Interbranch Bargaining and Judicial Review in India

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I. Introduction

In the past two decades, world events, along with research seeking to explain these events, have increased comparativists' focus on judicial behavior and courts as political institutions. Democratization in Latin America, the former Soviet Union and Eastern Europe, as well as the demands for more uniform rule of law regimes that have accompanied the rise of the global economy, have spurred research on the establishment and consolidation of judicial institutions across a variety of settings. This burgeoning literature has increased our understanding of the characteristics of new and more established courts in a range of contexts.[1] In this Essay, we argue that, in addition to these substantive contributions, the comparative study of courts outside the United States can improve the development of theories about judicial behavior and institutions generally, and it has the potential to help us see the U.S. judiciary in a

[1] *See, among others e.g.*, GRETCHEN HELMKE, COURTS UNDER CONSTRAINTS: JUDGES, GENERALS AND PRESIDENTS IN ARGENTINA 3 (2004) (analyzing why apparently dependent judges are willing to rule against powerful governments); MARK RAMSEYER & FRANCES MCCALL ROSENBLUTH, THE POLITICS OF OLIGARCHY IN IMPERIAL JAPAN ch. 6 (1998) (on judicial independence in democratic and autocratic regimes); JEFFREY STATON, JUDICIAL POWER AND STRATEGIC COMMUNICATION IN MEXICO 53, 127(2010) (constitutional review and judicial legitimacy); ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE 31, 127 (2000) (interbranch relationships and judicial lawmaking in Western Europe); ALEC STONE SWEET & MARTIN SHAPIRO, ON LAW, POLITICS AND JUDICIALIZATION 21 (2002)(on the development of the judicial politics literature); GEORG VANBERG, THE POLITICS OF CONSTITUTIONAL REVIEW IN GERMANY [ch.3] (2009) (the establishment of the Constitutional Court of Germany and its relationship with the legislature); Lee Epstein et al., *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 LAW & SOC'Y REV., 117, 118 (2001) (the role of constitutional courts in establishing and maintaining democratic regimes) Sunita Parikh, *The Supreme Court, Civil Rights, and Preference Policies*, 92 TEACHERS COLL. REC. TEACHERS COLL. REC. 192, [192] (1990) (comparing Supreme Court decisions on affirmative action in the United States and India); Kim Lane Scheppele*, The New Hungarian Constitutional Court*, 8 E. EUR. CONST. REV. 81, 81 (1999).

new light by illuminating how relations between the judiciary and other branches of government vary according to ideological differences over the role of courts and historical contexts in which these differences are embedded.

One of the clear advantages of the comparative study of courts is the diverse range of courts and political contexts in which they are situated. Such diversity can provide researchers with the opportunity to identify a wider range of conditions and experiences of courts in order to help develop more general understandings of how courts function in relation to other government institutions. This range crosses several divides: developed and developing countries, established and newly democratizing political regimes, civil and common law traditions, and domestic and supranational institutions. Established democratic polities have established entirely new institutions, such as constitutional courts, and new nations have built or rebuilt appellate and apex court systems.

Studying courts comparatively and in new settings provides us with multiple instances of institutional formation and change at critical moments, when key decisions are made. Increasing the number of observations enables making stronger theoretical and general explanations than what a single case study allows. Several reasons stand out: (1) A researcher can identify patterns and idiosyncrasies in decision making that would not otherwise be observable; (2) comparing the same types of courts over time in a constant national context allows variation while controlling for the structural relationships of the institutions involved (in our analysis, for example, the type of court is held constant by virtue of each being an apex court); (3) observing the transition of new to established courts helps highlight the political and legal forces that drive and shape changes in the institutional strength of courts and legal systems.

Why should we study nascent courts in particular? They are fragile; their legitimacy has yet to be established; their judges are inexperienced; and they may not survive to become mature, independent, powerful institutions. These characteristics, which appear at first to be analytic weaknesses, should be of interest to us. First, by examining both successful and unsuccessful attempts to establish judicial legitimacy and independence, we can gain a richer understanding of the paths to success. Second, by examining a diverse set of cases, we can theorize more precisely about relations between the judiciary and other branches of government across a range of contexts and elucidate patterns in relationships and events which would otherwise appear to be idiosyncratic or case specific. Third, and especially germane to the conversation between political scientists and legal scholars in the United States, comparative inquiries offer the opportunity to transcend the debate over whether judges are practicing law or politics.[2]

For scholars of the judicial politics of colonial and independent India, it is well-accepted that good judges are practicing both law and politics, while mediocre judges may be practicing either, both, or neither. They are not usually seen as political in the sense that they are allied to a particular political party's ideology, but rather in the sense that Judge Posner has observed—i.e., having a sophisticated concept about their role in the political system and the policies that follow from these positions.[3] Indeed, at different points in time, judges in India have been criticized for being insufficiently attuned to the policy ramifications of their decisions. Marc Galanter and Rajeev Dhavan have both written about the tradition of black letter law in India, or the adherence to a formal legal perspective that shares much with the civil law tradition.[4] Legal and political scholars agree that Indian judges consistently write opinions that combine political and formal

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[2] RICHARD A. POSNER, HOW JUDGES THINK, ch. **1 (Posner concludes a critique of social science theories of judicial decision making by observing that "even this most political of courts, in its most political domain, that of constitutional law, is, to a degree, legalistic" (56)).**

[3] *Id.*

[4] MARC GALANTER, LAW AND SOCIETY IN MODERN INDIA [ch. 1] (1989); Rajeev Dhavan, *Introduction*, xvii, in Galanter.

legal arguments, obliterating the dichotomy which often characterizes U.S. debates over judicial motivations.[5]

Moreover, justices in Indian apex courts have behaved in ways that scholars of American courts find extremely puzzling; the justices have consistently challenged the executive branch even when their judicial institutions have been relatively new and their legitimacy has not been strongly established. And they have done so in the context of unified executive–legislative institutions, not in a separated powers context. For scholars working from a strategic perspective, this type of behavior is difficult to explain as rational.[6]

The three apex courts we examine below—the Supreme Court of Judicature, the Federal Court of India, and the Supreme Court of India—are excellent cases for illustrating factors that are systematic across the three periods and for identifying conditions and decisions that are idiosyncratic to the times. As we will see below, the inability of these courts to secure institutional strength results in critical disadvantages for each.

In the remainder of this Essay, we analyze interbranch relations between the executive and three different apex courts in India in three different historical periods to make sense of conflicts that arose between each apex court and the central government.[7] We argue that the justices who challenged the executive branch were acting in predictably strategic ways and that their decisions cannot be categorized as clearly formal or political. We contend that judges in

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[5] GRANVILLE AUSTIN, WORKING A DEMOCRATIC CONSTITUTION [ch.1] (1999); CHARLES EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE [ch. 5] (1998); LLOYD I. RUDOLPH & SUSANNE HOEBER RUDOLPH, IN PURSUIT OF LAKSHMI: THE POLITICAL ECONOMY OF THE INDIAN STATE [107] (1987).

[6] LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 16 (1998). Using the U.S. Supreme Court as their example, Epstein and Knight posit that a court will "have a strong incentive to compromise its preferences and adopt an interpretation that Congress would see was the best it could expect and leave undisturbed."

[7] Alfred Darnell & Sunita Parikh, *Interbranch Bargaining and Judicial Review in India*, *presented* at the annual meeting of the Law and Society Association, Berlin, Germany, July 25-28, 2007; Alfred Darnell & Sunita Parikh, Judicial Stability During Regime Change, presented at the PEDI Conference II, University of Portland, Portland, Oregon, June 17-19, 2009.

new judicial institutions face the task of establishing and strengthening their own institutions, a task which almost inevitably brings them into conflict with the way in which the executive branch views their roles. While the conflict is heightened for new courts, the types of conflicts we see occur in more subdued forms for mature courts as well.

