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A PROGRESSIVE JURISTOCRACY? THE UNEXPECTED SOCIAL ACTIVISM OF INDIA'S SUPREME COURT*

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ABSTRACT

Since 2005, India has introduced a series of progressive social acts that legislate a right to various socioeconomic entitlements. These range from information, work, and education to forest conservation, food, and public service. Three features distinguish these acts: the explicit use of rights-based claims; the design of innovative governance mechanisms that seek to enhance the transparency, responsiveness, and accountability of the state; and the role played by social activists and activist judges in spearheading these pieces of legislation with the help of progressive party politicians.

This paper analyzes a key slow-burning stimulus of India's new rights-based welfare paradigm: the socially activist turn of its Supreme Court. I address two main questions. First, what explains the rise of progressive socioeconomic jurisprudence in India in the late 1970s? Following the prevailing scholarly consensus, I analyze the role of antecedent conditions and particular causal mechanisms to explain high judicial activism in India: deepening political fragmentation, endogenous judicial change, and the strategic political retreat of elected representatives. None of these factors can fully explain the timing, sequence, and focus of the social activist turn of the Indian Supreme Court in the late 1970s, however, which owed much to the rise of popular social formations during these years and their proliferation in the 1980s. Thus the complex interaction effects of several causal factors, whose weight has differed over time, provides a more convincing explanation. Second, what have been the achievements and failures of high judicial activism in India regarding socioeconomic rights? As many scholars persuasively demonstrate, its direct impact has been limited, while its pro-poor posture has been inconsistent. However, by focusing excessively on direct material consequences in the short-run, these studies discount the powerful long-term ramifications, many of which are symbolic and indirect, of the Indian Supreme Court's earlier progressive turn.

RESUMEN

Desde 2005, India ha introducido una serie de leyes sociales progresistas que regulan la titularidad de varios derechos socioeconómicos. Estos van desde la información, el trabajo y la educación hasta la conservación de los bosques, la alimentación y la función pública. Tres atributos distinguen a estas leyes: el uso explícito de argumentos basados en derechos; el diseño de mecanismos de gobierno innovadores que procuran aumentar la transparencia, la capacidad de respuesta y la rendición de cuentas del estado; y el rol que jugaron los activistas sociales y los jueces activos en impulsar estas piezas de legislación con la ayuda de políticos de los partidos progresistas.

Este paper analiza un estímulo clave y de acción prolongada en el nuevo paradigma de bienestar de la India basado en los derechos: el giro hacia el activismo social de su Corte Suprema. Me ocupo de dos cuestiones principales. Primero, qué explica el ascenso de la jurisprudencia socioeconómica progresista en la India hacia fines de los años 1970s? Siguiendo el consenso prevaleciente entre los analistas, analizo el rol de algunas condiciones antecedentes y mecanismos causales particulares para explicar el alto activismo judicial en la India: la profundización de la fragmentación política, el cambio judicial endógeno y el retiro político estratégico de los representantes electos. Sin embargo, ninguno de estos factores puede explicar

completamente el momento de ocurrencia, la secuencia o el foco del giro hacia el activismo social de la Corte Suprema India hacia fines de los 1970s, el que obedeció en buena medida al ascenso de las formaciones sociales populares y a su proliferación en los 1980s. Así, los complejos efectos de interacción de varios factores causales, cuyo peso ha variado a lo largo del tiempo, ofrece una explicación más convincente. En segundo lugar, cuáles han sido los logros y los fracasos del alto activismo judicial en relación con los derechos socio-económicos en India? Como muchos estudiosos han demostrado de modo persuasivo, su impacto directo ha sido limitado, mientras que su posición a favor de los pobres ha sido inconsistente. Sin embargo, concentrándose excesivamente en las consecuencias materiales directas de corto plazo, estos estudios subestiman las poderosas ramificaciones de largo plazo del más temprano giro progresista de la Corte Suprema india, muchas de las cuales son simbólicas e indirectas.

Since 2005, India has enacted a series of national legislative acts that enshrine new civil liberties and socioeconomic entitlements through legally enforceable rights. The Right to Information Act (RTI), 2005, mandates government agencies to release information regarding their activities to individual citizens upon request in a timely manner. The National Rural Employment Guarantee Act (NREGA), 2005, grants adult members of every rural household the right to demand 100 days of wage-employment from the state. The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, empowers tribal communities with the right to own and use traditionally cultivated land and to protect and conserve forests. The Right of Children to Free and Compulsory Education Act, 2009, makes the enrollment, attendance, and completion of schooling of every child under fourteen the obligation of the state. Indeed, the desire to entrench new citizenship rights has recently inspired, the Right of Citizens for Time Bound Delivery of Goods and Services and Redressal of Their Grievances Bill, 2011, and the National Food Security Bill, 2012. In short, the introduction of these rights-based national acts and the pressure to extend their purview to other subjects and domains signify a "new welfare architecture" with a distinct "social contract" in modern Indian democracy.[1]

Three particular features of these national acts warrant scholarly attention. First, the decision to legislate a right to basic socioeconomic goods marks a watershed in modern Indian democracy. Since India achieved independence in 1947, national and state-level governments have introduced an extraordinary range of social welfare initiatives. Crucially, the vast majority of such initiatives came under the purview of the Directive Principles of State Policy in Part IV of the Constitution, making them non-justiciable, as opposed to the fundamental rights regarding political liberties and civic freedoms in Part III. The early 1990s witnessed major constitutional reforms to enhance civic participation in poverty-alleviation schemes and to decentralize political authority and economic resources to local village councils, constituting a "new regime of

[1] Pratap Bhanu Mehta, "Public advisory," Indian Express, 6 April 2010.

governance and development."[2] What distinguishes the recognition of a right to basic socioeconomic goods, however, is that it undermines in principle the distinction made between civic and political rights versus social and economic entitlements in the Constitution.

Second, many of these rights-based laws seek to secure political goods such as greater transparency, responsiveness, and accountability, either independently or as an integral design feature of new social programs. Indeed, it is striking that many of them explicitly seek to reform how public institutions work. This is the overt purpose of the Right to Information Act, of course. Yet it also explains the novel governance mechanisms in the NREGA, for example, which allow its intended poor beneficiaries to participate in social audits of local public officials. These institutional reforms furnish an opportunity to challenge the practices of corruption and patronage that have enabled benefits to be targeted towards or captured by particular social groups, undermining the coherence, equity, and implementation of many developmental interventions in the past. The fact that even regions with progressive social regimes, such as Kerala, have recently introduced a Right to Public Service Act underscores the primacy of systematic institutional reform in India's new rights-based social agenda. The latter has occurred alongside a slate of large-scale initiatives—such as the Second Administrative Reforms Commission Unique Identification Authority of India (UIDAI) and LokPal (Public Ombudsman) Bill—that seek to renew the purpose, capacity, and accountability of the state. Arguably, the move to entrench socioeconomic rights in contemporary Indian democracy is an innovative state-building project that aims simultaneously to enhance the capacity of the state to "see its citizens" yet curb the danger of authoritarian high modernism by allowing the citizenry to "see the state."[3]

Finally, progressive social movements in India have historically pursued interest-based struggles by pressing their claims vis-à-vis the bureaucracy and judiciary. They have rarely penetrated electoral politics at the national level, a domain that has been

[2] Stuart Corbridge, Glyn Williams, Manoj Srivastava, and René Véron, Seeing the State: Governance and governmentality in India (Cambridge: Cambridge University Press, 2005), 21.
[3] See James C. Scott, Seeing like a State: How certain schemes to improve the human condition have failed (New Haven: Yale University Press, 1998); and Corbridge et al., Seeing the State.

dominated by the politics of identity, especially since 1989.[4] Put differently, despite the remarkable historical achievement of consolidating a representative democracy in a poor agrarian society, and the rising electoral participation by historically subordinate groups and the capture of national political office by their putative representatives over the last three decades, India has proven relatively unresponsive to popular demands for greater social opportunities and material welfare. In contrast, many of India's recent social bills bear the distinct imprint of social activists and activist judges working in tandem with progressive party politicians. Indeed, prior landmark judgments by the Supreme Court precede each of these pieces of legislation.

What explains the emergence of these new rights-based acts over the last decade? Why has it taken so long for such a politics to emerge despite the fact that post-independent India was committed from the start to eradicating absolute poverty, lessening economic inequalities, and transforming its society? What are the legal, political and economic consequences of enshrining civic entitlements as formal statutory rights? Can a rights-based approach to basic socioeconomic entitlements address the deep structural determinants of socioeconomic inequalities in a postcolonial society such as India? Or does it merely represent a new palliative response, the latest manifestation of neoliberal governmentality, to the evolving power asymmetries in the global South?

In general terms, three slow-burning transformations, distinct yet interconnected, contributed to the genesis of India's new welfare paradigm: progressive judicial activism, a growing countermovement against rapid uneven development, and the expanding social foundations of the country's federal parliamentary democracy. Significantly, all three processes exposed the growing nexus between political corruption and socioeconomic deprivations. Equally, however, each of them only partly met the rising popular expectations for greater social justice that they had ignited.

In this paper, I analyze the key catalyst of India's new welfare paradigm: the unexpected social activism of its Supreme Court. I chart the evolution of the Court from its conservative heyday in the 1950s and 1960s and battles with parliament in the 1970s to its widely studied activism regarding civil liberties, socioeconomic rights, and

[4] See Mary Katzenstein, Smitu Kothari, and Uday Mehta, "Social movement politics in India: Institutions, interests, and identities," in Atul Kohli, ed., The Success of India's Democracy (Cambridge: Cambridge University Press, 2001), 244–46.

questions of governance through its innovation of public interest litigation in the 1980s and 1990s, culminating with the various controversies surrounding the institution today. High judicial activism attracts great political attention and scholarly analysis in India, of course. Yet its causes and ramifications may have wider theoretical implications too.

Indeed, the progressive judicial activism of the Indian Supreme Court regarding socioeconomic rights challenges two general findings in the scholarly literature. The first is that it happened at all. According to Hirschl, the constitutionalization of rights and assertion of judicial review in many Westminster-style parliamentary democracies has often militated against "progressive conceptions of distributive justice."[5] In general, the constitutionalization of certain fundamental rights and empowerment of apex judiciaries to protect these rights has been a distinctive feature of many post-1945 democratic regimes.[6] This is particularly the case in countries that explicitly adopted new basic laws following transitions from authoritarian rule, ranging from Spain to Brazil and South Africa, as well as post-communist states dismantling command economies such as Russia, Hungary, and Poland. However, concluding a broad comparative study of the constitutionalization of rights in countries that had "no apparent transition" to a new political-economic regime, Hirschl argues that high judicial activism frequently led to

> the adoption of a narrow conception of rights, emphasizing Lockean individualism and the dyadic and antistatist aspects of constitutional rights…protecting the private sphere (whether human or economic) from interference by the 'collective' (often understood as the long arm of the encroaching state).… In an age of social and economic neoliberalism, constitutional rights appear to have only a limited capacity to advance progressive notions of social justice into arenas such as employment, income distribution, health, housing, and education, which require wider state intervention and more public expenditure. However, when it comes to negative liberties—all of which require that the state maintain merely procedural fairness and refrain from excessively interfering in the private sphere—the constitutionalization of rights has the potential to plant the seeds of change.[7]

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[5] Ran Hirschl, Towards Juristocracy: The origins and consequences of the new constitutionalism (Cambridge: Harvard University Press, 2007), 13. See also A. S. Sweet, Governing with Judges (New York: Oxford University Press, 2000).

[6] John Ferejohn, Frances Rosenbluth, and Charles Shipan, "Comparative judicial politics," in Carles Boix and Susan C. Stokes, eds., The Oxford Handbook of Comparative Politics (Oxford: Oxford University Press, 2009), 734, 738–39.

[7] Hirschl, Towards Juristocracy, 14–15.

In particular, extant political, judicial, and economic elites in Israel, Canada, South Africa, and the United Kingdom sought to preserve their hegemony against the threat of a new majoritarian politics comprising previously excluded groups by constitutionalizing individual liberties and property rights in an increasingly neoliberal order.[8] The trajectory of conservative high jurisprudence in India, a comparable Westminster-style parliamentary democracy, largely fits Hirschl's thesis from independence in 1947 to the late 1970s. Beginning in the late 1970s, however, the Indian Supreme Court progressively interpreted the basic socioeconomic needs of relatively disempowered groups as integral to the fundamental "right to life" under Article 21 of the 1950 Constitution.[9] It also permitted an expansive new form of public interest litigation. To put it in Hirschl's terms, these substantive reinterpretations and procedural innovations enabled the apex judiciary to resist becoming a conservative "juristocracy" like many of its counterparts over the last few decades, and "plants the seeds of change" for subsequent legislative action.[10] This is the first puzzle.

The second concerns the causes of growing judicial activism in India. According to Edelman, Tate and Vallinder, Guarneri and Pederzoli, and Ferejohn and his various coauthors, high judicial activism normally arises in response to greater legislative fragmentation in presidential regimes and the emergence of (minority) coalition governments in parliamentary systems.[11] Alternatively, Ferejohn, Rosenbluth, and Shipan

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[8] In contrast, criminal due process rights accounted for 57 to 71 percent of all high judicial activity regarding constitutional rights in these four countries between their respective dates of inauguration and 2002. Ibid., 49, 109, 147.

[9] Hirschl acknowledges India's anomalous record in this regard but does not investigate it: see Towards Juristocracy, 126 fn 81.

[10] Hirschl, Towards Juristocracy.

