

# DISCOVERING DWORKIN IN THE SUPREME COURT OF INDIA - A COMPARATIVE EXCURSUS

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*This paper sets out to ascertain whether Ronald Dworkin's jurisprudence has had an influence on the Supreme Court of India. Dworkin's approach to constitutional adjudication is characterised by judges exercising a more judgmental and less mechanical role in interpreting the Constitution. This paper undertakes a comparative excursus by looking at a few landmark Indian cases where reliance has been placed on judgments from the United States of America that have been the subject of Dworkinian exposition. With the aid of Dworkin's critique of legal pragmatism, a theory of constitutional adjudication that several judges relied on in crafting the 'basic structure' doctrine, the paper demonstrates that what the judges did was to substitute their own moral convictions for that of the legislature. In order to bolster this contention, the paper also discusses Dworkin's critique of originalism and demonstrates how originalism alone does not support the 'basic structure' limitation on the amending power of Parliament. It is argued that what does lend support to the conclusion reached in the 'basic structure' case, is what Dworkin calls 'the moral reading of the Constitution'. This conception allows judges to make fundamental moral judgments about conflicting political values. The paper then situates Dworkinian virtues like 'equal concern and respect' and a 'constitutional conception of democracy' in the larger context of the basic structure doctrine, thereby concluding that Dworkin's philosophy has found, and will continue to find, expression in the theories and practices of the Indian Supreme Court.*

## I. INTRODUCTION

This paper continues the conversation begun by Upendra Baxi in an essay some years ago wherein he situated Ronald Dworkin in contemporary Indian jurisprudence.<sup>1</sup>

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<sup>1</sup> Upendra Baxi, *A Known But an Indifferent Judge: Situating Ronald Dworkin in Contemporary Indian Jurisprudence*, 1 INT'L J CONST. L. 557 (2003) (Baxi began his essay by lamenting the low intensity engagement of American legal scholarship, of which Dworkin has been a leading light, with the eminently comparable Indian experience. Not much seems to have changed

Dworkin has always argued that the interpretive question of what the law holds on a particular subject is, in principle, an open-ended question.<sup>2</sup> Dworkin developed his theory of adjudication in his seminal work ‘Taking Rights Seriously’ wherein he argued that it is the judge’s duty to discover what the rights of the parties are, even when no settled rule disposes of the case.<sup>3</sup> Dworkin refers to such cases as ‘hard cases’ where there is a need to rely on principles in arriving at a conclusion, as opposed to merely pedigreed rules. Judges, according to Dworkin, can normally reach competent answers in ‘hard cases’ by consulting the legal materials of their own jurisdiction that fall into the doctrinal neighbourhood of their immediate problem, guided by what he calls the principle of ‘local priority’, which he defines as “looking no further than the cases or statutes dealing directly with the matter at hand” in formulating interpretive arguments.<sup>4</sup> But such arguments, limited in that way, are finally sound in his view only if they are sustained by a much more general interpretation that embraces legal materials as a whole, and is grounded in a more basic ‘jurisprudential’ conception of law. How far a judge must venture into this more general territory before announcing a conclusion about the state of the law is essentially, for Dworkin, a practical question; it depends, among other things, on the challenges to his view that have been mounted by officers of the court. It may be that these challenges cannot be answered from the materials in the immediate neighbourhood and a ‘theoretical ascent’, as Dworkin calls it, is necessary.<sup>5</sup> The judges of the Supreme Court of India (‘the Court’) have had to undertake such a theoretical ascent on numerous occasions, and, in doing so, they have discussed various theories of constitutional adjudication.

The rest of the paper will seek to demonstrate how this ‘theoretical ascent’ has more often than not been undertaken in a manner that is ‘Dworkinian’ at its core. The first section analyses Dworkin’s critique of legal pragmatism, a theory of constitutional adjudication that found favour with the architects of the basic structure doctrine, and then demonstrates how the doctrine is unlikely to curry favour with proponents of pragmatism. The second section analyses Dworkin’s critique of two competing theories of originalism, and concludes that an appeal to the original intent alone fails to tell us how judges can conclude that a principle or stated value warrants protection from

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in the decade since Baxi’s lament. In commenting on a draft of this article (available on file with the Editors), Baxi continues to maintain that no Indian judge has read much of Dworkin’s corpus. This paper aims to remedy this situation and hopes to serve as another invitation to Indian judges, lawyers, academics and students, much like Baxi’s essay a decade ago, to discover Dworkin so as to achieve a ‘common space’ between two constitutional cultures that, as the rest of this paper will demonstrate, are an edifice of Dworkinian virtues).

<sup>2</sup> RONALD DWORIN, JUSTICE IN ROBES 25 (2006).

<sup>3</sup> RONALD DWORIN, TAKING RIGHTS SERIOUSLY 85 (1978).

<sup>4</sup> DWORIN, *supra* note 2, 54.

<sup>5</sup> *Id.*

hostile legislation or executive action without making fundamental moral judgments about conflicting values. The third section demonstrates how Dworkin's 'moral reading' of the Constitution, a theory which postulates that judges should discover principles justifying not only the text of the Constitution but also traditions and practices that are a part of the jurisdiction's constitutional record, is the very foundation on which the edifice of the Indian Supreme Court rests. The fourth and fifth sections highlight the influence of Dworkinian virtues like the 'right to equal concern and respect' and a 'constitutional conception of democracy' on Indian constitutionalism. The paper concludes that Dworkin's body of work has unwittingly played a role in shaping the activist philosophy of the Supreme Court of India.

## II. DWORKIN ON LEGAL PRAGMATISM

Justice Kapadia (as he then was) explored the nature of constitutional adjudication in the case of *M. Nagaraj v. Union of India*<sup>6</sup>:

"At one extreme it is argued that the judicial review of legislation should be confined to the language of the Constitution and its original intent. At the other end, non-interpretivism asserts that the indeterminate nature of the constitutional text permits a variety of standards and values. Others claim that the purpose of a Bill of Rights is to protect the process of decision-making. Constitutional adjudication is like no other decision-making process."<sup>7</sup>

Justice Kapadia's description of the different approaches to constitutional adjudication is fully endorsed by Dworkin. Dworkin recognizes that there are those who believe that the Constitution is incomplete or open-ended, so that judges have no choice but to expand its provisions to meet new cases.<sup>8</sup> Others, continues Dworkin, believe that the Constitution is abstract as it lays down general moral principles that contemporary lawyers, judges, and citizens must apply by finding the best answer to the moral questions these abstract principles pose.<sup>9</sup> Dworkin also recognizes that there are those who believe that the Constitution, properly understood, is not so much open-ended as structural – it requires that judges serve the role of guardians of moral principles inherent in the national tradition.<sup>10</sup> Thus, Dworkin submits, these different approaches

<sup>6</sup> *M. Nagaraj v. Union of India*, (2006) 8 SCC 212.