II. Apex Courts in India

The Supreme Court of India is well known and studied. Less well known are its two predecessor courts, which were established during the first and the last years of the British Empire's governance in India. The first of these, the Supreme Court of Judicature, was established by the British Crown and Parliament in 1773[8] and appeared to be endowed with wide and powerful jurisdiction.[9] The second, the Federal Court of India, was established by the Government of India Act of 1935 and was intended to adjudicate disputes among British provinces and Indian princely states.[10] Finally, the Supreme Court of India was established according to the Constitution of India in 1950 and given original and appellate jurisdiction as well as explicit powers of judicial review.[11] While the three courts operated in different political and institutional contexts, they shared traditions of British common law and British political institutions and cultures. For the Supreme Court of Judicature and for the office of Chief Justice of the Federal Court, justices were selected exclusively from the British Bar and the laws which were applicable to British India were determined by the British Parliament.[12] The remaining

[8] Lord North's Regulating Act of 1773 provided for the creation of a Supreme Court of Judicature at Fort William, Bengal. The Court was established by Letters Patent in 1774. P.W. MARSHALL, PROBLEMS OF EMPIRE: BRITAIN AND INDIA 1757-1813, 152 (1968); ROBERT TRAVERS, IDEOLOGY AND EMPIRE IN EIGHTEENTH-CENTURY INDIA, 183 (2007).
[9] Travers, *supra* note 8, at 181.
[10] See M. V. PYLEE, THE FEDERAL COURT OF INDIA 68 (1966),
[11] GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION 164 (1966).
[12] See Travers, supra note 8 at 183; George Harold Gadbois, Jr., The Paramount Judiciary in India, 1937-1964 36 (April 23, 1965) (unpublished Ph.D. dissertation, Duke University) (on file with author).

justices of the Federal Court, while from India, were trained in British law and traditions.[13] For the third court, the Supreme Court of India, the Constitution has its roots in British common law and the configuration of the court was identical to that of the Federal Court, save for replacing the British Chief Justice with an Indian jurist.[14]

In addition, all three governments which were in power during each of these respective time periods shared a key characteristic: they all had the ability to alter the courts' composition and jurisdiction if they became sufficiently dissatisfied with them. In each instance, the elected branches of government were more powerful than the judicial institutions because they had the constitutional right and capacity to appeal decisions to the Privy Council or to unilaterally divest the Court of its authority through Acts of Parliament in the first two cases, and through the constitutional amendment procedure in the third.[15] The governments of the British Raj had the unilateral power to do so, and the post-independence government was a parliamentary system in which the Congress Party dominated without any unified opposition. Nevertheless, soon after their creation, all three courts directly conflicted with the desires of the executive branches that had created them, leading those branches to respond.

We explore these cases to try and solve the contradictions of why new courts challenge the authority and power of more powerful institutions and why judges make decisions that put their courts in jeopardy. We adopt the framework of the strategic theory of judicial politics, which assumes that judges act rationally, and we then analyze whether the courts' actions comport with the theory. In addition, we pay particular attention to the interests and preferences of the governments that created the new courts. We hypothesize that conflicts emerge in new

[13] Gadbois, supra note 12 at 36.
[14] Austin, supra note 5 at 123.
[15] For changes in the jurisdiction of the Supreme Court of Judicature, see N. JAYAPALAM, HISTORY OF INDIA: FROM 1773 TO LORD MINTO 217 (2001); for appeals of the Federal Court's decisions see Pylee, supra note 10 at 254; for constitutional amendments nullifying Supreme Court decisions, see Austin supra note 5 at 42.

courts between the creators and the created because frequently the two actors' interests are at odds.

A basic characteristic of the separation of powers model and of the rational actor theory more generally is the assumption that because the actors behave strategically, they will always strive to anticipate responses which work against their preferred outcomes.[16] Therefore, when the distribution of power between branches of government is in equilibrium, we should not observe courts challenging legislatures and executives unless they are certain to prevail. But our evidence from Indian courts contradicts this assumption. All three of the courts we studied issued rulings that resulted in sanctions by the executive. Most recently, the Supreme Court engaged in a long-term battle with Parliament over the latter's ability to amend the Constitution. Ultimately, Parliament (at the behest of Prime Minister Indira Gandhi) eviscerated the ability of the Supreme Court to engage in judicial review.[17] We cannot explain this behavior within the rational-actor paradigm as it is presented in the separation of powers model;[18] we would have to assume judges were either badly informed or acting irrationally. But neither explanation is fully satisfying.

We offer a different explanation, one that is probably most applicable to new courts but may also occur at times in established courts. We assert that the current theories of judicial behavior and interbranch bargaining pay insufficient attention to judges' preferences regarding the institution itself. Judges care about policies and issues of law, but they also have preferences over the strength and stability of the court and the justice system. Indeed, unless judges can assume a stable and powerful court, their policy or black-letter-law preferences are unlikely to be

[16] John Ferejohn & Charles Shipan, *Congressional Influence on Bureaucracy*, 7 J. L. ECON., & ORG. 1, 5 (1990).
[17] See Rudolph & Rudolph supra note 5 at 115.
[18] Epstein & Knight, supra note 6 at 13.

achieved. In new courts, issues of stability, strength, and scope of decisionmaking are often still contested.[19] In this Essay we argue that judges are likely to challenge the legislature and executive in two instances. First, they will issue decisions contrary to executive preferences in cases that they perceive to be especially important in terms of institutional legitimacy or sphere of influence. Second, they will be more likely to make these decisions in the early years of the court, when it is less established and therefore more vulnerable, but when precedents are less binding and the judges are in the process of establishing legal doctrine.

We now turn to three case studies: the Supreme Court of Judicature in Calcutta under Elijah Impey's tenure as Chief Justice, the Federal Court of India from 1937 to 1948, and the first decade of the Supreme Court of India. First, we identify the conditions that led to the creation of each court, and second, we examine tensions between the preferences of the executive branch actors who established the courts and the judges whom they appointed. We then highlight how critical decisions issued by each court and explore how these cases reflect the competing preferences of judges and governments. While these instances form the exception rather than the rule,[20] they are important because they lead to interbranch conflict, and they often test the courts' jurisdictional bounds and scope of authority.

A. The Supreme Court of Judicature

We look first at the Supreme Court of Judicature. The first apex court in India, its early history provides insight into tensions between its own interests as a new institution of

[19] Antal Orkeney & Kim Lane Scheppele, *Rules of Law: The Complexity of Legality in Hungary*, 26 INT. J. SOCIOLOGY 76, [81] (1996) (the Constitutional Court of Hungary ruled over two hundred laws unconstitutional); Epstein et al., *supra* note 1, at 135**;** Gretchen Helmke, *The Logic of Strategic Defection: Court-Executive Relations in Argentina Under Dictatorship and Democracy* 96 AM. POL. SCI. REV. 291, [291[(2002) (when judges in conditions of institutional insecurity will issue decisions which challenge the government).

[20] Darnell & Parikh, *supra* note 7, at 19 show that the Federal Court and the Supreme Court affirmed the government's position in more than half the cases.

governance, the interests of the British governing elites which predated the court's creation, and the central government of Britain. We will see that there was no consensus on the objectives envisioned for the court, and this lack of consensus contributed to struggles between the different governing branches over the breadth and strength of the court's jurisdiction.

In 1773, the British Crown and Parliament created a court to be installed in India with greater power over the British colony and the East India Company than was granted to the existing patchwork judicial system, which had been under increasing strain. It remained the sole apex court in colonial India until 1800, when the judicial system was transformed into a series of High Courts with regional jurisdictions and a Privy Council in Britain as the court of final appeal. The three justices of the new Supreme Court, all experienced jurists drawn from the King's Bench, saw themselves as representatives and adherents of British law in a colonial environment, while the Government was more interested in the Court as a source of judicial legitimacy and oversight, which could rein in uncontrolled behaviors of the East India Company.[21]

At the same time that Parliament established the Supreme Court of Judicature, they strengthened the governance structure by creating a council that would serve alongside the newly styled and appointed Governor-General, Warren Hastings. Although British political parties were engaged in intense competition at the time, they had been able to agree on an institutional solution that would regulate the East India Company and provide a more systematic rule of law for British agents in India as well as the indigenous population who interacted with them. When the ships carrying the members of the new Supreme Council and the new Supreme Court left England in 1773, all parties involved thought they had solved a difficult problem. But by the

[21] P.J. MARSHALL, *supra* note 8 at 21; LUCY SUTHERLAND, THE EAST INDIA COMPANY IN EIGHTEENTH-CENTURY POLITICS, 240 (1952).

time the two ships landed in Bengal in October of 1774, the schisms that were to mark the first decade of Court and Council were already becoming apparent.

The conflicts between the Governor-General, his Supreme Council and the Court have been analyzed and commented upon for over a century.[22]. But the long-standing emphasis on individuals and on personal conflicts has tended to obscure the institutional mismatch which the Regulating Act of 1773 created. In recent years, historians have emphasized institutional factors in their analyses, and although these scholars have focused on larger issues of colonial rule or law rather than interbranch relations, these historical analyses help us understand how institutional configurations and strategies shaped actors' behavior.