[11] See Martin Edelman, "The judicialization of politics in Israel," International Political Science Review 15, 2 (1994): 177–86; C. Neal Tate and Torbjörn Vallinder, eds., The Global Expansion of Judicial Power (New York: New York University Press, 1995); C. Guarneri and P. Pederzoli, From Democracy to Juristocracy? The power of judges: A comparative study of courts and democracy, edited by C. A. Thomas (Oxford: Oxford University Press, 2002); Jenna Bednar, William N. Eskridge Jr., and John Ferejohn, "A political theory of federalism," in John Ferejohn, Jack N. Rakove, and Jonathan Riley, eds., Constitutional Culture and Democratic Rule (New York: Cambridge University Press, 2001), 223–70; John Ferejohn, "Judicializing politics, politicizing law," Law and Contemporary Problems 65 (3) 2002: 41–68; Ferejohn, Rosenbluth, and Shipan, "Comparative judicial politics." In general these scholars agree that parliamentary systems exhibit much less internal political contestation, even those with proportional electoral

claim that changes in government are likely to encourage more assertive courts because the exact preferences of new political administrations and their willingness to punish judicial overreach are relatively unknown.[12] Finally, Whittington argues that leaders of government and opposition themselves may have good strategic reasons for deferring institutional power to an apex judiciary, even allowing it to become the "supreme" authority over the meaning of a constitution for periods of time.[13]

Indeed, leading scholars of India's Supreme Court advance analogous arguments for each of the preceding theoretical explanations to explain its surprising activist turn and mounting institutional power since the late 1970s. Formulating their own version of the "political fragmentation" thesis, Rudolph and Rudolph argue that high judicial activism in India was the outgrowth of a deeper structural transition from a highly "interventionist" to a more "regulatory" state, caused by economic liberalization, greater political contestation, and the rise of national coalition governments after 1989.[14] Likewise, Shankar notes that Indian Supreme Court judgments regarding anti-terror legislation were more deferential to the Congress Union government when it enjoyed massive seat majorities in the Lok Sabha but became less so in late 1980s, a period of rising parliamentary fragmentation.[15] Indeed, the early 1990s saw the apex judiciary arrogate the final power to appoint itself in consultation with the executive and legislature, in stark contrast to virtually every constitutional democracy in the world.[16] Additionally, many distinguished observers of India agree with Sathe that India's national political class deliberately ceded authority to the Supreme Court in order to avoid

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rules that encourage plural legislatures, than presidential regimes that separate the powers of government. Hence they expect to witness greater judicial activism in the latter ceteris paribus.

[12] "Comparative judicial politics," 746.

[13] Keith E. Whittington, Political Foundations of Judicial Supremacy: The presidency, the Supreme Court, and constitutional leadership in U.S. history (Princeton: Princeton University Press, 2009).

[14] Susanne Hoeber Rudolph and Lloyd I. Rudolph, "Redoing the constitutional design: From an interventionist to a regulatory state," in Atul Kohli, ed., The Success of India's Democracy (Cambridge: Cambridge University Press, 2001), 127–62.

[15] Shylashri Shankar, Scaling Justice: India's Supreme Court, anti-terror laws, and social rights (New Delhi: Oxford University Press, 2009), 21.

[16] See Ferejohn, Rosenbluth, and Shipan, "Comparative judicial politics," 729, 744–46, 732.

tackling difficult questions in the 1990s, most prominently fierce disputes over the role and status of lower castes and religious minorities in public life.[17]

What these accounts cannot explain well, however, is the timing, focus, and sequence of high judicial activism in India. Simply put, the Indian Supreme Court began to assert its constitutional authority over new issue-areas in the early 1970s. Moreover, the substantive constitutional reinterpretations by the Court and its innovation of public interest litigation arose in the late 1970s and early 1980s, more than a decade prior to the growing political fragmentation of the national electoral landscape and the calculus of national political elites to cede greater authority. In addition, the 1980s witnessed massive back-to-back parliamentary majorities by the Congress (1980–1989), the country's traditional ruling party. Yet, contrary to expectation, it was also the period of the most progressive social action litigation by the Court. Hence Mehta argues that ultimately the causes of high judicial activism may well be endogenous because "power flows to those who choose to exercise it."[18] In short, these empirical anomalies encourage us to revisit the various mainsprings of high judicial activism in India since the late 1970s, which remains an understudied critical juncture in modern Indian politics. Doing so may also heighten our comparative understanding of such matters, offering crucial insights into the prospects for and difficulties of progressive judicial activism in other contexts.

The paper unfolds in the following manner. The first part traces the evolving socioeconomic jurisprudence of the Supreme Court from the early 1950s to the early 2000s. Starting with the decision of the postcolonial state to make socioeconomic rights non-justiciable in the 1950 Constitution, it describes the introduction of public interest litigation by the Supreme Court and its substantive reinterpretations of civil liberties and socioeconomic rights and governance failures from the 1970s through the 1990s.

The second part of the paper seeks to explain growing judicial activism across a number of spheres from the late 1970s to the present. I argue that several distinct factors, whose causal weight differed over time, help to explain its emergence, continuation, and expansion. As many leading scholars assert, the unexpected social activism of the Indian

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[17] S. P. Sathe, Judicial Activism in India: Transgressing borders and enforcing limits, second edition (New Delhi: Oxford University Press, 2004), 247, 263, and 272.
[18] Pratap Bhanu Mehta, "The rise of judicial sovereignty," Journal of Democracy 18, 2 (April 2007), 78–79.

Supreme Court in the late 1970s was largely an attempt to resuscitate judicial authority and protect the Court's independence following its capitulation during Indira Gandhi's Emergency (1975–1977). However, against the view that it was largely responding to the priorities of the ruling establishment, I argue that its main impetus was the groundswell of diverse social movements that emerged in the mid-1970s, crystallizing in the formation of the short-lived Janata Party government (1977–1979). Moreover, the latter authorized a more progressive stance by the apex judiciary. The subsequent innovations in public interest litigation by the Court created a new institutional arena, empowering popular grassroots movements and nongovernmental organizations that had previously served as "midwives to judicial activism"[19] to press the interests of historically subaltern classes. To be sure, the political fragmentation of India's electoral landscape in the 1990s and the willingness of its political class to relinquish greater authority to the Court helped to deepen its relative autonomy. Neither factor was, however, the primary cause of the latter.

The last part evaluates the achievements, character, and limitations of India's Supreme Court over the last three decades. As many claim, the direct impact of its jurisprudence has been limited, while its character has been inconsistent. The inability of the Court systematically to enforce its rulings, the "conditional social rights" articulated by its jurisprudence, and the growing political concern over the separation of powers underscore the limits of even a "progressive juristocracy." Hence in many ways the legislation of new social acts by successive Congress-led administrations in New Delhi since 2005 exposes the failure of high judicial activism to effect immediate political change in India. That said, the rights-based character, innovative accountability mechanisms, and role of committed social activists in the genesis of these various acts demonstrate the powerful long-term ramifications—material, symbolic and often indirect—of the Indian Supreme Court's earlier progressive turn.

[19] Upendra Baxi, "The (im)possibility of constitutional justice: Seismographic notes on Indian constitutionalism," in Zoya Hasan, E. Sridharan, and R. Sudarshan, eds., India's Living Constitution: Ideas, practices, controversies (New Delhi: Permanent Black, 2006), 48.

THE EVOLVING SOCIOECONOMIC JURISPRUDENCE OF THE INDIAN SUPREME COURT

Most scholars tend to divide the history of India's Supreme Court regarding socioeconomic rights into three eras. The first was a conservative era (1950 to 1967) during which the Court sought to uphold the right to property against parliamentary legislation concerning land reform and economic nationalization.[20] The apex judiciary justified its stance by appealing to the law of the land. The 1950 Constitution distinguished the political liberties and civic freedoms ensconced in Part III—the freedoms of speech and expression, assembly, movement, and association, and the right to hold property—from the social and economic goods—covering livelihood, pay, work, education, and health[21]—listed under the Directive Principles of State Policy in Part IV, a distinction that "presage[d]…the Covenant on Civil and Political Rights…and the Covenant on Social, Economic and Cultural Rights."[22] Crucially, the Constitution recognized the former as fundamental rights enforceable by the courts, whereas the latter comprised the goals and aspirations of the newly independent nation.

The reason was twofold. On the one hand, the majority of India's Constituent Assembly conceptualized socioeconomic entitlements as positive rights, contingent on resources. Similar to many of their postcolonial counterparts and the emergent profession of development economists, they consequently viewed such rights as fiscally prohibitive and impossible to guarantee.[23] On the other, as many nineteenth-century conservatives

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[20] As Dhawan notes, however, the 1960s saw greater compromise under Chief Justice Gajendragadkar. Rajeev Dhawan, "Judges and Indian democracy," in Francine R. Frankel, Zoya Hasan, Rajeev Bhargava, and Balveer Arora, eds., Transforming India: Social and political dynamics of democracy (New Delhi: Oxford University Press, 2000), 325.

[21] For example, the Constitution enjoins the state to promote the welfare of the people (Article 38); to provide within its capacity for rights to work, education, and public assistance in event of unemployment, old age, and sickness (Article 41); to support fair wages and conditions of work (Article 42); to seek a decent standard of living for all its citizens (Article 43); to ensure free and compulsory education for children under the age of 14 (Article 45); to raise the level of nutrition and standard of living and public health (Article 47); to protect and improve the environment and to safeguard forests and wildlife (A48-A). Shankar, Scaling Justice, 125.

[22] Baxi, "The (im)possibility of constitutional justice," 62 fn 61.

[23] Neera Chandhoke, "Democracy and well-being in India," UNRISD (May 2005), 6: http://www.unrisd.org/80256B3C005BCCF9/(httpPublications)/AFA456B71A0BD335C1256FFF0052FE69? Open Document. For a lucid exposition of these concerns from a development economist, which also highlights the interpersonal and intertemporal trade-offs involved, see Paul

and twentieth-century socialists in Europe respectively feared and hoped, Jawaharlal Nehru, India's first prime minister, believed that modern representative democracy would naturally empower the poor. The decision to make a poor, unequal, agrarian society such as India a constitutional democratic republic, with universal suffrage and various compensatory measures for historically subordinate groups, was itself a radical act. Moreover, like many post-WWII development economists, Nehru thought that central technocratic planning, public sector dominance of the economy, and a strategy of import-substitution-industrialization (ISI) would lead to high economic growth, structural diversification, and rapid poverty reduction.[24] The towering Dalit leader and chairman of the Constitution drafting committee, B. R. Ambedkar, summarized the Nehruvian optimism well:

> Whoever captures power will not be free to do whatever he likes with it. In the exercise of it, he will have to respect these instruments of instructions what are called Directive Principles. He cannot ignore them. He may not have to answer for their breach in the court of law. But he will certainly have to answer for them before the electorate at election time.[25]

In retrospect, Nehru and Ambedkar were over-optimistic in expecting that poor voters would successfully pressure competing party organizations to deliver basic social goods. In addition, the Nehruvian strategy of planned economic development failed to achieve a "socialistic pattern of society." Instead, it represented a "passive revolution."[26] The bias towards heavy industrialization, particularly following the second Five-Year Plan (1956–1961), led to insufficient public investment in the agricultural sector. Poorly devised village cooperative schemes cemented the power of local notables. And attempts

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Streeten, "Basic needs and human rights," World Development 8, 2 (1980): 107–11. For a critique of the tendency to portray civil liberties and political freedoms as "negative rights" and social and economic goods as "positive rights," see Cécile Fabre, Social Rights under the Constitution: Government and the decent life (Oxford: Oxford University Press, 2000); Stephen Holmes and Cass R. Sunstein, The Cost of Rights: Why liberty depends on taxes (New York: W. W. Norton & Company, 2000); and Sandra Fredman, Human Rights Transformation: Positive rights and positive duties (Oxford: Oxford University Press, 2000).

[24] It is important to note that the Planning Commission was not even mentioned in the Constitution. See Rudolph and Rudolph, "Redoing the constitutional design," 128.

[25] A. Vaidyanathan, "The pursuit of social justice," in Hasan et al., India's Living Constitution, 286.

[26] See Sudipta Kaviraj, "A critique of the passive revolution," in Partha Chatterjee, ed., *State and Politics in India (New Delhi: Oxford University Press, 1998), 45–89.*

to return land to the tiller, apart from abolishing the zamindari (a feudal landholding and tax collection system), largely failed in most states. Indeed, Nehru's attempt to push land reform through the state assemblies—agriculture was a provincial subject in the federal system—encountered many obstacles within his own party: the local high caste notables, who stood to lose the most from the initiative, dominated the Congress in state legislative assemblies and thus stymied it.

Yet the Supreme Court played a critical role in these events too. It challenged the legitimacy of land-to-the-tiller legislation and sided with big business against labor in numerous cases. It also ruled against the reservation of seats in medical colleges.[27] Between 1950 and 1967, the apex judiciary struck down 128 pieces of parliamentary legislation ostensibly inspired by the Directive Principles, provoking the Nehruvian Congress to introduce constitutional amendments under Article 368 in order to circumvent Supreme Court rulings.[28] In particular, the first, fourth, and seventeenth amendments removed various pieces of legislation regarding property rights from judicial review.[29]

Opinion divided over the latter. Reportedly, Nehru viewed Supreme Court justices as umpires. But critics of the Supreme Court perceived an ideological bias, even a distinct class prejudice, owing to the social roots of its justices.[30] Some even pursued litigation on such grounds.[31] Admittedly, the apex judiciary reflected a world of "middle class intellectuals" and comprised a disproportionate share of middle- and upper-caste Hindu men.[32] In addition, many viewed the judiciary with suspicion on account of their role

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[27] State of Madras v. Srimathi Champakam Dorarajan and another (1951) SC 226. See Lavanya Rajamani and Arghya Sengupta, "The Supreme Court," in Niraja Gopal Jayal and Pratap Bhanu Mehta, eds., The Oxford Companion to Politics in India (New Delhi: Oxford University Press, 2010), 81.

[28] Mehta, "The rise of judicial sovereignty," 74; Amit Sibal, "From 'niti' to 'nyaya'," Seminar 615 (November 2010): 28–34, 30. Mehta notes that approximately half of the first 45 constitutional amendments sought to curb the power of the Supreme Court.

[29] Sathe, Judicial Activism in India, 7.

[30] The accusation of such bias reflects a consequentialist reading of the justices' judgments vis-à-vis various parliamentary legislation introduced in the name of the Directive Principles of State Policy. Dhawan, "Judges and Indian democracy," 327–28.

[31] See E.M.S. Namboodiripad v. T.N. Nambiar (1970) SC 2015. Rajeev Dhawan, "Judges and Indian democracy," 326.

