

## How to do Constitutional Law & Politics in South Asia

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### A. Introduction

The study of South Asia has been neglected in the vast and growing field of comparative constitutional law and politics. But along what dimensions has this neglect occurred? In the simplest terms, South Asian jurisdictions have been largely absent from important debates in the field. To take but one example, over the past decade, an important point of comparative investigation has been the application of bills of rights to private actors (horizontal effect), and the related issues this raises for the institutional allocation of responsibility among apex courts (constitutional courts and supreme courts), lower courts with jurisdiction over ordinary law, and legislatures. This work blends doctrinal analysis with institutionalist approaches to public law and courts.

Notwithstanding that some of the Fundamental Rights in Part III of the Indian Constitution have horizontal effect, and that the writ jurisdiction of the High Courts and the original jurisdiction of the Supreme Court of India over Part III have fueled the horizontal seepage of Part III, in turn shaping patterns of legal mobilization and altering the powers and status of the High Court and the Supreme Court in India's judicial hierarchy, India has been missing in action in this scholarly conversation. And when South Asian jurisdictions have been included in comparative studies, the intellectual agenda has been set by the systems around which comparative constitutional law and politics has been framed – the liberal democracies of the North Atlantic, South Africa, and Israel. So the study of Indian secularism in Gary Jacobsohn's *Wheel of Law* was motivated by debates about the constitutional architecture of religion-state relations in the United States in Israel, and the examination of socio-economic rights litigation in India in the 1980s in Sandra Fredman's *Human Rights Transformed* (2008) was informed by the constitutional debates launched by the South African constitutional transition a decade later.<sup>1</sup> The engagement with South Asia has been narrow and selective, approached through the lens of constitutional law and politics in constitutional systems implicitly understood as paradigm or central cases.

These axes of intellectual disengagement are mutually reinforcing, and to respond to them requires an integrated scholarly strategy. At its foundation is the claim that we

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<sup>1</sup> Gary Jeffrey Jacobsohn, *The Wheel of Law: India's Secularism in Comparative Constitutional Context* (New Delhi: Oxford University Press, 2003); Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (New York: Oxford University Press, 2008).

must study South Asia on its own terms. To come to grips with South Asian constitutional law and politics requires that we build our research agendas around the actual practice of constitutional actors in South Asia. While religion-state relations and socio-economic rights have been important to constitutional practice, they have not been the only, or indeed the central, topics of concern. For example, as I have written elsewhere, across South Asia, the constitutional politics of official language status has been the principal driver of the reconfiguration of political space in the late colonial and post-colonial period.<sup>2</sup> And orienting the study of South Asian constitutionalism around the problems that have preoccupied constitutional actors opens the door to an alternative strategy of comparative case-studies that shifts the field beyond the narrow set of jurisdictions that command central concern. The constitutional politics of official language policy, for example, links South Asia with Turkey and Spain, where a major axis of cleavage for sub-state nationalist mobilization has been language.

But alongside the questions of substantive focus and case selection, the study of South Asia has suffered from other methodological shortcomings. In this chapter, I focus on the disjuncture between the study of South Asian constitutional development and constitutional law in their examination of constitutional jurisprudence. Scholars of constitutional development have developed a literature on the politics surrounding the adoption and amendment of South Asia's various constitutions, especially the Indian Constitution, as well as the inter-institutional relationships between legislatures and the courts regarding the interpretation of constitution and its enforcement. The judicialization of constitutional politics in South Asia – including the process of constitutional amendment – is pervasive and has been widely noted. But scholars of South Asian constitutional development, mostly historians and political scientists, have in general offered highly truncated analyses of constitutional jurisprudence. Their institutional focus is constitutional assemblies and legislatures. On the other side of the aisle, there is a large legal literature, produced by legal scholars and commentators, that has analyzed these judgments. This body of work is formalistic and doctrinal, and is oddly divorced from the broader constitutional politics of which particular constitutional cases are a part – in a sense, the mirror image of work in constitutional development. I suggest that the research strategy for bridging divide lies in a close reading of judgments. Upon careful examination, the leading judgments highlight how the broader constitutional politics was presented in terms cognizable under formal legal categories to the courts. Moreover, the courts signaled that they were alert to this broader politics, and at times attempted to address the substantive concerns at play in lengthy and complex judgments that wrestled, often imaginatively, with the issues at play. What is sorely needed an analysis of key cases that integrates the constitutional politics, occurring outside the courts, with the details of those judgments themselves. In short, there is a gap between scholarly analysis and primary source materials. Taking those materials seriously offers a promising platform for reimagining what the study of South Asian constitutional law and politics could look like.

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<sup>2</sup> Sujit Choudhry, "Managing Linguistic Nationalism through Constitutional Design: Lessons from South Asia", 7 *International Journal of Constitutional Law* 577 (2009).

In this chapter, I illustrate what the study of South Asian constitutional law and politics could look like if we addressed this cluster of methodological concerns in parallel. I do so through two vignettes, relying mostly on Indian constitutional materials. The first is the basic structure doctrine, whereby the Supreme Court of India imposed substantive restraints on the power of constitutional amendment. The second is India's system of reservations or preferential hiring and admissions on the basis of caste. These two issues have been central to constitutional politics in India.

## B. The Basic Structure Doctrine

The story of the rise of the basic structure doctrine is well known, so I present it only in outline. Article 368 of the Indian Constitution provides a mechanism for constitutional amendment. The constitutional text imposes procedural, but not substantive, constraints on the power of constitutional amendment, which on its face is otherwise unlimited. The basic structure doctrine was developed by the Supreme Court of India and imposes a set of substantive constraints on the power of constitutional amendment.

The Supreme Court of India developed the doctrine in the context of a lengthy legal-political saga concerning land redistribution, which was a dominant theme in Indian constitutional jurisprudence in the 1950s and 1960s. The national Parliament attempted to enact land reform legislation which, crudely put, sought to abolish the pre-independence system of tenure (the *zamindari* system) and redistribute land to peasants. The Supreme Court responded by striking down these laws on the basis that they breached the constitutional obligation to compensate landowners for deprivations of property.<sup>3</sup> In response, Parliament amended the constitution to withdraw estates held under the *zamindari* system from the right to compensation, and then to make the amount of compensation non-justiciable.<sup>4</sup> It also enacted the Ninth Schedule to the Constitution, which listed an ever-increasing number of laws rendered them entirely immune from constitutional challenge on the ground that they infringed a Fundamental Right in Part III. The Supreme Court responded in *Golak Nath* by treating constitutional amendments as ordinary laws that were subject to the fundamental rights in the Indian Constitution, including the right to property.<sup>5</sup> Parliament, in turn, responded through a set of constitutional amendments that asserted, inter alia, the plenary nature of the power of constitutional amendment.<sup>6</sup> The Supreme Court famously responded in *Kesavananda*

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<sup>3</sup> *The State of Bihar v Maharajadhiraja Sir Kameshwar Singh of Darbhanga and Others* (1952) 1 SCR 889; AIR 1975 SC 1083 and *Karimbil Kunhikoman v State of Kerala* (1962) Supp 1 SCR 829.