<sup>7</sup> *Id.*, 242.

<sup>8</sup> RONALD DWORKIN, *FREEDOM'S LAW* 289 (1999).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

to adjudication all contemplate judges exercising ‘a more judgmental and less mechanical role in interpreting the Constitution’.<sup>11</sup> One such ‘judgmental’ approach to constitutional adjudication is legal pragmatism, an approach that has been endorsed in some landmark decisions of the Court.

Dworkin characterizes ‘legal pragmatism’ as advocating careful judicial decisions which try to discover what really works in practice rather than attempt to deduce concrete decisions from large, broad, abstract statements of principle.<sup>12</sup> Its most nuanced voices are those of Oliver Wendell Holmes, Felix Frankfurter and Learned Hand, three judges whose landmark judgments were quoted by the Court in *Kesavananda Bharati v. State of Kerala*<sup>13</sup> (‘*Kesavananda*’) in formulating the ‘basic structure’ doctrine. In *Kesavananda*, the scope of the amending power was to be determined by adjudicating on the validity of the relevant part of Article 368 of the Constitution, as amended by the Twenty-Fourth Amendment, which read as follows: “Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.”<sup>14</sup>

This amendment was passed in order to give Parliament the power to amend any part of the Constitution, including fundamental rights, such as the right to freedom, equality and property (no longer a fundamental right) among others. By a slim majority, the Court held that specific features of the Constitution, deemed fundamental to the integrity of the constitutional project, were immune from drastic alteration by Parliament exercising its amending power. Before proceeding any further, we must heed Baxi’s warning that “it is simply unforgivably naive, for anyone to look for, or claim to have discovered, the *ratio decidendi* of the case; all that one can aspire to do is to elucidate a set of principles and to indicate the weight of agreement or disagreement attaching to each principle.”<sup>15</sup>

Justice Khanna, whose opinion carried heavy weightage in this case, relied on Justice Holmes’s reflection that the Constitution was meant not merely for people who shared his own views but also for people of fundamentally differing views.<sup>16</sup> In *Freedom’s Law*, Dworkin chronicles Holmes’s reasons for constitutional restraint; they were based not on practical politics but

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<sup>11</sup> *Id.*

<sup>12</sup> DWORKIN, *supra* note 2, 135.

<sup>13</sup> *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

<sup>14</sup> *Id.*, 385-86.

<sup>15</sup> Upendra Baxi, *The Constitutional Quicksands of Kesavananda Bharati and the Twenty-Fifth Amendment*, (1974) 1 SCC (Jour) 45, II.

<sup>16</sup> *Lochner v. New York*, 49 L Ed 937 : 198 US 45 (1905), ¶ 75.

on a philosophical scepticism about morality.<sup>17</sup> Although he had firm and confident convictions about almost everything, Holmes said that these were only his opinions, only what he, constituted and conditioned as he was, could not help but believe. Therefore, Holmes termed them his ‘can’t helps’ and insisted that from an objective point of view there was no more to be said for them than for the opposite. Instead, he said, judges must only strike down legislation that no rational or reasonable person could think proper- only legislation that offends the ‘can’t helps’ of all reasonable people.<sup>18</sup> Justice Chandrachud (as he then was), part of the minority in *Kesavananda*, expounds his own ‘can’t helps’, namely Clause (7) of Article 22 of the Constitution which permits Parliament to enact a law under which a person may be detained for a period of no longer than three months without obtaining the opinion of an Advisory Board. “When I look at a provision like the one contained in Article 22 of the Constitution, I feel a revolt rising within myself” he declares, “but then personal predilections are out of place in the construction of a constitutional provision.”<sup>19</sup> He carries on:

“In assessing the argument that the gravity of consequences is relevant in the interpretation of a constitutional provision, I am reminded of the powerful dissent of Justice Holmes in *Lochner v. New York*...the test according to the learned judge was not whether he considered the law to be unreasonable but whether other reasonable persons considered it unreasonable.”<sup>20</sup>

In *Lochner v. New York*<sup>21</sup>, the U.S. Supreme Court invalidated a state law limiting hours of work on the ground that it interfered unreasonably with the freedom of contract, a form of liberty protected, the Court held, by the due process clause of the Fourteenth Amendment. The decision drew a scornful dissent from Holmes, the gist of which Justice Chandrachud referred to in *Kesavananda*:

“This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law.”<sup>22</sup>

<sup>17</sup> DWORKIN, *supra* note 8, 340.

<sup>18</sup> *Id.*

<sup>19</sup> *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225, at 989.

<sup>20</sup> *Id.*

<sup>21</sup> 49 L Ed 937 : 198 US 45 (1905).

<sup>22</sup> (1973) 4 SCC 225, 989 (cites *Lochner v. New York*, 198 US 45 (1905), at 75).

Dworkin launches a fatal attack on Holmes's form of moral scepticism which reflected much of the pragmatist philosophy of his time and the views of Justice Chandrachud:

“If someone can't help but believe something, he can't help but believe it, and then he contradicts himself if he says that it isn't really true, or no more true than its opposite. It doesn't remove the contradiction for him to say that though he believes some moral claim to be true, he doesn't believe that it is 'ultimately' or 'objectively' or 'foundationally' or 'cosmically' true.”<sup>23</sup>

Dworkin asserts that Holmes's philosophical scepticism was too muddled to have any important effect on his own legal arguments, and in fact it didn't. Dworkin cogently argues that while Holmes did not necessarily agree with the economic theories behind the progressive social legislation he voted to uphold *viz.*, limiting hours of work is efficient, he plainly did not think that these laws were immoral, or that they violated any important individual rights, as his colleagues who voted to invalidate them did think.<sup>24</sup> According to Justice Louis Brandeis, another prominent Supreme Court figure, Holmes's actual working test for unconstitutionality was the question: “Does it make you puke?”<sup>25</sup> Or, as Dworkin puts it, “Does it offend your deepest moral ‘can't helps’ or convictions?” Dworkin goes on to make a compelling case that if Holmes had been on the bench deciding *Brown v. Board of Education* (‘Brown’)<sup>26</sup>, a case concerning the racial segregation laws in America's schools, there would be no reason to believe that he would have voted any differently from fellow pragmatist Felix Frankfurter holding the ‘Jim Crow’ laws unconstitutional; it might well have made him puke that black children were turned away from white schools.<sup>27</sup>

Justice Chandrachud's minority view was that there were no inherent limitations on the amending power and the amending body could make amendments that damaged or destroyed the essential features or the very fundamental principles underlying the Constitution. To support his contention he recalled another famous saying of Holmes':

“About seventy–five years ago, I learnt that I was not God.  
And so, when the people... want to do something I can't find

<sup>23</sup> DWORKIN, *supra* note 8, 341.

