Economic Analysis of Amendments to the Indian Constitution

A dissertation submitted in partial fulfillment of the requirements for the degree of Doctor of Philosophy at George Mason University

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DEDICATION

I dedicate this work to my grandparents, Lalithambal and R Ramadurai, and Rukmini and V Santhanam.

To my grand uncle, R Chandrachudan, who introduced me to the joy of reading.
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ABSTRACT

ECONOMIC ANALYSIS OF AMENDMENTS TO THE INDIAN CONSTITUTION

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The Indian Parliament has amended the Indian Constitution ninety-seven times since its ratification in 1950. Fundamental Rights in India were amended frequently, specifically the right to private property, which was deleted in 1978 through the Forty-Fourth Amendment. These amendments gradually removed the constitutional constraints placed by the founding fathers on democratic decision-making.

In this dissertation, I analyze the role of the ideology and interests of political entrepreneurs in forming and amending constitutional rules in postcolonial India. I also examine the robustness of the amendment process and its vulnerability to political and ideological capture by interest groups in the post-constitutional setting in India.

In the first essay, I argue that frequent constitutional amendments are a consequence of the incompatibility between socialism and constitutionalism in India. I provide evidence from constitutional amendments and Supreme Court cases to show that
the Constitution was amended to execute the objectives and targets of the Five-Year Plans.

In the second essay, I examine the role of ideology and interests of the Constituent Assembly, consequently creating a weak procedure for amending property rights. I find that the socialist ideology of the founding fathers, and their fear of markets and private predation, reduced the voting requirements for amending property rights.

In the third essay, I examine the consequent political opportunism and constitutional rent seeking due to a weak amendment procedure; and explain the creation, expansion and recent dormancy of the Ninth Schedule of the Constitution. Using the 282 laws in the Ninth Schedule, I show that a combination of weak procedural rules and strong substantive rights, led to rent seeking at a constitutional level, despite the institution of independent judicial review.
INTRODUCTION

The Indian Parliament has formally amended the Indian Constitution ninety-seven times since its ratification in 1950. The Fundamental Rights chapter was amended most frequently and some constitutional protections, like the right to private property, were deleted. In the first three decades of the Indian Republic, the Parliament gradually removed constitutional constraints through these amendments, and weakened the most fundamental institutions in Indian democracy like the framework of individual rights, federalism, separation of powers, and independent judicial review.

In this dissertation, I explore why the Indian Constitution did not maintain its original structure and became vulnerable to frequent changes and political capture. I analyze the role of the ideology and interests of political entrepreneurs in forming and amending constitutional rules in postcolonial India.

To better understand the failure to maintain constitutional rules in India, I ask three specific questions. First, why did the Indian Parliament amend the constitution frequently, starting almost immediately after ratification? Second, why did the founding fathers create an easy amendment procedure and allow a majority voting-rule to amend Fundamental Rights? And third, what are the consequences of such frequent amendments to constitutional rules?

It is important to analyze the amendment process from these different points of view because amendments to the constitution must be studied as a process. The rule to
The constitution is one of the most important rules in the constitution. The amendment procedure can protect or undermine the original constitutional contract. However, economists have paid minimal attention to the formal amendment process of constitutional rules.

Economic analysis treats constitutional rules as the “rules of the game.” The analogy between constitutional rules and ordinary rules has led to economic analysis at two different levels. One is constitutional economics, which is the analysis of the choice of rules. And once the rules are chosen, or given, there is the study of public choice, which is the analysis of choice within the rules.

But there is a fundamental distinction between constitutions and the rules of ordinary games. Constitutions also provide the rules by which the rules of the constitution can be changed. This implies that constitutional rules can be changed or revised amidst play. But the choice to revise the rules is made within the realm of given constitutional rules. During the formal constitutional amendment processes, constitutional and post-constitutional decision-making takes place simultaneously.

The clean separation of the analysis of rational individuals choosing a set of rules, and then rational individuals devising strategies within this set of rules, does not explain the process of constitutional amendments. The constitutional amendment process is the interaction between the choice of rules and choice within rules; and a more complex process than a simple two-stage analysis.

