

# JUDICIAL REVIEW VS. LEGISLATIVE SUPREMACY: ASSESSING THE LEGITIMACY OF COURTS IN RESOLVING DEEPLY POLARIZED SOCIAL ISSUES

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## ABSTRACT

*Constitutional democracies confront an enduring institutional puzzle when deeply polarized social questions, such as marriage equality, reproductive autonomy, religious practice, and affirmative action, reach the courts for resolution. This paper examines whether unelected judiciaries possess the legitimacy to settle disputes that divide the electorate along moral and religious lines, or whether such questions belong properly to legislatures answerable to the electorate. Drawing on the constitutional experience of India, contrasted with the United States and the United Kingdom, the paper argues that the legitimacy of judicial intervention does not turn on whether a court decides such a case, but on how it decides it. Courts act within their institutional competence when they remove state-imposed disabilities inconsistent with entrenched constitutional guarantees, as in the decriminalization of consensual same-sex conduct. They exceed that competence when they attempt to author new social institutions absent legislative architecture, as the qualified restraint in the marriage-equality litigation and the decade-long pendency of the Sabarimala reference illustrate. The paper develops a framework of calibrated judicial review, distinguishing negative rights-vindication from positive institutional creation, and argues that this distinction, rather than a binary choice between judicial supremacy and legislative supremacy, offers the more defensible account of institutional legitimacy in India's constitutional order.*

**KEYWORDS:** *Judicial Review; Legislative Supremacy; Basic Structure Doctrine; Counter-majoritarian Difficulty; Constitutional Morality*

## 1. INTRODUCTION

Every mature constitutional democracy eventually confronts a class of disputes that cannot be resolved by ordinary legal craft alone. Whether two persons of the same sex may marry, whether a woman may terminate a pregnancy, whether a religious denomination may exclude women from its inner sanctum, and whether the state may classify citizens for preferential treatment are not questions with a single legally compelled answer waiting to be discovered by a court. They are questions on which reasonable citizens, informed by conscience, faith, and competing conceptions of equality, disagree in good faith. When such questions arrive before a constitutional court, dressed in the language of fundamental rights, the court cannot decline to answer merely because the answer is contested. Yet the very fact that the answer is contested raises a distinct question: does the court possess the institutional legitimacy to give it?

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This paper argues that legitimacy in this domain is not a binary property that a court either possesses or lacks. It is a variable that depends on the mode of judicial intervention. An unelected bench that strikes down a colonial-era criminal provision criminalizing consensual intimacy between adults exercises a fundamentally different kind of authority than a bench that attempts to read a new social institution into a statute that Parliament never enacted. The former vindicates an existing constitutional guarantee against majoritarian excess. The latter substitutes judicial preference for legislative choice on a matter of institutional design. India's own constitutional trajectory, from the decriminalization of Section 377 to the qualified restraint of the marriage-equality litigation to the still-pending nine-judge reference on the interplay between religious freedom and gender equality arising out of Sabarimala, supplies a living laboratory for this argument.<sup>1</sup>

Part 2 sets out the two competing constitutional visions, namely legislative supremacy of the Diceyan variety and constitutional supremacy enforced through judicial review, and situates India's mixed constitutional design between them. Part 3 restates the countermajoritarian objection to judicial resolution of polarized disputes and the institutional case for legislative primacy. Part 4 develops the countervailing justification for judicial review as a safeguard for constitutional pre-commitments that majoritarian legislatures have historically failed to honour. Part 5 examines four sites of Indian constitutional contestation, namely sexual orientation, religious freedom, reproductive autonomy, and affirmative action, to test the distinction between negative rights-vindication and positive institutional creation. Part 6 proposes a framework of calibrated judicial review as a more defensible account of institutional legitimacy than either judicial or legislative supremacy taken alone, and Part 7 concludes.

## 2. TWO MODELS OF CONSTITUTIONAL AUTHORITY

The classical common law model of legislative supremacy finds its most influential articulation in the Diceyan account of parliamentary sovereignty, under which Parliament may make or unmake any law whatsoever, and no court may question the validity of an Act of Parliament.<sup>2</sup> In such a system, courts interpret statutes but do not sit in judgment over the wisdom or constitutionality of primary legislation; the corrective for an unjust or ill-considered law lies in the ballot box rather than the courtroom, a model that presumes an unwritten or flexible constitution in which the legislature is the ultimate custodian of constitutional change.