<sup>4</sup> These were the Constitution First (1951), Fourth (1955), and Seventeenth (1964) Amendment Acts.

<sup>5</sup> *Golak Nath v State of Punjab* AIR 1967 SC 1643.

<sup>6</sup> The Constitution 24<sup>th</sup> (1971), 25<sup>th</sup> (1971), 26<sup>th</sup> (1971) and 29<sup>th</sup> (1972) Amendments Acts.

*Bharati*, which asserted the Court's power to review the substance of constitutional amendments for compliance with the Constitution's basic structure, which included the power of the courts to ensure that the amount of compensation paid for property compulsorily acquired by the state was not arbitrary.<sup>7</sup>

The doctrine has been in place since 1973 and continues to be used, albeit sparingly. It turns on a distinction between those amendments that amend a constitution (which are permitted) and those that damage or destroy it (which are prohibited). The content of the basic structure remains contested. However, at a minimum it includes constitutional supremacy, a republican and democratic form of government, secularism, the separation of powers, judicial independence, and federalism. What is encompassed by each of those elements of the basic structure is in turn, a matter of on-going dispute, both in the courts and in constitutional politics more broadly.

The basic structure doctrine has generated a substantial scholarly literature, which broadly speaking falls into two intellectual traditions. One body of work is firmly anchored in legal scholarship, and has been produced by constitutional scholars. It is squarely focused on the court's judgments, which it examines from a number of angles. The first generation of scholars, influenced by emerging American constitutional scholarship on the counter-majoritarian dilemma spawned by *Brown v. Board of Education* and the Warren Court, was in general critical of the doctrine. The essence of the claim was the Indian constitution sets out a clear institutional division of labor between the courts and Parliament, whereby the former interprets and enforces the Constitution, whereas the latter retains the ultimate power of constitutional amendment. In the face of textual clarity, the doctrine is a judicial usurpation of constituent power. P. K. Tripathi, a leading Indian constitutional scholar at the time, offered a devastating account of *Kesavananda Bharati*'s internal inconsistencies and failures in reasoning.<sup>8</sup> Tripathi had previously presented an equally vigorous attack against *Golak Nath*,<sup>9</sup> and his essay on *Kesavananda Bharati* encouraged much debate over the Court's exact ratio.<sup>10</sup> Rajeev Dhavan's book *The Supreme Court of India and Parliamentary Sovereignty* similarly explored the character of the decision, paying great attention to ideas of implied limitations, constituent power, legal and political sovereignty, and the particular orientations of different judges.<sup>11</sup> The disagreement among the judges about the elements

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<sup>7</sup> *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1469.

<sup>8</sup> P. K. Tripathi, "Kesavananda Bharati v. State of Kerala: Who Wins?", *Supreme Court Cases (Journal)* 3 (1974).

<sup>9</sup> P. K. Tripathi, *Some Insights into Fundamental Rights* (Bombay: University of Bombay, 1972) at 1-44.

<sup>10</sup> See Upendra Baxi, "The Constitutional Quicksands of Kesavananda Bharati and the Twenty-Fifth Amendment", *Supreme Court Cases (Journal)* 45 (1974).

<sup>11</sup> Rajeev Dhavan, *The Supreme Court of India and Parliamentary Sovereignty* (New Delhi: Sterling Publishers, 1976).

of the basic structure buttresses this view. These critiques of judicial activism were joined with a critique about the theory of political economy that appears to underlie the judgment.<sup>12</sup> On this view, the “struggle between parliament and court for supremacy in interpreting the constitution pitted proponents of the oppressed many without property against the privileged few with property”.<sup>13</sup> The Court’s jurisprudence on property rights was widely attacked in tones reminiscent of the attack on the *Lochner*-era jurisprudence of the United States Supreme Court a few generations earlier. These themes continue to be central in legal scholarship about the doctrine, although they have abated as the constitutional conflict over property rights and land reform has receded in policy relevance.

In recent years, however, legal scholars have come to accept the doctrine as a given, and have shifted their focus to clarifying the doctrine’s boundaries. At the heart of this research agenda – set by Sudhir Krishnaswamy’s *Democracy and Constitutionalism in India* – is the idea that the basic structure is not merely a doctrine that limits constituent power, but one that applies to all exercises of public power. To a large extent, this shift in scholarly analysis tracks the trajectory of the jurisprudence, which has moved on from disputes over property rights to the role of the basic structure doctrine in constraining exercises of executive power in other areas. For example, the doctrine was invoked to check the power of President’s rule Article 356 (which allows the central government to dismiss state governments), to require that exercises of that power comply with secularism. Another issue is whether the doctrine applies to legislative powers, and by implication, to the exercise of grants of statutory authority to the executive. Yet another question is whether the doctrine operates as a canon of constitutional interpretation. Krishnaswamy has also explored the standard of review entailed by the “damage or destroy” test. As the range of public decisions to which the doctrine extends grows, the question of the standard of review ties the literature on the basic doctrine to broader debates about judicial deference that arise under other grounds of constitutional review.

Unlike some scholarship at the time, such as the works by Tripathi, Baxi, and Dhavan, the current legal literature on the basic structure doctrine is largely devoid of an analysis of the political contexts that give rise to the underlying political disputes, the political constituencies that supported bringing these claims to the court, how those political agendas were refracted through legal arguments, the relationship between the courts’ judgments and these broader political agendas, and how each decision provided political resources and/or created constraints that shaped subsequent litigation. In addition, the impact of the fragmentation of the Indian political party system on the exercise of the power of constitutional amendment, and how this has shaped the docket of basic structure challenges, and what bearing this may have had on the relationship created

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<sup>12</sup> L I Rudolph & S H Rudolph “Judicial review versus parliamentary sovereignty: The struggle over stateness in India” (1981) 19 *Commonwealth & Comparative Politics* 231.

<sup>13</sup> *Ibid.*, 236.

by the doctrine between the Supreme Court and Parliament, has attracted little commentary from legal scholars.

Other scholarly traditions have developed in different ways. Political theorists, such as Pratap Bhanu Mehta, have considered the theoretical implications of limiting the amendment power and the conditions under which a basic structure doctrine might be defensible.<sup>14</sup> Such contributions have been few and far between, though, and the major non-legalistic intellectual tradition to have developed is one that has focused much less on the court and its judgments, and on the current contours of the doctrine, and much more on the political disputes that came before the courts and gave rise to the doctrine. The major piece of scholarship here is Granville Austin's *Working a Democratic Constitution*, which charts the back and forth between Parliament and the Court. Methodologically, Austin sets out a grand historical narrative around key ideas, interests, individuals and events. The broader intellectual project is not the doctrine itself, but rather, the consolidation of India's democracy. The lens through which Austin examines the question is the commitment of political actors to live under the Indian constitution. Austin takes pains to emphasize that assessing fidelity to constitutionalism is not an abstract exercise; rather, he presupposes the distinctive character of the Indian constitution as an instrument of "social revolution". The cases under the basic structure doctrine are prominent elements in the story, but are not the story itself, which begins in the disputes over property rights, and (as discussed below) turns to rise of Indira Gandhi, the Emergency, the 1977 election which voted Gandhi and the Congress Party out of power, and Gandhi's return to power until her assassination.