Buchanan and Tullock connect the constitutional and post-constitutional stages of decision-making by using the veil of uncertainty while analyzing the choice of
constitutional rules. They situate the individual behind the veil of uncertainty and specify a type of generational uncertainty that prevents the individual from predicting precisely how the choice of constitutional rule will influence his welfare in the future. The future, in their setting, is unknowable, however it is not unimaginable. The individual is able to predict the form of issues that will come up for decision in the post-constitutional setting under whatever rule is adopted by the group. Therefore, the individual can form some expectation of costs and benefits in the future, or the post-constitutional setting; and he will attempt to minimize costs at the point of choice of constitutional rules (1999 [1962], p. 79).

While discussing expectations of cost and benefits in the future, we must understand how an individual forms these expectations. Individuals do not operate in a vacuum in the pre-constitutional setting; their expectations must be formed on some basis. I argue that ideology is the tool that enables an individual to form a mental model of how other individuals in the group will act in the present and future.

Ideology is the foundational belief of the nature of reality in the world; and therefore, ideology tells a man what his interests are at the point of choice (Mises 2007 [1957], p. 138). This mental model of the world is derived from the existing pre-constitutional institutions like language, culture, religion etc. Any analysis of expectations formed, or decisions taken based on one’s interest, behind the veil of uncertainty, must necessarily account for ideology of the individual and group. This approach is outlined in the pre-constitutional and constitutional stages of Figure 1.
I use this approach in Chapter 2 to explain the creation of the majority rule required to amend the Indian Constitution, and why the Fundamental Rights were not entrenched in the Constitution. I argue that the socialist ideology pursued by members of the Constituent Assembly of India, and their fear of markets and private predation, led them to reduce the voting requirements for amending property rights.

While constitutional rules may inform an individual of his constraints and, and therefore his interests; existing constitutional rules are not the only factor determining an individual’s interest. Even in the post-constitutional setting, individuals do not take decisions in an ideological vacuum. The creation of constitutional rules does not render
the ideological beliefs held by individuals in the pre-constitutional setting unimportant or void. Political actors pursue their interests, which are determined by their ideology and also the ideology of their voters.

Constitutional amendments are necessarily initiated in a post-constitutional setting. They reflect a tension or incongruence between expectations formed behind the veil of uncertainty and the political reality in the post-constitutional setting. Traditional public choice describes political actors pursuing their interests within the constitutional constraints.

When specific policies pursued by political actors in a post-constitutional setting are dis-allowed by the given constitutional rules, political entrepreneurs attempt to change the rules through the formal amendment process. This approach is outlined in the constitutional and post-constitutional stages of Figure 1. Constitutional rules inform individuals of the constraints; and for certain policies motivated by ideology and interests, but not allowed within constitutional rules, there may be a process to amend constitutional rules.

In *The Road to Serfdom*, Hayek (1944) outlines the unintended institutional consequences of the pursuit of socialist ideology through central planning. He argues that political institutions were interrelated with economic institutions and the incompatibility between socialist planning and constitutional rules would gradually transform political institutions and make them vulnerable to interest groups. First, he examines the incentives and constraints of political actors due to the incompatibility between planning
and constitutionalism. Second, he examines the evolutionary processes by which these weakened political institutions create perverse incentives for political selection.

In Chapter 1, I argue that the reason for frequent amendments to the Constitution, especially Fundamental Rights, was the incompatibility between formal institutions of socialist planning and the Indian Constitution. Using Parliamentary debates, Supreme Court cases, and constitutional amendments, I provide evidence to show that the Indian Parliament gradually removed the constraints on Indian democracy by amending the Constitution to give validity to unconstitutional legislation executing central plans.