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<sup>1</sup> Navtej Singh Johar v. Union of India, (2018) 10 S.C.C. 1 (India); Supriyo alias Supriya Chakraborty v. Union of India, 2023 SCC OnLine SC 1348 (India); Kantaru Rajeevaru v. Indian Young Lawyers Association, (2020) 2 S.C.C. 1 (India).

<sup>2</sup> A.V. Dicey, Introduction to the Study of the Law of the Constitution 39-40 (10th ed. 1959).

The American model inverts this hierarchy. A written and rigid constitution is treated as superior law, and an Act of the legislature repugnant to it is void. Chief Justice Marshall's foundational reasoning in *Marbury v. Madison* rested on the syllogism that a constitution is either superior, paramount law, unchangeable by ordinary legislative means, or it is on the same level as ordinary legislation, alterable when the legislature pleases; and if the former is true, a legislative act contrary to the constitution is not law at all, and it falls to the judiciary to say so in cases properly before it.<sup>3</sup> Judicial review, on this account, is not a usurpation of legislative authority but a necessary incident of a written constitution that binds even the legislature that operates under it.

India's constitutional design borrows from both traditions without replicating either. The Constitution is written, elaborately detailed, and textually supreme. Article 13(2) declares that the State shall not make any law which takes away or abridges the rights conferred by Part III, and any law made in contravention of this clause shall, to the extent of the contravention, be void.<sup>4</sup> Articles 32 and 226 vest the Supreme Court and the High Courts respectively with the power to issue writs for the enforcement of fundamental rights, a power the Supreme Court itself has held to be part of the basic structure of the Constitution and therefore beyond the reach of even a constitutional amendment.<sup>5</sup> At the same time, India retains a Westminster-style parliamentary executive, in which the Council of Ministers is collectively responsible to the directly elected House of the People and exercises the bulk of ordinary governance without judicial supervision.<sup>6</sup> India is therefore neither a system of untrammelled parliamentary sovereignty nor one of unqualified judicial supremacy. It is a system of constitutional supremacy operating through a parliamentary form of government, in which Parliament possesses plenary power to legislate and even to amend the Constitution, but subject to a judicially enforced basic structure that no amending majority, however large, may alter.<sup>7</sup>

This equilibrium was not reached at the founding moment but was worked out through a running institutional contest between Parliament and the Court over the very question this paper addresses, namely who has the final word on the content of fundamental rights. In *Golak Nath v. State of Punjab*, an eleven-judge bench held, by a narrow majority, that Parliament's amending power under Article 368 could not be used to abridge or take away the fundamental

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<sup>3</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

<sup>4</sup> The Constitution of India, 1950, art. 13, cl. 2.

<sup>5</sup> *L. Chandra Kumar v. Union of India*, (1997) 3 S.C.C. 261 (India); *Minerva Mills Ltd. v. Union of India*, (1980) 3 S.C.C. 625 (India).

<sup>6</sup> *Ram Jawaya Kapur v. State of Punjab*, A.I.R. 1955 S.C. 549 (India).

<sup>7</sup> *Kesavananda Bharati v. State of Kerala*, (1973) 4 S.C.C. 225 (India); *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp S.C.C. 1 (India).

rights guaranteed by Part III at all.<sup>8</sup> Parliament responded with the Twenty-Fourth and Twenty-Fifth Amendments, asserting its power to amend any provision of the Constitution, including Part III, and to enact laws giving effect to certain directive principles even if they abridged fundamental rights. *Kesavananda Bharati* was the Court's answer to this contest, and it was a compromise rather than a capitulation to either extreme: Parliament could amend fundamental rights, but it could not use that power to destroy the basic structure of the Constitution itself.<sup>9</sup> The basic structure doctrine, in other words, emerged not from an abstract judicial theory of its own supremacy, but from a concrete historical negotiation between the two institutions this paper is concerned with, and it is that negotiated settlement, rather than either pole of the Diceyan or Marshallian models, that continues to govern the relationship between judicial review and legislative supremacy in India today.