[32] As of 1999, according to Sathe, out of 136 Supreme Court justices, there were only two who represented Scheduled Castes or Scheduled Tribes (Varadarajan and K. Ramaswamy), two

during the struggle for independence. In contrast to elected national politicians, many of whom had fought against the British colonial raj and suffered and thus were accorded relatively high esteem, judges were seen as "mere technocrats" who had originally been appointed to serve colonial interests.[33] Yet longstanding observers of the Supreme Court such as Galanter noted a "tradition of detachment" amongst its justices due to their training and experience in these early years.[34] The Court's positivist legal interpretations of progressive legislation were consistent with the Constitution in a literal sense. Moreover, the Supreme Court recognized the power of Parliament to amend the Constitution. Indeed, in Shankari Prasad v. Union of India, a five-judge bench unanimously held that no restrictions in principle hampered the constituent power, while a majority bench upheld that view in Sajjan Singh v. State of Rajasthan.[35] Hence, even if most scholars would not go so far as to describe the charge of overt class bias as "politically shrill, analytically crude and historically muddled,"[36] relatively few doubted the integrity of Supreme Court judges in these years.[37]

The second era, which largely coincided with Indira Gandhi's rule, ran from the late 1960s until the late 1970s. It was a turbulent political era with many cross-currents

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women (Fatima Beevi and Sujata Manohar), and twenty-one religious minorities (thirteen Muslims, four Christians, two Sikhs, and two Parsis). Sathe warns of possible errors in the data, however. Sathe, Judicial Activism in India, 298. For an early general analysis, see George H. Gadbois Jr., "Indian Supreme Court justices: A portrait," Law and Society Review 3, 2/3 (November 1968/February 1969): 317–36.

[33] Sathe, Judicial Activism in India, 20.

[34] Marc Galanter, Law and Society in Modern India, edited with an introduction by Rajeev Dhawan (New Delhi: Oxford University Press, 1997), 9. The "tradition of detachment" is harder to see from the 1970s onwards.

[35] AIR 1951 SC 458 and AIR 1965 SC 845. Ibid., 7–8. According to Baxi, "[t]he Court clarified that Parliament was within its power to pass a law rejecting the interpretation given to a statute or the Constitution by the Supreme Court. But it could not pass a law to override the interpretation of a constitutional provision adopted by the Court except by amending the Constitution." Baxi, "Preface," in Sathe, Judicial Activism in India, lxiii.

[36] Dhawan argues that such an accusation reflects a consequentialist reading of the Court's judgments vis-à-vis various parliamentary legislation introduced in the name of the Directive Principles of State Policy. "Judges and Indian democracy," 327–28.

[37] The first amendment created Article 31A, which "saved all laws on zamindari abolition from being invalidated on the singular ground that they violated fundamental rights," and Article 31B, "which immunized all laws placed in the 9th Schedule from judicial review." By 1964, seventeen constitutional amendments by Parliament had placed forty-four legislative acts in the 9th Schedule of the 1950 Constitution, in an attempt to prevent the judiciary from ruling them unconstitutional. Rajamani and Sengupta, "The Supreme Court," 82.

that buffeted the Supreme Court into shifting postures. At one extreme, these years pitted claims of parliamentary sovereignty in the name of social justice against judicial review far more intensely than before. The Supreme Court challenged the legality of "nationalizing the banks, insurance, mines, steel plants, textile mills" and the removal of the princes' privy purses.[38] Far more importantly, it confronted the power and scope of Parliament to amend the Constitution in a number of landmark judicial cases: Golak Nath v. State of Punjab in 1967, which challenged land reform by ruling that Parliament's amending power could not violate fundamental rights; Kesavananda Bharati v. State of Kerala in 1973, in which the Supreme Court claim that while Article 368 granted parliament the power to amend every article, the Constitution nevertheless had a "basic structure" that could not be amended without judicial review;[39] and Minerva Mills & Ors v. India in 1980, which invalidated two clauses of the 42nd amendment that had eliminated judicial review of parliamentary amendments to the Constitution inspired by the Directive Principles. Hence the call by Mrs. Gandhi in the mid-1970s for a "committed judiciary" that was "ideologically suitable" for her declared antipoverty agenda.[40] In the middle, many commentators point out that each of these rulings increasingly sought to balance the Directive Principles of State Policy with fundamental rights. Read cumulatively, the rulings revealed recognition by the Court that Parts III and IV of the Constitution were supplementary rather than hierarchical: the former identified the means, the latter, the ends.[41] The turning point was Kesavananda, where the apex judiciary declaimed that "when the State, in pursuance of its fundamental obligation makes a law implementing them [the Directive Principles], it becomes the law of the land and the judiciary will be found to enforce the law."[42] But these years also witnessed the other extreme, the Emergency, during which the apex judiciary severely damaged its own

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[38] In R.C. Cooper v. Union of India (1969) SC 1126, the Court invalidated bank nationalization on grounds that it violated Article 31(2), and it ruled against the abolition of privy purses in Madhavrao Scindia and Others v. Union of India (1971) SC 530. See Sibal, "From 'niti' to nyaya'," 31; Rajamani and Sengupta, "The Supreme Court," 84.

[39] (1973) 4 SCC 225. Sathe, Judicial Activism in India, 8–10. As Sathe notes, however, the Court has utilized the basic structure doctrine with great restraint vis-à-vis only five constitutional amendments since its declaration in 1973. It is telling that three of these moments transpired during Emergency Rule.

[40] Dhawan, "Judges and Indian democracy," 327–28.

[41] Sibal, "From 'niti' to nyaya'," 31.

[42] Quoted from Shankar, Scaling Justice, 126.

credibility. It overturned Mrs. Gandhi's conviction by the Allahabad High Court for electoral offences. Most infamously, a four-to-one majority bench of the Supreme Court overruled nine High Courts to justify the suspension of habeas corpus in A.D.M. Jabalpur v. Shiv Kant Shukla, ruling that in state of emergency the President could suspend the right of citizens to petition the Court for the enforcement of fundamental rights.[43] (Indeed, India's Supreme Court has failed systematically to confront government practices of preventive detention undertaken vis-à-vis domestic insurgencies in India.) The failure of the apex judiciary to protect basic civil liberties represented its nadir.

The third era of the Supreme Court dates from the post-Emergency phase in the late 1970s to the turn of the century. It began when several members of the Court made social justice an explicitly avowed goal and ingeniously expanded their powers through new forms of public interest litigation. Substantively, the apex judiciary gradually expanded its remit by interpreting matters formally under the purview of the Directive Principles of State Policy as integral to Article 21 of the Constitution, which recognized the right to life: "Protection of life and personal liberty—No person shall be deprived of his life or personal liberty except according to procedure established by law." In contrast to the past, activist judges began to propound an intimate link between Parts III and IV of the Constitution. The following extracts from well-known legal decisions reflected their new method of reasoning:

> The right to life includes the right to live with human dignity and all that goes with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and comingling with fellow human beings.[44]
>
> …when a complaint is made on behalf of workmen that they are held in bondage and are working and living in miserable conditions…it is difficult to appreciate how such a complaint can be thrown out on the ground that it is not violative of the fundamental right of workmen.… This right to live with

[43] AIR 1976 SC 1207. The Supreme Court ruled that the invocation of emergency under Article 359, which allows the President to suspend the right of any court to hear any case regarding fundamental rights, invalidated the principle of the rule of law. Justice Khanna dissented, only to see his four colleagues eventually promoted to chief justice. Sathe, Judicial Activism in India, 104–5.

[44] Francis Coralie Mullin v. Administrator, Union Territory of Delhi (1981) 2 SCR 516; italics mine. Quoted in Justice Richard J. Goldstone, "Foreword," in Varun Gauri and Daniel M. Brinks, eds., Courting Social Justice: Judicial enforcement of social and economic rights in the developing world (New York: Cambridge University Press, 2008), viii fn 1.

> human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy…therefore, it must include protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief.[45]

The Supreme Court also permitted vital procedural changes, leading to an expansive form of public interest litigation, which encouraged activist judges and social activists to exploit these substantive reinterpretations.[46] According to former chief justice P. N. Bhagwati, in a widely hailed judgment, this was because

> Today a vast revolution is taking place in the judicial process; the theatre of the law is fast changing and the problems of the poor are coming to the forefront. The Court has to innovate new methods and devise new strategies for the purpose of providing access to justice to large masses of people who are denied their basic human rights and to whom freedom and liberty have no meaning. The only way this can be done is by entertaining writ petitions and even letters from public spirited individuals seeking judicial redress for the benefit of persons who have suffered a legal wrong or a legal injury or whose constitutional or legal right has been violated but who by reason of their poverty or socially or economically disadvantaged position are unable to approach the Court for relief.[47]

In particular, the Supreme Court authored three crucial innovations.[48] First, it relaxed the norms of "standing" and "pleading" and the notion of "aggrieved persons" by permitting concerned individuals who had not directly suffered harm to seek judicial redress for public injury, breach of public duty, or constitutional violation on behalf of the poor. Indeed, the apex judiciary even permitted "epistolary jurisdiction"—including accepting postcards from alleged victims of state impunity and even from jailed inmates as writ petitions—in order to expand legal access as well as taking the initiative in such cases suo moto.[49] Second, the Supreme Court began to appoint fact-finding and monitoring commissions to assist with public interest litigation (akin to so-called

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[45] Bhandhua Mukti Morcha v. Union of India & Ors (1984) SC 802; italics mine. Quoted in Sibal, "From 'niti' to nyaya'," 33.
[46] See P. P. Craig and S. L Deshpande, "Rights, autonomy and process: Public interest litigation in India," Oxford Journal of Legal Studies 9, 3 (1989): 356–73.
[47] S.P. Gupta v. Union of India (1982) AIR SC 149. Quoted in Shankar, Scaling Justice, xiii.
[48] See Mehta, "The rise of judicial sovereignty," 71.
[49] Rudolph and Rudolph, "Redoing the constitutional design," 137; Sathe, Judicial Activism in India, 17.

Brandeis briefs in the United States) and exploited its right to issue continuing mandamus to follow through with such investigations. Third, and most controversially, in several cases the Court's justices used such commissions to perform administrative tasks normally handled by the executive. These substantive reinterpretations and procedural innovations created new avenues for progressive legal change on the part of justices as well as citizens.

The first wave of judicial activism in the late 1970s saw the Supreme Court attempting to safeguard civil liberties, "human rights against state abuses: police brutality and torture, custodial rape, inhuman treatment in jails and 'protective' homes."[50] The Supreme Court began by recognizing, in M. H. Rao Hosket v. Maharashtra (1978), citizens' fundamental right to bail and legal aid. The Court further defended the rights of prison inmates to life, liberty, and equality in three subsequent rulings: Charles Sobraj v. Superintendent, Central Jail (1978), Hussainara Khatoon v. Bihar (1980), and Sunil Batra v. Delhi Administration (1980).[51] These interventions presaged a second phase of progressive judicial activism, beginning in the 1980s. It witnessed the Court bringing basic socioeconomic entitlements, of "pavement dwellers, rickshaw pullers, construction workers, Adivasis and Dalits,"[52] under its purview by linking their alleged violation to the fundamental rights guaranteed by the Constitution. In Bandhua Mukti Morcha v. Bihar (1984), the Supreme Court claimed the prerogative to supervise the implementation of legislation to abolish bonded labor because of parliamentary inaction, while its ruling in P.U.D.R. v. Union of India (1982) sought to protect unorganized labor from exploitation.[53] Olga Tellis v. Bombay Municipal Corporation (1985) recognized the right to shelter on behalf of a forcibly removed pavement dweller.[54] Perhaps most famously, the Court interpreted the right to education as a fundamental right, declaring in 1992 that

> every child of this country has the right to free education until he completes the age of 14 years. Thereafter his right to education is subject to the limits of economic capacity…the effect of holding that the right to education is implicit

[50] Rudolph and Rudolph, "Redoing the constitutional design," 134.
[51] (1978) 3 SCC 544; (1978) 4 SCC 104, (1980) 1 SCC 81, (1980) 3 SCC 488. See Sathe, Judicial Activism in India, 120–21, 262.
[52] Katzenstein et al., "Social movement politics in India," 257.
[53] (1984) 3 SCC 161 and AIR 1982 SC 1473. Sathe, Judicial Activism in India, 261, 17.
[54] (1985) 3 SCC 545.

> in the right to life is that the state cannot deprive the citizen of his right to education except in accordance with the procedure prescribed by law.[55]

Indeed, the late 1980s and early 1990s saw the Court make law under the authority of Article 141, issuing new rules for the adoption of children by foreigners in Laxmi Kant Pandey v. Union of India (1987) and for combating sexual discrimination in the workplace in Visaka v. State of Rajasthan (1997).[56] Its strikingly progressive stance regarding the welfare of children led, in P.U.C.L. v. India & Ors., to another landmark judgment. Citing the phenomenon of "scarcity amidst plenty" and of malnutrition and starvation amongst the most deprived sections of the population, and linking the basic health status of school-age children to the right to education, the apex judiciary directed every state government to introduce cooked mid-day meals in all government and government-assisted primary schools within six months.[57]

The third phase of progressive jurisprudence, regarding environmental concerns, largely began in the 1990s. The Supreme Court injunction in 1992 against construction to protect the Taj Mahal on grounds of the Environmental Protection Act, 1986, and its establishment of a monitoring committee to improve drinking water and sewage facilities in Agra in 1999, generated widespread attention in the media.[58] Yet a number of other decisions by the apex judiciary—protection against the pollution of waterways in D.L.F. Universal Ltd. v. Prof. A. Lakshmi Sagar (1998) and M.C. Mehta (Calcutta Tanneries Matter) v. India (1997); the appointment of a committee to oversee mining operations' adherence to anti-pollution regulations in Tarun Bhagat Sangh v. India (1993); the attempts to protect and conserve forests in T.N. Godovarman Thirumulpad v. India (1997) and wildlife in M.C. Mehta v. India (1997)—underscored its expanding juridical

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[55] Mohini Jain v. State of Karnataka (1992) 3 SCC 666, italics mine. Quoted in Shylashri Shankar and Pratap Bhanu Mehta, "Courts and socioeconomic rights in India," in Courting Social Justice, 151. A larger bench of five justices supported the ruling in a subsequent case, Unnikrishnan J.P. v. State of Andhra Pradesh (1993) 1 SCC 645.