Austin does not pay careful attention to the legal justification for the doctrine offered by the Court, and controversies it has generated among legal scholars. He does approve of the Court's role, and sets out a theory that justifies the basic structure doctrine. For Austin, the Indian Constitution is a "seamless web" that instantiates underlying commitments to national unity and integrity, democracy (which includes fundamental rights), and social revolution. At its adoption, the Indian Constitution reflected a degree of harmony or balance among the different strands of the seamless web. However, constitutional amendments distorted and threatened to destroy the seamless web. These distortions fell into two categories. First, some amendments narrowed the scope of the right to property to permit redistribution, which upset the balance between democracy and social revolution. Second, other amendments put legislation entirely beyond the scope of fundamental rights review, which fundamentally changed the separation of powers, by subordinating the judiciary to the Congress-dominated executive and Parliament. The basic structure doctrine was justified as a judicial measure to redress these distortions in the seamless web. But Austin does not trace this theory through the details of the lengthy judgments, which in turn disables him from developing it into a full-blown theory of constitutional interpretation that provides

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<sup>14</sup> Pratap Bhanu Mehta, "The Inner Conflict of Constitutionalism: Judicial Review and the Basic Structure" in Zoya Hasan et al. eds. *India's Living Constitution* (New Delhi: Permanent Black, 2002).

the basis for wrestling with the legal dilemmas created by the doctrine, because it contradicts the constitutional text.

The contrast between, and the limitations of, these two genres of scholarship, is brought into focus by their treatments of the *Indira Gandhi* election case.<sup>15</sup> Austin provides the following backdrop to the case. In 1975, Indira Gandhi was found guilty of committing electoral fraud arising out of the 1971 election. Had it stood, the conviction would have stripped Gandhi of her seat in Parliament, and barred her from seeking election to Parliament for six years. The judgment threatened to end Gandhi's political career. Gandhi's first response was to declare a state of emergency within weeks of the handing down of the judgment. Under emergency powers, the government detained approximately 13,000 individuals linked to opposition political parties and banned organizations. By presidential order, these detentions were immunized from judicial review. Freedom of the press was sharply curtailed. As Austin put it, "[w]ith the sweep of her hand, Mrs. Gandhi had snuffed out democracy".<sup>16</sup> Firmly in control of the political process – indeed, with many opposition politicians in detention – Gandhi then introduced a series of constitutional amendments to immunize the exercise of emergency powers from judicial review, and to protect her from being removed from office.

The constitutional amendment at issue in the *Indira Gandhi* election case was the 39<sup>th</sup> Amendment. The amendment has two key features. Prior to the amendment, electoral disputes were adjudicated by the courts, which had the power to determine the validity of elections to Parliament. The amendment withdrew the jurisdiction of the courts over the conduct of elections of the Prime Minister and the Speaker of the Lok Sabha, authorized Parliament to enact a law to vest authority over electoral disputes with respect to these two individuals in another body, and immunized that law from constitutional challenge. The second feature of the law was to provide that no law made before the adoption of the 39<sup>th</sup> Amendment applied to the election of the Prime Minister Speaker, and any court order declaring such an election void was itself void and of no effect.

The Court struck down the amendment, on the basis that democracy was an essential feature of the basic structure of the Constitution and the amendment jeopardized free and fair elections (although it also overturned Gandhi's conviction). Although the judgment is 696 paragraphs long, Austin's description of the judgment covers a mere two paragraphs. Krishnaswamy, by contrast, engages in a doctrinal analysis of a number of issues raised by the judgment, but largely fails to integrate the broader constitutional politics into his analysis. What is striking is that the arguments before the Court foregrounded the political context. Justice Beg candidly described the gist of the claim, that the power of constitutional amendment "has been really abused by a majority in Parliament for the purposes of serving majority party and personal ends which were

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<sup>15</sup> *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1.

<sup>16</sup> Granville Austin *Working a Democratic Constitution: A History of the Indian Experience* (New Delhi: Oxford University Press, 1999) at 309.

constitutionally unauthorized”.<sup>17</sup> This was an argument that impugned the amendment on the basis that it had been enacted for a constitutionally impermissible purpose. Justice Beg stated that the amendment “was done, wholly and solely ... with the object of validating the Prime Minister’s election”.<sup>18</sup> Moreover, in addition to advancing Gandhi’s personal agenda, the amendment was tainted by partisanship, because the dispute over Gandhi’s election was “really between a majority party and the numerically minority groups or parties” and the effect of the amendment was for the “majority party ... to virtually act as the Judge in an election dispute between itself and minority parties whose cause ...the election petitioner represents”.<sup>19</sup>

But Justice Beg stood alone among the justices for impugning the 39<sup>th</sup> Amendment on this basis (although he saved it by construing it to not have these effects). Three other Justices (Chief Justice Raj, Justice Matthew, and Justice Khanna) also impugned the amendment for abrogating democracy, but for different reasons. One line of analysis held that the principle of free and fair elections required the judicial resolution of electoral disputes, which the amendment contravened. Another line of analysis posited that the amendment was unconstitutional because it declared Gandhi the victor in her election while at the same time repealing the law pursuant to such an election could have occurred. This raised the question of the electoral norms according to which the 39<sup>th</sup> Amendment could have declared her the victor. The argument was that in the absence of an electoral law for Parliament to apply to the election, the amendment was formally deficient. The narrow applicability of the 39<sup>th</sup> Amendment likewise was a formal deficiency, because a basic feature of law is its generality.

Thus, the interesting question that arises is *not* why four judges on the Court judged the 39<sup>th</sup> Amendment to abrogate from democracy (I put to one side Chandrachud J’s concurrence, which reached the same result on different grounds). Rather, it lies in the different implications drawn from that abstract idea by Justice Beg and his colleagues, and the choices made by each judge among these different implications. Because the formal and procedural conceptions of democracy did not require the Court to impugn the motives underlying the constitutional amendment, they arguably lowered the heat of the constitutional confrontation between the Court and Prime Minister Gandhi. At the time the reasons were delivered, Gandhi enjoyed nearly unlimited authority, and a frontal confrontation by the Court might have triggered an attack on the Court itself. Indeed, in the 1971 election, she had run against the Court, and secured a large Parliamentary majority that enabled her to enact the 39<sup>th</sup> Amendment, so this fear was real. By contrast, Justice Beg’s argument was premised on the claim that the amending power had been abused for partisan and personal ends, and therefore put the motives of the Prime Minister directly at issue. This way of explaining the choice of formal and procedural notions of democracy is distinct from, but consistent with Upendra Baxi’s analysis of the

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<sup>17</sup> *Raj Narain*, note 15, at para. 390.

<sup>18</sup> *Raj Narain*, note 15, at para. 512.