This hybrid design is precisely why the question posed in this paper cannot be answered by reflexive reference to either the Diceyan or the Marshallian model. The Indian Supreme Court has both the textual mandate and the doctrinal history to intervene decisively in matters of fundamental rights, yet it operates within a political culture and an institutional design that presumes the ordinary business of governance, including the resolution of morally contested social questions, belongs to elected representatives. The tension between these two commitments is not a design flaw. It is the central organizing fact of Indian constitutionalism, and it is precisely this tension that deeply polarized social disputes force into the open.

### 3. THE COUNTERMAJORITARIAN OBJECTION AND THE CASE FOR LEGISLATIVE SUPREMACY

The strongest objection to judicial resolution of polarized social disputes is institutional rather than doctrinal. Judges are not elected, are not removable by the electorate for the substance of their decisions, and do not answer to any constituency for the social consequences of their rulings. When five or nine judges settle a question on which the country is genuinely divided, whether that question concerns marriage, religious practice, or reproductive choice, they resolve by fiat what a legislature would have resolved, if at all, through negotiation, compromise, and periodic electoral correction. Alexander Bickel described this feature of constitutional adjudication as the counter-majoritarian difficulty, the central and persistent puzzle of judicial review in a democracy.<sup>10</sup>

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<sup>8</sup> *I.C. Golak Nath v. State of Punjab*, A.I.R. 1967 S.C. 1643 (India).

<sup>9</sup> *Kesavananda Bharati v. State of Kerala*, (1973) 4 S.C.C. 225 (India) (overruling *Golak Nath* to the extent it held Part III wholly unamendable, while imposing the basic structure limitation).

<sup>10</sup> Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 16-23 (1962).

The difficulty is sharpest precisely where the underlying dispute is not a technical legal question but a contest between rival moral or theological worldviews on which no legal training confers special competence.

There is also a distinct institutional-competence argument. Legislatures possess fact-finding mechanisms, standing and select committees, public consultation processes, and the capacity to design graduated, revisable regulatory schemes. A Constitution Bench deciding a writ petition works from the record placed before it by the parties and intervenors, hears oral argument compressed into a matter of days or weeks, and must produce a single binding pronouncement with only limited capacity for future recalibration short of a review or a curative petition. Courts are, in this sense, structurally better suited to correcting a discrete unconstitutional act than to designing an ongoing regulatory or institutional framework that must respond to changing social facts.

The Indian Supreme Court has itself recognized these limits in its separation of powers jurisprudence outside the fundamental rights context, cautioning that judicial review does not authorize the courts to substitute their own wisdom for that of the executive or legislature on matters of policy, and that the strength of a democracy lies in the harmonious functioning of its constitutional organs rather than in the aggrandizement of any one of them.<sup>11</sup> This caution finds its most direct application in the marriage-equality litigation. In *Supriyo*, the majority declined to read the words husband and wife in the Special Marriage Act, 1954 to include same-sex couples, holding that such a reading would amount to judicial legislation on a subject, namely the legal architecture of marriage with its attendant consequences for succession, adoption, and maintenance, that is properly for Parliament to design.<sup>12</sup> The Court urged the Union to constitute a committee to examine the entitlements that could be extended to queer couples, but it stopped short of compelling any legislative outcome, leaving the substantive question where the majority believed it institutionally belonged.

The comparative experience of the United States supplies a cautionary illustration of the instability that can follow when a court, rather than a legislature, freezes a morally contested question into constitutional doctrine. In *Roe v. Wade*, the United States Supreme Court derived a constitutional right to abortion from an unenumerated right to privacy and constructed a trimester framework of its own design, without any comparable federal statute to interpret.<sup>13</sup> Half a century later, in *Dobbs v. Jackson Women's Health Organization*, a differently composed Court overruled *Roe* in its entirety,

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<sup>11</sup> *Government (NCT of Delhi) v. Union of India*, (2018) 8 S.C.C. 501 (India), paras 276-286.

<sup>12</sup> *Supriyo alias Supriya Chakraborty v. Union of India*, 2023 SCC OnLine SC 1348 (India) (majority opinion of Bhat, J., for himself, Kohli and Narasimha, JJ.).