The new Supreme Court of Judicature was bedeviled from its inception by ambiguities in its jurisdiction and its scope of authority.[23] While scholars have attributed these ambiguities to the role of the East India Company and its unusual relation to the British government,[24] they also arose because of competing interests in Parliament and the often contradictory aims of the Regulating Act. The competing interests grew from the intense partisan conflict within Britain during the latter half of the 18th century. One fundamental disagreement centered on the proper

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[22] Hastings's impeachment trial , which began in 1786 and stretched over nine years until his acquittal in 1795, was the penultimate use of impeachment in British politics. The divisions between members of the Supreme Council—in particular between Hastings and Philip Francis—reflected the intense party polarization and conflict within domestic British politics. Edmund Burke, an influential Tory Member of Parliament with considerable antipathy toward Hastings, held up Hastings as the archetype of the corrupt imperial East India agent. Fifty years later, Macaulay wrote a stinging indictment of Hastings, which well-researched studies have failed to dislodge as the dominant view. See, e.g., SIR JAMES FITZJAMES STEPHEN, THE STORY OF NUNCOMAR AND THE IMPEACHMENT OF ELIJAH IMPEY , Vol. 1, 2 (1885), an exhaustive reinterpretation of the Nanda Kumar case; KEITH FEILING, WARREN HASTINGS 343 (1954), who described the trial as "nine years' persecution"; Lucy Sutherland, *New Evidence on the Nandakuma Trial* 72 ENG. HIST. REV. 43, 444 (1957) providing evidence of Hastings's innocence from newly discovered papers.

[23] See generally, Travers, supra note 8, ch. 5, for a discussion of the ontradictions inherent in the language of the Regulating Act.

[24] *See, e.g.*, Sutherland, supra note 21 at 260, 306 (on the relationship between the East India Company and the British government, and the ramifications for party politics); Sudipta Sen, *Imperial Subjects on Trial: On the Legal Identity of Britons in Late Eighteenth-Century India*, 45 J. BRIT. STUD. 532, 549 (2006) (on how British and Indian parties were recognized as subject to British law).

oversight of the East India Company's actions.[25] The Company had been reporting significant debts and paying lower dividends to its shareholders and to the Crown for several years. In response, one faction in Parliament sought greater control over the Company's actions, while another fought against increased ministerial supervision.[26] As a result, Parliament created the position of Governor-General in Council, but the Council in Calcutta mirrored the divide between the two political factions in London.

Establishing the Court's Agenda

For the Supreme Court, the outcome of this parliamentary infighting was that the legislators endowed the Court with apparently immense powers in some areas, but left other issues inadequately specified.[27] The judges were considered personal representatives of the Crown, "with sources of fiat independent of the Company."[28] They were also empowered to review all policies and regulations emanating from the Supreme Council, which gave them not only the right of judicial review in the conventional sense, but the potential responsibility for day-to-day oversight of the Council's actions.[29] While this sweeping authority was unusual, it was understandable, given the fears within Parliament that the Company was insufficiently regulated. Surprisingly, however, this review authority was not the source of the most controversy with regard to the Court's decisions.

Instead, that controversial authority stemmed from the Court's power to hear suits against British agents of the Company and its Indian employees. Agents who had been accustomed to acting unilaterally suddenly found that they could be called before a judicial bench and tried

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[25] H.V. BOWEN, REVENUE AND REFORM: THE INDIAN PROBLEM IN BRITISH POLITICS 1757-1773, 133 (2002); Sutherland, *supra* note 21 at 260.
[26] See Sutherland, supra note 21 at 138.
[27] See THOMAS M. CURLEY, SIR ROBERT CHAMBERS: LAW, LITERATURE, AND EMPIRE IN THE AGE OF JOHNSON 185 (1998)
[28] Travers, *supra* note 8, at 183 for a discussion of the judges' interpretation of their roles..
[29] See Marshall, supra note 8 at 543 on the Court's efforts to determine who was subject to their jurisdiction.

under English law. Further, the Court's reach extended through Bengal, Bihar, and Orissa—not just the towns and factories that were recognized as British settlements.[30] The judges did not hesitate to use this authority because they saw themselves as bringing British law and justice to a corrupt, lawless territory.[31] As Justice Robert Chambers wrote to Lord North, whose government had passed the Regulating Act, the Act rescued "oppressed and declining People from Insecurity and Unhappiness of Dominion exercised without Regularity or Knowledge," and the judges served as "an Instrument of this glorious Purpose."[32] Given this perspective, it is hardly surprising that Company agents and Council members were protesting the Court's decisions to London within the first year of the Court's operation.[33]

However extensive the formal power granted to the court, it was undercut by two issues which weakened the judges' ability to issue decisions that would be accepted by the litigants, Indian elites, and the East India Company. First, the guidelines of the Court's authority were not always clearly articulated. The Court has the authority to hear cases where agents of the East India Company were parties, but who qualified as an agent was not clearly specified. [34] Additionally, the Court was given the authority to review all of the Governor General of Calcutta's policies, but the consequences of declaring policies extr-judicial was not stipulated.

A second set of difficulties arose from the judges' ignorance of local laws, customs, and languages.[35] While the justices were well-versed in English law and had a mandate to extend that law to Britons in India, they were also instructed to apply it only "as nearly as the Condition and

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[30] See generally, Travers, *supra* note 8, ch. 5 for a discussion of the Court's rulings into areas outside Company jurisdiction.
[31] See Curley supra note 27 at 186.
[32] Id.
[33] Sutherland supra note 21 at 301.
[34] See Sen, supra note 24 at 543 for a discussion of the judges' attempts to determine who fell within their jurisdiction.
[35] See Curley, supra note 27 at 191 on the discrepancy between the justices' understanding of English law and Indian laws and customs.

Circumstance of the Place, and the Persons will admit of."[36] There had been considerable debate within Parliament about the advisability of imposing British law in such a different social and political context, and the result was a confusing mixture of judicial responsibilities: on the one hand, the Court was to respect indigenous laws and customs, but on the other they were to extend the protections of British law to anyone engaged in business with the Company's agents, even if their rulings went against the Company's interests. Given the background of the justices,[37] it is hardly surprising that they chose to emphasize the latter rather than the former. Two well-known and extremely controversial cases illustrate how this preference played out in practice.

Court v. Company: Critical Cases

The first case, which has become known as the *Patna Cause*,[38] involved the Court in an inheritance dispute between the widow of a property holder and his nephew. The widow and her late husband were neither British subjects nor employed by the East India Company. The nephew was not a British subject, but he was an employee of the Company. The indigenous Muslim law officers who had initially heard the case in Patna had ruled for the nephew.[39] The Court, however, claimed appellate jurisdiction on the grounds that as a Company employee, the Court was entitled to oversee the nephew's actions even in a dispute wholly between Indians and then overturned the decision.[40] In doing so they stretched the ambiguous definition of "employee" or "agent" from the original charter, they rejected the Muslim law officers' bases for their decision, and they invoked "universal reason, natural law, and common sense to see [them]

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[36] Letters Patent, quoted in Travers, *supra* note 8, at 183.
[37] See Curley, supra note 27 at 197 for brief biographies of the justices.
[38] The written opinion in the Patna cause, formally known as *Nauderah Begum v. Behader Beg, Kharzy Saudee, Muftee Barracktoola, and Mufty Golaum Mackdown*, is not, to our knowledge, available in an officially reported document of the Court. Summaries of the decision, based primarily on the private papers and notebooks of Justices Chambers and Hyde, are available in Curley, supra note 27 at 278; and B,N. PANDEY, THE INTRODUCTION OF ENGLISH LAW INTO INDIA 130 (1967).
[39] Curley, supra note 27 at 279.
[40] Id. At 281.

through to an area of jurisdiction beyond the usual remit of English law."[41] In a single case, Impey's Court went beyond their jurisdiction, which was limited to the Company's British settlements, to the Indian sections of the city of Patna, overturned Company-appointed indigenous legal officials, and adjudicated a case in which the East India Company was not a direct party. The Court's actions in the Patna Cause became a critical component of the Company's case against the Court's jurisdiction and formed one of the articles of impeachment considered against Impey.[42]

The second case is perhaps the most famous case in the legal history of the British Raj and comprised the main part of the impeachment case against Hastings. The case of Nandakumar (Nuncomar in the terminology of its time)[43] has been exhaustively debated, from just after the decision,[44] through Hastings's trial,[45] to Macaulay's essay on Hastings,[46] through 20th-century historiography.[47] It is beyond the scope of this paper to revisit these debates; whether Nandakumar was the victim of "judicial murder"[48] is still a subject of contention. We