[56] AIR 1987 SC 232 and (1997) 6 SCC 241. Sathe, Judicial Activism in India, 14.

[57] Chandhoke, "Democracy and well-being in India," 10. In M.C. Mehta v. State of Tamil Nadu (1996) 6 SCC 756, the Supreme Court articulated a "right to childhood." Sathe, Judicial Activism in India, 13.

[58] Rudolph and Rudolph, "Redoing the constitutional design," 138.

remit on such matters.[59] In short, progressive judicial activism by the Supreme Court in the 1980s and 1990s progressively coupled the accessibility to and provision of basic socioeconomic goods to the fundamental rights guaranteed by the Constitution.

In a significant, although frequently under-analyzed, development the last decade of the twentieth century also saw the apex judiciary turn its attention to the structure, character, and functioning of political society and the state apparatus. To some extent, questions of governance had influenced progressive judicial activism from the start. Famously, the so-called Judges case—S.P. Gupta v. President of India (1981)—had liberalized the rules for locus standi. Yet the Supreme Court simultaneously asserted its independence in that case, arguing that it had the right to review the transfer and promotion of judges, even if the government had final say after "meaningful consultation" with the chief justice. Moreover, the Court declared the right to examine in camera any official documents withheld by the state to ascertain whether their disclosure would harm the public interest. In doing so, it established the "right to information" as integral to the freedom of speech and expression in Art 19(1)(a).[60] That said, the intervention of the apex judiciary into matters of governance became increasingly assertive from the mid-1980s. The Supreme Court began to address the widespread and growing concern over a state seemingly "riddled with corruption and human rights atrocities on a disturbingly excessive scale," jeopardizing the rule of law and general political governance, as well as "India's infrastructure of national, ecological, human, and administrative resources to [irreparable] levels."[61] In fact, several of the Court's judgments encroached upon the prerogatives of the executive.

In D.C. Wadhwa v. State of Bihar (1987), the Supreme Court declared that any ordinances made by the Governor that had failed to receive legislative assent violated the Constitution and were thus revocable.[62] Later, it pressed the Central Bureau of Investigation (CBI) to book politicians suspected of illegal financial activities,

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[59] Respectively, (1998) 7 SCC 1 and (1997) 2 SCC 411; (1993) Supp. (1) SCC 4; (1997) 2 SCC 267 and (1997) 3 SCC 715. Sathe, Judicial Activism in India, 224–27.
[60] (1981) Supp. SCC 877. Sathe, Judicial Activism in India, 125, 216, 262.
[61] Dhawan, "Judges and Indian democracy," 333. Former Chief Justices Venkatachaliah and Verma, as well as Justice Kuldip Singh, were seen as particular catalysts.
[62] AIR 1987 SC 579. Sathe, 123–25. Sathe disapproves of the decision, however, arguing that it represented an example of "judicial overreach."

exemplified by the so-called hawala (informal money transfer) scandal that implicated many senior figures of the national political class in the mid-1990s.[63] Indeed, the specter of high-level corruption encouraged the apex judiciary to flex its authority in new ways. Some of the cases taken up by the Court involved corruption in the form of graft. Examples include the imposition of fines by the Supreme Court upon (former) Union ministers (of state) for personally acquiring or distributing state entitlements to friends, relatives and staff in cases such as Common Cause, A Registered Society v. Union of India, Shiv Sagar Tiwari v. Union of India and B.L. Wadhera v. India.[64] Other anti-corruption judgments exposed the loss of integrity of or dereliction of duty by specific public institutions. A particularly gruesome local example was re: Death of 25 Chained Inmates in Asylum Fire in Tamil Nadu v. India (2001), which saw the Supreme Court take suo moto action on basis of reportage that 25 mentally ill patients had been charred to death in an accidental fire because they had been chained to their beds or poles in violation of the Mental Health Act, 1987.[65] Yet high judicial intervention into such matters also reached the citadel of power. When it appeared that political intrigue had undermined the integrity of the CBI, the Court sought to strengthen its independence by removing the "single directive" principle that placed the agency under the purview of the

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[63] Rudolph and Rudolph, "Redoing the constitutional design," 130–31. That said, in December 1997 a CBI spokesman claimed undue pressure by the Supreme Court influenced the course of the hawala investigations: "the Supreme Court pressurized us into charge-sheeting these politicians." Most of the charges in these investigations were dropped in 2000. Ibid., 135 fn 22.

[64] In the first case, (1996) 6 SCC 530, the Supreme Court responded to a writ petition by a social action organization by cancelling the allotment of petrol pumps given by the minister in charge to relatives of his staff and colleagues in cabinet, which had originally been intended for poor or unemployed persons. It thereafter auctioned the pumps and imposed Rs. 50 lakh in damages upon Minister of State for Petroleum and Natural Gas, Satish Sharma. In the second, (1996) 6 SCC 558, the Court acted similarly vis-à-vis Minister of Urban Development, Sheila Kaul, charging her Rs. 60 lakh in exemplary damages. That said, subsequently in Common Cause, A Registered Society v. Union of India (1999) 6 SCC 667, the apex judiciary overruled its earlier decision in petrol pump case and asked the government to refund the fine paid by then Minister Sharma. According to Sathe, the Court recognized that populism drove its initial verdict. In the third case, AIR 2002 SC 1913, the Supreme Court found against Bharat Yatra Kendra, a trust formed by former prime minister Chandrashekhar, for influencing gram panchayat of Bhondsi in Haryana to gift it 600 acres of land. Chandrashekhar had used the land to build a farmhouse for himself rather than a hospital and a polytechnic for women as originally intended. See Sathe, Judicial Activism in India, lxvii–lxviii, 141–45.

[65] (2001) 3 SCC 31. Ibid., lxx–lxxi.

prime minister's office in Vineet Narain v. Union of India (1998).[66] In doing so, the apex judiciary trespassed on executive power. Nonetheless, then chief justice Verma justified its action on the following grounds: "No doubt, the overall control of the agencies and responsibility of their functioning has to be in the executive, but then a scheme giving the needed insulation from extraneous influences even of the controlling executive, is imperative."[67]

Similarly, a later decision by the apex judiciary conferred statutory power to the Central Vigilance Commissioner and even issued directions regarding the selection, transfer, and tenure processes related to the post. And in India v. Association for Democratic Reforms, the Court held that citizens had the right to know the antecedents of candidates standing for election when they filed their nominations, in order to ensure the conduct of free and fair elections and to safeguard the fundamental right to free speech and expression. In particular, the apex judiciary required that candidates disclose (a) whether they had been convicted, acquitted or discharged of past criminal offence or had any pending cases for offences punishable by two years' imprisonment or more; (b) the assets and liabilities of their family and dependents'; and (c) their educational qualifications. The intervention of the Court led the National Democratic Alliance to enact an ordinance amending the Representation of the People Act (RPA), 1951, that eventually satisfied these conditions.[68]

Perhaps the most significant judgments regarding the separation of powers, though, were Supreme Court Advocates on Record Association v. India (1993) and S.R. Bommai v. India (1994).[69] In the first case, the Court controversially arrogated the final power of appointment and promotion regarding its own collegium and that of state-level high courts unto itself on the grounds that an independent judiciary was vital for the rule of law and fundamental rights.[70] In the second, and far less controversially, a six-to-three

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[66] (1998) 1 SCS 226. Rajamani and Sengupta, "The Supreme Court," 88.
[67] Sathe, Judicial Activism in India, 145.
[68] 2002 AIR 2112; 2002 (3) SCR 696. The initial ordinance of the NDA stipulated provision (a) in Section 33-A but neither (b) nor (c) in Section 33-B. The Supreme Court struck down the latter omission in P.U.C.L. v. India (2003) 4 SCC 399. See Sathe, Judicial Activism in India, lx–lxii.
[69] (1994) 3 SCC 1. Ibid., 150–60.
[70] (1993) 4 SCC 441. Specifically, it argued that a collegium of the Chief Justice of India and four other justices of the Supreme Court, in consultation with the executive, could decide high judicial appointments and promotion. However, Sathe observes that it entertained the petition under

vote of the Court placed Article 356 under judicial review, declared that a state legislative assembly could not be dissolved without parliamentary assent, and asserted that secularism was a part of the "basic structure" of the Constitution. This landmark judgment, widely seen as the most important since Kesavananda regarding the balance of powers between the executive and the legislature in India's constitutional democratic regime, served to encourage greater self-restraint by parties in government and greater political assertion by the President in subsequent years. That said, the judgment followed a general trend that saw the Court "forcing other institutions of governance to do what they are supposed to do by using new and powerful methods of investigation and monitoring [of official action]…for illegality, unreasonableness and procedural lapses," even if that sometimes meant claiming the power to fill the void left by the omissions of the legislative branch.[71] Put differently, the Supreme Court adopted a progressively interventionist role in affairs of state, transforming itself from an "institution of state" in the 1950s and 1960s, performing a complicated balancing act vis-à-vis the executive and legislature in 1970s, until it became an "institution of governance" from the 1980s to the present.[72] Thus, contra the Rudolphs who argue that regulatory institutions generally pursue a role that is "more procedural than substantive, more rule-making and enforcing than law-making and policy-making,"[73] the Supreme Court exhibited two dispositions simultaneously. On the one hand, it adopted an interventionist role in promoting various socioeconomic rights by reinterpreting, justifying, and reinforcing their normative constitutional grounds. It thereafter sought to regulate the performance of various public institutions in light of their original mandates. On the other hand, it directly intervened in the domain of the executive, creating law itself.

Article 32, which provides an opportunity to petitioners to move the court on grounds that fundamental rights are violated or likely to be. Neither was at stake in this decision, however. Ironically, the judgment violated the separation of powers in the "basic structure doctrine" enunciated by the Court itself in Kesavananda. Ibid., 125–30.

[71] Dhawan, "Judges and Indian democracy," 326, 333, and 340 fn 1.

[72] Ibid., 334.

[73] See Rudolph and Rudolph, "Redoing the constitutional design," 129.

EXPLAINING THE PUZZLE OF PROGRESSIVE JUDICIAL ACTIVISM IN INDIA

What explains the striking political transformations of India's Supreme Court over the last six decades? In particular, how can we explain its increasing activist turn regarding socioeconomic rights since the late 1970s? Explaining these changes requires attention to questions of structure, agency, and conjuncture.

Constitutional design matters. In part the power of the Supreme Court—often called "the most powerful in the world"—is enshrined in the 1950 Constitution. The latter empowers the Court to adjudicate general appeals regarding fundamental rights and to resolve inter-jurisdictional conflicts, disputes of interpretation and civil law cases. Articles 131, 132, and 133 grant it "original, appellate and advisory jurisdiction over any dispute between the central and state governments, and between state governments,"[74] creating the institutional opportunities for greater judicial activism than is found in many other federal polities with a separation of powers.[75] Article 32 grants the Supreme Court original jurisdiction to enforce fundamental rights, conferring the power to issue "directions, orders or writs" that have the status of a ratio (ruling) towards chosen objectives, such as appointing committees and giving specific instructions,[76] while also allowing petitioners to approach the apex judiciary in the first instance, making it perhaps the most accessible in the world.[77] Finally, Article 141 makes the Court's decisions binding on all lower courts, Article 142 empowers the Court to "make such order as is necessary for doing complete justice in any cause or matter pending before it,"[78] and Article 143 grants it advisory jurisdiction regarding matters referred by the President.[79] Thus, although Ambedkar was both too optimistic in believing that poor voters would use the Directive Principles of State Policy to hold governments accountable "at election

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[74] Shankar and Mehta, "Courts and socioeconomic rights in India," 148.
[75] See Martin Shapiro, "The success of judicial review and democracy," in Martin Shapiro and Alec Stone Sweet, On Law, Politics and Judicialization (Oxford: Oxford University Press, 2002), 149–84.
[76] Sathe, Judicial Activism in India, 237–39.
[77] Madhav Khosla, "Making social rights conditional: Lessons from India," International Journal of Constitutional Law (forthcoming), 37. http://papers.ssrn.com/sol3/papers.cfm?abstract_id =1742746: Retrieved 1 May 2011.
[78] Rajamani and Sengupta, "The Supreme Court," 94 fn 38.
[79] Shankar, Scaling Justice, 32.

time" and too pessimistic for failing to see how the latter might indeed "have to answer for their breach in the court of law," Part IV of the Constitution furnished the necessary legal basis for progressive judicial activism.

These various constitutional provisions could not guarantee the latter, however. The Constitution did not give the Supreme Court a mandate to enforce socioeconomic rights.[80] During the 1950s and 1960s, facing a one-party-dominant system ruled by nationalist political elites who steered the commanding heights of the economy with the aim of legislating social transformation,[81] the Supreme Court acted conservatively as theories of juristocracy would expect. Moreover, against the view that federalism augments high judicial autonomy, the Court occasionally even weakened the Union at the behest of central political authorities. Its 1977 advisory opinion following the post-Emergency election of the Janata Party (JP) government, "permitting the dissolution of 9 state governments by the JP,"[82] is a well-known case. Hence Austin's biting critique of the "dilatory legal processes" of the Supreme Court in the early 1980s and its failure to assert "only intermittently the reach it does have [vis-à-vis the poor]."[83]

Absolutely crucial, thus, was judicial agency. According to one of its early pioneers, former Chief Justice P. N. Bhagwati, progressive socioeconomic jurisprudence "demands judicial statesmanship and high creative ability."[84] More dispassionate observers essentially agree: the growing institutional power of the Supreme Court rested to a significant degree on the decision of judges to assert their will imaginatively.[85] The activist turn of India's Supreme Court demonstrates that, in the end, "judicial review causes itself": "This is a way of saying that there is no such thing as the rule of law which is not also the rule of men, for men will decide what the law is."[86]

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[80] Khosla, "Making social rights conditional," 33 fn 2.
[81] Rudolph and Rudolph, "Redoing the constitutional design," 132.
[82] Mehta, "The rise of judicial sovereignty," 77.
[83] Granville Austin, Working a Democratic Constitution: A history of the Indian experience (New Delhi: Oxford University Press, 2003), 663–64; italics mine.
[84] Quoted in S.P. Gupta v. President of India (1981), cited by Sathe, Judicial Activism in India, lxxxvi.
[85] Unless otherwise noted, the following draws on Shankar and Mehta, "Courts and socioeconomic rights in India," 148–49.
[86] Mehta, "The rise of judicial sovereignty," 78–79.