<sup>19</sup> *Raj Narain*, note 15, at paras. 512 & 623.

judgment. In *Courage, Craft, and Contention*, Baxi argued “that the Court was on the defensive” and that judgment “worked out a masterly strategy of accommodation, so that neither the regime nor the opposition could say that the Court failed them” because the Court struck down the constitutional amendment while dismissing the charges against Gandhi.<sup>20</sup> In parallel fashion, one could argue that the formal and procedural notions of democracy offered a narrower and politically safer basis for the Court’s ruling on the constitutionality of the amendment.

But on closer examination, it is apparent that the procedural and formal arguments were motivated by the same concerns that lie at the root of Justice Beg’s analysis. The stripping of the court’s jurisdiction to resolve electoral disputes was problematic because it left those questions in the hands of institutions that, as a result of party politics, were likely to fall prey to the risk of partisan abuse by the majority party, led by Gandhi. The formal deficiency of the amendment, likewise, suggested that the decision to declare Gandhi the victor of the election was nothing more than an exercise of “an irresponsible despotic discretion, being governed solely by what it deems political necessity or expediency”.<sup>21</sup> Likewise, the amendment’s narrowness was inexplicable except by reference to partisan motives. So if the same concerns underlay all the judgments, the question is how the judges wrestled with the institutional dilemma to present them directly or indirectly, and what flowed from this choice. Was there a cost to not calling the constitutional danger posed by the 39<sup>th</sup> Amendment by its name? Did avoiding a direct confrontation with Gandhi preserve the institutional capital of the Court, but come at the cost of establishing a direct link between the way in which the constitutional harms of the 39<sup>th</sup> Amendment were understood in the broader constitutional politics? Were the alternative grounds for judgment sufficiently strong to police future abuses of the amending power?

In sum, a close reading of the *Indira Gandhi* election case illustrates that the Court was alert to this broader politics, and attempted to address the substantive concerns at play in lengthy and complex judgments that wrestled, often imaginatively, with the issues at play. What the existing literature lacks is an analysis of the case that integrates the constitutional politics occurring outside the courts with the details of those judgments themselves, and highlights the choices and institutional dilemmas that the judges confronted.

Moreover, wrestling with these questions at this level of detail does not condemn the literature to being nothing more than a mass of particular stories without an overarching analytic narrative. The basic structure doctrine arose in the context of the domination of the Indian Parliament by the Congress Party, which alone, and with its allies, controlled the process of constitutional amendment. The course of the doctrine holds lessons for how one Supreme Court managed to check the power of a dominant

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<sup>20</sup> Upendra Baxi, *Courage, Craft, and Contention: The Indian Supreme Court in the Eighties* (Bombay: N. M. Tripathi, 1985) at 77.

<sup>21</sup> *Raj Narain*, note 15 at para. 327 (per Matthew J.).

political party through constitutional adjudication. In this account of the doctrine, the most important jurisprudential development is its extension beyond the property rights context to the political process, in the *Indira Gandhi* election case.

In this respect, the study of the case is part of a broader, global constitutional conversation about the ways which apex courts have confronted the abuse by a political party of its dominant position to preserve, enhance, and entrench its power through formally constitutional and democratic means. The problem of partisan entrenchment in democratic states is a widely noted phenomenon that occurs across regions and sub-types of democratic regimes. There is a sub-literature that focuses on the character of this problem in new democracies, because of the frequent presence of dominant political parties. In these countries, the problem of partisan entrenchment thus becomes the problem of dominant party entrenchment, and is an element of the larger problem of democratic transitions and consolidation. In post-authoritarian states, this danger has come to be termed authoritarian backsliding. This is a topic that is of growing interest, driven by contemporary constitutional developments in cases as diverse as Colombia, Hungary, and South Africa.<sup>22</sup> In this emerging transnational literature, the Indian cases figure as early examples of a court to protect a basic, procedural understanding of democracy, built around the ideas of political competition and alternation of power, from being subverted through democratic means from within. Why the Congress Party had not simply captured the Court is an issue that requires further research. Perhaps the insulation of Supreme Court appointments process at that time, through the practice of elevating High Court justices drawn from a legal profession that until that point had been largely separate and apart from Congress Party networks contributed to the insulation of the Court. Although India is a post-colonial, not a post-authoritarian, case, it is nonetheless possible to read the *Indira Gandhi* election through this lens links the India to a different set of jurisdictions that lie outside the paradigm or central cases of comparative constitutional law and politics.

### **C. Reservations**

Reservations on the basis of caste have been one of the central themes in Indian political life, and in Indian constitutional politics, in the post-Independence period. The extensive jurisprudence on the constitutionality of reservations provides another platform to reimagine the study of constitutional law and politics in South Asia. The constitutional centrality of reservations is a product of the pervasiveness and role of the caste system. Hindus, who account for 85% of Indians, belong to *jatis*, groups that are historically linked to a traditional occupation, in which membership is hereditary, and which are endogamous. Traditionally, social life, ritual observance, and cultural practices are distinctive for each *jati*. *Jatis* are part of a highly structured, hierarchical division of occupational labor that historically served as the basis for the distribution of economic,

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<sup>22</sup> See Sujit Choudhry "'He Had a Mandate': The South African Constitutional Court and the African National Congress in a Dominant Party Democracy," *2 Constitutional Court Review* 1 (2009); Samuel Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge University Press, forthcoming 2015).

political, social and cultural power. The exact number of jatis is unknown; this uncertainty is itself a source of constitutional controversy. Jatis, in turn, are often grouped into four *varnas* – Brahmins, Kshatriyas, Vaishyas, and Sudras, which are sometimes described as castes, with the jatis as sub-castes. Beneath the four *varnas* are the “Untouchables”, which in legal terms are known as the Scheduled Castes.

One of the principal goals of the Indian Constitution was to launch a social revolution that would attack economic and social hierarchies, and the caste system was one of its principal targets. The most relevant provisions are Articles 15 and 16. Article 15(1) prohibits the State from discriminating on the basis of caste, and Article 16(2) specifically prohibits discrimination on the basis of caste in public sector employment. But the Indian constitution also contains numerous provisions that operate as exceptions to these prohibitions on caste discrimination. When the Indian Constitution was adopted, there was a single exception, Article 16(4), which permitted reservations for “any backward class of citizens that, in the opinion of the State, is not adequately represented in the services under the State”.

The Constitution itself does not refer to “Other Backward Classes”, a term that was introduced by Prime Minister Nehru into Indian political discourse during the Constituent Assembly debates over the adoption of India’s constitution. Rather, the only legal term is “backward classes”. As Marc Galanter has explained, at the time of Indian independence, “backward classes” was in use, but had multiple meanings.<sup>23</sup> On one definition, it encompassed tribals (referred to in the Constitution as “Scheduled Tribes”), Scheduled Castes, and all other castes below Brahmins, Kshatriyas, Vaishyas; on another view, the term excluded the Scheduled Tribes and Castes. Another key point is the use of the term “classes” instead of “castes”, which has generated legal debates over the relationship between caste and class. In the Constituent Assembly, these different issues were raised, but no resolution was reached. The Constitution does not define backward classes. Rather, it has in effect delegated their meaning to the central and state governments, subject to judicial oversight. For the central government, the Constitution created an institutional mechanism for the determination of what constituted a backward class, by authorizing the President to appoint a Commission on Backward Classes.