<sup>13</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

holding that the Constitution does not confer a right to abortion and that authority to regulate the matter returns to the people and their elected representatives.<sup>14</sup> Whatever view one takes of the substantive merits of either decision, the sequence illustrates the fragility of a judicially authored settlement of a deeply polarized question that lacks a durable textual anchor and that a differently constituted bench can simply unmake. The lesson this comparative sequence offers India's own courts is not that judicial intervention in polarized disputes is inherently unstable, but that the durability of such intervention depends heavily on whether it is anchored in text and precedent that a differently composed bench cannot easily discard, a theme this paper returns to directly in Part 6.

#### 4. THE JUSTIFICATION FOR JUDICIAL REVIEW OF POLARIZING QUESTIONS

The case for legislative supremacy is powerful, but it rests on an empirical premise that Indian constitutional history repeatedly disproves, namely that majoritarian legislatures can be trusted to correct their own injustices against minorities once those injustices are pointed out. John Hart Ely's representation-reinforcement theory of judicial review supplies the clearest theoretical answer to this premise. On this account, judicial review is most legitimate not when courts substitute their own values for those of the legislature, but when they correct malfunctions in the representative process itself, particularly the systematic exclusion of discrete and insular minorities who lack the numbers or the political capital to protect themselves through ordinary majoritarian politics.<sup>15</sup> Section 377 of the Indian Penal Code, a colonial provision criminalizing carnal intercourse against the order of nature, remained on the statute book for one hundred and fifty-eight years, notwithstanding decades of documented persecution of sexual minorities and repeated failure of Parliament to repeal it. The correction, when it came, came from the Court, not from the legislature.<sup>16</sup> The same pattern recurs in the recognition of transgender persons' right to self-identified gender, a recognition that arrived through the Court's judgment in *National Legal Services Authority v. Union of India* years before Parliament enacted a comprehensive transgender rights statute.<sup>17</sup>

The doctrinal architecture that makes this kind of intervention legitimate, rather than an ad hoc exercise of judicial preference, is the basic structure doctrine. In *Kesavananda Bharati*, a thirteen-judge bench held that Parliament's power to amend the Constitution under Article 368 does not extend to altering its basic structure, a set of foundational features that includes the supremacy of

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<sup>14</sup> *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022).

<sup>15</sup> John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 135-79 (1980).

<sup>16</sup> *Navtej Singh Johar v. Union of India*, (2018) 10 S.C.C. 1 (India).

<sup>17</sup> *National Legal Services Authority v. Union of India*, (2014) 5 S.C.C. 438 (India).

the Constitution, the rule of law, and judicial review itself.<sup>18</sup> In *Minerva Mills*, the Court struck down clauses of the Forty-Second Amendment that sought to place constitutional amendments and laws made to implement directive principles beyond judicial review, holding that the donee of a limited amending power cannot use that power to convert it into an unlimited one, and that judicial review is itself part of the basic structure it protects.<sup>19</sup> The basic structure doctrine therefore functions as a pre-commitment device. It entrenches certain constitutional guarantees against erosion even by a legislative or amending majority acting with full electoral mandate, precisely on the theory that some commitments, once made at the founding moment of the constitutional order, ought not to be revisable by transient majorities, however large.

The recognition of privacy as a fundamental right in *Justice K.S. Puttaswamy v. Union of India* illustrates how this pre-commitment logic operates in practice. A nine-judge bench held that privacy is intrinsic to the right to life and personal liberty under Article 21 and to the freedoms guaranteed by Part III, and that this right is not conferred by the Constitution but inheres in every individual as a natural right.<sup>20</sup> *Puttaswamy* did not resolve any single polarized social question, but it supplied the constitutional vocabulary, dignity, autonomy, and decisional privacy, that subsequent benches invoked in *Navtej Singh Johar* and in the marriage-equality litigation. This lineage demonstrates that judicial review of polarizing questions in India does not proceed from unconstrained judicial preference. It proceeds from the progressive elaboration of textually rooted guarantees, applied consistently across a widening set of factual contexts, in a manner that a legislature, subject to shifting electoral incentives, has historically been slower to undertake.