But what provoked the high justices to act in the late 1970s? Their precise motivations, suffice it to say, have fuelled much informed speculation. On the one hand, some view their progressive turn as the result of slow imperceptibly accumulating change until it reached a tipping point. According to Sathe, it became inevitable after the Court enunciated the "basic structure doctrine"—"those enduring values that constitute the essence of constitutionalism" that appealed to the principles and values articulated in the Preamble of the 1950 Constitution. In other words, once it started, "the Court could not stop…"[87] Sathe concedes, however, that "judicial activism of the post-emergency period might have been inspired by the emergency experience. The Court might have realized that its independence and neutrality towards various political formations depended upon the support of the people."[88]

Indeed, most scholars agree with the latter sentiment. Baxi argues that early judicial activism was a moment of "catharsis," which attempted to restore the image of the court after the Emergency and to give judicial power a "new historical basis of legitimation."[89] Minimally, this required the Court "to atone for its mistake in deciding the infamous habeas corpus case"[90] and its members "to compensate for their failure to defend democratic principles during the 1975–77 emergency [by] avidly [taking] up the task of preserving the republic."[91] More expansively, the Emergency compelled the apex judiciary, whose prior jurisprudence "had been essentially of…property owners, princes, political leaders, and at the most the civil servants,"[92] to protect the most vulnerable. Indeed, the justification for the Emergency and its aftermath furnished a basis for high

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[87] Sathe, Judicial Activism in India, 13, 99.
[88] Ibid., 6, 12.
[89] Ibid., 107. The Baxi quote is from the essay, "Taking suffering seriously: Social action litigation in the Supreme Court of India," in V. R. Krishna Iyer, Rajeev Dhawan, R. Sudarshan, and Salman Khurshid, eds., Judges and the Judicial Power: Essays in honour of Justice V. R. Krishna Iyer (Bombay: M. N. Tripathi, 1985), 289–94. Although Sathe asserts that "we have no evidence" for such a claim, he nonetheless states that India's apex judiciary had "to overcome the negative image it had acquired because of its decision in the…Fundamental Rights case." See Judicial Activism in India, 107, 100.
[90] Balakrishnan Rajagopal, "Pro-human rights but anti-poor? A critical evaluation of the Indian Supreme Court from a social movement perspective," Human Rights Review 18, 3 (April–June 2007), 159.
[91] Mehta, "The rise of judicial sovereignty," 79.
[92] R.C. Cooper v. India AIR 1970 SC 564 and Madhavrao Scindia v. India AIR 1971 SC 530. See Sathe, Judicial Activism in India, 258.

judicial activism. Mrs. Gandhi had justified authoritarian rule by invoking the need for radical social change. In particular, she had depicted judicial review as a threat to parliamentary sovereignty. Yet the most brutal lesson of the Emergency was the need to protect basic political liberties and civic freedoms in order to ensure economic development with social dignity. It was the arbitrariness, coercion, and brutality of measures pursued ostensibly in the name of the poor—especially slum clearance projects and compulsory sterilization programs[93]—that led the majority of the electorate to throw Mrs. Gandhi out of power in 1977 after the Sixth General Election. Hence it is unsurprising that public interest litigation in the early 1980s focused on violations of fundamental civil liberties and perceived socioeconomic rights, and the intimate nexus between them. Concerted judicial reflection upon the lessons of the Emergency was a necessary condition for its own progressive turn. Put differently, Mrs. Gandhi's decision to end the Emergency with an election constituted a critical juncture, expanding the opportunities for deliberate political agency. The sudden fluidity of power enabled the most dynamic justices of the Supreme Court to exploit the tensions between Parts III and IV in the Constitution.

Still, it was insufficient. A second factor guiding its actions, which many leading observers stress, was the priority of the ruling establishment. Mrs. Gandhi's plebiscitarian populist politics in the 1970s captured by the slogan garibi hatao (abolish poverty) raised social expectations that other institutions of state could not ignore. As discussed above, the Supreme Court responded to parliamentary attacks on judicial review in these years by articulating a supplementary relationship between the Directive Principles and fundamental rights. The fact that Mrs. Gandhi's Twenty-Point Program during the Emergency included the promise to abolish bonded labor and provide legal aid gave the Supreme Court a pretext and impetus to act towards such goals.[94] Similarly, others argue that the Court's progressive turn suited the populist inclinations of Indira Gandhi and

[93] See Emma Tarlo, Unsettling Memories: Narratives of the Emergency in Delhi (London and Berkeley: Hurst and University of California Press, 2003).
[94] Sathe, Judicial Activism in India, 263.

subsequently her son Rajiv during their respective tenures in the 1980s.[95] In fact, these years saw a marked expansion of antipoverty programs under her rule, as well as official encouragement for the idea of a NGO-led "third sector."[96] And the rhetoric against everyday political corruption employed by Rajiv Gandhi, despite the eventual blowback on his administration in the later 1980s, legitimated such claims in high political discourse. Hence Shankar depicts the justices of the Supreme Court justices as "embedded negotiators," seeking to balance the framework of law, institutional norms, political influences, and public concerns. Specifically, they advocated social rights partly because they wanted to avoid a clash with Mrs. Gandhi after her return to power in 1980. "The court was loath to overturn government orders or laws, and supported only those social rights that had legislation backing them."[97] In contrast, addressing anti-terror legislation would have risked a backlash given the strict constitutional limits imposed upon judicial action regarding prevention detention. The Supreme Court was keen to avoid a repeat of its suppression during the Emergency.[98] Tellingly, some of the most activist judges on the Court in the early 1980s, such as former Chief Justice P. N. Bhagwati, were also accused of being conspicuously favorable towards Mrs. Gandhi.[99] The fact that she became increasingly distracted in the early 1980s by growing communal

[95] For example, Mehta, "The rise of judicial sovereignty," 73; Rudolph and Rudolph, "Redoing the constitutional design," 134; Shankar and Mehta, "Courts and socioeconomic rights in India," 178.
[96] See Corbridge et al., Seeing the State, 47–86; Rob Jenkins, "Non-governmental organizations," in Niraja Gopal Jayal and Pratap Bhanu Mehta, eds., The Oxford Companion to Politics in India (New Delhi: Oxford University Press, 2010), 427.
[97] Shankar, Scaling Justice, 144, 149.
[98] Article 22 (3)–(7) permits preventive detention during peacetime and limits the jurisdiction of the courts regarding its content, grounds and procedures. Ibid., xix, xiv fn 7, 20.
[99] Justice P. N. Bhagwati had joined a five-judge majority bench in 1976 that infamously upheld Mrs. Gandhi's view that the right to life stood abrogated during the Emergency; he then criticized her following the formation of the Janata Party in 1977, only to sing her virtues upon her return to office in 1980: "I am sure that your iron will and firm determination, uncanny insight and dynamic vision, great administrative capacity and vast experience, overwhelming love and affection of the people and above all, a heart which is identified with the misery of the poor and weak, you will be able to steer the ship of nation safely to its cherished goal." He later admitted regret for the 1976 ruling. See Maneesh Chibber, "35 yrs later, a former Chief Justice of India pleads guilty," Indian Express, 16 September 2011.

violence in Punjab, the Northeast and other parts of the country—due at least in part to her own cynical political actions—arguably strengthened their calculus of decision.[100]

That said, both Congress administrations in the 1980s also inaugurated a rightward turn that cuts against the preceding interpretation. Economically, Mrs. Gandhi oversaw a "pro-business tilt" that emphasized high economic growth after 1980, in stark contrast to her previous economic policies.[101] Her administration deregulated key economic sectors and enabled private sector expansion more generally by lowering corporate taxes and creating a framework for private equity markets. It discouraged labor activism and new investment in public sector enterprises. And public spending on primary education and public healthcare, despite the expansion of antipoverty programs, began to decline.[102] Politically, Mrs. Gandhi stoked communal anxieties in Jammu and Kashmir, Assam and Punjab for cynical short-term ends, creating an opening for ascendant cultural nationalists that ultimately led to her assassination in 1984. Rajiv Gandhi intensified the direction of these economic changes, both ideologically and in terms of policy, leading Kothari to lament the growing "amnesia" of the urban middle classes towards the struggles of the poor majority.[103] Significantly, these political shifts and policy changes at the Centre were coterminous with the rise of public interest litigation defending socioeconomic rights.

Consequently, to fully explain the timing, focus, and sequence of the progressive judicial activism in India, we need to examine the moment of conjuncture more closely. In particular, we need to recognize a third factor of progressive judicial activism in the 1970s that has largely been neglected in recent scholarly debates,[104] namely the upsurge of oppositional "non-party political movements" in civil society that arose before the Emergency and expanded in number and strength following its defeat.[105] Some of these

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[100] Sathe, Judicial Activism in India, 263.
[101] See Atul Kohli, Poverty amid Plenty in the New India (Cambridge: Cambridge University Press, 2012), chapter 1.
[102] Ibid.
[103] See Rajni Kothari, Growing Amnesia: An essay on poverty and the human consciousness (Ann Arbor: Michigan University Press, 1993).
[104] Besides Baxi, a recent exception is Sibal, "From 'niti' to nyaya'," 32.
[105] See Rajni Kothari, "The nonparty political process," *Economic and Political Weekly*, 19, 5 (4 February 1984): 216–24. For a critique of Kothari, on the ground that these new political groups engaged in parties and formal political institutions in order to advance their causes, see Amita

new social actors—ranging from local grassroots organizations and urban NGOs to broad social movements—arose in the early to mid-1970s. The Movement for Total Revolution (sampoorna kranti), led by the eminent socialist leader Jayaprakash Narayan, was arguably the most important. According to Baxi, most judicial scholars neglect its impact, which has been "almost permanently erased in constitutional and public memory" by the Emergency.[106] Yet it is hard to miss the striking resonance between its main political demands and the progressive jurisprudence of the Supreme Court from the late 1970s through the early 1980s.

Narayan's call for "total revolution" in June 1975, which Mrs. Gandhi used to justify Emergency rule, invoked a revolutionary society based on lok shakti (people power). The so-called JP movement pledged to end corruption, communalism, and class and caste conflict through "continuous mass action." It had two immediate legacies. First, the eminent leader forged several disparate party organizations into the Janata Party, which came to power as the first non-Congress government since Independence. The title of its manifesto, 'BOTH BREAD AND FREEDOM: A Gandhian Alternative', captured its aim: "It is a choice between freedom and slavery; between democracy and dictatorship.… Bread cannot be juxtaposed against liberty. The two are inseparable." Politically, the JP movement had pledged to restore judicial independence and the rule of law as well as fundamental liberties of speech, assembly, and the press; to repeal the Maintenance of Internal Security Act (MISA), release all political prisoners, rescind the 42nd Amendment, amend Article 352, and move to amend Article 356; and to consider the right to recall. Economically, it promised to delete property as fundamental right, affirm the right to work, stress the welfare of the poorest, and focus on rural development through agrarian growth, wage goods production, and small-scale and cottage industries. Socially, it swore to eradicate illiteracy, universalize access to safe drinking water, health insurance, public housing, and social security, create new commissions to guarantee minority and civil rights, and implement reservations for "weaker sections." In sum, it envisioned a "new society" that was "free and just."[107]

Baviskar, "Social movements," in Niraja Gopal Jayal and Pratap Bhanu Mehta, eds., The Oxford Companion to Politics in India (New Delhi: Oxford University Press, 2010), 384.

[106] "The (im)possibility of constitutional justice," 48.

[107] See Janata Party Election Manifesto 1997.

Moreover, although it lasted a mere two years in office due to a "squabbling gerontocratic triumvirate" at the helm, the Janata Party restored the rule of law and basic democratic freedoms through significant constitutional amendments. Rajagopal claims that it was politically acceptable for the Supreme Court to focus on human rights violations in the late 1970s for two reasons: it was "riding a human rights wave," and the Janata Party, in power from 1977 to 1979, was politically weak.[108] Both were partly true. Apart from high-level factionalism, the growing demands of students and labor and a police revolt against poor working conditions in seven Janata Party–ruled states created an "impression of a dangerous drift, a galloping anarchy, especially to the vocal middle classes."[109] Nonetheless, it might be more accurate to follow Austin and say, "It achieved wondrously and failed miserably."[110] It was the Janata Party government that reestablished democratic rule, appointing the Shah Commission to document abuses that had occurred during the Emergency under MISA and passing the 43rd and 44th amendments to the Constitution. Significantly, the latter restored a five-year term to parliament and the state legislative assemblies, as well as the right of Supreme Court to adjudicate all elections, while making it far more difficult either to impose President's rule or to declare an Emergency.[111] Thus it was the explicit political actions of the Janata Party and its general signaling, not political uncertainty, that bolstered the cause of progressive judicial activism at a critical turning point in India's democratic life.

