervai).

161. Reference re Remuneration of Judges (*Provincial Judges Reference*), [1997] 3 S.C.R. 3, 75-76.

constitutionalism in a common law polity, for it is the way in which the indeterminate text of the constitution acquires meaning. Indeed, as Jed Rubenfeld argues, the early cases of a constitutional court form the “paradigm cases” for a new constitution’s provisions, from which flow the “foundational application understandings” of the text.¹⁶² With time, the unwritten principles even come to be venerated as constituting the “original understanding” of the text.

An example from the early constitutional history of the United States may help to illustrate the pattern of courts resorting to underlying principles that are “not explicitly made part of the Constitution by any written provision” in order to ascertain and fix the meaning of the text.¹⁶³ Consider the classic case of *Marbury v. Madison*, which contains the kernel of at least three unwritten principles of American constitutionalism: the separation of powers, the political question doctrine, and the theory of judicial review.¹⁶⁴ None of these principles is clearly stated anywhere in the text of the U.S. Constitution, but Chief Justice John Marshall nonetheless discerns them by means of structural analysis.

Let us begin with Marshall’s construction of a justification for judicial review, which is based on two premises. The first is that “it is emphatically the province and the duty of the judicial department to say what the law is,” and the second is that the true import of the Constitution’s Article VI supremacy clause is to make void any “act of the legislature, repugnant to the Constitution.”¹⁶⁵ The interaction of these two premises leads Marshall to the conclusion that if “two laws conflict with each other, the courts must decide on the operation of each,” since “those who apply the rule to particular cases, must of necessity *expound and interpret* that rule.”¹⁶⁶

Just as in the *Provincial Judges Reference*, where the Supreme Court of Canada constructed the unwritten principle of judicial independence from the separation of powers, so too has Chief Justice Marshall based his theory of judicial review on a prior unwritten principle. Marshall’s famous phrase about the “province and duty of the judicial department” implies that the judiciary has functions that are distinct from the legislative and executive departments. That is, the duty of the judiciary is to interpret the law, whereas that of the legislative and executive departments is to make and apply them.

The separation of powers principle also figures prominently in Marshall’s elaboration of the forerunner to the modern political question doctrine. In deciding whether the Court may review Madison’s failure to deliver Mr. Marbury his signed and sealed commission, Marshall posits a difference between the acts of United States officers performing discretionary functions under the President’s Article II powers, as opposed to duties imposed upon them by Congress. Whereas the latter may be surveyed by courts, since the “rights of individuals are dependent on the performance of

162. JED RUBENFELD, *REVOLUTION BY JUDICIARY* 15-16 (2005).

163. Reference re Secession of Quebec (*Quebec Secession Reference*), [1998] 2 S.C.R. 248.

164. 5 U.S. (1 Cranch) 137 (1803).

165. *Id.* at 177.

166. *Id.* (emphasis added).

those acts,” the same is not true of the former, which “can never be examinable by the courts” since “[t]he subjects are political.”¹⁶⁷

Marbury thus serves to articulate two unwritten principles of the U.S. Constitution (judicial review and the political question doctrine) based on a third unwritten feature: the separation of powers. None of these principles appears anywhere in the text of the Constitution, nor can these principles be said to be part of some unanimous original understanding of the Constitution by the Founding Fathers. Indeed, *Marbury* represents an unfavorable judgment by Chief Justice Marshall as to the constitutionality of the actions of both Thomas Jefferson and especially James Madison, who was among the first to champion the concept of the separation of powers.¹⁶⁸

Even so, over the course of two centuries, the unwritten principles Chief Justice Marshall relied upon in *Marbury* have come to be seen as part of the “original understanding” of the U.S. Constitution—to the point that the mere recitation of one of these three unwritten principles makes for a conclusive legal argument. There is no longer any serious dispute in the United States as to the legitimacy of judicial review; American cases are routinely decided on the basis of the separation of powers;¹⁶⁹ and the political question doctrine is used to shut the courtroom door on what would otherwise be justiciable disputes.¹⁷⁰ Similarly, in Indian and Canadian jurisprudence, unwritten principles discerned by the courts are now used as a sort of jurisprudential shorthand for dealing with certain kinds of cases. The best example of this in both India and Canada is, of course, the use of the unwritten principle of judicial independence, which was dispositive in cases such as *Mackin*¹⁷¹ and *Minerva Mills*.¹⁷²

In all three countries, the basic problem that is being resolved by courts making resort to unwritten principles is the indeterminacy of the constitutional text in a wide range of situations. While critics complain that the articulation of unwritten principles is tantamount to the judiciary amending the constitution, it is axiomatic that courts must resort to interpretive aids external to the text to make sense of it, and to construct useful doctrines from it that can be applied to particular cases.