## 5. THE INDIAN EXPERIENCE: FOUR SITES OF CONTESTATION

### 5.1 *Sexual Orientation and the Limits of Adjudicated Equality*

The trajectory from *Navtej Singh Johar* to *Supriyo* offers the clearest illustration of the distinction this paper proposes between negative rights-vindication and positive institutional creation. In *Navtej Singh Johar*, the Court was asked to strike down a criminal provision that inflicted a state-imposed disability, namely the threat of prosecution, upon consenting adults. Removing that disability required no legislative architecture. It required only the invalidation of an existing law found to be inconsistent with Articles 14, 15, 19, and 21, an act squarely within the Court's textual mandate under Article 13(2).<sup>21</sup> In *Supriyo*, by contrast, the petitioners asked the Court to confer a new civil status,

<sup>18</sup> *Kesavananda Bharati v. State of Kerala*, (1973) 4 S.C.C. 225 (India).

<sup>19</sup> *Minerva Mills Ltd. v. Union of India*, (1980) 3 S.C.C. 625 (India).

<sup>20</sup> *Justice K.S. Puttaswamy v. Union of India*, (2017) 10 S.C.C. 1 (India).

<sup>21</sup> *Navtej Singh Johar v. Union of India*, (2018) 10 S.C.C. 1 (India).

marriage, with an entire attendant legal architecture of succession, adoption, maintenance, and taxation, upon a class of persons for whom Parliament had built no such architecture. The majority's refusal to do so, while affirming the dignity and anti-discrimination claims of queer persons and directing the Union to consider administrative measures such as joint bank accounts, nomination rights, and medical decision-making authority, reflects a coherent limiting principle rather than inconsistency.<sup>22</sup> The Court proved willing to exercise its negative, invalidating power over an existing criminal provision, but declined to exercise a positive, institution-creating power that the constitutional text does not confer upon it. The Court's dismissal of the subsequent review petition in January 2025 confirmed the durability of this distinction.<sup>23</sup>

### ***5.2 Religious Freedom and Gender Justice: The Sabarimala Reference***

The Sabarimala litigation illustrates the institutional costs of judicial intervention that lacks a clear limiting doctrine. In *Indian Young Lawyers Association v. State of Kerala*, a five-judge bench held by a four to one majority that Rule 3(b) of the Kerala Hindu Places of Public Worship Rules, which excluded women between the ages of ten and fifty from the Sabarimala temple, violated Articles 14 and 25, and that the exclusion could not be justified as an essential religious practice of a separate religious denomination.<sup>24</sup> Review petitions followed, and in November 2019 a five-judge bench declined to decide the review on its merits, instead referring seven broad questions concerning the interplay between religious freedom under Articles 25 and 26 and the guarantee of equality to a larger bench, questions that extended well beyond Sabarimala to the entry of Muslim women into mosques, the right of Parsi women married outside their community to enter fire temples, and related controversies.<sup>25</sup> A nine-judge bench upheld the maintainability of this referral in 2020, but the reference then lay dormant for roughly six years. It was finally taken up by a bench headed by the Chief Justice of India in 2026, heard arguments over sixteen days between April and May, and reserved judgment on the seven referred questions.<sup>26</sup> For close to a decade, the original 2018 finding on the merits, that the exclusionary practice was unconstitutional, remained neither overruled nor authoritatively settled, and the underlying practice at the temple itself continued largely unaltered on the ground pending the outcome of the review. This prolonged institutional limbo is precisely the cost that critics of judicial resolution of polarized religious disputes point to: a court that intervenes in a domain governed by the essential religious practices test, a

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<sup>22</sup> Supriyo alias Supriya Chakraborty v. Union of India, 2023 SCC OnLine SC 1348 (India).

<sup>23</sup> Supriyo alias Supriya Chakraborty v. Union of India, Review Petition (C) No. 181 of 2024, order dated Jan. 9, 2025 (India).

<sup>24</sup> *Indian Young Lawyers Association v. State of Kerala*, (2019) 11 S.C.C. 1 (India).

<sup>25</sup> *Kantaru Rajeevaru v. Indian Young Lawyers Association*, (2020) 2 S.C.C. 1 (India).

<sup>26</sup> Supreme Court Observer, *Sabarimala Review: Nine-Judge Bench Reserves Judgment on Articles 25 and 26 After Sixteen-Day Hearing* (May 2026).

doctrine that requires judges to determine which practices are theologically essential to a faith, exposes itself to a scale and duration of contestation that a legislature negotiating a settlement through consultation with religious bodies might, in principle, have avoided or at least resolved more conclusively. The scope the nine-judge bench ultimately took on, extending to Dawoodi Bohra excommunication practice and female genital cutting alongside the original Sabarimala and mosque-entry questions, illustrates a further institutional risk distinct from mere delay: a reference framed broadly enough to capture the full theoretical scope of a doctrinal question can, in practice, expand a bench's task well beyond what the original dispute required it to resolve, compounding the very indeterminacy the reference was meant to settle.