<sup>24</sup> *Id.*

<sup>25</sup> PHILIPPA STRUM & LOUIS D. BRANDEIS, *JUSTICE FOR THE PEOPLE* 361 (1984).

<sup>26</sup> *BROWN v. Board of Education*, 347 U.S. 483 (1954).

<sup>27</sup> DWORKIN, *supra* note 8, 341.

anything in the Constitution expressly forbidding them to do, I say, whether I like it or not: ‘God–dammit let ‘em do it!’”<sup>28</sup>

Perhaps in the wake of Brandeis’s revelation and Dworkin’s attack, a caveat must be added: “Unless it makes me puke”.

What then should be made of that other ardent follower of Holmes, Justice Khanna of the majority? This task must be postponed until another of Justice Khanna’s much revered justices, Judge Learned Hand, is subject to Dworkin’s exposition. Hand endured a personal uncertainty about moral issues as it was his belief that no simple formula could help one arrive at the ‘moral truth’; according to Dworkin, who knew Hand personally having clerked under him, this contributed to his distaste for judicial activism in constitutional matters.<sup>29</sup> Hand believed passionately in the virtues of ‘civic republicanism’; he thought that a political community could not flourish, or its citizens develop and improve their sense of moral responsibility, unless they participated in the community’s deepest and most important decisions about justice.<sup>30</sup> Though Hand’s views about judicial restraint are generally not studied in law schools, Indian or American (as Dworkin acknowledges), his views on civic republicanism have made a considerable contribution to the debate on constitutional interpretation in the Supreme Court of India. As Justice Khanna relies heavily on legal pragmatism in formulating the ‘basic structure’ doctrine, his judgment is particularly instructive. Justice Khanna, in a passage reminiscent of Hand’s approach to constitutional interpretation, posits:

“Assuming that under the sway of some overwhelming impulse, a climate is created wherein cherished values like liberty and freedom lose their significance in the eyes of the people and their representatives and they choose to do away with all fundamentals rights by amendment of the Constitution, a restricted interpretation of Article 368 would not be of much avail. The people in such an event would forfeit the claim to have fundamentals rights and in any case fundamental rights would not in such an event save the people from political enslavement, social stagnation or mental servitude. I may in this context refer to the words of Learned Hand in his eloquent address on the Spirit of Liberty: ‘I often wonder whether we do not rest our hopes too much upon Constitutions, upon laws and upon courts. These are false

<sup>28</sup> Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225, at 991.

<sup>29</sup> DWORKIN, *supra* note 8, 342.

<sup>30</sup> *Id.*

hopes; believe me these are false hopes... Liberty lies in the hearts of men and women; when it dies there, no Constitution, no law, no court can save it; no Constitution, no law, no court can even do much to help it’<sup>31</sup>

In the case of *United States v. Dennis*<sup>32</sup>, Hand expressed the view that an amendment passed in conformity with the provision in the Constitution relating to amendments was valid as though the amendment had been originally incorporated into it, subject to the exception that no State, without its consent, could be deprived of its equal suffrage in the Senate by way of a constitutional amendment. While the ‘equal suffrage’ exception recognized by Hand is an *explicit* limitation contained in Article 5 of the United States Constitution, Justice Khanna reads *implicit* limitations into the corresponding Article 368 of the Indian Constitution. Justice Khanna proceeded to hold that the people in the final analysis were the ultimate sovereign and if they decide to have an entirely new Constitution, they would not need the authority of the existing Constitution for this purpose. Justice Khanna had no doubt that the power of amendment was plenary and included the power to add, alter or repeal the Constitution. However Justice Khanna held that this power could not be used to amend the Constitution in a manner that destroyed the basic structure or framework of the Constitution. To justify the ‘basic structure’ exception, Justice Khanna explained that while the amending power was plenary, the desirability for change was to be reconciled with the need for continuity; though nothing was absolute in the Constitution, the basic guidelines and norms set by the framers could not be obliterated; its basic structure or framework had to be retained.<sup>33</sup> This was clearly an attempt by Justice Khanna to deduce a concrete doctrine from large, broad, abstract statements of principle not emanating from an interpretation by the legislature, something which legal pragmatism expressly forbids. A cardinal rule of legal pragmatism, as Holmes sees it, is that the judiciary cannot encroach on the legislative function by reading in some limitation which the judge may think was probably intended but which cannot be inferred from the text of the Constitution. Hence, Justice Khanna’s contention that “sometimes a judicial interpretation may make a Constitution broad-based and put life into the dry bones of a Constitution so as to make it a vehicle of a nation’s progress”<sup>34</sup>, is unlikely to find any favour with Holmes. Doing so is essentially, in the eyes of the pragmatists, a function of the legislature. It is therefore an inescapable question whether, in the end, the interpretations of the legislatures or those of the judges will prevail, and though lawyers who dislike

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<sup>31</sup> *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225, at 763-64 (quoting LEARNED HAND, *THE SPIRIT OF LIBERTY* 189 (1952)).

<sup>32</sup> *United States v. Dennis*, 183 F.2d 201 (2d Cir. 1950).

<sup>33</sup> *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225, at 725-26.

<sup>34</sup> *Id.*, at 750.



either answer call for something in between, there is, in Dworkin's view, no logical space for anything in between.