In Chapter 3, I analyze the consequence of the weakening of constitutional rules on interest group activity. In India, when the independent judiciary enforced constitutionally guaranteed property rights; the Indian Parliament amended the constitution, suspending independent judicial review for a list of preferred legislation, called the Ninth Schedule, and enabling land reform policy. In the following decades, the Ninth Schedule took a life of its own, and legislation enabling inefficient wealth transfers, beyond the purview of the original policy of land reforms were added through constitutional amendments. Using the 282 laws in the Ninth Schedule, I show that a combination of weak procedural rules and strong substantive rights, led to rent seeking at a constitutional level, despite the institution of independent judicial review.
CHAPTER 1: INCOMPATIBLE INSTITUTIONS: SOCIALIST PLANNING AND CONSTITUTIONALISM IN INDIA

It is now well established that institutions determine economic outcomes. Therefore, understanding the institutional framework in India is key to understanding its economic development. A simple explanation for the poverty, red tape, and corruption in India is the poor institutional regime. Historians and legal scholars have chronicled the gradual decline of constitutionalism in India over the years. Palkhivala described the amendment process as the systematic defiling and defacing of the Indian Constitution (1974). Singh states that after the Constitution was ratified, “over the next 30 years these constituent rules were progressively chipped away” (2006, p. 305). Subramanian (2007) provides empirical evidence for decline of Indian institutions such as bureaucracy and judiciary. India today, is characterized as a nation with weak property rights, poor enforcement of contracts, and the lack of the rule of law.

However, the picture was not always so dismal. On January 26, 1950, a New York Times editorial welcomed the newly minted Republic of India to the fold of

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1 India ranks 87th on the corruption index and is rated 3.3 on a scale of 10 on the Corruption Perception Index where 1 is most corrupt and 10 is most transparent. "In the World Bank’s “Ease of Doing Business” index, India ranks 134th out of 183 countries, scoring particularly badly on enforcing contracts (182nd). Another index, on “Entrepreneurship and Opportunity”, produced by the Legatum Institute, a think-tank, puts India 93rd out of 110 countries.” http://www.economist.com/node/18586958
sovereign democratic nations. Referring to the new Indian constitution as a great document, that was “starting a new era,” the New York Times wrote that the Constitution “is a document in which Britons, especially, can take pride, for it is British liberal parliamentary ideas and practices that form the primary basis for the new federation.” Institutions like an independent judiciary, strong bill of rights, federalism, and separation of powers were the foundations of the new republic (*The New York Times*, January 26, 1950).

Despite the great beginning, why did the rule of law and constitutionalism, progressively deteriorate in India? On this question, the emphasis of past work has been to single out individuals, cases, or events. The general theme in this literature suggests that India was off to a good start under the leadership of Jawaharlal Nehru, but subsequent leaders like Indira Gandhi undermined the Constitution (see Austin 1999, p. 270, 573; Das 2000, p. 174; and Guha 2007, p. 518). Bose (2010) blames the weak judiciary and the misinterpretation of the Constitution by lawyers and judges. Singh (2006) explains the deterioration of property rights through the weakening of separation of powers, where the judiciary failed to check an all-powerful executive. The focus on this literature has been to single out individuals or historical events.\(^2\) While there is a general consensus that institutions in India deteriorated, no systematic explanation has been put forth for the constitutional decline during the first few decades of post-independence India.

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\(^2\) One exception to this rule is Singh (2006). However, while Singh’s analysis focuses on institutions and not individuals, it fails to account for the cause of the systematic decline, by focusing on the power of the executive, or essentially the Prime Minister’s Office.
I argue that the reason for constitutional decline in India was incompatibility between formal institutions of socialist planning and the Indian Constitution. The Indian Parliament gradually removed the constraints on Indian democracy by amending the Constitution to execute central plans. Constitutionalism prevails when general rules are announced beforehand and apply equally to all individuals in a non-arbitrary manner. However, the impossibility of rational socialist calculation requires unlimited discretion in the hands of planners, which conflicts with constitutional constraints. The Indian Republic was founded on principles to form a socialist state as well as create a constitutional democracy and this internal contradiction was the main cause of the constitutional decline.