So long as their use is principled, there is no fundamental difference between a court taking judicial notice of the dictionary definition of a word, and in its discerning principles underlying the text by means of a consistent methodology. Thus, to the extent that there is a legitimacy problem with the unwritten constitutional principles being propounded by the supreme courts of Canada and India, it can be attributed to their methodological eclecticism, rather than to the very nature of their jurisprudential endeavor. Simply put, if the courts limited themselves to drawing necessary or permissible

167. *Id.* at 166.

168. See THE FEDERALIST No. 51 (James Madison).

169. See, e.g., *INS v. Chadha*, 462 U.S. 919 (1983) (Powell, J., concurring); *United States v. Cox*, 342 F.2d 167 (5th Cir. 1965).

170. See, e.g., *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006).

171. [2002] 1 S.C.R. 405 (Can.).

172. (1980) 2 S.C.C. 591 (India).

implications from the structure of the text, there would be much less of a legitimacy problem.

It is worth noting, however, that there is a greater demand for the judicial articulation of constitutional norms in Canada and India than in the United States, both for structural and socio-historical reasons. On the structural side, both Canada and India are parliamentary democracies where the veto held by the successors of the Crown (the Canadian Governor-General, and the Indian President) has fallen into desuetude. By contrast, presidential vetoes and signing statements contribute significantly to shaping constitutional understandings in the United States. For example, even though the Supreme Court upheld the constitutionality of the Second Bank of the United States in *McCulloch v. Maryland*,¹⁷³ Andrew Jackson had the last word on this issue with his veto pen.

Moreover, the Canadian and Indian supreme courts cannot make use of prudential doctrines to the same extent of the U.S. Supreme Court, because of the nature of their jurisdiction. Article 32 of the Indian Constitution gives its Supreme Court original jurisdiction over petitions for prerogative writs to halt violations of Fundamental Rights, thereby making it difficult for the Court to decline to hear such cases. The Canadian Supreme Court, for its part, is burdened by a jurisdictional statute that allows Cabinet to ask it for reference opinions¹⁷⁴—a power that Cabinet is only too happy to use to lob the hottest constitutional potatoes to its neighbor down Ottawa's Wellington Street. Unless the Court refuses to answer a question outright,¹⁷⁵ it is well advised to answer the question in a manner that preserves its legitimacy for any future litigation that arises on the issue; and in this context, unwritten principles may provide the Court with a way of finessing difficult issues.

Finally, on the socio-historical front, neither Canada nor India was fortunate enough to have a “constitutional norm entrepreneur” with the prestige of George Washington in its early history, whose behavior while in office delimits the scope of acceptable constitutional practice. For example, the Twenty-Second Amendment is widely acknowledged to be nothing more than a codification of the precedent established by Washington's resignation after two terms—albeit a precedent observed mainly in its breach by Franklin Delano Roosevelt.¹⁷⁶ One wonders whether Mahatma Gandhi might have played such a role had he not been assassinated so soon after India's independence.

B. *Similar Principles . . .*

In every modern democratic constitutional order, unwritten principles play an important function in fleshing out the spare, unadorned constitutional text. To be sure, there are several other functional roles that unwritten

173. 17 U.S. 316 (1819).

174. Supreme Court Act, R.S.C. c. S-19, s. 53 (1985).

175. Such refusals are rare, but the Court did refuse to answer the Cabinet's questions in *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, given that the government had already introduced legislation to recognize such marriages.

176. See AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 433-36 (2005).

principles can play, from the aforementioned gap filling, to lending coherence to different lines of cases, to bolstering the prestige and authority of the judiciary.