Through administrative and political practice, the term “Other Backward Class” or OBC has come to refer those backward classes that are neither Scheduled Classes nor Scheduled Tribes – in essence, defining OBCs as a residual category. As Niraja Jayal has argued, as a residual category, OBCs are a heterogeneous group that lacks “any sociological basis”, whose meaning is elastic and has varied.<sup>24</sup> The lack of a precise definition has allowed the definition to vary on a state-by-state basis, and in central institutions. Indeed, the elastic nature of the term, coupled with the lack of precise census

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<sup>23</sup> Marc Galanter, *Competing Equalities: Law and the Backward Classes in India* (New Delhi: Oxford University Press, 1984).

<sup>24</sup> Niraja Gopal Jayal, *Citizenship and Its Discontents: An Indian History* (Cambridge, MA: Harvard University Press, 2013) at 229-271.

data, make it difficult to state what percentage of India's population falls into the OBC category – although it is now believed to be a majority. Moreover, the lack of a clear definition has served as the basis for political mobilization to claim OBC status and its material and political benefits. As explained below, this has consisted of claims by specific jatis for recognition as OBCs.

In the area of public sector employment, there are two kinds of reservations, which differ in terms of their beneficiaries. The first set is targeted at the Scheduled Castes and the Scheduled Tribes. These were implemented soon after Independence. Positions have been reserved for members of these groups in proportion to their share of the population. For many years, these quotas were filled in the lower ranks of the bureaucracy, but not at the higher ranks. As Christopher Jaffrelot has argued, the pattern of SC employment in the central administration tracked the caste hierarchy more generally.<sup>25</sup> In recent years, this pattern has begun to shift. But overall, SC/ST reservations have never been politically controversial, because the SC/STs were a minority who did not pose a challenge to the established distribution of political power, and because there was widespread consensus that SC/STs had a history of discrimination that called for radical measures like reservations.

The second set is reservations for OBCs, which have politically mobilized around them for nearly all of India's post-colonial history. Two key events have been the reports of the two Backward Classes Commissions, the first in 1955, and the second in 1980. The main issue before the First Commission was the relationship between a caste and class. As Marc Galanter has explained, caste was in principle relevant in two senses. First, caste could be used to as the unit of analysis, to identify which groups could be potential beneficiaries of OBCs. Second, caste could be used as a measure of backwardness. The Commission relied on caste in both of these senses, and produced a list of OBCs that amounted to 32 percent of the population (2399 castes) and recommended the reservation of 25 to 40% of open positions in the central public sector. At a notional level, however, caste was not the sole criterion for determining backwardness. Nonetheless, the Chair of the Commission, and several members, dissented, on the grounds that the report gave too much weight to caste in assessing backwardness, which should be measured directly by social and economic indicators. The report was rejected by the Congress-led government on a number grounds familiar to scholars of affirmative action in other jurisdictions – the fear that reservations would impede the efficiency of public administration; the concern that reservations were a departure from equality of opportunity and the merit principle; and finally, that the institutionalization of caste would sow the seeds of social division and contradicted one of the basic projects of the Indian constitution, which was to produce a casteless society.

The rejection of the First Backward Classes Commission report shifted the politics of OBC reservations from the center to the states. Several states, especially those in the South, had adopted OBC reservations prior to Independence, as part of broader

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<sup>25</sup> Christopher Jaffrelot, *India's Silent Revolution: The Rise of the Lower Castes in North India* (New York: Columbia University Press, 2003).

policies of social reform. After the rejection of the First Backward Classes Commission, the demands for OBC reservations were initially successful in those states where they were already in place. States responded by establishing state-level Backward Classes Commissions, which recommended OBC reservations that in turn were adopted. State-level commissions put a much heavier reliance on caste than did the First Backward Classes Commission. Moreover, castes excluded from the initial lists produced by state commissions often lobbied state governments to designate them as OBCs (sometimes through the creation of a new commission). Indeed, in two states, Karnataka and Tamil Nadu, reservations exceeded fifty percent.

But the deeper impact of the shift of the politics of OBC reservations to the states was to fuel the reconfiguration of state-level politics. Caste-based political appeals around OBC reservations became central to the political mobilization of OBC voters. OBC political mobilization occurred at the same time as the reorganization of Indian states along linguistic lines. Together, they fueled the rise of regional, OBC led parties at the state level, which campaigned on increased OBC reservations. State-level politics, as Jaffrelot puts it, became “quota politics”.<sup>26</sup> These parties challenged the dominance of the Congress Party at the state level, and later, served as the basis for a new electoral coalition at the national level led by the OBC-dominated Janata Dal party, which placed OBC reservations back on the national political agenda.

The Janata Dal prevailed over Congress in the 1977 national elections, and quickly moved to appoint the Second Backward Classes Commission in 1978 (known as the Mandal Commission). The Second Commission reported in 1980, and its analysis differed materially in a number of respects from that of the First Commission. First, the Second Commission gave greater weight to caste in assessing backwardness than had the First. Arguably, the First Commission had relied on caste as a proxy for social and economic backwardness, whereas the Second Commission diagnosed caste as the principal cause of social and economic backwardness. Second, the Second Commission relied on the findings of the state-level commissions, which had themselves largely relied on caste. Third, the Commission determined that OBCs now amounted to 52% of the population (3747 castes) – a majority that had already been politically mobilized on this basis. By the time the Second Commission delivered its report, the Janata Dal had lost power, and had been replaced by the Congress Party, which once again declined to adopt OBC reservations.

However, the fragmentation of the Indian political party system and the rise of regional, OBC parties continued, with the result that the Janata Dal came back to power in 1989 at the head of a coalition government. It had campaigned on a platform of OBC reservations, which thrust OBC reservations onto the national political agenda. The Janata Dal proceeded to implement the recommendations of the Mandal Commission, in the form of an executive order (an Office Memorandum), instead of legislation. The decision provoked intense controversy, and mass demonstrations by members of the upper castes who feared losing opportunities as a consequence of the expansion of OBC

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<sup>26</sup> Ibid.

reservations. The decision to implement the Mandal Commission Report was vigorously opposed by the Congress Party and the Bharatiya Janata Party (BJP) in Parliament. It was constitutionally challenged in the *Indira Sawhney* case, discussed below.<sup>27</sup>

The second episode of OBC reservations at the national level took place in 2006. This time, the reservations were proposed by the Congress-led coalition government, which had come to support OBC reservations. The driving consideration here was political, as Congress had become dependent on regional political parties that drew heavily on OBC voters for support in state-level elections and nationally to form governments. The focus of this round of reservations was in access to institutions of higher education, which were dominated by the upper castes. In the wake of the economic liberalization in the early 1990s, there was a dramatic expansion in the economic opportunities available in the private sector, to which university-based education was a pathway. Reservations were extended to both publicly funded and privately funded institutions (the latter required a constitutional amendment). Unlike the first round of OBC reservations, these were introduced in Parliament, attracted broad cross-party support, and passed by an overwhelming majority. This change reflected the impact of OBC political mobilization and the necessity for major parties to rely on regional parties as coalition partners. As Jayal puts it, “a once residual category has been decisively reinvented as a political majority”.<sup>28</sup> The second episode of reservations also came before the Court in the *Ashoka Thakur* case.<sup>29</sup>