To conclude this section, it is worth recounting the story of when Hand, in order to provoke a response, implored Holmes, who was on his way to court, to 'do justice'. Holmes responded that his job was not to do justice but "to play by the rules".<sup>35</sup> Judge Richard Posner, the inheritor of Holmes' pragmatist legacy and a formidable opponent of Dworkin's, has conceded that "judges make, and do not just find and apply the law".<sup>36</sup> When faced with the task of 'doing justice' in the case of Dennis, Hand chose to 'make the law' holding that the right under the First Amendment to free speech and peaceful assembly could be abrogated if the exercise involved the creation of a plot to overthrow the government.<sup>37</sup> The question that then arises for consideration is this: When and how far is it right for judges testing statutes against the 'Bill of Rights', to rely on their own moral convictions about which liberties and which forms of equality are fundamental?<sup>38</sup> Dworkin astutely observes that many contemporary judges, scholars and journalists hope for an answer to this question that will enable them to applaud the Supreme Court for its decision in *Brown*. However, if they applaud *Brown*, they cannot simultaneously condemn Hand for the decision in *Dennis* while nevertheless insisting that judges may not substitute their own moral convictions for those of the legislature. Dworkin discusses why all such attempts have failed:

"But all notable attempts by constitutional scholars and judges to explain how this is possible failed for a reason Hand saw clearly and most of his critics ignore. The great constitutional clauses set out extremely abstract moral principles that must be interpreted before they can be applied, and any interpretation will commit the interpreter to answers of fundamental questions of political morality and philosophy."<sup>39</sup>

How a judge should go about interpreting these clauses is the next subject-matter for consideration.

### III. DWORKIN ON ORIGINALISM

While the Court in *Kesavananda* focused its attention on the language of Article 368, Chief Justice Sikri sought to interpret the text "in

<sup>35</sup> See M. Herz, "Do Justice!": *Variations of a Thrice-told tale*, 82 VA. L. REV. 111 (1996).

<sup>36</sup> *University of Kerala v. Council of Principals of Colleges, Kerala*, (2010) 1 SCC 353, at 367 (cites RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985)).

<sup>37</sup> *United States v. Dennis*, 183 F.2d 201 (2d Cir 1950).

<sup>38</sup> DWORKIN, *supra* note 8, 343.

<sup>39</sup> *Id.*

the setting of our Constitution, in the background of our history and in the light of our aspirations and hopes”.<sup>40</sup> This approach is endorsed by Sudhir Krishnaswamy, who, in his detailed study of the basic structure doctrine, observes that by bringing various elements of constitutional design and aspirations to bear on the interpretation of constitutional phrases, this approach offers a “persuasive bouquet of reasons for the conclusion reached in *Kesavananda*”<sup>41</sup> For Krishnaswamy, the interpretation of the Constitution proposed by Chief Justice Sikri overcomes some of the defects in the reasoning adopted by Justices Chandrachud and Khanna in support of their versions of the basic structure doctrine.<sup>42</sup> Nevertheless, Krishnaswamy argues that a structural interpretation alone will not suffice and the focus of any interpretive exercise must be on the conclusions which such an interpretation would support.<sup>43</sup> Dworkin’s formulation of the interpretive exercise does exactly this:

“Lawyers and judges faced with a contemporary constitutional issue must try to construct a coherent, principled, and persuasive interpretation of the text of particular clauses, the structure of the Constitution as a whole, and their history under the Constitution—an interpretation that both unifies these distinct sources, so far as this is possible, and directs future adjudication.”<sup>44</sup>

For Dworkin, proper constitutional interpretation takes both text and past practice as its object. Similarly, Krishnaswamy argues that the Court must be concerned with the values expressed by the textual provisions of the Constitution, with history being relevant insofar as it allows the Court to isolate the moral and political principles which grounded the Constitution of India, as adopted by the Constituent Assembly.<sup>45</sup> Dworkin echoes this sentiment through his distinction between fidelity to the Constitution’s text and fidelity to past constitutional practice, including past judicial decisions, interpreting and applying the Constitution:

“...fidelity to the Constitution’s text does not exhaust constitutional interpretation, and on some occasions overall constitutional integrity might require a result that could not be justified by, and might even contradict, the best interpretation

<sup>40</sup> *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225, at 306.

<sup>41</sup> SUDHIR KRISHNASWAMY, *DEMOCRACY AND CONSTITUTIONALISM IN INDIA* 32-33 (2009).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*, 37.

<sup>44</sup> Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 *Fordham L. Rev.* 4 (1996), 1249.

<sup>45</sup> KRISHNASWAMY, *supra* note 41, 33.

of the constitutional text considered apart from the history of its enforcement.”<sup>46</sup>

Dworkin does however acknowledge that textual fidelity is an essential part of any broader program of constitutional interpretation because “what those who made the Constitution actually said is always, at the very least, an important ingredient in any genuinely interpretive constitutional argument.”<sup>47</sup> Nevertheless, Dworkin contends that any attempt to decide how the original framers would have interpreted the abstract clauses of the Constitution was both hopeless and pointless. This is the ‘originalist’ argument made by Robert Bork which Justice Ramaswamy refers to in *S.R. Bommai v. Union of India* (‘Bommai’)<sup>48</sup>:

“When constitutional materials do not clearly specify the value to be preferred, there is no principle weighing to prefer any claimed human value to any other. The judge must stick close to the text and the history and their fair implications and not construct new rights.”<sup>49</sup>

After quoting the above passage, Justice Ramaswamy invokes Dworkin to reject Bork’s originalist argument:

“Any theory of constitutional interpretation therefore presupposes a normative theory of the Constitution itself - a theory, for example, about the constraints that the words and intentions of the adopters should impose on those who apply or interpret the Constitution.”

As Ronald Dworkin observed:

“Some parts of any constitutional theory must be independent of the intentions or beliefs or indeed the acts of the people the theory designates as framers. Some part must stand on its own political or moral theory; otherwise the theory would be wholly circular.”<sup>50</sup>

<sup>46</sup> DWORKIN, *supra* note 2, 118.

<sup>47</sup> *Id.*

<sup>48</sup> *S.R. Bommai v. Union of India*, (1994) 3 SCC 1.

<sup>49</sup> R. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. LAW JOURNAL* 1, 8 (1971).

<sup>50</sup> *S.R. Bommai v Union of India*, (1994) 3 SCC 1, at 185.