While having some unwritten principles may serve these various functional purposes in different constitutional orders, how can we explain the articulation of almost exactly the same set of unwritten principles by the Canadian and Indian supreme courts? The (unsatisfying) answer to this analytical puzzle is that most any constitutional court in a modern federal democratic state would probably have come up with the same list as their Canadian and Indian counterparts if given the chance, for in the postwar era, constitutional law has become increasingly generic.¹⁷⁷ We are all democracies now, we all believe in the rule of law and its corollary of judicial review, and insofar as we are diverse, we all believe in respecting the rights of minority communities. The structural similarities that the Canadian and Indian constitutions share with most other postwar constitutions are only reinforced by the similarities of the two polities, in that both countries have in common the Westminster parliamentary system, as well as significant national minorities whose aspirations require accommodation.

C. . . . *But Different in Principle*

The two contentions advanced thus far are court-centric, as they both analyze the unwritten constitutional principles of the Indian and Canadian supreme courts from the perspective of the judiciary. The first analytical claim is that all judges in new constitutional orders turn to unwritten principles to fulfill a common functional need for flesh on bones, while the second claim suggests that different judges come up with a similar set of principles because they are all interpreting texts that are of a similar vintage and design.

But what of the effects of the unwritten constitutional principles on the Canadian and Indian bodies politic? As it turns out, similar principles forged in similar ways can have very different effects in different places. Whereas in Canada, unwritten principles serve as a flexibility device to compensate for the enormous difficulty of passing formal amendments to the constitution, in India the principles serve as stability devices that help to preserve the country's core constitutional commitments from being hollowed out by politicians who often seize the levers of power by hook and by crook.

D. *Principles in Canada*

The idea that the unwritten constitutional principles developed by the Supreme Court of Canada are amending the Constitution by extraconstitutional means is not new, and has long been part of the critique of this jurisprudence from the conservative end of the political spectrum.¹⁷⁸ An

177. See generally David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652 (2005) (arguing that similar basic principles underlie most modern democratic constitutions); Peter E. Quint, *What Is a Twentieth-Century Constitution?* 67 MD. L. REV. 238 (2007) (arguing that democratic constitutions enacted after the Second World War share many features in common).

178. See, e.g., LEISHMAN, *supra* note 17.

interesting re-articulation of this view, however, comes in Sujit Choudhry's recent attempt to export Bruce Ackerman's theory of "constitutional moments" outside the United States.¹⁷⁹ By comparing the *Quebec Secession Reference* to the American New Deal, Choudhry reconceptualizes the constitutional moment as an "extralegal constitutional change, prompted by the failure of formal rules of constitutional amendment that are designed to constitute and regulate constitutional politics without becoming part of it."¹⁸⁰

In Choudhry's view, the *Quebec Secession Reference* is best understood "as an extralegal move that the Court felt was made necessary by the breakdown of the procedures governing constitutional amendment,"¹⁸¹ because even though "[i]n Canadian constitutional practice, the starting point of constitutional interpretation is the text of the Constitution,"¹⁸² the Court "wrote a novel 'secession clause' into the Canadian Constitution through the use of unwritten constitutional principles."¹⁸³ The problem with such "gap filling through judicial interpretation," according to Choudhry, "is that the Canadian Constitution has already set up a process for filling constitutional gaps, whether perceived or actual—the process of constitutional amendment."¹⁸⁴ Therefore, the *Quebec Secession Reference* is best understood as a kind of "amendment-like interpretation" resulting from the failure of the formal amending process.¹⁸⁵

Choudhry's characterization seems apt with respect to the Supreme Court of Canada's finding of a duty to negotiate the secession of a province based on unwritten principles, but the *Quebec Secession Reference* is in many ways an outlier, for the primary use of the unwritten principles in Canada has been to preserve the separation of powers and promote judicial independence. Does it stretch credulity, therefore, to argue that the Court has been amending the Constitution in its rulings in such cases as the *Provincial Judges Reference*, or *Mackin v. New Brunswick*?