There are extensive literatures on OBC reservation policies. One body of work in constitutional law has engaged in a careful doctrinal analysis of the Supreme Court of India’s jurisprudence on OBC reservations. The Supreme Court of India has handed down a blizzard of cases on reservations. Drawing on the debates over reservations in the Constituent Assembly, legal scholars have tended to conceptualize OBC reservations as policies to promote material well-being by redistributing economic opportunity to redress historic, deeply rooted injustices that were a product of the caste system. Reservations were forms of compensatory discrimination, in Marc Galanter’s famous formulation. A second body of work in political science has analyzed the rise of political mobilization by OBCs and the role of reservations in that story. Political scientists, drawing on the discourse of political actors, have characterized the goals of OBC reservations policies as political, in two senses – as power-sharing devices to force upper castes to share the agenda-setting power of bureaucracies with OBCs, and more broadly, as tools for political mobilization. These literatures exist in disciplinary silos. Legal scholars have not integrated the political goals of reservations policies into their analyses of constitutional jurisprudence. Conversely, political scientists have not given careful attention to the detailed reasoning of the Supreme Court in the vast jurisprudence in this area.

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<sup>27</sup> *Indira Sawhney v. Union of India*, 1992 Supp (3) SCC 217.

<sup>28</sup> Jaffrelot, note 24, at 252.

<sup>29</sup> *A. K. Thakur v. Union of India* (2008) 6 SCC 1

But what is striking is that the political context surrounding the adoption of OBC reservation policies and the political functions of such policies were squarely put before the Court as being of legal relevance in the two leading decisions, *Indira Sawhney* and *Ashoka Thakur*. These two cases warrant careful attention because they concern challenges to the two main OBC reservation policies at the national level, and provide the fullest discussion of the Court's understanding of the constitutional framework for OBC reservations. Indeed, the divisions within the Court, and the evolution in the Court's position on OBC reservations, arguably reflect an acceptance of both the political function of these policies, and as well as an awareness of the potential abuses of these policies from the standpoint of democratic politics.

*Indira Sawhney* was a constitutional challenge to the Office Memorandum whereby the Janata Dal government of VP Singh sought to implement the recommendations of the Mandal Commission. The Court divided on the key issues of the overarching theory of OBC reservations, which reflected and mapped onto corresponding divisions in constitutional politics in Parliament during the debate over the government's decision. The majority judgments expressly adopted a political theory of OBC reservations. This theory was rooted in an explicit account of the redistribution of political power on the basis of caste, and explained that this shift in political power was the product of political cleavages on the basis of caste and the electoral success of caste-based political appeals, which produced a shift in control over the political executive. For the majority, however, the administrative (non-elected) executive was also a source of political power, and at the time of the judgment, was still under the control of the upper castes. The implication was that an upper caste-dominated administrative machinery was not sympathetic to OBC issues and indeed had been "ruinous" for OBCs.<sup>30</sup> Control over the political executive is also insufficient because governments come and go, whereas the bureaucracy remains in place. If the goal of OBC reservations is the sharing of political power, the majority reasoned, then this required OBC reservations in public sector employment. What is striking is that the material justification for OBC reservations is entirely absent in this account. Indeed, the Court's reasoning closely tracked the justification for OBC reservations given by Prime Minister VP Singh in Parliament, who emphasized their role as power-sharing devices and diminished their material impact.

The dissenting judges, by contrast, offered a material theory of OBC reservations, rooted in an earlier constitutional understanding of the rationale and limited purpose of reservations, in service of compensatory discrimination. The only constitutionally permissible goal for such policies was that they address prior discrimination inherent in the caste system, which had produced structural discrimination, even if the state had not itself created it. Along the same lines, and again in contrast to the majority, the dissent required that the means be narrowly tailored – that they could not be over-inclusive, and needed to be time-limited. These restrictions on ends and means were rooted in misgivings of the risks posed by OBC reservations, which these restrictions were

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<sup>30</sup> *Sawhney*, note 27 at para. 403 (per Justice Sawant).

designed to mitigate. OBC reservations could be motivated by nothing more than “expediency”<sup>31</sup> or “extraneous purposes”<sup>32</sup> – that is, they would be little more than the product of electoral strength and the spoils of political power that were not rooted in any broader public purpose. This was a frontal challenge by the dissenting judges to the political theory of OBC reservations. As we will see in *Ashoka Thakur*, a unanimous Court took on board a version of these worries to check the political abuse of OBC reservations for political patronage.

These differences on the underlying theory of permissible constitutional scope for OBC reservations translated into a disagreement over OBC identification. The heart of the dispute turned on the use of class and caste as the basis for identifying the “backward classes” in Article 16. This choice was relevant to two analytical issues – the unit of analysis and the measure of backwardness. These issues are often run together, but are distinct. For the most part, it has been accepted that caste is the unit of analysis, for ease of administration. The debate over caste vs. class is in reality about the role of caste in measuring backwardness. Prior to *Indira Sawhney*, it had been held that caste could be a factor, but should not be the only factor in identifying backwardness. This led to debate over two issues – whether caste was simply correlated with class or the cause of it, or if it should be supplemented by a direct assessment of social and economic backwardness. If caste was a cause of backwardness, there was less pressure to engage in an independent assessment of backwardness.

The challengers attacked the list of OBCs in the Mandal Commission as multiply flawed – for being based on infirm evidence, procedural deficiencies, the increase in the number of number of OBCs between the First and Second central government Backward Classes Commissions, and for relying on the relying on pre-independence 1931 census.<sup>33</sup> These were serious allegations – so much so that one judge would have given the list only interim effect and remanded it to a new commission. The majority responded to these flaws by placing distance between the government’s list of OBCs and that contained in the Mandal Commission; according to the majority, the central government developed its list on the basis of a review of the lists generated by the Mandal Commissions and numerous state-level commissions, thereby rendering any alleged errors in the Mandal Commission’s list irrelevant.<sup>34</sup> The reality is that the majority had no good answers to these concerns. This is not surprising, since the political power theory of reservations does not yield any obvious criteria for excluding program beneficiaries, if the ultimate goal is to shift political power. The lack of any criteria in the majority judgment to assess the fit between means and ends – save for the creamy layer exclusion discussed below -- is arguably traceable to the same conceptual root.

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<sup>31</sup> *Sawhney*, note 27 at paras. 312 & 313 (per Thomas J.)

<sup>32</sup> *Sawhney*, note 27 at para. 560 (per at Sahai J.)

<sup>33</sup> *Sawhney*, note 27 at para. 735 (per Jeevan Reddy J.).