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[41] Travers, *supra* note 8, at 198, and at 201, notes that the East India Company prepared a detailed reponse to the decision.
[42] Stephen, *supra* note 22, at 194, notes that the impeachment article took up 22 folio pages.
[43] To our knowledge, there is no official copy of the Court's original decision in the Nandakumar case. Curley, supra note 27 at 227, describes the preparation of a pamphlet comprising a narrative from a eyewitness and "the chief justice's observations, supplanted by memoranda" from two justices.
[44] See Curley, supra note 27 at 227 for a discussion of the repercussions of the decision in Bengal and in London.
[45] P.J. MARSHALL, THE IMPEACHMENT OF WARREN HASTINGS 141 (1965) notes that while the execution of Nuncomar was not one of the charges brought against Hastings, it was despite Burke's belief in Hastings' guilt.
[46] See SAMUEL M. TUCKER, ED., MACAULAY'S ESSAY ON WARREN HASTINGS 53 (1910), for Macaulay's assertion that while Hastings did not directly commit the crime, "we have not the least doubt that this memorable execution is to be attributed to Hastings."
[47] See, e.g., Sutherland, supra note 22 at 444 for a reconsideration based on new evidence; ; GEOFFREY CARNALL & COLIN NICHOLSON, EDS, THE IMPEACHMENT OF WARREN HASTINGS: PAPERS FROM A BICENTARY COMMENORATION 5 (1989) which argues that earlier analysis failed to consider sufficiently the impeachment as an exercise in accountability; A. G. NOORANI, INDIAN POLITICAL TRIALS 75 (2005) observes that more than 200 years after the decision, members of the Calcutta Bar demanded that Impey's portrait be removed from its place of prominence in the Bengal High Court. The anthropologist Nicholas Dirks recently published a book in which he compares Hastings' impeachment with contemporary American and British decisions to go to war in Iraq. NICHOLAS DIRKS, THE SCANDAL OF EMPIRE X, 35 (2006).
[48] Noorani, supra note 47 at 41.

instead draw attention to the crime for which he was convicted and executed: forgery with intent to defraud.[49] While forgery was still technically a capital crime under British law, it had traditionally been treated with more leniency under Indian law. [50] Therefore, even if we do not believe that Chief Justice Impey brought about the conviction and execution of Nandakumar in order to help his friend Hastings, he certainly imposed a sentence that violated the directive to follow indigenous customs, especially in criminal cases.

The Supreme Council, individual members of the Company, and Indians, prompted by the aforementioned cases and other cases in which the Company was a party[51] petitioned Parliament to change the jurisdiction of the Court.[52] Chief Justice Impey himself narrowly escaped being impeached by Parliament, and the Court's jurisdiction over the Company was sharply circumscribed in Pitt's India Act of 1784.[53] Some of the Court's powers were curtailed in the Act, but other judicial reforms sought by Impey and Hastings were implemented by Hastings's successor, Cornwallis. For example, Cornwallis successfully brought about the integration of the country and town courts, the increasing application of English common law, and the extension of jurisdiction to ever greater numbers of Indians.[54]

The conflicts between the Company and the Court and the subsequent intervention of Parliament seem almost inevitable given the ambiguities both in the Court's mandate and the preferences of Parliament. British political actors were seeking to regulate the Company through

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[49] Sutherland, supra note 47 at 438 provides a clear and concise summary of the trial.
[50] Curley, supra note 27 at 225 quotes Chambers's objection to the "cruel legal parochialism of importing an English capital penalty for forgery to India."
[51] *See, e.g.*, Stephen, supra note 22 at 209; Pandey, *supra* note 38 at 176; for discussions of the Kasijora case.
[52] Stephen, *supra* note 22.
[53] See Travers, supra note 8 at 213 for a discussion of the political climate which led to passage. Portions of the Act are excerpted in Marshall, supra note 8 at (pincite). See also N. JAYAPALAN, HISTORY OF INDIA (2001) at 217.
[54] B. Lindsay, *British Justice in India* 1 TORONTO. L. J. 343, [**344**] (1936). For a brief overview of the judicial reforms instituted by Hastings's successor, Lord Cornwallis, see Travers, *supra* note 8 at 207.

the Court, but they wanted above all for the Company to be solvent, productive, and prosperous. The Court, on the other hand, was made up of justices who saw their role as that of bringing English common law to a lawless and corrupt people, and they included Company agents in those categories.[55] When it became clear to Parliament that the Court's rulings were likely to inhibit the Company's ability to strengthen and extend its political and economic reach, the choice was to constrain the Court rather than the Company. The Court unquestionably could have employed more wisdom and prudence in its decisions; however, had it deferred too much to the Company's wishes, the Court's own authority would have been compromised. If we assume that Chief Justice Impey was a corrupt judicial officer who took every opportunity to exceed his authority and help his friends, then the explanation becomes simple. If we assume that he was sincerely and lawfully following what he considered to be his responsibilities, then we see that he was confronted with a Faustian choice: the Court could draw on British law and make decisions that infuriated the Company, or it could avoid confrontation and be seen as weak and unimportant.

B. The Federal Court of India

The Federal Court was established through provisions of the British Parliament's 1935 Government of India Act and issued judgments from 1938 to 1950.[56] The Federal Court has been perceived to be weak and ineffectual against the government.[57] However, an examination of the decisions of the Court does not support the conventional wisdom: in nearly half of the

[55] See, e.g., Curley, supra note 27 at 240.
[56] Our analysis is limited to the 1938-1947 period. 1938 marks the year of the Court's initial sitting; 1947 marks the year in which British India was partitioned into the independent nations of India and Pakistan. The Federal Court continued in its colonial form in India with a new, Indian Chief Justice, while the Constitution was being drafted. When the Constitution was passed in 1950, the Federal Court was reconstituted as the Supreme Court of India, with its full bench of justices carrying over to the new court.
[57] Cf. Pylee, supra note 10 at viii, and Gadbois, supra note 12 at 69, who each directly address and refute this position.

decisions in which the government was a party, the Court failed to side with the government.[58] As we will show below, these cases included several high-profile decisions which nullified key government policies. To understand the Federal Court's relation to the central government and why it challenged the authority and power of the institutions that created it, we need to explore a complex set of issues. We identify sources of institutional weakness and bases for conflicts with other branches of government by examining the terms of its creation, the interests of those creators, the cases it adjudicated, and the apparent preferences of the Court's judges.

Creation of the Federal Court

The Federal Court faced a number of constraints and ambiguities from its inception. The Act of 1935 was designed to provide a framework in which Indians and colonial rulers governed together (although not equally). Passed by the British Parliament and implemented by the Government of India, it was not the creation of an indigenous democratic regime. The establishment of the court had been discussed extensively at the All-Parties' Round Table Conferences, which brought together all the British political parties as well as representatives of the major Indian political organizations, ethnic and religious groups, and princely states in order to develop a new institutional framework to govern India.[59] While the outcome of the conferences produced no consensus among its participants about how to proceed toward an independent India, the debates were sophisticated and wide-ranging.[60] Indeed, the 1935 Act incorporated many of the suggestions raised there.[61]

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[58] Darnell & Parikh, *supra* note 7, at Table 1.

[59] For an excellent overview of the Round Table Conferences, see R.J. MOORE, THE CRISIS OF INDIAN UNITY 1917-1940 103 (1974). SUNITA PARIKH, THE POLTICS OF PREFERENCE: DEMOCRATIC INSTITUTIONS AND AFFIRMATIVE ACTION IN THE UNITED STATES AND INDIA 148 (1997) analyzes the outcomes of the Round Table Conferences given the preferences and strategies of the major actors.

[60] Moore, supra note 59 at 103.

[61] Moore, supra note 59.

The introduction of a Federal Court at the apex of the Indian judicial system was a response to a new political configuration created by the Government of India Act of 1935; it joined British India with the nominally independent princely states. But the history of the judicial administration of the British Raj dated from the early days of the British presence in India and preceded formal colonial rule by nearly one century. The Federal Court had clear judicial and institutional ties to the courts created by Parliament in the late 1700s, and it was viewed as complementing the existing structure of provincial High Courts.[62] In its rulings, the Federal Court attempted to expand its jurisdiction throughout the subcontinent and continued previous efforts to dispense decisions based on English common law, Hindu law, and Islamic law.[63]

Constraints on the Federal Court

The Government of India Act grafted the new Federal Court onto the existing judicial system above the long-established High Courts in the provinces. In response, many of the sitting High Court judges feared that the new Federal Court would undermine their prestige.[64] They argued that the existing system, in which cases appealed at the High Court level were sent on to the Privy Council in England, could be adapted to suit the new circumstances. However, the forces that supported the new court prevailed, and the provisions of the 1935 Act empowered a Federal Court at the apex of an integrated Indian judiciary, with the Court retaining power over referral to the Privy Council for cases falling within its jurisdiction.[65] In spite of the Court's position above the High Courts, the Government of India consistently sought to maintain a

[62] See Pylee, supra note 10 at 54.
[63] Id., for a comprehensive discussion of the Court's important cases across a range of issues.
[64] See Gadbois, supra note 12 at 92, who observes that the judges of the High Courts consistently opposed a wide-ranging jurisdiction for the Federal Court.
[65] Government of India Act of 1935 26 Geo. 5 ch. 2 §208.

limited jurisdiction for the Court.[66] The Act established British India as a federation for the first time. The provinces had previously had bilateral relations with the central Government of India, but they had not been statutorily connected to each other. The act did not require the princely states to become members of the federation, but it did set forth provisions for their voluntary inclusion. The very name, Federal Court, reflects the decision of the British government to avoid the appearance of establishing a Supreme Court.[67]