Second, the growing "human rights wave" of the 1970s had a synergistic relationship with the JP movement. It catalyzed an expanding public sphere, encouraging the formation of new social organizations into the 1980s. In fact, various NGOs had played a crucial role in fomenting the protests that led to the declaration of Emergency, while their participatory techniques and rural development programs influenced the Janata Party in office.[112] Directly, the JP movement bequeathed two important legacies, the People's Union for Civil Liberties and the People's Union for Democratic Rights,

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[108] Rajagopal, "Pro-human rights but anti-poor?" 159–60.
[109] Nivedita Menon and Aditya Nigam, Power and Contestation: India since 1989 (Hyderabad: Orient Longman, 2008), 6.
[110] Austin, Working a Democratic Constitution, 481.
[111] Ramachandra Guha, India after Gandhi: The history of the world's largest democracy (New Delhi: HarperPerennial, 2008), 538.
[112] Jenkins, "Non-governmental organizations," 427.

which immediately after Mrs. Ghandi returned to power in 1980 campaigned against rape, dowry deaths, and sex selection.[113] In subsequent years, both groups' portfolios greatly would expand to encompass other issues. Indirectly, the mass political mobilization of the mid 1970s in north India opened political space for many other "nonparty political organizations" to assert their claims, deepening the ranks of a burgeoning civil society. These organizations ranged from popular environmental movements (such as the Narmada Bachao Andolan in Madhya Pradesh, Gujarat, and Maharashtra, the Kerala Sastra Sahitya Parishad-led campaign against the Silent Valley dam,[114] the spread of the Chipko movement from Uttarakhand to other regions, and the formation of urban-based NGOs such as the Centre for Science and Environment in the 1980s)[115] to grassroots movements demanding greater political accountability in the 1990s (such as the Mazdoor Kisan Samiti Sanghathan, MKSS, whose path-breaking activism in local Rajasthan eventually inspired a national political campaign that spurred the legislation of the Right to Information Act in 2005). The fact that media coverage of high judicial decisions leapt after the Emergency surely helped.[116]

Determining the precise causal nexus between popular social activism and progressive judicial decision-making demands rigorous case-by-case analysis. A strong thesis would require microlevel process tracing showing how particular social campaigns directly influenced Supreme Court judgments against possible counterfactuals. Whether the social campaigns emerged largely in response to growing judicial activism or independently or whether the rise of social activists and activist judges galvanized each other in reciprocal fashion requires careful elucidation. Yet it is easy to defend a more diffuse argument, namely that concerted social mobilization in civil society was a necessary, if insufficient, condition of greater judicial activism. Simply put, the 1980s witnessed a massive increase in India in the number of NGOs alone, with estimates ranging between 50,000 and 100,000.[117] Perhaps more to the point, the Supreme Court

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[113] Katzenstein et al., "Social movement politics in India," 249.
[114] Baviskar, "Social movements," 384.
[115] Sibal, "From 'niti' to nyaya'," 32 fn 30. According to Jenkins, the "environmental action group" Dasholi Gram Swaraj Sangh "kickstarted" the Chipko movement in the early 1970s. See "Non-governmental organizations," 426.
[116] Sathe, Judicial Activism in India, 284.
[117] See Rudolph and Rudolph, "Redoing the constitutional design," 137.

justices' progressive juridical interpretations of the Directive Principles and their use of public interest litigation would have been exceedingly difficult without "public spirited individuals" acting as third-party litigants. The fact that the relaxation of locus standi occurred in 1982, after the early groundswell of critical social activism, lends further credibility to the argument. As Baxi asserts, there is a need to uncover the "unacknowledged histories of social movements that serve as midwives to judicial activism."[118]

What extended the possibilities of high judicial activism—as opposed to creating it[119]—was the diffusion of power that marked India's democratic politics after 1989. It had many distinct causes; its ramifications were many too. The increasing electoral participation of historically subordinate groups, who began to vote in higher numbers relative to more privileged sections and express their grievances through vernacular conceptions of social justice, undermined the alignments and broadened the discourses that had previously configured the party system. The proliferation of new state-based parties, often representing lower-caste groups and peripheral regions, diminished the relative electoral power of national political formations. High electoral volatility and minority coalition governments ensued. And economic liberalization devolved power to the states, created new arenas of prosperity, and empowered the rise of the corporate capitalist class, whose values, beliefs, and desires acquired social legitimacy amongst the aspiring middle classes of metropolitan India. Yet these reforms also engendered growing social inequalities across classes, sectors and regions and produced new opportunities for rent-seeking and corruption, feeding the avarice of an ever more assertive corporate sector and mendacious political class. In short, the simultaneous fragmentation of power in the electoral system, democratization of status in the social order, and concentration of wealth in the economy created unprecedented political uncertainty.

These massive changes enabled the apex judiciary to expand its purview and deepen its institutional self-confidence vis-à-vis parliament and government. On the one hand, its growing power in the early 1990s was a deliberate concession by party elites, keen to "to legitimize unpopular decisions that they did not have the courage to take and

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[118] Baxi, "The (im)possibility of constitutional justice," 48.
[119] See Rudolph and Rudolph, "Redoing the constitutional design."

to avoid taking decisions that were likely to incur unpopularity." As a result, the political establishment itself began to refer more questions to the Court. The two most important concerned the reservation of 27 percent of public sector posts for Other Backward Classes, as stipulated by the Mandal Commission Report, and the question of whether to rebuild the Babri masjid (mosque) after its destruction by militant Hindu nationalists in Ayodhya.[120] Yet the mounting institutional dominance of the Supreme Court, most vividly its declaration that it had the final say over its own composition, manifestly revealed its will to power. According to Mehta, the demise of single-party majority Union governments partly explains why "the 1990s saw no full-scale parliamentary assault on the courts' interpretation of what the 'basic structure' doctrine require[d]."[121] Moreover, as the Rudolphs point out, the Supreme Court was not the only organ of state to acquire greater institutional clout as a result. The Election Commission and the Presidency, key regulatory bodies that had formerly played minor roles, also began to assert their powers in the 1990s.[122] All three institutions found themselves working together to counter the excesses of political society in many instances. The diffusion of power in India witnessed over the last twenty years has allowed such regulatory institutions to check and balance the legislature and executive with greater vigor. The Supreme Court has led but also benefited from this wider political upheaval.

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[120] Sathe, Judicial Activism in India, 247, 263, 272. In Indra Sawhney v. Union of India (1993) SC 477, a nine-person bench of the Supreme Court led by Justice Jeevan Reddy upheld the following implementation of the Second Backward Classes Commission Report (also known as the Mandal Commission after its head, B. P. Mandal) by the V. P. Singh-led National Front Government. The majority opinion recognized caste as a legitimate criterion for belonging to a backward class; accepted a reservation of 27 percent of seats in the central administrative services and higher educational institutions for Other Backward Classes (OBCs) as well as an upper 50 percent ceiling for all reservations; but excluded better-off members of the OBCs from its purview and rejected the 10 percent reservation for economically backward sections not covered by the Report, which had been added by the subsequent Congress administration of Narasimha Rao. For legal analysis, compare B. Sivaramayya, "The Mandal judgment: a brief description and critique," in M. S. Srinivas, ed., Caste: Its twentieth-century avatar (New Delhi: Penguin, 1996), 221–43, with Sathe, Judicial Activism in India, 274–75.

[121] "The rise of judicial sovereignty," 75.

[122] Rudolph and Rudolph, "Redoing the constitutional design."

A PROGRESSIVE JURISTOCRACY?

The unexpected socioeconomic activism of India's Supreme Court since the late 1970s, particularly its antecedent conditions and successive causal mechanisms, merit renewed scholarly attention. Nonetheless, it raises an obvious question. What have the vaunted procedural innovations and ingenious substantive reinterpretations of the Court achieved? The apex judiciary has received much criticism in recent years from even sympathetic observers. For good reason: its actual record in realizing social justice belies the cherished image held by champions of India's apex judiciary. Two critiques dominate intellectual debate.

The first, and most severe, comes from Epp. On the basis of a widely praised study of incipient "rights revolutions" in India, Canada, Britain, and the United States, he concludes: "The Indian Supreme Court clearly tried to spark a rights revolution—but little happened."[123] According to Epp, the prospects for such a transformation in India were propitious, given its progressive constitutional framework, growing rights consciousness, and the widely recognized activism of its Supreme Court in the late 1970s.[124] Yet he argues that the Court's egalitarian judicial activism, specifically the attempt to uphold due process rights for criminal defendants and prisoners and to protect equal treatment for women, failed to extend much beyond the 1970s.[125] The reason was the lack of a "support structure for legal mobilization, consisting of rights-advocacy organizations, rights-advocacy lawyers, and sources of financing, particularly government-supported financing," which undermined the potential of high progressive jurisprudence.[126] In particular, the fragmentation of India's interest groups on grounds of caste and gender, the lack of cooperation amongst legal professionals and the limitation of resources for noneconomic, appellate litigation thwarted the attempt "to develop a sustained and deep agenda on individual rights."[127] Ultimately, "rights are not gifts: they are won through concerted collective action arising from both a vibrant civil society and

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[123] Charles R. Epp, The Rights Revolution: Lawyers, activists and Supreme Courts in comparative perspective (Chicago: University of Chicago Press, 1998), 71.
[124] Ibid., 71–89.
[125] Ibid., 91–95.
[126] Ibid., 2, 17–18.
[127] Ibid., 101.

public subsidy…through an interaction between supportive judges and the support structure for rights-advocacy litigation."[128]

This is a serious argument: the absence of concerted "legal mobilization" from below, many would agree, weakened the immediate reach of high judicial activism in India. But the narrow level, basis and scope of Epp's analysis mitigate its severe conclusion. He identifies three components of a "rights revolution" with particular emphasis upon the first: "judicial attention" (the proportion of cases decided by a court in a given year); "judicial support" (the general direction of court policies); and "implementation" (the extent to which courts issue subsequent decisions that elaborate or enforce previous judgments).[129] Despite its importance, defining "judicial attention" as the number of cases in court dockets and counting these cases as evidence of a "rights revolution" conflates the two.[130] Second, the scope of Epp's analysis inevitably neglects how landmark judicial decisions on wider matters encompassing labor, health, and the environment supported wider rights-based claims in electoral politics and civil society, encouraging political mobilization and social mobilization if not concerted "legal mobilization." Indeed, his analysis begins in 1965 and ends in 1990, just when India's Supreme Court seriously begins to link many socioeconomic rights violations to systematic political corruption and to subject the latter to its gaze. Finally, despite his criticism of judge-oriented explanations of "rights revolutions,"[131] ironically his measure of success is what judges do. In sum, Epp offers an important argument to explain the failure of high judicial activism in India to mount a high-level offensive vis-à-vis violations against women or to protect due process rights for criminal defendants, but given his terms of analysis, his sweeping conclusion is perhaps overdrawn. At the very

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[128] Ibid., 197. For analyses of the rise of conservative legal mobilization in the United States that employ a similar approach, see Lee Epstein, Conservatives in Court (Knoxville: University of Tennessee Press, 1985), and Steven M. Teles, The Rise of the Conservative Legal Movement: The battle for control of the law (Princeton: Princeton University Press, 2008).
[129] Epp, The Rights Revolution, 7–8.
[130] See Stacia L. Haynie, "Review of The Rights Revolution: Lawyers, activists, and Supreme Courts in Comparative Perspective," The Journal of Politics 61, 4 (November 1999), 1229; and Carl F. Stychin, "Book Review: The Rights Revolution: Lawyers, activists, and Supreme Courts in Comparative Perspective," Social & Legal Studies 9, 3 (2000), 460. It should be noted, however, that both reviews are generally positive.
[131] Epp, The Rights Revolution, 15.

least, the conclusion illuminates the hazard of strict comparative evaluations that employ limited descriptive indicators to operationalize causal variables and the explanandum.

Admittedly, several other scholars who examine the longer record of the Indian Supreme Court regarding other issues reach a similar conclusion. In fact, the Court's overall impact in improving and ensuring the provision of the most basic elements of public health and primary education has been "limited" and "indirect."[132] Between 1950 and 2006, only 382 of a total of 1,158,303 cases heard by the apex judiciary and high courts in India concerned health and education. Despite expanding access to certain services and the shaping of new policies in public health, notably regarding HIV-AIDS, "few cases dealt with poor access to medicines by vulnerable groups" or the quality of services provided. Indeed, public interest litigation only featured in one fifth of the health-related cases and has been concentrated in urban areas and richer states. The record of high judicial activism regarding educational matters has proven better. The courts have sought to enforce their rulings through more specific timelines and better monitoring systems. Nevertheless, even here public interest litigation has focused disproportionately on non-primary education and in urban areas and richer states. The quality of teaching in primary schools has rarely, if ever, been the focus of jurisprudence. In sum, the direct material effects of high judicial activism in India on these critical basic provisions for human development, whether through a higher incidence of rulings, bureaucratic action to discharge prior obligations, or the formulation of new government policy, have been underwhelming.

Yet such effects are merely one, albeit obviously critical, way to assess judicial activism. Following Rodriguez-Garavito, we might expand our vision of such activism to encompass "indirect material effects" such as the intervention of new actors into the judicial arena or policy debate, "direct symbolic effects" such as prompting greater media coverage, and "indirect symbolic effects" such as reframing public discourse.[133] Or as McCann puts it, even when high judicial precedent fails to generate immediate policy changes or institutional reforms, it nevertheless may have "radiating effects," providing a

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[132] The following details are from Shankar and Mehta, "Courts and socioeconomic justice in India," 152–63.

[133] César Rodriguez-Garavito, "Beyond the courtroom: The impact of judicial activism on socioeconomic rights in Latin America," Texas Law Review 89, 7 (2011): 1669–98.

new strategic "club" to compel political concessions and a potent symbolic resource that stirs pacified discontent, expands public debate, and reconstitutes actors' self-understandings. In other words, judicializing particular entitlements may enlarge the possibilities for new rights claims.[134] Ideally, the apex judiciary may engage in "dialogic activism" that "elicits collaboration among the different branches of power and promotes deliberation on public issues."[135]

As the preceding discussion sought to illustrate, high judicial activism in India has produced these wider effects in civil society and the public sphere. As Sathe observes, the willingness of the Indian Supreme Court to articulate a new status for non-enforceable fundamental rights in the late 1970s spurred civic awareness and political mobilization: "Political action may use judicial intervention for legitimizing its claims and judicial discourse may spur political action for securing certain claims. Each one catalyzes and also complements the other."[136] Admittedly, the pace and impact of dialogic socio-legal activism in India has been slow, uneven, and diffuse; a source of tremendous frustration for its proponents. Nevertheless, from the start it has engaged a diversity of local activist groups, domestic NGOs, and wider grassroots movements. Social activists and activist judges have jointly forged a "rhetoric of rights" that has simultaneously provided "an organizing principle for social action"[137] and progressive jurisprudence.