<sup>34</sup> E.g. *Sawhney*, note 27 at paras. 851(a) & 857 (per Sawant J.).

The dissent engaged with the majority on three grounds. The first was to object that the central government did not properly apply its mind to the listing of OBCs in the Office Memorandum and provided no analysis of its reasoning;<sup>35</sup> the second was to reiterate the alleged procedural flaws in the method of the Mandal Commission;<sup>36</sup> the third was to underline the lack of any clear evidence to justify the list of OBCs.<sup>37</sup> On their face, these rationales are different, but what unites them is they suggest that the underlying motive for the particular list of OBCs was purely political. To fail to apply its mind to the listing of the OBCs is tantamount to say that no thought was given to the issue – that is, that no plausible story could be told about the rationale behind the list that could be imputed to the central government. In other words, that the rationale was political. The failure to follow correct procedures is likewise suggestive of a pretext. Justice Sahal was most explicit, stating that the requirement for evidence to support the listing of OBCs was to “smoke out” a motive that was “suspect”.<sup>38</sup>

On its face, *Ashoka Thakur* represents a sharp departure from *Indira Sawhney*. The Court was unanimous in upholding the constitutionality of the extension of OBC reservations. The unanimity on the Court mirrored the debate in Parliament. The implementation of the Mandal Commission Report was a divisive issue in Parliament, with the Congress Party outspoken in opposition. However, as Rajeev Dhavan has noted, subsequent extensions of OBC reservations were passed with ever-larger Parliamentary majorities, and with diminishing amounts of debate.<sup>39</sup> The explanation for this emerging political consensus was the electoral power of caste-based political parties, which had contributed to the fragmentation of Parliament and the rise of coalition governments, in which they were indispensable partners. In the face of this political consensus, coupled with its own precedent in *Indira Sawhney*, it is arguable that the Court had less room to maneuver in *Ashoka Thakur* and simply deferred.

However, a closer examination of the judgment paints a very different picture. The core issue was the so-called creamy layer exclusion. The creamy layer represents the most advantaged group among the OBCs. A differently constituted majority in *Indira Sawhney* held that the exclusion of the creamy layer was constitutionally mandated, because without it, OBC reservations would not benefit only those who were truly backward. However, on that occasion, the Court did not offer a fully worked out theory of the creamy layer exclusion. The composition of this majority complicated matters further. Those judges who had conceptualized the OBC reservations as instruments of compensatory discrimination could easily argue that this theory required the exclusion of

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<sup>35</sup> *Sawhney*, note 27 at para. 325 (per Thomas J.)

<sup>36</sup> *Sawhney*, note 27 at paras. 497-500 (per Kuldeep Singh J.).

<sup>37</sup> Justice Sahal made this argument.

<sup>38</sup> *Sawhney*, note 27 at para. 560 (per Sahal J.).

<sup>39</sup> Rajeev Dhavan, *Reserved! How Parliament Debated Reservations 1995-2007* (New Delhi: Rupa and Co., 2008).

advantaged members of OBCs.<sup>40</sup> But the judges who had also conceptualized OBC reservations as power-sharing devices could not easily do so.<sup>41</sup> Just as the political power rationale for OBC reservations offered itself yielded no criteria for which OBCs to include and exclude, by implication, it could not yield a rationale for the exclusion of the creamy layer within those OBCs that were included. And no such explanation was provided. So how the creamy layer exclusion fit within the principal majority's theory of OBC reservations remained unsettled.

*Ashoka Thakur* provided the occasion to revisit this question. The OBC reservations had generated controversy while the measures worked their way through Parliament. Ultimately, the Hindi version of the bill excluded the creamy layer, but the English version did not. At the time, there was a UPA coalition government led by Congress. The regional, caste-based parties in the governing coalition strongly opposed the exclusion of the creamy layer. As Zoya Hasan explains, the reason is that the core constituency for the party leadership for these caste-based parties was political elites among the OBCs who saw themselves as potential beneficiaries of the OBC reservations.<sup>42</sup>

The Court unanimously held that the creamy layer exclusion was required, with a majority deeming the exclusion to exist by construing the policy to impliedly include this constitutionally mandated exclusion. This doctrinal strategy allowed the Court to formally grant the government a victory by upholding the extension of OBC reservations, but in substance impose an important check.<sup>43</sup> What bears careful examination is the Court's justification of the creamy layer exclusion, in light of the incoherence of *Indira Sawhney*. *Asoka Thakur* took the power-sharing theory of OBC reservations as a given, and developed a justification for the creamy layer exclusion that flowed from it. Justice Pasayat offered the most sustained explanation. He began by observing that the trajectory of OBC reservations was to always to add new castes, and there had not been a single case of exclusion. For him, this "raises a doubt about the real concern to remove inequality", suggesting that the true motive was something else.<sup>44</sup> Justice Pasayat did not directly state what that motive was. But his reasons set out such explanations provided by the challengers that he impliedly approved. The true answer lay in the political dynamic underlying this phenomenon – that OBC reservations functioned less as

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<sup>40</sup> E.g. *Sawhney*, note 27 at para. 520 (per Justice Kuldeep Singh).

<sup>41</sup> E.g. *Sawhney*, note 27 at paras. 790, 792, & 793 (per Justice Jeevan Reddy).

<sup>42</sup> Zoya Hasan, *Politics of Inclusion: Caste, Minority and Representation in India* (Delhi: Oxford University Press, 2009).

<sup>43</sup> All judges supported creamy layer exclusion for OBCs. The question of creamy layer exclusion to SC/STs was also raised. Chief Justice Balakrishnan held that the creamy layer doctrine was inapplicable to SC/STs. The other judges left this question open, given that it was not at issue before the Court.

<sup>44</sup> *Ashoka Thakur*, supra note 29 at para. 278.

instruments to redress inequality than as the basis of politically motivated, targeted appeals to OBC voters as part of a “vote bank politics”.<sup>45</sup> He reproduced, and impliedly endorsed scattered observations in earlier cases by judges who expressed apprehension of the growth of reservations at the state level, as a form of “state patronage”<sup>46</sup> and as resulting from claims “overplayed extravagantly in a democracy by large and vocal groups whose burden of backwardness has been substantially lightened by the march of time ... but wish to bear the ‘weaker section’ label as a means to score over their near equals formally categorized as the upper brackets.”<sup>47</sup>

But then he took this analysis one step further. Perhaps the most striking element of his reasons is this lengthy quotation from an earlier Supreme Court decision, *Balaji*,<sup>48</sup> that had endorsed class over caste as the basis for measuring backwardness, and which was superseded by *Indira Sawhney*. The Court in *Balaji* – commenting on the growth of OBC reservations in the South – was prescient about the future of national politics:<sup>49</sup>

... take a caste in a State which is numerically the largest therein. It may be that, though a majority of the people in the caste are social and educationally backward, an effective minority may be socially and educationally far more advanced than other sub-caste the total number of which is far less than the said minority. ... the object of the Constitution will be frustrated and the people who do not deserve any adventitious aid may get it

What this passage implies that is the principal beneficiaries of OBC reservations may be political elites within OBCs, who mobilize OBC vote banks not just for electoral gain, but in addition, to reap the direct benefits of OBC reservations. OBC reservations are a form of self-dealing. And Justice Pasayat, by implication, levels the same charge at the caste-based, regional parties in the governing coalition that opposed the exclusion of the creamy layer. Justice Bandhari’s concurrence made this point even more sharply, observing that the failure to exclude the creamy layer would mean that “the OBC Minister’s daughter” would in principle be eligible to benefit from a OBC reservation, a perverse result.<sup>50</sup>

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<sup>45</sup> *Ashoka Thakur*, supra note 29 at para. 245.