### ***5.3 Reproductive Autonomy: A Comparative Contrast***

India's experience with reproductive rights points toward a more durable model of judicial engagement than the American experience with Roe and Dobbs. Rather than deriving a freestanding constitutional right to abortion and constructing its own regulatory framework, Indian courts have worked within the framework Parliament itself enacted through the Medical Termination of Pregnancy Act, 1971, as amended in 2021 to extend gestational limits and expand the categories of women eligible for termination up to twenty-four weeks.<sup>27</sup> In *X v. Principal Secretary, Health and Family Welfare Department*, the Supreme Court held that the statutory scheme, properly and purposively construed, could not be read to exclude unmarried women from the benefit of provisions permitting termination up to twenty-four weeks on grounds of a change in marital status, and that restricting the benefit to married women alone would offend Article 14.<sup>28</sup> The Court reached a rights-protective outcome, but it did so through purposive statutory interpretation within a legislative framework rather than through the judicial invention of a constitutional right and an accompanying regulatory scheme absent any statute. This interstitial mode of review, correcting an unduly narrow legislative or executive construction of an existing statute, is considerably less exposed to the kind of wholesale reversal that overtook Roe, because it does not require the Court to have authored the underlying regulatory architecture in the first place.

### ***5.4 Affirmative Action and the Ceiling on Judicial Line-Drawing***

Affirmative action litigation shows the Court adopting a third mode of engagement, namely deference to legislative and executive classification combined with the judicial imposition of outer boundary conditions. In *Indra Sawhney v. Union of India*, a nine-judge bench upheld the reservation of

<sup>27</sup> The Medical Termination of Pregnancy Act, No. 34 of 1971, as amended by the Medical Termination of Pregnancy (Amendment) Act, No. 8 of 2021 (India).

<sup>28</sup> *X v. Principal Secretary, Health and Family Welfare Department*, NCT of Delhi, 2022 SCC OnLine SC 1321 (India).

twenty-seven per cent of posts for socially and educationally backward classes, while holding that reservations under Article 16(4) ordinarily should not exceed fifty per cent of available posts, and that the more socially and economically advanced members of a backward class, the creamy layer, should be excluded from the benefit of reservation.<sup>29</sup> The Court left the identification of backward classes and the quantum of reservation within that ceiling to the political branches, intervening only to fix an outer limit designed to prevent reservation from overwhelming the general principle of equality of opportunity. Three decades later, in *Janhit Abhiyan v. Union of India*, a five-judge bench upheld the Constitution (One Hundred and Third Amendment) Act, which introduced a ten per cent reservation for economically weaker sections exceeding the fifty per cent ceiling, by a three to two majority, with the majority again deferring substantially to Parliament's assessment of what constitutes permissible affirmative action while one dissenting opinion invoked the equality code as part of the basic structure to argue that the amendment was unconstitutional.<sup>30</sup> Read together, these decisions show a Court willing to set boundary conditions on legislative and constitutional line-drawing in the domain of affirmative action, but reluctant to substitute its own judgment for the political branches' assessment of social and economic backwardness, a reluctance that persists even when the political branches move the boundary itself through constitutional amendment.

## 6. TOWARD AN INSTITUTIONALLY SENSITIVE MIDDLE PATH

The four sites examined above suggest that the Indian Supreme Court has, often without articulating it as a self-conscious doctrine, been developing a form of what Mark Tushnet calls weak-form judicial review, in which courts identify constitutional infirmities and articulate constitutional principles, but leave considerable room for the political branches to design or redesign the ultimate institutional response.<sup>31</sup> The directions in *Supriyo* to constitute a committee, the directions in *NALSA* to extend reservation benefits to transgender persons in education and public employment pending appropriate legislative action, and the referral mechanism itself in the *Sabarimala* review are all instances of what might be called reference-back devices, remedies that establish a constitutional floor while leaving the final architecture to the legislature or to further judicial deliberation.