Moreover, virtually all of India's new rights-based acts credit prior landmark judgments by the Supreme Court. The Right to Information Act, 2005, explicitly notes the legal precedents set by State of Uttar Pradesh v. Raj Narain & Ors (1975), S.P. Gupta v. Union of India (1982), and Express Newspapers Pvt. Ltd. & Ors v. Union of India & Ors (1985), all of which declared that the fundamental right to freedom of speech guaranteed under Article 19(1)(a) turned on the right of all citizens to know about the activities of the state.[138] Similarly, a series of orders by the Supreme Court regarding the

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[134] See Michael W. McCann, Rights at Work: Pay equity reform and the politics of legal mobilization (Chicago: University of Chicago Press, 1994), 138–226.
[135] Rodriguez-Garavito, "Beyond the courtroom," 1688.
[136] Sathe, Judicial Activism in India, 14, 120.
[137] Doris Marie Provine, "Revolutionizing rights: Epp's comparative perspective," Law and Social Inquiry 24, 4 (October 1999), 1126.
[138] (1975) SCR (3) 333, (1982) AIR SC 149, (1985) SCR Supl. (3) 382. The RTI Act also mentions India v. Association for Democratic Reforms (2002) AIR 2112; 2002 (3) SCR 696.

need for nutrition-related schemes and open-ended employment in People's Union for Civil Liberties v. the Union of India and others galvanized the subsequent passage of the National Rural Employment Guarantee Act (2005).[139] Perhaps most obviously, the so-called Right to Education Act (2009) traces its lineage from the famous earlier verdict of the Supreme Court in Mohini Jain v. State of Karnataka (1992), making primary education a fundamental right of all citizens. Undoubtedly, these judicial rulings were not solely responsible for subsequent legislative achievements; far from it. However, they constituted a powerful impetus for extending a right to basic socioeconomic goods, creating political incentives for metropolitan social activists and grassroots social movements to press party politicians for national legislative change.

Indeed, such legal precedents are significant. According to Chatterjee, the distinction between rights and entitlements in India's postcolonial democracy found its manifestation in the distinction between a bourgeois "civil society" and a subaltern "political society."[140] In the former, urban middle classes appealed to their universal individual rights as equal democratic citizens, protected by law. In the latter, however, a domain that transgressed the law or lay beyond its reach, historically subordinate groups made strategic claims to welfare as members of distinct population groups. As a result, the entitlements secured by the subaltern classes in political society were always negotiated, provisional, and limited. Thus, the decision to enact a right to basic socioeconomic entitlements in contemporary Indian democracy challenges the ostensible disjuncture between the rights available to members of civil society and the welfare conditionally given to inhabitants of political society. More: it challenges the distinction made between civic and political rights versus social and economic entitlements in the Constitution. Hence some observers speculate that a key reason why the architects of these recent national acts in India formulated their provisions in the language of rights was to ensure the continuing vigilance of the judiciary.[141]

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[139] Writ Petition (Civil) 196/2001. See Reetika Khera, ed., Battle for Employment Guarantee (New Delhi: Oxford University Press, 2011).
[140] See Partha Chatterjee, The Politics of the Governed: Reflections on popular politics in most of the world (New York: Columbia University Press, 2004).
[141] I thank Yamini Aiyar for emphasizing this point to me.

The second criticism of high judicial activism in India, less surprisingly, concerns its inconsistent progressive record. Evidence exists across various domains. Numerous rulings by the Supreme Court in the 1990s weakened the thrust of the 73rd and 74th amendments, which sought to empower local elected representatives over state bureaucrats.[142] The subsequent decade saw a number of decisions that restricted the rights of labor, tenants, and students. In 2002, the apex judiciary decided against workers trying to stop the disinvestment of a loss-making public sector undertaking on grounds that government had a right to set economic policy,[143] while in 2003 the Court upheld the dismissal of large numbers of public sector employees by the state government of Tamil Nadu on grounds that the former had no "fundamental, legal, moral or equitable rights to strike."[144] Similarly, Malpe Vishwanath Acharya v. Maharashtra (1998) and Joginder Pal v. Naval Kishore Behal (2002) saw the apex judiciary uphold the rights of urban landlords under Article 19(1)(g), undercutting the Bombay Rent Control Act.[145] And in T.M.A. Foundation v. Karnataka (2002), the Court decided that unaided private educational institutions were free to charge any fee as long as it was not "excessive" or "discriminatory." Yet the apex judiciary failed to specify any criteria to determine the latter.[146] According to Shankar, the Supreme Court in general took a less progressive stance towards the provision of education and health after economic liberalization began in earnest. Specifically, it was 17 percent less likely to favor litigants against the state, revealing a trend of "conservatism and collaboration" with the new policy dispensation.[147]

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[142] Mehta, "The rise of judicial sovereignty," 80.
[143] Balco Employees Union (Registered) v. India (2002) 2 SCC 333, cited by Sathe, Judicial Activism in India, lviii–lx. Sathe defends the judicial verdict. However, he raises the possibility of intervention on grounds that unemployment in a society marked by deep material poverty and bereft of social security might demand judicial intervention.
[144] T.K. Rangarajan v. Government of Tamil Nadu & Ors (2003). See John Harriss, "How far have India's economic reforms been guided by 'compassion and justice'?" in Sanjay Ruparelia, Sanjay Reddy, John Harriss, and Stuart Corbridge, eds., Understanding India's New Political Economy: A Great Transformation? (London: Routledge, 2011), 137.
[145] Article 19(1)(g) provides for right to practice any profession, or to carry on any occupation, trade or business. (1998) 2 SCC 1 and (2002) 5 SCC 397. Rajagopal, "Pro-human rights but anti-poor?" 163.
[146] (2002) 8 SCC 481. Sathe, Judicial Activism in India, lvi.
[147] Shankar, Scaling Justice, 166. According to Shankar, the fading memory of the Emergency in the minds of the justices and (contra Rajagopal) their heightened awareness of the cost of providing new entitlements in the context of general economic crisis were likely determinants of these results.

Cumulatively, these examples suggested that high judicial activism had retreated from its more egalitarian posture of the 1980s.

Indeed the rise of controversial environmental decisions by the Court in the late 1990s, which historically had enjoyed progressive jurisprudence, exemplified a more conservative trend. In 2000, the Narmada Bachao Andolan, a grassroots social movement that aimed to stop the building of the Sardar Sarovar dam across the Narmada river, had appealed to the Supreme Court not to allow further construction of the disputed Sardar Sarovar dam. The movement claimed that continuing construction would forcibly evict local tribal communities, thereby violating Article 21 read in conjunction with ILO Convention 108, to which India was a party. The Court rejected their argument, however. In addition to pronouncing that "the displacement of these people [local tribal communities] would undoubtedly disconnect them from their past, culture, custom and traditions, but then it becomes necessary to harvest a river for the larger good," the justices further justified their decision by stating that "the displacement of the tribals…would not per se result in the violations of their fundamental or other rights.… At the rehabilitation sites, they will have more and better amenities than which they enjoyed in their tribal hamlets. The gradual assimilation in the mainstream of the society will lead to betterment and progress."[148] In general, the Supreme Court's decisions in environmental matters were mainly confine to scrutinizing whether government decision-making had taken into account "all the relevant aspects of the case." Technically, the Court performed judicial review of administrative action, which entailed balancing the claims of environmental sustainability vis-à-vis developmental needs. Yet the decision of the Supreme Court in Narmada Bachao Andolan v. Union of India & Ors (2000), on grounds that all the concerned governments' affidavits had outlined rehabilitation for the affected, discounted the fears of the most vulnerable parties to the dispute. The apex judiciary went further. It tried several prominent leaders of the movement (Medha Patkar, Prashant Bhushan, and Arundhati Roy), who had expressed strident criticism and staged a

[148] Narmada Bachao Andolan v. Union of India and Ors (2000) 10 SCC 664. See Rajagopal, "Pro-human rights but anti-poor?" 157–86.

dharna (sit-in) in response to the verdict, for contempt of court.[149] In 2005, the apex judiciary offered a more favorable ruling on procedural grounds. It was small consolation, however. Despite previous injunctions by the Court and its rationale for allowing the height of the Sarovar dam to be raised, many of the displaced had still not been resettled.[150]

There is no gainsaying the preceding trend in the 1990s. Genuine debate exists over its causes, however. Several commentators grant that as the apex judiciary has transformed into an "institution of governance," it has increasingly adopted the vantage and ideology of executive office-holders. Scholars differ in their assessment of the origins and consequences of this transformation, however. According to Mehta, the record of the Indian Supreme Court suggests a self-conscious attempt to develop a "modus vivendi" and strike political accommodations rather than enunciate precise, coherent, value-driven jurisprudence. The judicialization of politics begat the politicization of the judiciary: they are two sides of the same coin.[151] Rajagopal concurs to a degree. But he attributes the reluctance of the apex judiciary to proclaim radical jurisprudence to others factors: on the one hand, to the privileged social background and political outlook of its justices and their gradual internalization of the goals and methods of "statism" and "developmentalism" that characterized the post-Nehruvian Indian state; on the other, to the "structural bias" given to civil liberties and political rights in the Constitution of India, and because the conceptualization of social, economic, and cultural rights in international legal discourse makes their "progressive realization" dependent on "adequate resources" generated either by "state capacity" or "market provisioning." Indeed, Rajagopal argues that high judicial activism in India became more regressive after the introduction of liberal economic reforms, as Hirschl might expect.[152] Dhawan

[149] In N.B.A. v. India (1998) 5 SCC 586 and in re Arundhati Roy (2002) 3 SCC 343. Sathe, Judicial Activism in India, lxxviii–lxxxiii. Sathe defends the petitioners for questioning the integrity of the justices on grounds that an activist judiciary should be held accountable.
[150] Rajagopal, "Pro-human rights but anti-poor?" 162–63.
[151] Mehta, "The rise of judicial sovereignty," 76. See also Rajamani and Sengupta, "The Supreme Court," 90.
[152] Rajagopal, "Pro-human rights but anti-poor?" 165–74; Hirschl, Towards Juristocracy. A telling piece of evidence against the social background of the justices, according to Rajagopal, is that it was the lone Dalit member of the Court, Justice K. Ramaswamy, who decided the majority of

agrees: the Supreme Court's turn to questions of corruption in the 1990s reflected its "less[er] concern about social justice issues."[153] In short, all these reasons underscore the risk progressive voices take by assuming the Supreme Court has a single political disposition over time and allowing it to supersede the executive and legislature.

What should we make of this second critique? First, it is clear that civil liberties and political rights enjoy a "structural bias" in the Constitution. Chandhoke is right: high judicial activism in India is inherently "self-limiting," since it responds to appeals to the Constitution, which rules out radical measures.[154] Still, compared to their prior jurisprudence and to the record of many of their counterparts across the world, the justices of the Supreme Court deserve immense credit for coupling socioeconomic claims to fundamental rights through procedural innovations and substantive reinterpretations.

Second, in cases regarding the right to education, shelter, and health, the Supreme Court essentially highlighted the failure of the executive to implement its particular self-declared obligations to specific citizens who had suffered harm.[155] According to Khosla, in the majority of cases that involved perceived violations of basic socioeconomic rights, the Court advocated "conditional social rights" based on a "private law model of public adjudication." Such a model enjoins the state to remedy a particular grievance, injury, or dereliction of duty in a specific case because "[the] existence of a violation is conditional upon state action…[and] can only occur when the state undertakes an obligation but does not fulfill it."[156] Hence the "one consistent theme in the Supreme Court's jurisprudence…is that the violation of a social right [i.e., goal/aspiration] results in a violation of a civil-political right."[157] In contrast, the Court has never extended a doctrine of "systemic social rights," which would justify through declaration a "minimum core" or "reasonable standard" of basic entitlements to all citizens, leading to a strong or weak-form of judicial review.

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cases that referred to the International Covenant on Economic, Social and Cultural Rights (ICESCR).

[153] "Judges and Indian democracy," 333.

[154] Chandhoke, "Democracy and well-being in India," 36.

[155] I thank Madhav Khosla for clarifying the scope of his argument (personal correspondence). See also Dhawan, "Judges and Indian democracy," 347 fn 57.

[156] Khosla, "Making social rights conditional," 5, 16, and 19.

[157] Ibid., 4.

This argument seems quite persuasive. Shankar and Mehta lend indirect support. According to their recent analysis, the vast majority of cases regarding health and education heard by the apex judiciary and high courts in India concerned the enforcement of obligations (approximately 50 percent) and regulation of services (greater than one-third) as opposed to their provision and financing.[158] Others perceive more positive outcomes. Brinks and Gauri argue that a majority of Supreme Court decisions in cases regarding access to food by primary-school-aged children and environmental quality in major cities enjoined the state to institute a better regulatory framework that would allow their realization in particular instances. Since the provision of genuine public goods extends benefits to non-litigants, and because these "regulation cases" have erga omnes effects, these authors claim that high judicial activism in India has largely improved the condition of relatively disadvantaged citizens who share geographical proximity or social class with the plaintiff.[159] Squaring these competing assessments is not easy: the first examines cases regarding health, not environment, while the latter seems to analyze a shorter time period in recent years. Yet neither study refutes Khosla's basic claim that Indian Supreme Court rulings regarding socioeconomic rights have been conditional upon prior state action and thus limited in their scope.

Still, whereas Rajagopal criticizes the Supreme Court for "affirming a right to a process" rather than providing a "structural remedy for a violation,"[160] Khosla defends the conditional social model. He argues that it allows the apex judiciary to grant individual remedies, distinguishes the normative strength of a right from its systemic remedy, and can be more easily adopted by courts facing legislative and executive inertia or in poor countries with "weak governance." Ultimately, the conditional social model fulfills a vital "expressive role."[161] Not everyone is as sanguine. Even sympathetic observers of the Court such as Mehta bemoan that its case-by-case approach suggests a "jurisprudence of exasperation," which often fails to define the content of a right, thereby generating too

[158] Shankar and Mehta, "Courts and socioeconomic justice in India," 152.
[159] Daniel M. Brinks and Varun Gauri, "The law's majestic equality? The distributive impact of litigating social and economic rights," Policy Research Working Paper 5999, The World Bank, March 2012.
[160] Rajagopal, "Pro-human rights but anti-poor?" 161–62.
[161] Khosla, "Making social rights conditional," 31–32.

much individual discretion and institutional unpredictability.[162] In the end, whatever our assessment, it is important to grasp the specificity of high judicial activism in India.