<sup>46</sup> *Ashoka Thakur*, supra note 29 at para. 289, citing *Vasanth Kumar v. State of Karnataka*, 1985 Supp SCC 714.

<sup>47</sup> *Ashoka Thakur*, supra note 29 at para. 288, quoting from an obiter in *N. M. Thomas v. State of Kerala*, (1976) 2 SCC 310.

<sup>48</sup> *M. R. Balaji v. State of Mysore*, AIR 1963 SC 649.

<sup>49</sup> *Ashoka Thakur*, supra note 29 at para 348, quoting para. 20 in *Balaji*.

<sup>50</sup> *Ashoka Thakur*, supra note 29 at para. 388.

My analysis of *Ashoka Thakur* is at odds with the simplistic picture of a Supreme Court rendered inert in the face of a political consensus across party lines in favor of the expansion of OBC reservations. Moreover, the Court's reasoning was clearly alert to the broader political dynamics of vote bank politics, and took this on board to develop an account of the creamy layer justification nested within the power-sharing theory of OBC reservations. *Ashoka Thakur* reflects a judicial awareness of the potential abuses of these policies from the standpoint of democratic politics. One important point often raised about the creamy layer doctrine is that it shows the weak conceptual underpinnings of India's reservation policies. If caste is the marker of discrimination and the identifier of special treatment, then one's caste will not change regardless of one's material advancement. And if the creamy layer doctrine makes sense – because it seems to emphasize the importance of the link between special treatment and a backward status – then one could ask why caste is used to identify beneficiaries in the first place.<sup>51</sup> This point is a crucial one, of course, but my analysis also gives us something further to consider.

Although I cannot develop the point here, I think there is a link between this account of the creamy layer exclusion and another doctrine – that the total proportion of positions allocated to reservations of all categories (SC, ST and OBC) must presumptively not exceed 50%. The intuition here seems to be check the risk of a spoils system where broad electoral coalitions labeling themselves as OBCs take power, capture the state, and direct its benefits disproportionately to itself. The 50% cap allows other considerations (merit, efficiency) to govern public sector hiring decisions; it also may exert pressure on the capacity of rent-seeking coalitions to politically coalesce. I defer the details of this argument to another day.

As a matter of method, this close reading of *Ashoka Thakur* raises questions that existing scholarship does not answer. What accounted for the shift in the between *Indira Sawhney* and *Ashoka Thakur*? Was it the Court's awareness of the political dynamics of the OBC debate? If so, will this lead the Court to revisit the power-sharing rationale and move back to a notion of compensatory discrimination? Will the Court apply this approach to state-level OBC policies, which are at least as expansive as those at the national level? Are there other kinds of political abuse that the Court will identify and translate into constitutional doctrine? Will the Court build upon its ruling on the creamy layer exclusion to exercise more oversight over the inclusion of OBCs themselves, addressing procedural concerns and the lack of evidence? What has been the response of political parties to *Ashoka Thakur*?

Let me conclude on this note. India is one of a number of polities where the beneficiaries of affirmative action are not ascriptive minorities, but majorities. In these polities, ascriptive differences have become a major axis of political cleavage, and political mobilization occurs on that basis. These polities are a subset of a broader set of

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<sup>51</sup> Madhav Khosla, *The Indian Constitution* (New Delhi: Oxford University Press, 2012) at 94-106.

political communities that I have termed, in previous work, “divided societies”.<sup>52</sup> In these polities, ascriptive majorities are also political majorities. Moreover, these majorities have historically been denied power, through a combination of colonial rule and subordination to politically powerful minorities who differ from them on ascriptive criteria. Once these majorities have acquired power, they adopt affirmative action policies to benefit themselves. Moreover, they invoke as justification the need to redress historic, institutionalized forms of discrimination that they experienced when they lacked political power – that is, when they were political minorities.

Framed in this way, the study of reservations situates India among jurisdictions where affirmative action policies are adopted as parts of larger processes of democratization, especially in post-colonial contexts such as Sri Lanka and Malaysia. What unites these examples is the post-colonial context in which these policies arose. Two kinds of shifts in power unite post-colonial politics in these countries. First, the end of colonialism marked the shift from imperial rule to national sovereignty. Second, the democratic empowerment of a newly enfranchised majority provided the democratic platform for the contestation of political and economic power within those states, between small elites who had wielded power under colonial rule and continued to do so in the early years of independence, and a large majority that had historically been excluded from power. This comparative context, in turn, gives us critical leverage on the Indian case, and vice versa. This is a comparative investigation that has yet to happen.

#### **D. Conclusion**

The study of South Asian constitutional law and politics remains at the margins in comparative constitutional law. Through a study of two topics in Indian constitutional law – constitutional amendment and affirmative action – this chapter has shown how a research agenda on constitutional law and politics in South Asia might be set. I want to conclude, however, by putting the two topics explored to somewhat different use, and consider them in light of this volume’s overall theme of ‘unstable constitutionalism’. The theme of unstable constitutionalism, as the diverse contributions to this volume demonstrate, unpacks constitutional orders with deep forms of instability. Different South Asian nations have responded to the phenomenon of constitutional instability in their own ways, some more successfully than others.

The basic structure doctrine and reservations capture the idea of unstable constitutionalism in important respects. The former can be read as a doctrinal innovation that sought, inter alia, to make the politics surrounding constitutional amendments more stable. It was a response to the instability generated by repeated constitutional amendments and the tussle between Parliament and the Supreme Court, an instability which, the Court argued, posed a grave threat to the overall constitutional and democratic order. Similarly, the political developments and jurisprudence surrounding reservations is also a kind of response to constitutional instability. Here, the constitution has been used

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<sup>52</sup> Sujit Choudhry ed., *Constitutional Design for Divided Societies: Integration or Accommodation?* (New York: Oxford University Press, 2008).

as a tool to respond to conflicts among different groups. Insofar as India's constitutional order has not imploded, the response has been successful in political terms. Conversely, India's jurisprudence on reservations has embodied a high degree of instability, if one pays attention to the fact that the jurisprudence has evolved from preferential treatment for backward groups towards power-sharing among different groups, and that it has moved from the ideal of transcending caste towards sharing power between different castes. Above all, both the examples of formal constitutional change and reservations highlight the complex dynamic between law and politics, and the inadequacy of any analysis that privileges one over the other. Indeed, it is this very sentiment that lies at the heart of the idea of unstable constitutionalism.