The argument is less convincing in other contexts, but it does hold water if one compares the Supreme Court of Canada's unwritten constitutional principles to the two failed attempts to formally amend the Canadian Constitution in the early 1990s. Consider, for example, Section 1 of the Charlottetown Accord of 1992 (the "Canada Clause"), which was voted down in a national referendum later that year.¹⁸⁶ This provision specifies four of the

179. Choudhry, *supra* note 19.

180. *Id.* at 197.

181. *Id.* at 215.

182. *Id.* at 218.

183. *Id.* at 219.

184. *Id.*

185. *Id.*

186. The Charlottetown Accord's Canada Clause states, in relevant part:

(1) The Constitution of Canada, including the *Canadian Charter of Rights and Freedoms*, shall be interpreted in a manner consistent with the following fundamental characteristics:

(a) Canada is a democracy committed to a parliamentary and federal system of government and to the rule of law;

...

(e) Canadians are committed to racial and ethnic equality in a society that includes citizens from many lands who have contributed, and continue to contribute, to the building of a strong Canada that reflects its cultural and racial diversity;

six unwritten principles announced by the Supreme Court of Canada to date (rule of law, democracy, federalism, and respect for minorities), and one additional principle (judicial independence) is guaranteed in Section 101(A)—which would have transformed the Supreme Court of Canada from a statutory court to a constitutionally enshrined “general court of appeal for Canada.”

To the extent that the rejection of the Charlottetown Accord constitutes a *refus global* of its provisions,¹⁸⁷ the Supreme Court of Canada might be fairly accused of amending the Constitution with its unwritten principles, though it is difficult to know for sure given the up-or-down nature of voting in a referendum.

E. Principles in India

The Canadian experience with unwritten constitutional principles stands in stark contrast to the Indian experience with the basic structure doctrine, which I contend is a stability device that throws sand into the gears of the constitutional amendment process. This view is not the conventional wisdom in India, however, where the three leading hypotheses in the literature as to the functions of the basic structure doctrine are that it is:

- a mechanism for balancing between competing constitutional values, notably between the Fundamental Rights guaranteed in Part III, and the Directive Principles enshrined in Part IV;
- a “developmental” or “flexibility” device for the development of new constitutional doctrines; or
- a means of preserving the original intent of the Constituent Assembly.¹⁸⁸

The first and second of these explanations are not convincing, though the third is not inconsistent with my explanation and the evidence. Given that the Supreme Court of India has systematically privileged the Fundamental Rights over the Directive Principles in its jurisprudence, going so far as to declare that the Directive Principles are nonjusticiable in *Kesavananda Bharati*,¹⁸⁹ it stretches credulity to argue that the basic structure doctrine serves as a balancing mechanism for these competing values. It is also not easy to conceptualize of the basic structure doctrine as a developmental or flexibility device when the overwhelming use of the doctrine has been to torpedo constitutional amendments that derogate from the rights guaranteed in the original text. For this reason, there is something to the third theory of the basic structure doctrine as a form of originalism that embalms the normative commitments made by “We the People of India” in 1950; but this view has its

(f) Canadians are committed to a respect for individual and collective human rights and freedoms of all people . . .

Charlottetown Accord (Oct. 9, 1992) (draft), *reprinted in* THE CHARLOTTETOWN ACCORD, THE REFERENDUM, AND THE FUTURE OF CANADA, app. 2, at 315 (Kenneth McRoberts & Patrick Monahan eds., 1993).

187. *Refus global* is the title of a screed against the Catholic Church-dominated establishment in Quebec written in 1948 by the artists Paul-Émile Borduas and Jean Paul Riopelle, who together pioneered the *automatiste* school of abstract expressionist painting. PAUL-ÉMILE BORDUAS, *REFUS GLOBAL* (1948).

188. Anuranjan Sethi, Basic Structure Doctrine: Some Reflections 30-35 (Oct. 25, 2005) (unpublished manuscript), *available at* <http://ssrn.com/abstract=835165>.

189. A.I.R. 1973 S.C. at 1508.

limits, too, as the Constituent Assembly consciously embraced a Jeffersonian conception of constitutionalism in making the document so easy to amend.