Dworkin argues that an appeal to the intentions of the framers decides nothing until some choice is made about the right way to formulate those intentions.<sup>51</sup> As far as judges in the mainstream of American constitutional practice are concerned, Dworkin submits that they understand the framers' intentions as a matter of principle, and test competing principles by analyzing the extent to which each fits the framers' scheme. In this exercise, they are guided by the attempt to interpret them as part of a constitutional tradition that includes the general structure of the Constitution as well as past Supreme Court and other judicial decisions, and not merely as isolated historical events.<sup>52</sup> Dworkin acknowledges that competent and responsible judges disagree about the results of this exercise. Thus, while disagreement is inevitable under the non-originalist approach, the responsibility each judge accepts, of testing the principles he or she proposes in the aforementioned manner, disciplines each judge's work and concentrates and deepens constitutional debate.<sup>53</sup>

For Justice Ramaswamy however, the non-originalist literature threatens to be largely irrelevant to constitutional interpretation "so long as it does not consider with greater care under what circumstances the usually passive mode of judicial interpretation is to be replaced by the less common, but more important active mode."<sup>54</sup> In answering this question, Dworkin insists that we must assume that the intentions of the authors of the Constitution were honourable rather than cynical, and that they had various concrete opinions about the correct applications of various abstract principles of political morality to particular issues.<sup>55</sup> Today's judges may think that the Constitution's authors were mistaken in some of these concrete opinions, and that they did not reach correct conclusions about the reach of their own principles. Today's judges may believe, in other words, that the authors' abstract and concrete convictions were in conflict; if so, Dworkin submits, the judges themselves must decide which abstract principles to follow.<sup>56</sup> In a rare moment of agreement, Dworkin accepts Bork's contention that:

"...all a judge committed to original understanding requires is that the text, structure and history of the Constitution provide him not with a conclusion but with a major premise. That major premise is a principle or stated value that the framers wanted to protect against hostile legislation or executive action. The judge must then see whether that principle or value

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<sup>51</sup> DWORKIN, *supra* note 8, 271.

<sup>52</sup> DWORKIN, *supra* note 2, 127.

<sup>53</sup> *Id.*

<sup>54</sup> S.R. Bommai v. Union of India, (1994) 3 SCC 1, at 186.

<sup>55</sup> DWORKIN, *supra* note 8, 293.

<sup>56</sup> *Id.*, 294.

is threatened by the statute or action challenged in the case before him. The answer to that question provides the minor premise, and the conclusion follows.<sup>57</sup>

In constructing the major premise, Indian justices, Baxi argues, do not discover but ascribe intentions:

“Indian Supreme Court justices often cite the selfsame Constituent Assembly debates’ discursivity to sustain very divergent interpretive reasoning and outcomes. Indian justices regularly resort to the United States Supreme Court’s ways of understating the ‘original intent’. The practice is so inveterate as to render detailed citation impossible.”<sup>58</sup>

Before examining Dworkin’s critique of ‘original intent’, Justice Antonin Scalia’s theory of originalism merits consideration. Being the most prominent ‘originalist’ judge currently on the U.S. Supreme Court, Scalia, while always advocating that morality play no role in ‘applying’ the law, has nevertheless asserted that it is not possible to ascertain a ‘collective’ legislative intent of the framers.<sup>59</sup> Even if the framers’ intent may be ascertained, Scalia argues that we must look for a sort of ‘objectified’ original intent— the intent that a reasonable person at the time would have gathered from the text of the law.<sup>60</sup>

In response to Scalia, Dworkin makes a distinction between ‘semantic’ originalism, which insists that the rights-granting clauses be read to say what those who made them intended to say, and ‘expectation’ originalism, which holds that these clauses should be understood to have the consequences that those who made them expected them to have.<sup>61</sup> Under Bork’s ‘expectation’ originalism, *Brown* would clearly be a wrong decision, as the majority of the members of Congress who voted for the Fourteenth Amendment guaranteeing ‘equal protection of the laws’ did not expect or intend the amendment to have the consequence of making racial segregation illegal in schools. Similarly, under Scalia’s ‘expectation’ originalism, when the Fourteenth amendment was adopted, the ‘reasonable’ citizen would not have understood the amendment

<sup>57</sup> ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 162-163 (1990).

<sup>58</sup> Baxi, *supra* note 1, 572.

<sup>59</sup> *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993).

<sup>60</sup> Antonin Scalia, *Common Law Courts in a Civil System* in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 17 (1998).

<sup>61</sup> Ronald Dworkin, *Comment* in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 119 (1998).

as making racial segregation illegal in the nation's schools. Yet, both Scalia<sup>62</sup> and Bork<sup>63</sup> have insisted that *Brown* was decided correctly and their position can only be justified on the basis of semantic originalism – “the framers intended to, and did, lay down a general principle of political morality” which the Justices of the United States Supreme Court interpreted as condemning racial segregation.<sup>64</sup> Thus, expectant originalism fails to tell us how judges can conclude that a principle or stated value warrants protection from hostile legislation or executive action without making fundamental moral judgments about conflicting values. Where Bork and Scalia fail, Dworkin's theory of constitutional interpretation, what he calls the ‘moral reading’, succeeds.

#### IV. DWORKIN'S MORAL READING

Dworkin casts the ‘moral reading’ as entailing a particular way of reading, interpreting and enforcing a political constitution:

“Most contemporary constitutions declare individual rights against the government in very broad and abstract language. The moral reading proposes that we all – judges, lawyers, citizens – interpret and apply these abstract clauses on the understanding that they invoke moral principles about political decency and justice.”<sup>65</sup>

This view was echoed by former Chief Justice Beg for whom the basic structure doctrine was nothing more than a set of obvious inferences “arrived at by applying the established canons of construction rather broadly, as they should be so far as an organic constitutional document, meant to govern the fate of a nation, is concerned.”<sup>66</sup> This statement would have delighted Dworkin who often lamented the fact that although judges' own views about political morality influenced their constitutional decisions, and though they might easily have explained that influence by insisting that the Constitution demands a moral reading, they never do:

“Instead, against all evidence, they deny the influence and try to explain their decisions in other – embarrassingly unsatisfactory – ways. They say they are just giving effect to

<sup>62</sup> Arizona Public Media, *A Conversation on the Constitution: Principles of Constitutional and Statutory Interpretation*, October 26, 2009, available at <https://tv.azpm.org/s/3641-a-conversation-on-the-constitution/> (Last visited on May 4, 2014).

<sup>63</sup> BORK, *supra* note 49, 82.

<sup>64</sup> DWORKIN, *supra* note 60, 119.

<sup>65</sup> DWORKIN, *supra* note 8, 2.