My argument directly challenges the existing literature on the specific relation between socialism and constitutionalism in India. Scholars view the two institutions as so “interdependent as to be almost synonymous” (Austin 1999, p. 633). Mirchandani (1977) blames the opportunism of politicians and bureaucrats and Kohli (1990) argues that the political actors took advantage of the conflict between the have-haves and have-nots and, in the process, undermined the rule of law. Dhavan (1992, p. 60-61) argues that constitutionalism and socialism are compatible; and that the failure was caused by poor execution. He argues that socialism and constitutionalism have not worked because the political “will” to make it work is missing. He provides a list of suggestions

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3 Even when Austin concedes that these goals are in conflict at times, he believes the conflict is temporary and there is no long-term incompatibility between the two. “The goals of unity-integrity, democracy, and social revolution were not always in perfect harmony and on occasion seemed in competition. These difficulties had to be surmounted, circumvented or accommodated in the conditions prevailing in the country.” (Austin 1999, p. 636) “Conflict between the web’s democracy and social revolution strands is inevitable. … efforts toward long-term harmony between the strands make the short-term conflict inevitable.” (Austin 1999, p. 668)
(requirements) for socialism to work without abuse of arbitrary power; and his formula hinges on selfless political participants.\textsuperscript{4} Kashyap (2010, p. 8) argues that the reason the fundamental principles of governance and constitutionalism were “defiled, debased, and debunked openly” is because the socialist principles in the Constitutions were unenforceable positive rights.

Thus, the prevailing view is that while socialism and constitutionalism were sound and harmonious, it is the poor execution of these principles that undermined the Indian Constitution. My analysis exposes the incompatibilities between socialism and constitutionalism and shows that the political actors undermining the constitution were pursuing the socialist planning to its logical conclusion.

In addition, this research contributes to a vast literature on socialist planning resulting in poor economic growth in India. Socialist policies are blamed for poor incentives and information and unintended economic consequences (see Shenoy 1969; Bhagwati and Desai 1970; Das 2000; Panagariya 2008; Manish 2011; and White 2012). However, the institutional consequences of socialist planning are overlooked in this literature. I argue that economic growth was not the only casualty of socialist planning, as constitutional principles were also compromised.

I argue that by concurrently espousing the ideologies of socialism and constitutionalism, the founding fathers set the stage for many inevitable constitutional conflicts. To implement socialist planning, the Indian constitutional contract was changed

\textsuperscript{4} According to Dhavan, four ingredients are necessary for Nehru’s plan to work. First, that Parliament is determined to enact radical legislation. Second, such legislation is supported by large ideological consensus, even those adversely affected. Third, bureaucrats are dedicated and incorruptible. Fourth, Indians must not abuse public power.
to a point where the spirit of the constitution, which was to create a constrained
democracy with adequate checks and balances, was diluted. In section 1.1, I describe the
ideological vision of the Indian founding fathers. I show that they believed socialism and
constitutionalism were congruent and attempted to reconcile conflicts between the two
for many decades. In section 1.2, I discuss the incompatibility and contradiction between
the institution of socialist planning and constitutional democracies. In section 1.3, I
provide evidence that the conflict between these two institutions undermined rule of law,
individual rights and democracy in India. In section 1.4, I conclude this chapter.

1.1 The Ideas of India
By Indian independence in 1947, the allure of Soviet style planning had already
faded slightly. But the vast majority of intellectuals in the West still thought that socialist
economic policies could be combined with democratic politics in a manner that would
yield a more rational economic allocation of resources than capitalism, a more just
system in terms of egalitarian distribution of income, and a more democratic society by
transferring power to the powerless.

Indian political leaders were inspired by members of Fabian Society, especially
Harold Laski (see Bhagwati 1993, Austin 1999, Das 2000, Guha 2007, Varma 2008, and
White 2012). The members of the Fabian Society in London were the first of the British
intellectuals to support home rule in India and attracted Indians who were involved in the
nationalist movement (Moscovitch 2012). They influenced an entire generation of Indian
intellectuals educated in England. These Indians were skeptical of capitalism, which they
equated to mercantilism, due to India’s historical experience with colonial firms like the
British East India Company. They believed that a socialist welfare state would uplift the masses deprived and exploited 200 years of colonial rule (Das 2000 and Varma 2008). It was from this colonial past, that the idea of an independent India was formed; the Indian independence movement was the coming together of ‘national’ and ‘social’ revolutions.\(^5\)

The most prominent among this generation of intellectuals was Jawaharlal Nehru, who developed strong socialist leanings during his time in England. While studying law in London, he was enormously influenced by Fabian ideas. He believed that capitalism could not strengthen either political or socio-economic equality. "Democracy and capitalism grew up together in the nineteenth century, but they were not mutually compatible. There was a basic contradiction between them, for democracy laid stress on the power for many, while capitalism gave real power to the few” (Nehru 2004 [1936], p. 547).