The Act carefully delineated the Federal Court's areas of original, appellate, and advisory jurisdiction. The scope of its original jurisdiction seems fairly expansive at first glance. The 1935 Act specified that, "the Federal Court shall . . . have an original jurisdiction in any dispute between any two or more of the following parties, that is to say, the Federation, any of the Provinces or any of the Federated States."[68] However, the Act further stipulated restrictions on this jurisdiction in great detail, and stated: "The Federal Court in the exercise of its original jurisdiction shall not pronounce any judgment other than a declaratory judgment."[69] The Court's original jurisdiction "was to cover the minimum grounds of dispute in a federation . . . Nevertheless, . . . [it] was certainly in conformity with the position of such a court as the sole defender of the federal compact."[70] The Act's stipulated jurisdiction of the Court bound only the British provinces; the princely states were not required to subject themselves to its jurisdiction.[71]

The enumerated aspects of the Court's appellate jurisdiction appeared, like its original jurisdiction, to be quite extensive. The Act gave the Court the power to consider on appeal any

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[66] See the Viceroy's letter to the Secretary of State for India, 7 October 1941 (on file in the Linlithgow Papers, European Manuscripts F125 [box 10], Indian Office Library and Records, British Library, London). Chief Justice spens also argued unsuccessfully for enlarged Jurisdictions (see Linlithgow papers, Box 12).
[67] Gadbois, supra note 12 at 24 for a discussion of the Federal Court-Supreme court distinction.
[68] Government of India Act of 1935, supra note 65 at §200.
[69] *Id*. at §204.
[70] Pylee, supra note 10 at 106.
[71] See Gadbois, supra note 12 at 29.

civil or criminal case that involved a "substantial question of law as to the interpretation of the Constitution Act [of 1935]."[72] Though the Act provided that the lower and High Courts were to consider the Federal Court's decisions as binding on them, this grant of appellate power was less extensive than it originally appeared. The princely states were not required to adhere to its rulings, and the provincial courts were only bound insofar as a case fell within the provisions of the Act. Indeed, the British government expected few cases to arise this way.[73] However, both litigants and the Court expanded their reading of relevance under the Act to develop a jurisdiction that was broad and powerful in scope. As we show below, the Court asserted jurisdiction most forcefully and controversially in its rulings in cases involving civil liberties issues.[74]

Finally, the Court had jurisdiction to provide advisory decisions to the Government of India regarding the constitutionality of new provisions formulated either by the Governor-General in Council or by one of the Federal Legislatures. This was expected to be infrequently used, but it was included in the Act with the expectation that this new constitution would occasionally give rise to ambiguities in pending legislation.

Not surprisingly, the Federal Court confronted a number of problems in establishing its authority. First, it met some resistance from the High Courts and had to assert its autonomy in relation to them.[75] Second, the Federal Court did not have universal jurisdiction on two fronts: princely states were not obligated to submit to its rulings, and its role relative to certain aspects of the Government of India was only advisory. Finally, the tenure of individual justices was generally brief given the criteria for being a justice. No member of the court was likely to serve

[72] See Pylee, supra note 10 at 110.
[73] Linlithgow Papers, *supra* note 66, letter from Viceroy to Secretary of State, 1 November 1942 (Box 11).
[74] See Pylee, supra note 10 at 319.
[75] See Linlithgow papers, supra note 66, letter from Viceroy to Secretary of State, 1 June 1943 (Box 12).

more than a few years due to the mandatory age retirement provision,[76] and talented Indian justices could be promoted to the Privy Council in England.[77]

Several lines of potential conflict existed during the era of the Federal Court. One issue was the selection of judges to sit on the bench. The Act clearly stipulated the requirements for office;[78] they were intended to emphasize appointees' "eminence and distinction attained" in India's courts or in England and Northern Ireland's legal communities.[79] There is no mention of religious or caste affiliation, but there was a well understood expectation that the two Indian justices would represent the Hindu and Muslim communities respectively.[80] Unlike the justices on the Supreme Court of Judicature, the justices who comprised the Federal Court combined longstanding ties to the British Raj with a deep knowledge of Indian legal institutions. The first Chief Justice, Sir Maurice Gwyer, was a key participant in the Round Table Conferences and was instrumental in drafting the Act of 1935. The first Muslim associate justice, Sir Shah Suleiman, was Chief Justice of the Allahabad High Court for six years, and the Hindu associate justice, M. R. Jayakar, was a leading Indian lawyer who had been elected to the Bombay Legislative Council and the Bombay Legislative Assembly as a member of the Swaraj Party and the Nationalist Party respectively. Later appointments were also distinguished, although by the middle and late 1940s the Governor-General and the Secretary of State both complained about

[76] Pylee, supra note 10 at 91.
[77] The promotion of Federal Court justices to the Privy Council arose early in the Court's existence, and official correspondence between the Government of India and the India Office illustrates the difficulties British officials faced in finding appropriate candidates. See, e.g., Linlithgow Papers, supra note 66, letter from Viceroy to Secretary of State, 29 March 1941 (Box 10).
[78] Government of India Act of 1935, at § 200 (3).
[79] Government of India Act of 1935, at § 200 (3) ; see Pylee, supra note 10 at 87.
[80] Discussions between British officials about appointments assumed that an outgoing judge would be succeeded by someone from the same religious community. See Linlithgow Papers, supra note 66, letter from Viceroy to Secretary of State, 29 March 1941), where the Viceroy reminds the Secretary that "for the first of these [judicial] posts we *must* find a Muslim (emphasis added) (Box 10).

finding qualified British candidates in the waning years of the Raj.[81] The Indian judges continued to be selected from the High Courts of the provinces, and the last Indian justices of the Federal Court became the first justices of the new Supreme Court in 1950.[82]

Many members of the Indian judiciary, particularly those in the High Courts, prided themselves on remaining free from political bias. The first Chief Justice, Sir Maurice Gwyer, articulated this view early in his tenure, asserting that "Independent of government and parties and unaffected by the vicissitudes of politics" the Federal Court's "primary duty is to interpret the Constitution."[83]. Yet even though Indian judges tended to avoid politics or embrace a moderate brand of political participation, their actions still drew scorn from Indians active in the independence struggle.[84] As a result of these attributes, British and Indian political leaders perceived the Federal Court justices as, removed from the heated politics of the independence period, and unlikely to be legal innovators.[85]

The Court Confronts the Government

Despite the common expectation that the Court would refrain from taking politically volatile positions, the Court's support of civil liberties brought it into direct conflict with the Government of India, most often in cases that involved the Defence of India Act.[86] The Government had promulgated the Act in the early 1940s as a wartime necessity to maintain order

[81] See, for example, Linlithgow Papers, supra note 66 , letter from Secretary of State to Viceroy, 12 October 1942, in which the Secretary complains that "I am as anxious as you are to secure a really good man as Chief Justice, but it is likely to be extraordinarily difficult to do so and we may have to be content with someone of much lower standing than we should like" (Box 11).
[82] See Austin, supra note 5 at 123.
[83] Quote in Pylee, supra note 10 at 81.
[84] RAJEEV DHAVAN, THE SUPREME COURT OF INDIA: A SOCIO-LEGAL CRITIQUE OF ITS JURISTIC TECHNIQUES 128 (1977).
[85] See George H. Gadbois, Jr., *Indian Supreme Court Judges: A Portrait*, 3 LAW & SOC'Y REV. 317, 330 (1968).
[86] Pylee, supra note 10, ch. 10 and 11.

and crush sedition, which included the civil disobedience of the Quit India movement.[87] Though Government argued that national security in wartime overrode civil liberties protections, the Court unanimously ruled against the Government in its first case challenging a provision of the Defence of India Act.[88] In another case, *Niharendu Dutt Mazumdar v. King Emperor*,[89] the Court held against the Government, ruling that the appellant's speech did not meet the definition of sedition under the Defence of India Act.[90] Though infuriated by these decisions, the Government nevertheless accepted them and subsequently amended the relevant parts of the Defence of India Act whereever possible to prevent similar decisions from occurring in the future.[91]

The government accepted the decisions in order to avoid challenging the Court in the early civil liberties cases.[92] In 1943, however, when the Court's first Chief Justice reached retirement age, the government chose a new British Chief Justice who was more likely to vote in their favor. Sir Patrick Spens was a practicing lawyer and a Member of Parliament, but he had no experience in India, and unlike his predecessor there was no reason to believe he felt an attachment to India or its institutions[93]. He was frequently on the dissenting side of civil liberties cases,[94] and the government increasingly took civil liberties cases it lost in the Spens Court to the

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[87] See Linlithgow Papers, supra note 66, letter from Viceroy to Secretary of State for India, 25 August 1939, on attaching the Defence of India Act to an omnibus bill in Parliament in order to reduce "the danger of giving the Left Wing a handle to use against us" (Box 8). .