<sup>66</sup> *State of Karnataka v. Union of India*, (1977) 4 SCC 608, at 677.

obscure historical “intentions”, for example, or just expressing an overall but unexplained constitutional “structure” that is supposedly explicable in non-moral terms...The theoretical debate was never about whether judges should interpret the Constitution or change it – almost no one really thought the latter – rather it was about how it should be interpreted.<sup>67</sup>

According to Dworkin, two important restraints sharply limit the latitude the moral reading gives to individual judges. *First*, constitutional interpretation must begin with what the framers said, with the judges turning to history to answer the question of what they intended to say and not the different question of what other intentions they had. *Second*, constitutional interpretation under the moral reading is disciplined by the requirement of constitutional integrity:

“Judges may not read their own convictions into the Constitution. They may not read the abstract moral clauses as expressing any particular moral judgment, no matter how much that judgment appeals to them, unless they find it consistent in principle with the structural design of the Constitution as a whole, and also with the dominant lines of past constitutional interpretation by other judges. They must regard themselves as partners with other officials, past and future, who together elaborate a coherent constitutional morality and they must take care to see that what they contribute fits with the rest.”<sup>68</sup>

Thus, as is evident from the passage above, moral reading brings political morality into the heart of constitutional law. But, as Dworkin has cautioned, political morality is inherently uncertain and controversial, so any system of government that makes such principles part of its law must decide whose interpretation and understanding will be authoritative.<sup>69</sup> Chief Justice Kapadia has relied on Article 141 of the Constitution to emphatically declare that the Supreme Court’s ‘moral reading’ would be authoritative:

“It is well settled that precedents of this Court under Article 141 and the Comparative Constitutional Law help courts not only to understand the provisions of the Indian Constitution, it also helps the constitutional courts to evolve principles

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<sup>67</sup> DWORKIN, *supra* note 8, 4.

<sup>68</sup> *Id.*, 10.

<sup>69</sup> *Id.*, 2.

which as stated by Ronald Dworkin are propositions describing rights (in terms of its content and contours).<sup>70</sup>

This description by Chief Justice Kapadia of the judicial function is endorsed by Dworkin who describes the Supreme Court of the United States as:

“...an institution that calls some issues from the battleground of power politics to the forum of principle. It holds out the promise that the deepest, most fundamental conflicts between individual and society will once, someplace, finally, become questions of justice. I do not call that religion or prophesy. I call it law.”<sup>71</sup>

In a comparative exercise such as this one, a question that arises for consideration is whether the Supreme Court of India has fulfilled the promise of resolving such fundamental conflicts, and if so, on what basis? While there is no right answer to this question, as we shall see in the next section, the Supreme Court of India has succeeded in resolving these conflicts to some extent with the aid of Dworkinian virtues such as the ‘right to equal concern and respect’.

## V. DWORKIN ON EQUALITY

In a case concerning the death penalty, the Supreme Court of India described itself as no longer being an ‘essentially practical’ forum that performed only those functions “directly related to the needs of society”.<sup>72</sup> Relying on an article written by Dworkin<sup>73</sup>, the Court described itself as a ‘forum of principle’ and asserted that such a description was consistent with the constitutional mandate of due process and equal protection.<sup>74</sup> Consequently, the Court has acknowledged that Dworkin’s jurisprudence, central to which is his distinct conception of the ‘right to equality’, has played a significant role in shaping the nature of its rights-based jurisprudence. ‘Our intuitions about justice’, writes Dworkin, “presuppose not only that people have rights but that one right among these is fundamental and even axiomatic”.<sup>75</sup> This supreme right, according to Dworkin, is ‘the right to equal concern and respect’.<sup>76</sup> Dworkin employs his

<sup>70</sup> Sahara India Real Estate Corp. v. Securities Exchange Board of India, (2012) 10 SCC 603, at 728.

<sup>71</sup> Ronald Dworkin, *The Forum of Principle*, 56 NYU L. REV. 469, 518 (1981).

<sup>72</sup> Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra, (2009) 6 SCC 498, at 546.

<sup>73</sup> Dworkin, *supra* note 70.

<sup>74</sup> Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra, (2009) 6 SCC 498, at 546.

<sup>75</sup> RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* xii (1978).

<sup>76</sup> *Id.*



distinct conception of ‘equality’ to interpret the Fourteenth Amendment of the American Constitution, thereby justifying the constitutionality of affirmative action.<sup>77</sup> This interpretation by Dworkin, referred to as a ‘socio-jural defense of preferences’ by Justice Krishna Iyer, was utilised in *Akhil Bharatiya Soshit Karamchhari Sangh (Railway) v. Union of India* (‘Soshit Sangh’)<sup>78</sup> where the Court was concerned with fundamental rights contained in Articles 14 and 16(1), the former guaranteeing the right to equality before the law and the latter guaranteeing equality of opportunity in the matter of public employment. Special attention in the case was paid to Article 16(4), an enabling provision which allows the State to make provisions for the reservation of appointments or posts in favour of any backward class which, in the opinion of the State, is not adequately represented in the services under the State. Justice Iyer, relying on the Dworkinian virtue of ‘right to treatment as an equal’, concluded that when the State intends to make reservation of appointments or posts under Article 16(4) nothing in Article 16(1) prevents it from doing so.<sup>79</sup>

“Professor Dworkin distinguishes between two ‘different sorts of rights’ which individuals may be said to have. The first is the right to equal treatment, which is the right to an equal distribution of some opportunity or resource, and the second is the right to treatment as an equal, ‘which is the right, not to receive the same distribution of some burden or benefit, but to be treated with the same respect and concern as anyone else’. For Dworkin it is the right to treatment as an equal that is fundamental, whilst the right to equal treatment is only derivable, and it is the former that, as a general matter, is given ‘constitutional standing’ by the Equal Protection Clause. In other words, white applicants for admission to Law School who may have been turned away because of the reservation of some places for members of disadvantaged minority groups cannot (in a case like the one set out above) successfully complain, the reason being that they do not have a right to equal treatment in the assignment of places, but they do have the right to be treated as equals, that is, with equal respect, concern and sympathy, in the making of decisions as to which admissions standards should be used. More specifically, this right is viewed by Dworkin as meaning that each candidate for admission has a right that his interests should be looked at ‘as fully and sympathetically’ as the interests of any others when decisions are being taken as to

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<sup>77</sup> *Id.*, at 227.

<sup>78</sup> *Akhil Bharatiya Soshit Karamchhari Sangh v. Union of India*, (1981) 1 SCC 246, at 292.