Third, the increasing concern of the Supreme Court in the 1990s with governance in general and corruption in particular may be construed as part of a neoliberal ideological framework, as Rajagopal, Dhawan, and others claim. Yet it was hardly the product of the latter. After all, the cry against high-level corruption as well as everyday graft was a central political theme of the JP movement in the 1970s. Moreover, high judicial concern over corruption was inevitable. In part, it was a natural upshot of the largely "conditional" nature of the Court's jurisprudence; in part, of mounting evidence that many violations of the socioeconomic rights of relatively disempowered citizens were intimately tied to systemic institutional neglect or outright public theft of government resources by high political officials, dominant social classes, and rank-and-file bureaucrats. Arguably, the innovative governance reforms that characterize many of India's recent social acts reflect hard-won insights into the nexus between political corruption and socioeconomic well-being gleaned from three decades of pioneering judicial activism.

Fourth, although the conceptualization of social, economic, and cultural rights in international legal discourse may well make their "progressive realization" dependent on "adequate resources," such a critique raises inescapable political questions: Who would ensure these rights, how, and with what means? Whether the Indian Supreme Court has the capacity to enforce sufficient remedies, or if any apex judiciary can, remain critical questions. In fact, relying on excessive judicial activism carries several risks. On the one hand, it may encourage a self-righteous moralistic posture on the part of the judiciary vis-à-vis other branches of government; something that is shared by several voices in civil society that claim to represent the "people" and cling "to the notion that they knew best and could do best" (a disposition that used to describe the earlier Nehruvian regime)[163] without clear popular consent or sufficiently democratic mechanisms of accountability (a pressing issue given recent cases of judicial corruption).[164] Such an attitude risks heaping general scorn on parties, electoral politics, and political society without tackling the

[162] Rajamani and Sengupta, "The Supreme Court," 90.
[163] Dhawan, "Judges and Indian democracy."
[164] Ibid., fn 96.

inherently difficult task of politics, which ultimately must reconcile competing values, interests, and aspirations amidst the inequalities of wealth, status, and power.

On the other hand, relying on judicial activism too much may raise expectations that judicial institutions and civil society organizations cannot fully meet, either independently or together, since they frequently lack the competence, standing or resources to do so—a concern recently expressed by the present Chief Justice S. K. Kapadia himself.[165] As Shankar and Mehta remind us, "judges are [ultimately] members of an institution whose rules emphasize restraint rather than activism." Specifically, the power of the chief justice to allocate cases, the short terms of his colleagues and the inadequate enforcement capacity of the Supreme Court as a whole encourage selective judicial activism.[166] Moreover, "[c]ourts can proclaim new rights as much as they want, but the proclamation of rights by itself does not produce results."[167] And they cannot independently revitalize public institutions that suffer from poor bureaucratic governance, limited material resources or malign political interference or neglect. Indeed, the judiciary too requires systematic institutional reform. Its staggering case overload—in 2001, the number of pending cases facing the Supreme Court and high courts was 20,000 and 3.2 million, respectively[168]—means accessing routine justice is exceedingly difficult. The travesty meted out to victims of the Union Carbide disaster, in which the Government of India decided not to sue the company because of perceived inefficiencies in the judicial system, is perhaps the most well-known egregious instance. As a result, hardened observers note that in many instances "due process is the punishment."[169] Thus Bardhan, albeit too pessimistically, is right to warn: "India is already littered with hundreds of unenforced or spasmodically enforced court injunctions, some of them on the implementation of rights …[a situation which] may end up, for all its good intentions, undermining the credibility and legitimacy of the judiciary itself."[170] The myriad costs of

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[165] See Chief Justice S. H. Kapadia, "Judges do not have the competence to make policy choices and run administration," Indian Express, 18 April 2011.
[166] Shankar and Mehta, "Courts and socioeconomic justice in India," 177.
[167] Mehta, "The rise of judicial sovereignty," 81.
[168] Shankar and Mehta, "Courts and socioeconomic rights in India," 154 fn 32.
[169] Mehta, "The rise of judicial sovereignty," 72.
[170] Pranab Bardhan, quoted in Varun Gauri, "Are you poor? Then file a lawsuit." Available at http://blogs.worldbank.org/governance/are-you-poor-then-file-a-lawsuit. Retrieved on 1 October 2011.

pursuing litigation and the backlog of cases may engulf social activists too, of course, as several recent studies demonstrate.[171]

Finally, endowing socioeconomic entitlements with the status of fundamental rights does not automatically guarantee more progressive outcomes. As several recent studies of Brazil and South Africa demonstrate, the constitutionalization of social and economic rights has often benefited more privileged citizens, undermining its intention. In response to individualized claims for curative medical treatment, Brazilian judges have interpreted the right to health recognized in Articles 6 and 196 of the 1988 Constitution in maximal terms, instructing service providers to offer the most advanced care available to frequently better-off litigants irrespective of cost. Given finite resources, both the principle of universality and the comprehensive health programs that it justifies paradoxically suffer. Since resources are finite in general, while the level and pattern of expenditures in social policy are determined by deeper political economies of taxation, such perverse outcomes may be generic.[172] Similarly, the decision of the Constitutional Court of South Africa in 2000 to affirm that its new postapartheid constitution granted citizens a systematic right to housing in the landmark judgment Government of the Republic of South Africa & Ors v. Grootboom & Ors (2000) provided a powerful tool for various communities struggling against eviction by contributing to domestic case law and setting a significant international precedent. However, the judgment itself has failed to compel the state to rectify the severe housing shortage that led to its declaration, or force the government to change its general policy framework that ostensibly has failed to generate sufficient employment.[173]

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[171] See Anuradha Joshi, "Do rights work? Law, activism and the Employment Guarantee Scheme," World Development, 38, 4 (2009), 620–30; Marc Galanter and Jayanth K. Krishnan, "'Bread for the poor': Access to justice and the rights of the needy in India," Hastings Law Journal 55, 4 (2004): 789–834.

[172] See Octavio Luiz Motta Ferraz, "The right to health in the courts of Brazil: Worsening health inequities?" Health and Human Rights 11, 2 (2009): 33–45; and idem, "Harming the poor through social rights litigation: Lessons from Brazil," Texas Law Review 89, 7 (2011): 1643–68; Virgilio Afonsa da Silva and Fernanda Vargas Terrazas, "Claiming the right to health in Brazilian courts: The exclusion of the already excluded?" Law and Social Inquiry 36, 4 (Fall 2011): 825–53.

[173] (2000) (11) BCLR 1669. Elisabeth Wickeri, "Grootboom's legacy: Securing the right to access to adequate housing in South Africa?" Center for Human Rights and Global Justice Working Paper, NYU School of Law, Number 5, 2004: 1–32.

Hence it may be preferable, as Tushnet argues, to declare non-justiciable social rights, because weakly enforcing "strong" rights may simply generate popular cynicism towards and legitimacy problems for apex judiciaries.[174] In short, building a powerful electoral bloc able to capture political office, transfer economic resources towards the disadvantaged, improve the performance of institutions, and encourage a more egalitarian social ethos amongst the citizenry remains an outstanding political challenge in most constitutional democracies around the world.

CONCLUDING REMARKS

What lessons can we draw from the preceding analysis of the unexpected social activism of India's Supreme Court since the late 1970s? Let me suggest two broad observations by way of conclusion. The first concerns political explanation. In the short run, an apex court may acquire political autonomy and assert its independence without great political fragmentation in the electoral arena, against the consensus of many comparative scholars of the judiciary. The Indian experience suggests that we may need to lower the explanatory bar by recognizing that contentious political competition in itself and a single transfer of electoral power may suffice to stimulate judicial activism. Of course, such activism may occur due to a context of greater political uncertainty about the new administration. Yet the degree of progressivism embraced and pushed by apex judiciaries will likely depend to a great extent on the character of the political opposition and the level of mobilization within civil society.

In the long run, though, progressive judicial activism is likely to be the result of complex interaction effects: textual precedent, creative judicial agency, constitutional design, radical social upsurges, strategic concessions by the executive, and the fragmentation of power in the wider political arena. The presence of the Directive Principles of State Policy encoded in Part IV of India's 1950 Constitution provided the critical textual basis for novel constitutional interpretations by its high justices. To be sure, they began to practice such readings prior to the Emergency. Yet the latter proved to be a paradigmatic critical juncture: a "major watershed in political life…which

[174] Shankar, Scaling Justice, 122.

establish[ed] certain directions of change and foreclose[d] others in a way that shape[d] politics for years to come."[175] The justices of India's Supreme Court deserve tremendous credit for construing new meanings in the Constitution, of course, for "playing the rules as if they were instruments" rather than scripts.[176] That said, "[m]oments of crisis usually contain within them several possibilities of transition. The specific turn that history takes is decided on the battlefield of politics."[177] In particular, the possibility of seizing progressive outcomes in these circumstances depends on "visions of alternative futures."[178] Arguably, it was the popular social upsurges of the 1970s, crystallizing in the JP movement and subsequent Janata Party government that provided the impetus to push the constitutional envelope at a critical early stage. The critical judicial interventions made by the Court in the 1980s set it onto a new path against the increasing rightward shift in Indian politics under Indira and Rajiv Gandhi in the 1980s. The growing political fragmentation of India's electoral landscape in the early 1990s, combined with the strategic abdication of responsibility for difficult social issues by its elected representatives, locked in these emergent trends.

The second observation concerns the question of evaluation. The move by India's Supreme Court over the last three decades to make various socioeconomic entitlements in the Constitution justiciable through its substantive reinterpretations and the innovation of public interest litigation has been enormously valuable. Simply put, the move has highlighted the severe human deprivations that still afflict millions of citizens in the world's largest democracy, and sought to protect many of them in individual judicial

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[175] Ruth Berins Collier and David Collier, Shaping the Political Arena: Critical junctures, the labor movement, and regime dynamics in Latin America (Princeton: Princeton University Press, 1991), 27.
[176] Gerald Berk and Dennis Galvan, "How people experience and change institutions: A field guide to creative syncretism," Theory and Society 38, 6 (2009), 544. For a similar endogenous approach to the study of institutional change, see Adam D. Sheingate, "Political entrepreneurship, institutional change, and American political development," Studies in American Political Development 17, 2 (Fall 2003): 185–89.
[177] Partha Chatterjee, A Possible India: Essays in political criticism (New Delhi: Oxford University Press, 1998), 71.
[178] Ira Katznelson, "Periodization and preferences: Reflections on purposive action in comparative historical social science," in James Mahoney and Dietrich Rueschemeyer, eds., Comparative Historical Analysis in the Social Sciences (New York: Cambridge University Press, 2003), 274 and 283.

cases. In the early phase of activism, the role of the Court, as Baxi puts it darkly, was to provide "chemotherapy for a carcinogenic body politic."[179] But with time the Court's activism has, like activism elsewhere, created "an additional avenue for the expression of social and economic demands" and "enhanced the deliberative quality of democratic decision-making," by "improving the quality of information available to policy-makers" and asserting the significance of norms and values in state affairs.[180] Significantly, the apex judiciary has also challenged the declining norms of the political class and the failure of the state to discharge many of its basic governance functions, especially since the early 1990s. By highlighting the nexus between socioeconomic rights violations and poor governance, the higher judiciary in India has "emerged as the defender of a normative and homogenous civil society of equal citizens," allaying the fear that nonelected public institutions would increasingly become the abode of privileged social classes in the wake of increasing electoral participation by historically subordinate groups.[181] In comparative terms, the Court has resisted becoming a conservative "juristocracy" like many of its counterparts in Westminster-style parliamentary democracies around the world.[182]

That said, the record and trajectory of India's Supreme Court also indicate the drawbacks of relying too heavily on an apex judiciary to protect basic socioeconomic rights and the risks of burdening even well-intentioned progressive justices with unrealistic popular expectations. High judicial activism cannot guarantee the extension of basic socioeconomic entitlements, since it cannot enforce its directives in many instances, which in any case turn on the responsiveness, capacity, and accountability of the state. Ultimately all courts face what scholars call Hamilton's dilemma: "The judiciary…may truly be said to have neither FORCE nor WILL, but merely judgment; and it must ultimately depend on the aid of the executive arm even for the efficacy of its

[179] Baxi, "Preface."
[180] Gauri, "Are you poor?"
[181] Partha Chatterjee, "The state," in Niraja Gopal Jayal and Pratap Bhanu Mehta, eds., The Oxford Companion to Politics in India (New Delhi: Oxford University Press, 2010), 13. The last claim is made by Francine F. Frankel and M. S. A. Rao, eds., Dominance and State Power in Modern India: Decline of a social order, Volumes I and II (New Delhi: Oxford University Press, 1990).
[182] Hirschl, Towards Juristocracy.

judgments."[183] The legislation of new social acts by successive Congress-led administrations in New Delhi since 2005 simultaneously represents the short-term defeats yet long-term victories of high judicial activism in India.

Ultimately, the direct material failures of India's Supreme Court exist alongside its more indirect achievements, symbolic and otherwise. Indeed, it is impossible to grasp the emphasis on rights, the design of innovative accountability mechanisms, or the pivotal political role of committed social activists that mark the genesis of these various national acts without understanding the origins, character, and focus on high judicial activism in India over the last three decades. As Dylan said, there's no success like failure, and failure's no success at all.

[183] Quoted in Matthew D. McCubbins and Daniel B. Rodriguez, "The judiciary and the role of law," in Barry R. Weingast and Donald A. Wittman, eds., The Oxford Handbook of Political Economy (New York: Oxford University Press, 2008), 273–86.

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