[88] *Keshav Talpade v. King Emperor*, 30 AIR 1943,holding that Rule 26 of the Defense of India Act was invalid.

[89] 29 AIR 1942.

[90] 29 AIR 1942, holding that "the speech of the applicant did not amount to sedition.

[91] See Linlithgow Papers, supra note 66, letter from Viceroy to Secretary of State, 2-4 May 1943, in which the Viceroy states, "I quite agree with the comment your private telegrams about the Federal Court decision; but I agree also that for the reasons mentioned it was much wiser not to challenge it by trying to appeal to the Privy Council, but to make an amending ordinance at once" (Box 12)

[92] Id.

[93] Id.

[94] [will provide exact number of dissents and comparison to Gwyer in next edit]

Privy Council, which was frequently "in complete disagreement with the Federal Court."[95] However, while Spens dissented more than Gwyer in civil liberties cases, the Spens Court was equally willing to challenge the government in other cases to which it was a party.[96] When we examine the Court's decisions in cases in which the Government was a party during the entire period under consideration, the Court rules against the Government 48.5% of the time.[97]

The Federal Court's history reveals several conditions that converged to create a confrontational relationship with the government that created it. Faced with an institutional structure that had significant weaknesses, many British and Indian justices were prepared to be assertive in order to protect the authority of the Court, especially with respect to those aspects of the law that they deemed particularly important.[98] These areas of law, however, were the same as those over which the British wanted maximum authority because of their importance to the maintenance of political stability and control in India. In contrast to Parliament's response to the Supreme Court of Judicature in the late 18th century, however, the British government did not alter the Court's jurisdiction to constrain it. Instead, it used the power of appointment to ensure that the next Chief Justice would be more sympathetic to British interests,[99] and it more frequently challenged the Court's decisions by taking them to the Privy Council.

The Federal Court was always subject to being reversed by the Privy Council on those occasions it granted a party's request to appeal. While appeals were rare during Chief Justice Gwyer's tenure, after his retirement the Government appealed a greater number of cases it lost in the Federal Court to the Privy Council.

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[95] Pylee, supra note 10 at 311.
[96] Darnell & Parikh, supra note 7 at tbl. 1.
[97] Id.
[98] [Will provide citations from other civil liberties cases in next edit]
[99] See Linlithgow papers, supra note 66, at Box 11, for letters between the Viceroy and Secretary of State which discuss the advantages of having a Chief Justice who is a "European from home, wholly detached from India's communal and other problems" and for criticism in India of Spens as a politically partisan appointee.

C. The Supreme Court of India

The Supreme Court of India replaced the Federal Court upon the adoption of the Constitution of India in 1950. Similar to the courts previously discussed, the Supreme Court faced institutional limitations that justices had to confront in order to assert the Court's authority. Structurally, the Constitutional provisions for the judicial branch of government were taken almost verbatim from the Government of India Act of 1935.[100]

The Supreme Court's jurisdiction followed closely the provisions laid down for its predecessor. It was granted the explicit power of judicial review, and it had original, appellate, and advisory jurisdiction. Unlike the Federal Court, however, the Supreme Court's caseload has been heavy from the outset. The Court has no tradition of *certiorari*, and therefore must adjudicate every case. While it disposes of many cases without comment by letting stand the lower courts' decisions, hundreds of decisions are officially reported, and the majority of reported cases have written judgments. While the Court has some discretion regarding the timing of a ruling, in theory the Court must rule on all the cases at some point. This means that Indian justices have far less ability to pick and choose cases that suit their strategic or sincere interests than their American counterparts.

In addition, Supreme Court justices function as trial court judges for the majority of a term. The Court was initially established with eight justices, but justices were added regularly from the mid-1950s onward, bringing the current total to twenty-six.[101] The bench system allows routine cases to be disposed with two- and three-judge panels, but cases with constitutional

[100] Austin, supra note 11 at 327.
[101] INDIA CONST. art. 124, §1, cl. 4.

import must be heard by a minimum of five justices,[102] and cases that overturn previous Supreme Court decisions must be heard by a larger bench than the original case. The largest bench ever convened[103] was made up of the thirteen judges who heard the *Kesavananda Bharati* case.[104]

It is unclear why the Indian National Congress party[105] (more familiarly known as the Congress party), which was frequently dismissive of colonial institutions, was willing to so thoroughly adopt the colonial judicial system.[106] Perhaps because the courts in general and their judges in particular played so small a role in the struggle for independence, political party leaders viewed judicial institutions as necessary to an independent state, but unimportant compared to the elected branch. The potential for conflict with the Government was further heightened when the Supreme Court followed in the steps of the Federal Court by protecting and advancing individual and civil rights even when these rights came into conflict with popular government policies.[107] Indeed, in the first decade of the Supreme Court's existence, some justices viewed the primary role of the Court to be the protector of the Constitution.[108] This role is reinforced by explicit "constitutional limitations on the authority of the state"[109] and the right of the Court "to issue writs in defense of fundamental rights,"[110]

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[102] Id., art, 145, §3.
[103] Rudolph & Rudolph, supra note 5 at
[104] *Kesavananda Bharati . The State of Kerala and Others* AIR 1973 SC 1461
[105] The Indian National Congress was the leading party and preeminent voice of the independence movement. Following independence and India's first national elections in 1952, it was the dominant political party and formateur of every government until 1977.
[106] Austin, supra note 11 at (pincite)
[107] Austin, supra note 5 at (pincite)
[108] Id., at (pincite). The Constituion of India is more detailed that the U.S. Constitution in its delineation of Fundamental Rights (arts. 12-35). It explicitly stipulates a right to property (art. 300A). In addition, the Constitution's Directive Principles (arts. 36-51) explicitly direct the state to formulate policies that enforce the Fundamental Rights.
[109] ANUP CHAND KAPUR, CONSTITUTIONAL HISTORY OF INDIA 511 (1970).
[110] Burt Neuborne, *The Supreme Court of India*, 1 INT. J. CONSTITUTIONAL LAW 476, 478 (2003).

The Constrained Court

When the delegates to the Constituent Assembly[111] took up the judicial provisions of the Constitution, they were concerned with creating an autonomous judiciary that would command respect.[112] But they also wanted to avoid creating a Supreme Court that would impede the Parliament in its efforts to direct Indian economic, social, and political development.[113] The result, in Austin's elegant phrase, was that they "created an idol and then fettered at least one of its arms."[114] The Court was endowed with strong powers of review and an extensive jurisdiction, but it had to be sensitive to the reality that the requirements for passing a constitutional amendment were relatively easy to meet, especially for a government with a comfortable majority in Parliament. To pass an amendment overruling a Court decision that did not involve federal issues, the requirement was a simple majority quorum and the assent of two-third of those present.[115] If federal issues were at stake, then half the state governments also had to pass the amendment[116]. Given that the government has enacted nearly one hundred constitutional amendments in less than fifty years, [117] it is evident that the process of amending the Constitution has been fairly easy.

In addition to political constraints, legal norms and and formal institutional rules have further limited the Supreme Court's ability to develop strong and sustained positions that ran counter to parliamentary and bureaucratic preferences. According to Indian common-law tradition, Parliament has the right to delegate the power to pass and administer legislation to

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[111] The Constituent Assembly was created through an agreement between the British government and Indian political leaders as an elected body charged with the task of drafting a new Indian constitution. See Austin, supra note 11.
[112] See Pylee, supra note 10 at 322.
[113] Austin, supra note 11
[114] Id., at 174.
[115] CONST. INDIA, art. 368, §2.
[116] Id.
[117] http://indiacode.nic.in/coiweb/coifiles/amendment.htm

central and state administrative agencies, to state and local governments, and to quasi-governmental bodies. The courts can invalidate this delegation in only a few circumstances: (1) if the delegated power is too sweeping, (2) if the delegated power is contradictory to the statute authorizing it, or (3) if the delegated power is "repugnant to the general law."[118]

Even more constraining is the doctrine of "subjective satisfaction."[119] Under this device, the agent is given enormous discretion to choose how legislation is to be implemented.[120] Almost any bureaucratic interpretation must be accepted by the courts, even if it can be construed as inappropriate or mistaken. "The emphasis [using the formula of subjective satisfaction] has been laid on the amplitude of the discretionary power rather than on the need to relate it to the purposes of the Act."[121] The only recourse available under statutory review is if the agent has intentionally and on *mala fide* grounds misapplied the legislation.[122] The Indian Supreme Court has used this last option with considerable ingenuity to develop a pattern of review based on the argument that any interpretation that fails the *ultra vires* test "is in fact a *mala fide* exercise of power,"[123] but the strategy has inherent limits.