<sup>79</sup> *Id.*, at 293.

which of the many possible criteria for admission to elevate to the status of the pertinent ones. But if this condition is satisfied, rejected white applicants will fail in their contention that the particular admissions program was unfair and unconstitutional (even if they had been effectively excluded from consideration as a result of the adoption of racial criteria in determining the allocation of some of the available places). The simple question Dworkin would ask in these cases is whether the particular admissions program ‘serves a proper policy that respects the right of all members of the community to be treated as equals, but not otherwise’.<sup>80</sup>

This distinction between the right to equal treatment and the right to treatment as an equal was brought out by former Chief Justice Ray in *State of Kerala v. N.M. Thomas*<sup>81</sup>:

“There is no denial of equality of opportunity unless the person who complains of discrimination is equally situated with the person or persons who are alleged to have been favoured... This equality of opportunity need not be confused with absolute equality... Under Article 16(1) equality of opportunity of employment means equality as between members of the same class of employees and not equality between members of separate, independent class...”<sup>82</sup>

Thus, as Justice Sahai put it in the *Indra Sawhney*<sup>83</sup> case:

“Articles 16(1) and (4) operate in [the] same field. Both are directed towards achieving equality of opportunity in services under the State. One is broader in sweep and expansive in reach. Other is limited in approach and narrow in applicability. Former applies to ‘all’ citizens whereas latter is available to ‘any’ class of backward citizens...The one is substantive equality and other is protective equality. Article 16(1) is a fundamental right of a citizen whereas 16(4) is an obligation of the State. The former is enforceable in a court of law, whereas the latter is ‘not constitutional compulsion’ but an enabling provision.”<sup>84</sup>

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<sup>80</sup> *Id.*, at 292-93.

<sup>81</sup> *State of Kerala v. N. M. Thomas*, (1976) 2 SCC 310.

<sup>82</sup> *Id.*, at 333.

<sup>83</sup> *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217, at 580.

<sup>84</sup> *Id.*, at 564.

Justice Sahai goes on to state that the idea of ‘reverse discrimination’ represents one sided thinking without a grasp of the constitutional goal set out by the framers of the Constitution; namely, that the “equality of opportunity must be transformed into equality of results.”<sup>85</sup> Thus, Article 46 enjoins upon the State to treat with special care the educational and economic interests of the weaker sections of Indian society, and in particular the Scheduled Castes and Scheduled Tribes. Justice Sahai also claims that Article 39, which lays down certain principles of social policy to be followed by the State, is an extension of Dworkinian thought:

“Article 16...reflects modern and progressive thinking on equality. According to Ronald Dworkin, “All human beings have a natural right to an equality of concern and respect, a right they possess not by virtue of birth, but simply as human beings with the capacity to make plans and give justice.””<sup>86</sup>

Dworkin would undoubtedly approve of such reservation for scheduled castes, scheduled tribes and other backward classes as “no one in our society should suffer because he is a member of a group thought less worthy of respect, as a group, than other groups.”<sup>87</sup> Thus, on the basis of the Dworkinian virtue of “equal concern and respect”, it is now well settled by the Court that any legislative or executive measure guaranteeing quotas in public employment for the backward and weaker sections of society cannot be assailed as being beyond constitutional sanction. In the *Elections* case<sup>88</sup> Justice Chandrachud (as he then was) went further, holding that ‘equality of status and opportunity’ of an individual was a part of the basic structure. Thus, any attempt by a future government to repeal Article 16(4), thereby denying equality of opportunity in public employment, could be struck down by the Court, if Justice Chandrachud’s interpretation is followed, as violating the basic structure of the Constitution. In a comparative excursus such as this, a critical question that must be addressed is what Dworkin would make of the Court’s use of the basic structure doctrine to strike down amendments passed by a Parliament representing the sovereign will of the majority?

## VI. DWORKIN ON DEMOCRACY

Critics of the ‘basic structure’ doctrine argue that it is undemocratic in nature as the Court has arrogated vast political power not given to

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<sup>85</sup> *Id.*, at 565.

<sup>86</sup> *Id.*, at 582.

<sup>87</sup> RONALD DWORKIN, A MATTER OF PRINCIPLE 302 (1985).

<sup>88</sup> *Indira Gandhi v. Raj Narain*, (1975) Supp SCC 1, at 252.

it by the Constitution<sup>89</sup>, thereby subverting amendments that a supermajority of the people's representatives support.<sup>90</sup> A fundamental question needs to be answered before addressing any such criticisms; democracy means rule *by* majority but does it mean rule *of* the majority?<sup>91</sup> Dworkin opines that beneath this familiar question lies a profound philosophical dispute about democracy's fundamental value or point, and one abstract conundrum is crucial to that dispute: Should we accept or reject 'the majoritarian premise'?<sup>92</sup> The 'majoritarian' hypothesis insists that political procedures should be designed in such a way that the decision reached is that which a majority or plurality of citizens favour, or would favour if they had adequate information and time for reflection.<sup>93</sup> Advocates of the majoritarian premise consider this to be the essence of democracy.<sup>94</sup> While the majoritarian premise accepts that there are situations where the will of the majority should not govern, they believe that it is always unfair when a political majority is not allowed to have its way, so that even when there are strong enough countervailing reasons to justify this, the unfairness remains.<sup>95</sup> Thus, when the Court has utilised the doctrine to strike down amendments, it has been accused of using the doctrine as a counter-majoritarian check.<sup>96</sup> The question, therefore, that arises for consideration is whether the "basic structure" doctrine decisively rejects the majoritarian premise of law making?

The answer to this question would be in the affirmative for Krishnaswamy:

"The Indian constitution confers fundamental rights on citizens and ordains the court with authority to enforce these rights and override state action which violates these rights. Thereby the constitution recognises that there may be circumstances in which the representative institutions of state do not have the power to decide on certain issues. Hence it may be asserted that, as Dworkin argues in another context, the Indian constitution embraces a constitutional conception of democracy where collective decisions are 'made by political institutions whose structure, composition, and practices

<sup>89</sup> Raju Ramachandran, *The Supreme Court and the Basic Structure Doctrine* in SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA 108 (B.N. Kirpal, Ashok K. Desai et al, 7<sup>th</sup> ed., 2000).

<sup>90</sup> S. Kashyap, *The 'Doctrine' Versus the Sovereignty of the People* in THE SUPREME COURT VERSUS THE CONSTITUTION: A CHALLENGE TO FEDERALISM 99 (2006).