A better view of the function of the basic structure doctrine in the Indian body politic comes from turning the Choudhry hypothesis about the *Quebec Secession Reference* on its head. Instead of unwritten constitutional principles amending the Constitution to give the people of Canada what they may or may not want, the basic structure doctrine acts much like a suspensory veto to ensure that the people of India really want the constitutional changes enacted by their leaders.

Reading the line of cases from *Golak Nath* to *Minerva Mills* in the light of the tumultuous history of Indira Gandhi's premiership makes this clear. Faced with what it saw as a constitutional amendment that would hollow out the Fundamental Rights protections just to fulfill some campaign promises, the Supreme Court in *Golak Nath* slammed down hard against any erosion of Part III by subjecting the Article 368 amending process to the full rigors of Article 13(2). This decision, like the Court's subsequent decision in *R.C. Cooper* (on the question of bank nationalization), led Gandhi to run against the Court in the 1971 election, where she was rewarded with the biggest landslide in Indian history.

The Court recognized the strength of Gandhi's democratic mandate in both *Kesavananda Bharati*, where it yielded on the *Golak Nath* holding, and in *Raj Narain*, where it upheld her election. At the same time, however, the Court struck down both the Twenty-Ninth and Thirty-Ninth Amendments in the two cases—and that too at a time when the normal democratic checks against abuse of power were at first imperiled by Gandhi's massive majority, and later completely destroyed by the Emergency. The Court's move would be redeemed in the next election, which resulted in a massive defeat for Gandhi, and in the election of a broad coalition government that undid most of the legislative results of the Emergency. With this popular affirmation behind it, the Court had little trouble in unanimously affirming the basic structure doctrine in *Minerva Mills*.

The result is an interesting mirror image of Ackerman's theory of constitutional change in the United States. Rather than the judiciary lagging behind the other branches and society at large as it did in the United States during the New Deal, the Supreme Court of India's basic structure doctrine checks the representatives of the people from abusing the amendment power until the people themselves can speak on constitutional issues of fundamental importance.

V. CONCLUSION

While twins may look alike, and even act alike to some extent because of their shared genetic inheritance, we are as much a product of our environment as of our genes, so who we are depends a great deal on where we come from. And so it is with the unwritten constitutional jurisprudence of the supreme courts of Canada and India. Given the genetic material they have in common, it is not surprising that the Canadian unwritten constitutional principles and the Indian basic structure doctrine bear more than a fraternal

resemblance; but it is only when we look carefully at each jurisprudence in its native soil that we see the very different functions that each serves.

This Note presents a first-cut explanation both as to why the Canadian and Indian unwritten constitutional jurisprudence looks so similar on the surface (similar genes), and yet has very different consequences for each country's body politic (different environment). The fact that the amending formulae of the two countries possess complementary pathologies (too easy versus too difficult to amend) seems to drive the difference, though it does beg the question of why my two "most similar cases" behave so differently when it comes to constitutional amendment. That, however, is fodder for another article.

To the extent that two similar-looking bodies of law can have very different consequences in different places, this Note serves as a warning about the simplistic functionalist analysis that can be found in so much comparative law scholarship. It is not good enough to read the law and note the similarities and differences. One simply cannot appreciate what function legal doctrines play in different times and places without being attuned to the context of the place. This Note is by no means the final say on the interaction between doctrine and circumstance in India and Canada, but it is a modest first step in developing such an understanding.

Finally, there is a point to be made about the long-running debate between "clause-bound interpretivism" and "judicial activism" in the United States¹⁹⁰ that unfortunately, though perhaps inevitably, has become the dominant lens for analyzing unwritten constitutionalism in India and Canada. While Section IV.A of this Note shows yet again why this is a false dichotomy even in the United States, there is a valid concern both in Canada, but especially in India, as to just how far judges can go in divining unwritten principles without the benefit of a consistent and determinate methodology. There may be broad agreement that the Indian and Canadian courts have both hit on the right results in checking an unbridled amending power, or imposing a legal framework that mitigates the uncertainties around provincial secession. But achieving the right result is a thin basis for ongoing judicial legitimacy, especially if the courts should ever misstep.

190. ELY, *supra* note 27, at 11-41.