The strength of the political party in government, legal norms, and formal institutional rules all imposed limitations on the Court's ability to assert itself in the political realm, and these constraints were exacerbated by the ease with which Parliament could undermine the Court's oversight of legislation and its implementation. In addition, since the Court's caseload is so

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[118] V.P. SARATHI, THE INTERPRETATION OF STATUTES 399 (1981).
[119] See ANDREW HARDING & JOHN HATCHARD, EDS., PREVENTIVE DETENTION AND SECURITY LAW : A COMPARATIVE SURVEY 33 (1993) for a discussion of the subjective satisfaction doctrine in South Asia legal systems.
[120] Id., at 92.
[121] Dhavan, *supra* note 84, at 239.
[122] Harding & Hatchard, supra note 119 at 93.
[123] Dhavan, supra note 84 at 237.

onerous and it issues written opinions on so many decisions,[124] strategic cherry-picking of cases was quite difficult.

Opposition to the Government's position was not as frequent in the early years of the Supreme Court as it had been for the Federal Court.[125] The latter ruled against the colonial government more often than the Supreme Court ruled against the Congress Party government.[126] Nearly half the Federal Court's decisions rejected the government's argument, while less than a third of the Supreme Courts decisions went against the government.[127] Despite the conventional wisdom that the Federal Court was relatively weak and ineffectual while the Supreme Court was aggressively obstructionist, this position is not supported by a simple numerical tally; we would have to argue that the cases in which the Supreme Court rejected government positions were somehow more important than those it upheld. It is hard to argue that a court insists upon challenging the executive when it actually rules in favor of the government two-thirds of the time; nonetheless, this view is widely held.[128] But, as with the preceding iterations of India's high court, the nature of the cases in which it opposed the Government's position is central to understanding its "oppositional" character.

The *Gopalan* Case

The first critical case heard by the Court was *A. K. Gopalan v. State of Madras*, which involved a Communist party member who had been repeatedly jailed under the Preventive Detention Act of 1950 (PDA) for speech that was allegedly threatening.[129]

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[124] will insert number of written opinions yearly for 1950-1964 in next edit.
[125] Darnell & Parikh, supra note 7, at tbl. 1
[126] Id.
[127] Id.
[128] See, e.g., Epp, supra note 5 at 80; Austin, supra note 5 at 197; Rudolph & Rudolph, supra note 5 at 121.
[129] 1950 SCR 88

The PDA has an interesting legislative and policy history. The colonial government had issued preventive detention provisions during World War II and the Indian National Congress had repeatedly denounced the government for them.[130] The Federal Court's rulings against preventive detention policies in the early 1940s were among the few cases that helped the Court find favor with the Congress Party.[131] But in the tumultuous and violent period that followed independence, when the Congress Party was in control of the government, it found preventive detention to be a convenient tool and incorporated provisions for preventive detention into the Constitution.[132] Prior to *Gopalan*, the PDA allowed individuals to be detained for up to a year without being informed of the reasons for their detention.[133] While there were provisions for an advisory board to review the legitimacy of the detention, the government was not required to give the board the reasons for detention, and the board's recommendations were not binding.[134]

Gopalan challenged his detention under the PDA by arguing that it violated his fundamental rights as provided by the new Constitution. The Supreme Court issued a complicated decision in *Gopalan* with each justice writing a separate opinion. The majority upheld certain provisions of the PDA while invalidating others.[135] It did not declare the Act itself unconstitutional, but it ruled that withholding the reasons for detention and failing to give the advisory board authority over its legitimacy violated the fundamental rights clauses of the constitution.[136] Government leaders were nonetheless displeased with the Court.[137] While they agreed that preventive detention should only be used in cases in which the security of India was at stake, they were loath to give up their ability to decide what constituted security and when

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[130] Pylee supra note 10.
[131] Austin, *supra* note 5.
[132] INDIA CONST. art. 22.
[133] Preventive Detention Act, 1950, No. 4, Acts of Parliament, 1950 (India).
[134] Austin, supra note 5.
[135] Id.
[136] Id.
[137] Id.

information about detainees should be offered.[138] The PDA was amended to take account of the Supreme Court's ruling in 1950 and in successive reenactments, but the essential contours of the policy remained unchanged.

The *Gopalan* case is noteworthy because the government believed the Supreme Court was challenging its authority even as other observers criticized the Court for being insufficiently protective of fundamental rights and failing to strike down the Act in its entirety.[139] The Court appears to have been trying to tread a fine line between protecting fundamental rights while also allowing the government some latitude in issues involving national security. The PDA and its successor laws[140] have not attempted to "define either the range of acts considered threaning to 'public order' and 'national security'," [141] thus leaving room for discretion in the application of the law and requiring the courts to develop working definitions on a case by case basis.[142]

The Land Compensation Cases

In land reform and compensation cases,[143] the Court actually went farther than it did in *Gopalan* and found itself in a battle with the executive over which branch was the guardian of the constitution. Among the most important policy initiatives put forth by the Congress Party government following India's independence in 1947 was a commitment for the redistribution of land.[144] The government's advocacy of a "social revolution" and socialist policies led to the policy of "zamindari abolition," where large absentee landlords, or zamindars, would have their

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[138] Id.
[139] *Id*.
[140] See Harding & Hatchard, supra note 119, at 61 for a discussion of the expiration of the PDA in 1969 and similar laws that followed it.
[141] See Derek P. Jinks, *Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty*,
22 MICH. J. INT'L L. 311, 328 (2001).
[142] See Id., at 328, for a discussion of the difficulties associated with defining "public order" and "national security."
[143] Add cite
[144] RONALD HERRING, LAND TO THE TILLER: THE POLITICAL ECONOMY OF AGRARIAN REFORM IN SOUTH ASIA 51 (1983); FRANCINE FRANKEL, INDIA'S POLITICAL ECONOMY 1947-2004: THE GRADUAL REVOLUTION, 100 (2005).

lands seized and (in principle) redistributed to the people who actually worked them.[145] The Congress Party also claimed the right to appropriate nonagricultural land to the government or for redistributive purposes. Not surprisingly, landlords and urban property owners challenged these efforts in the Supreme Court as violations of their fundamental rights, and the Supreme Court ruled against the government in several of these cases.[146]

Like the preventive detention case, land reform and compensation cases posed a problem for the government. On the one hand, the redistribution of land and the public ownership of property were critical to the Congress Party's vision of socialist economic and political development.[147] On the other hand, appropriation without compensation explicitly violated provisions of the Constitution.[148] The ongoing confrontation that resulted between the executive and the judiciary led to a debate over who had the ultimate authority of constitutional interpretation.[149] Prime Minister Jawaharlal Nehru asserted that Parliament, not the Supreme Court, has the "duty to see whether the Constitution so interpreted was rightly framed and whether it is desirable to change it . . . to give effect to what really . . . was intended or should be intended." As for the challenges to fundamental rights, he remarked, "inevitably in big social changes some people have to suffer."[150]

The Court took a different view. It repeatedly upheld the individual's right to compensation for appropriated land and struck down governmental attempts to sidestep such compensation.[151] The government passed legislation overriding the decisions, but the Court

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[145] Herring, supra note 144
[146] Austin, *supra* note 5..
[147] Herring, supra note 144
[148] INDIA CONST. art 31
[149] Austin, supra note 5
[150] *Id.,*at 87-8.
[151] Herring, *supra* note 144

consistently responded by issuing narrower but equally negative decisions.[152] The resulting interbranch debate was not fully resolved until 1980,[153] and during the Indira Gandhi administration of 1971-1977, Parliament responded to the Court's assertion of authority over the Constitution by putting the Court in institutional jeopardy.[154] During this period, the Court lost public prestige as successive Congress Party governments led by Nehru, L.B. Sastri, and Indira Gandhi were successfully able to portray it as elitist and out of touch with popular needs.[155] The Court, on the other hand, considered itself to be protecting an essential part of the Constitution, even as some justices worried about challenging the government.[156]

The oppositional character of the early Supreme Court was grounded not in the sheer numbers of cases they ruled against the government, but instead resided in the Court's efforts to constrain the government's efforts to amass power. They challenged these strategies through their interpretations of fundamental rights and directive principles.[157] Congress party leaders, who had written and approved the language, were thereby put into a difficult position. They dominated the Constituent Assembly and were thus instrumental in establishing the Court's authority. But as elected politicians seeking to implement policies, they viewed the Court as obstructing economic and social reforms which they saw as necessary for the country's development.

The Court in Crisis

The Government systematically and repeatedly removed policies from the realm of judicial review, but judicial review itself remained intact through these conflicts. However, after

[152] See Rudolph & Rudolph, supra note 5.
[153] *Minerva Mills Ltd. & Ors v. Union of India & Ors* 1980 AIR 1789
[154] For example, the President (at the behest of the Gandhi government) violated established norms when selecting as Chief Justice a judge who did not have the greatest seniority. See KULDIP NAYAR, ED., SUPERSESSION OF JUDGES 9 (1973).
[155] Rudolph and Rudolph, *supra* note 5..
[156] Austin, supra note 5 at pincite
[157] MARC GALANTER: COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES IN INDIA (1984).