This paper proposes that the legitimacy of judicial intervention in a deeply polarized social dispute should be assessed against three considerations, rather than against the single question of whether a court ought to decide the case at

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<sup>29</sup> *Indra Sawhney v. Union of India*, A.I.R. 1993 S.C. 477 (India).

<sup>30</sup> *Janhit Abhiyan v. Union of India*, 2022 SCC OnLine SC 1540 (India).

<sup>31</sup> Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* 18-25 (2008).

all. First, courts have the strongest claim to intervene decisively where legislative inaction, rather than legislative choice, is itself the source of the rights violation, as with the century and a half of parliamentary silence on Section 377. Second, courts should prefer negative, invalidating remedies, striking down an offending law or reading down an unduly narrow provision, over positive remedies that require the judicial construction of a new institutional framework such as a civil union or marriage regime, because the latter properly demands the deliberative and resource-allocating capacities that only a legislature possesses. Third, courts act within their institutional competence when enforcing an existing textual or doctrinally entrenched guarantee, such as the guarantees of equality, liberty, and religious freedom in Part III as elaborated through *Kesavananda Bharati* and *Puttaswamy*, and act at the outer edge of that competence when they must give content to open-textured doctrines with no fixed metric, such as the essential religious practices test that has kept the *Sabarimala* reference unresolved for close to a decade.

Judicial minimalism, in Cass Sunstein's sense of deciding no more than the case before the court requires and avoiding broad theoretical pronouncements that foreclose future recalibration, complements this framework well in the domain of polarized social disputes.<sup>32</sup> A narrow, fact-bound ruling that vindicates the immediate claimant's right while leaving the broader social and institutional question open for legislative deliberation and future litigation preserves both the Court's authority to intervene again should the legislature fail to act, and the legislature's space to design a considered response rather than one improvised in the shadow of a sweeping judicial mandate. The American experience with *Roe*, later dismantled wholesale in *Dobbs* precisely because it had frozen a contested social question into a comprehensive judicially authored code, and the comparative durability of *Obergefell v. Hodges*, which extended the right to marry to same-sex couples as an application of an existing due process and equal protection framework built up over decades of incremental precedent rather than through a single freestanding invention, together illustrate that durability in this domain tracks incrementalism and textual grounding far more reliably than it tracks the mere fact of judicial intervention.<sup>33</sup>

Comparative practice outside the Indian and American contexts reinforces this preference for calibrated, dialogic remedies over freestanding judicial invention. The South African Constitutional Court, confronted with a polarizing question of socio-economic entitlement in *Government of the Republic of South Africa v. Grootboom*, declined to specify the precise content of the state's housing obligations, holding instead that the state's housing programme must be reasonable and must include a component addressing the needs of those in

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<sup>32</sup> Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* 3-24 (1999).

<sup>33</sup> *Obergefell v. Hodges*, 576 U.S. 644 (2015).

desperate circumstances, and leaving the legislature and executive to design the actual programme consistent with that standard.<sup>34</sup> This reasonableness-review model, like the committee-based remedy in *Supriyo* and the reservation directions pending legislative action in *NALSA*, allows a constitutional court to hold the political branches to a standard without dictating the institutional means of compliance, and it is precisely this combination, a judicially enforced floor coupled with legislative discretion over the means of meeting it, that this paper identifies as the most defensible form of judicial engagement with polarized social questions. The Canadian Supreme Court's use of suspended declarations of invalidity, under which a law found unconstitutional remains temporarily in force to allow Parliament time to enact a replacement, offers a further comparative instance of the same underlying logic: the court supplies the constitutional finding, while the legislature retains the first opportunity to supply the institutional remedy, a sequencing that the Indian Supreme Court's own committee-based directions in *Supriyo* and *NALSA* approximate without formally adopting the Canadian device by name.

Legislative supremacy, taken as an unqualified principle, cannot be squared with a written and rigid constitution that entrenches fundamental rights precisely against majoritarian revision. Judicial supremacy, taken as an unqualified principle, converts five or nine unelected individuals into the final arbiters of contested moral and theological questions on which the Constitution itself often speaks only in general terms, and risks precisely the kind of institutional overreach and prolonged instability that the *Sabarimala* reference and the *Roe* to *Dobbs* sequence illustrate. Calibrated judicial review, distinguishing the vindication of entrenched rights from the construction of new institutions, and preferring incremental to sweeping remedies, offers a more defensible account of where the legitimate authority of the Indian judiciary begins and ends in this domain.