<sup>91</sup> S.P. SATHE, JUDICIAL ACTIVISM IN INDIA 77 (2002).

<sup>92</sup> DWORKIN, *supra* note 8, 15.

<sup>93</sup> *Id.*

<sup>94</sup> See also, J. Waldron, *A Majority in the Lifeboat*, 90 B.U. L. REV 1043 (2010).

<sup>95</sup> DWORKIN, *supra* note 8, 17.

<sup>96</sup> Kashyap, *supra* note 90.

treat all members of the community, as individuals, with equal concern and respect.”<sup>97</sup>

Thus, under Dworkin’s ‘constitutional’ conception of democracy, State institutions must respect democratic conditions such as ‘equal status for all citizens’ in order to be politically legitimate.<sup>98</sup> One such state institution is the judiciary and any democracy which embraces strong judicial review, Dworkin argues, commits itself to a conception of democracy which requires that decisions taken by governmental institutions respect democratic conditions, and, hence, restrict these institutions through the mechanism of judicial review.<sup>99</sup> The majoritarian conception fails to do so because, as Dworkin submits, there is nothing inherently valuable about a process that allows a large number of people to impose its will on a smaller number.<sup>100</sup>

While some basic features of the constitution protected by the court go further than the Dworkinian ‘democratic conditions’ of equal status and respect for all citizens, the version of basic structure review defended by Krishnaswamy envisages that the doctrine will not stand in the way of radical constitutional change carried out by the ‘people’ directly exercising their sovereign power.<sup>101</sup>

Let us assume then that a majority of Indians, frustrated by the constraints of the doctrine, decide to give themselves an entirely new Constitution free from the basic features of the present Constitution; a Constitution not based on features such as secularism<sup>102</sup>, equality<sup>103</sup>, and independence of the judiciary.<sup>104</sup> Can the principles on which these features are based, such as the right to freedom of religion, right to equality of opportunity and judicial review, be excluded from the new Constitution if it is the “will” of the people? While the answer would undoubtedly be ‘yes’ under a majoritarian conception of democracy, the answer would be ‘no’ under a constitutional conception of democracy; this is because the basic democratic conditions of equal concern and respect will not be fulfilled if fundamental principles of political decency and justice are excluded. If under the new Constitution these principles are indeed excluded, then, according to Dworkin, “there can be no genuine democracy, because unless they are met, the majority has no legitimate moral

<sup>97</sup> KRISHNASWAMY, *supra* note 41, 201-2.

<sup>98</sup> DWORKIN, *supra* note 8, 17.

<sup>99</sup> DWORKIN, *supra* note 8, 33.

<sup>100</sup> RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 357 (2002).

<sup>101</sup> KRISHNASWAMY, *supra* note 41, 32-33.

<sup>102</sup> S.R. Bommai v. Union of India, (1994) 3 SCC 1.

<sup>103</sup> Indira Gandhi v. Raj Narain, (1975) Supp SCC 1, at 252.

<sup>104</sup> P. Sambamurthy v. State Of Andhra Pradesh, (1987) 1 SCC 362.

title to govern.”<sup>105</sup> Thus, while Krishnaswamy is right in concluding that the doctrine cannot stand in the way of the people exercising ‘their constituent power’<sup>106</sup>, it would be doing a great disservice to the framers of the doctrine to assert that the principles on which these basic features are based would only be relevant to the Constitution of India, and not to any future Constitution. It is precisely because the Supreme Court of India favours a principled approach to constitutional interpretation, based on Dworkinian notions of constitutional democracy, moral reading, and equal concern and respect that the doctrine has survived for four decades and will likely survive for generations to come.

## V. CONCLUSION

Upendra Baxi began a conversation about Dworkin by situating him in contemporary Indian jurisprudence. This paper has picked up where he left off by chronicling Dworkin’s critique of legal pragmatism and originalism as theories of constitutional interpretation. We have seen how pragmatism provides no answer to the question of how judges should go about making law when it is impossible to simply find and apply it. This was the exact conundrum that faced the court in *Kesavananda*; while paying obeisance to the titans of pragmatism such as Holmes *et al*, they essentially chose to ignore the tenets of pragmatism in devising the basic structure doctrine. As demonstrated earlier, they read into Article 368 inherent and implicit limitations, thereby disregarding originalism based on textual fidelity. As has been shown, it is only Dworkin’s moral reading, which brings political morality into the heart of constitutional law that provides the most compelling justification for the basic structure doctrine.

The paper has also attempted to demonstrate how Dworkin’s seminal concepts such as the sovereign virtue of “equal concern and respect” and the “constitutional conception of democracy” have resonated in the theories and practices of the Supreme Court. Dworkin passionately fought for the idea of a ‘constitution of abstract principle’, a constitution that judges would interpret by resorting to arguments of principle and integrity. This idea has come to fruition in the Supreme Court of India, as is evident from this passage in *State of U.P. v. Jeet S. Bisht*:<sup>107</sup>

“The ultimate justification for the creation of new rights and renewed emphasis on implementation of statutory rights is that they have to be made justiciable, simply because of their

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<sup>105</sup> RONALD DWORKIN, *LIFE’S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA AND INDIVIDUAL FREEDOM* 123 (2011).

<sup>106</sup> KRISHNASWAMY, *supra* note 41, 228.

<sup>107</sup> *State of U.P. v. Jeet S. Bisht*, (2007) 6 SCC 586, at 617.

primacy in living a life with dignity and the matching recognition thereof with the values that our Constitution inheres. Following this philosophy the Supreme Court has developed new methods and new remedies. The same is to be considered to be a part of wider civilization. ...Ronald Dworkin, *Taking Rights Seriously* (1977); Ronald Dworkin, *A Matter of Principle* (1985)...referred to.”<sup>108</sup>

Dworkin was a man of ‘principle’ throughout his life. Following his death relatively recently, Ronald Dworkin was hailed universally as one of the most important legal philosophers of the twentieth century.<sup>109</sup> It is fitting that his brilliant philosophy will continue to find expression in the jurisprudence of the Supreme Court of India, the largest forum of principle in the world.

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<sup>108</sup> *Id.*, at 591.

<sup>109</sup> F. Shapiro, *The Most Cited Legal Scholars*, 29 J. LEGAL STUD. 410 (2000) (Dworkin is amongst the most cited legal scholars of the twentieth century).