Gandhi's landslide victory in the 1971 Parliamentary elections, her government sought to constrain the power of the Supreme Court by passing a series of constitutional amendments that undermined its power of judicial review. The 24th Amendment excluded "constitutional amendments from the reach of Article 13,"[158] which stipulates that "the State shall not make any law which takes away or abridges the rights conferred"[159] by the Constitution. The 25th Amendment "precluded review of the adequacy of compensation."[160] The 29th Amendment removed the Kerala Land Reforms Act of 1969 from judicial review.[161]

Tensions between the Supreme Court and the Indira Gandhi government escalated in *Kesavananda Bharati v. State of Kerala*.[162] The Court overruled its position in *Golak Nath v. State of Punjab*,[163] in which it had stipulated certain limits to Parliament's right to amend the constitution.[164] However, a majority of nine justices also held that "Article 368 did not enable Parliament to alter the basic structure or framework of the Constitution."[165] The day after the decision was announced, Chief Justice Sikri stepped down upon reaching the mandatory retirement age of 65. The President of India then passed over the next three seniormost justices and appointed A.N. Ray, whom the Government considered to be more sympathetic to their policies, as the new Chief Justice.[166] And in 1976, the Parliament passed the 42nd Amendment, which nullified the *Kesavananda* limitations by amending Article 368. The new Clause (4) stated that "no amendment of this Constitution … shall be called in question on any court on any

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[158] Burt Neuborne, *The Supreme Court of India*, 1 INT. J. CONSTITUTIONAL LAW 476, 490 (2003).
[159] INDIA CONST. art 13, §1.
[160] Neuborne, supra note 158 at 490.
[161] Id.
[162] (1973) Supp. SCR 1.
[163] (1967) 2 SCR 762
[164] Id.
[165] *Kesavananda Bharati v. State of Kerala* (173) Supp. SCR 1 at 1007.
[166] Austin, supra note 5 at 278.

ground,"[167] and Clause (5) stated that "there shall be no limitation whatever on the power of Parliament to amend"[168] the Constitution.

The 42nd Amendment was one of a series of measures passed during the period of Emergency under which the Gandhi government functioned from June 1975 until elections took place in March 1977. The Congress party suffered a resounding defeat and the Janata party, a coalition of disparate parties who joined to challenge the incumbents, formed the government. Within a year, the government passed the 43rd[169] and 44th[170] Amendments, which reversed many of the excesses of the Emergency period and restored judicial review, [171] and it reinstated the norm of seniority when filling the position of Chief Justice.[172] In 1980, the Supreme Court offered a compromise in the *Minerva Mills* decision,[173] in which it reiterated its view of basic structure, but it removed the right to property from the list of fundamental rights. Since that time, the Court has found other avenues, most notably public interest litigation,[174] through which to reinforce its authority and extend its power.[175]

III. Conclusion

The three apex courts we have analyzed provide insight into a pattern of confrontation with other branches of government that affect the institutional role and strength of the court. For

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[167] Constitution (Forty-Second Amendment) Act, 1976, No. 91, Acts of Parliament, 1976 (India).
[168] Id. See Austin, supra note 5 at 370 and D.D. BASU, SHORTER CONSTITUTION OF INDIA, 12th ed., 1139 (2000) for discussions of the political and legal ramifications of the 42nd Amendment.
[169] Constitution (Forty-Third Amendment) Act, 1977, No. 148, Acts of Parliament, 1977 (India).
[170] Constitution (Forty-Third Amendment) Act, 1978, No. 88, Acts of Parliament, 1978 (India)
[171] See Austin, supra note 5 at 409 and Neuborne, supra note 158 at 494.
[172] See Austin, supra note 5 at 437 for a discussion of the debate over replacing retiring Chief Justice Beg.
[173] *Minerva Mills Ltd. & Others v. Union of India & Others* 1980 AIR 1789
[174] MIHIR DESAI & K.B. MAHABAL, HEALTH CARE CASE LAW IN INDIA: A READER 199 (2007) define public interest litigation as cases in which "There must be a public injury and public wrong caused by the wrongful act or omission of the state or public authority [and] It is for the enforcement of basic human rights of weaker sections of the community who are downtrodden, ignorant and whose fundamental and constitutional rights have been infringed." See S. P. Sathe, Judicial Activism in India 195 (2002) for a discussion of the encouragement of public interest litigation by the Supreme Court.
[175] Sathe, supra note 174 at 100.

newly established courts, whose institutional strength is weaker than the executives who have created them, there is potential for the latter to seek political remedies which diminish the courts' authority and control. This was clearly the fate of the courts under consideration here, although to varying degrees and consequences.

The judges in each period took risks in order to advance the legitimacy of their respective courts by issuing decisions that were unpopular with the executive branch. They did not wait until their courts were more established and safer, but instead confronted the preferences of their respective executive branches directly. The risks judges took were not only to the institution, but also personal: Chief Justice Impey narrowly escaped being impeached by the British Parliament, and Chief Justice Gwyer failed to receive the usual honors bestowed by the government when he retired.[176]

It is difficult to call the judges' behavior "strategic" in the strict sense of the Separation of Powers approach, because judges cannot easily calculate their probability of success or failure, especially in the sense of the long-term effects for the institution. But the consistency with which judges challenge executive preferences with specific types of cases, in particular civil liberties and habeas corpus decisions, suggests that the choice of cases is motivated by an underlying logic.

Under the first Supreme Court, the protection of individual rights took a slightly different form than it did in the later courts. The Court was deeply invested in asserting the rule of law and the institutional presence of British common law in the East India Company's Indian territories. On the one hand, the justices sought to limit the extra-legal activities of the Company in order to

[176] See Linlithgow Papers, supra note 66, for a letter from the Viceroy to the Secretary of State, 22 June 1943, notes that "I confess that had the Federal Court judgement been delivered before I recommended Gwyer I do not think I should have put his name forward, and the somewhat perverse nature of that judgment (as it seems to the layman) and its political character lead me to view the absence of a Privy Councillorship for him with considerable equanimity!" (Box 12). The Government of India never again suggested Gwyer for honours.

establish their authority vis-à-vis the Company and in line with their perceptions of the expectations of Parliament. On the other hand, in order to operate effectively as a court for the British and their agents in India, they needed to be perceived to a legitimate arbiter of conflicts between British and Indian parties. In this effort they were frequently unsuccessful because of their heavy-handed application of British law and their insensitivity to local culture and customary law. The case of Nandakumar epitomizes these weaknesses.

The Federal Court, by contrast, was much more sensitive and responsive to the social and legal traditions of colonial India, to the extent that the British government began to lose faith in their appointees. But the Court walked a fine line between British and Indian interests by developing and then protecting its role as arbiter among the British government and its Indian subjects. Without at least minimal support from the Government and the Indian National Congress, the Court could not establish independence and legitimacy.

The Supreme Court of India found itself in a different position than its precedessors. While the Supreme Court of Judicature and the Federal Court had to balance their roles in relation to the governments that created them and a separate, indigenous populace, the Supreme Court came into conflict with an extremely popular elected government whose leadership was drawn from the population it represented. The Court's insistence on its role as protector of the constitution created a head-to-head confrontation with the executive branch, and its refusal to back down led to an institutional crisis.

While we have focused on the motivations and behavior of Courts and their judges in this Essay, the way in which powerful executives respond to adverse decisions deserves greater scholarly scrutiny. Of the three executives considered here, only one, the 18th-century British Parliament, permanently altered the jurisdiction and composition of the Supreme Court in

response to its decisions. Neither the late colonial nor the early independent governments (with the temporary exception of Indira Gandhi's government) went as far. It is somewhat surprising that the British government supported the Federal Court despite its outrage at the Preventive Detention decisions. But the government was strongly committed to the successful implementation of the Government of India Act. If the British had undermined a key institution, the door would have been opened for the Indian National Congress and the princely states to challenge other provisions.

Finally, it is worth noting that although courts and individual justices were punished for challenging the executive branches,in the long term, many of their efforts were successful. Lord Cornwallis's reforms of the judiciary in India largely followed the organization envisaged by Impey and Hastings.[177] The Supreme Court of India retained the powers and emoluments of the Federal Court to an astonishing degree. And while the Supreme Court's powers were sharply curtailed by Indira Gandhi's government, these powers were restored by the Janata government which followed the Emergency period. Subsequent justices also successfully enlarged the scope of the Court's jurisdiction through successful challenges to executive power[178] and through the expansion of their jurisdiction, most notably in public interest litigation. Today the Indian Supreme Court is considered to be a powerful and independent branch of the government, and the risks that early judges took in building the institutional strength and legitimacy of their courts are important factors in the strength it enjoys today.

[177] Sathe, supra note 174 at 195.
[178] Id., at 100.