## 7. CONCLUSION

The question posed at the outset of this paper, whether courts possess the legitimacy to resolve deeply polarized social issues, admits no single answer because it is framed at the wrong level of generality. The Indian Supreme Court's own record across four decades of constitutional adjudication demonstrates that legitimacy is earned or forfeited case by case, through the mode of intervention rather than through the fact of intervention. The Court acted well within its legitimate authority when it removed a criminal disability inconsistent with entrenched guarantees in *Navtej Singh Johar*. It acted with defensible restraint when it declined to construct an entire marital institution absent legislative design in *Supriyo*, while still using its authority to press the political branches toward incremental reform. It exposed the costs of open-

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<sup>34</sup> *Government of the Republic of South Africa v. Grootboom*, 2001 (1) SA 46 (CC) (S. Afr.).

ended doctrinal tests and unbounded remedial ambition in the long and still unresolved Sabarimala reference. And it charted a more durable, interstitial path in the reproductive rights and affirmative action litigation, working within legislative frameworks rather than displacing them. The genuine choice facing Indian constitutionalism is therefore not between judicial supremacy and legislative supremacy, but between an unreflective judiciary that intervenes without regard to the nature of the remedy it fashions, and a calibrated judiciary that reserves its most decisive power for the vindication of entrenched constitutional commitments, while leaving the construction of new social institutions, so far as the Constitution permits, to the branch of government that the electorate can hold to account.

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2. *Ram Jawaya Kapur v. State of Punjab*, A.I.R. 1955 S.C. 549 (India).
3. *I.C. Golak Nath v. State of Punjab*, A.I.R. 1967 S.C. 1643 (India).
4. *Kesavananda Bharati v. State of Kerala*, (1973) 4 S.C.C. 225 (India).
5. *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp S.C.C. 1 (India).
6. *Minerva Mills Ltd. v. Union of India*, (1980) 3 S.C.C. 625 (India).
7. *Roe v. Wade*, 410 U.S. 113 (1973).
8. *Indra Sawhney v. Union of India*, A.I.R. 1993 S.C. 477 (India).
9. *L. Chandra Kumar v. Union of India*, (1997) 3 S.C.C. 261 (India).
10. *National Legal Services Authority v. Union of India*, (2014) 5 S.C.C. 438 (India).
11. *Justice K.S. Puttaswamy v. Union of India*, (2017) 10 S.C.C. 1 (India).
12. *Navtej Singh Johar v. Union of India*, (2018) 10 S.C.C. 1 (India).
13. *Government (NCT of Delhi) v. Union of India*, (2018) 8 S.C.C. 501 (India).
14. *Indian Young Lawyers Association v. State of Kerala*, (2019) 11 S.C.C. 1 (India).
15. *Kantaru Rajeevaru v. Indian Young Lawyers Association*, (2020) 2 S.C.C. 1 (India).

16. Obergefell v. Hodges, 576 U.S. 644 (2015).
17. Supriyo alias Supriya Chakraborty v. Union of India, 2023 SCC OnLine SC 1348 (India).
18. X v. Principal Secretary, Health and Family Welfare Department, NCT of Delhi, 2022 SCC OnLine SC 1321 (India).
19. Janhit Abhiyan v. Union of India, 2022 SCC OnLine SC 1540 (India).
20. Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022).
21. Government of the Republic of South Africa v. Grootboom, 2001 (1) SA 46 (CC) (S. Afr.).
22. Supriyo alias Supriya Chakraborty v. Union of India, Review Petition (C) No. 181 of 2024, order dated Jan. 9, 2025 (India).

**Statutes and Constitutional Materials**

1. The Constitution of India, 1950, arts. 13(2), 25, 26, 32, 226, 368.
2. The Medical Termination of Pregnancy Act, No. 34 of 1971, as amended by the Medical Termination of Pregnancy (Amendment) Act, No. 8 of 2021 (India).
3. The Special Marriage Act, No. 43 of 1954 (India).

**Reports**

1. Supreme Court Observer, Sabarimala Review: Nine-Judge Bench Reserves Judgment on Articles 25 and 26 After Sixteen-Day Hearing (May 2026).