The main thread joining these two ideas, critiquing capitalism and embracing socialism, was that political equality was meaningless unless there was economic equality in India. Sydney and Beatrice Webb, the founders of the Fabian Society emphatically made this connection between substituting the capitalist order with a socialist democracy.\(^6\) Along with the Webbs, George Bernard Shaw and Harold Laski’s ideas left

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\(^5\) "The national revolution focused on democracy and liberty- which the colonial rule had denied to all Indians- whereas the social revolution focused on emancipation and equality, which tradition and scripture had withheld from women and low castes.” (Guha 2007, p. 107).

\(^6\) “The central wrong of the Capitalist system is neither the poverty of the poor nor the riches of the rich: it is the power which the mere ownership of the instruments of production gives to a relatively small section of the community over the actions of their fellow-citizens and over the mental and physical environment of successive generations. Under such a system personal freedom becomes, for large masses of the people, little better than a mockery.... What the Socialist aims at is the substitution, for this Dictatorship of the Capitalist, of government of the people by the people and for the people, in all the industries and services by which the people live”. Sidney and Beatrice Webb, *A Constitution for the Socialist Commonwealth of Great Britain* (London 1920, p. xiii) ff. Quoted in Mises 1922, p. 399 n.1
a mark on Nehru during his time at Harrow, Cambridge, and London (Nehru 2004 [1936], p. 27).

Awed by socialist ideals, Nehru visited the Soviet Union for the tenth anniversary of the Bolshevik revolution. Nehru believed he had witnessed a system that had achieved the idea of equality in every sense. In a gushing travelogue, Nehru concluded that the Soviet system treated its workers and peasants, its women and children, even its prisoners better than any liberal system. Describing this visit, he wrote, “the contrast between extreme luxury and poverty are not visible, nor does one notice the hierarchy of class” (1929, p. 13).

Like Nehru, others were also inspired by the socialism as a cure for other social evils. The closest to Nehru’s vision was VK Krishna Menon, also a student of Harold Laski, and an important member of the Indian National Congress Party. His cousin BK Nehru argues that “the burning issue for us [Indian students] was Indian independence; the socialists and communists supported it; the capitalists and Conservatives opposed it. Ergo, socialism (or communism) was good; capitalism bad” (Nehru 1977, p. 20).

An important grassroots socialist leader in India was Jayaprakash Narayan, who founded the Congress Socialist Party in 1934. This was an attempt to give voice to Nehru’s wishes of instilling a commitment toward economic equality and social change within the Congress party. The Congress Socialist Party leadership included Kamaladevi Chattopadhyay (2010 [1944]) who believed socialism would lead to more equal status for women in society. Ram Manohar Lohia (2010 [1964]), another devoted member, believed socialism would eliminate caste differences by giving preferential treatment to
lower castes for a few decades (Guha 2010, p. 395). Young activists like Narendra Dev, Yusuf Meherally and Achyut Patwardhan also joined the Congress Socialist Party.

These causes for equality supported by socialist ideas were so powerful that within a few years the Congress Socialist Party was more than one-third of the strength of the All India Congress Committee with its influence spreading to the grassroots (Devasahayam 2012, p. 9). With the strength of the socialists increasing in the Congress Party, in 1938 the Congress constituted the National Planning Committee with Nehru as its first chairman (Nehru 2004 [1946] p. 435). The policies planned under this banner were largely inspired by policies already in place in the USSR. India also had its own taste of central economic planning, in an effort to channel resources to aid the British war effort, during World War II.

It was not only the members of the Indian National Congress who were Fabian socialists. Outside the party, an influential group of businessmen also held strong socialist views. In 1944, with independence on the horizon, a group of leading industrialists published *A Brief Memorandum Outlining a Plan of Economic Development for India* stating that the “principal objective of our plan is to bring about a doubling of the present *per capita* income within a period of fifteen years” (Thakurdas 1945, p. 9). Even these capitalist businessmen believed in a strong state economic plan and that “the existing economic organization, based on private enterprise and ownership, has failed to bring about a satisfactory distribution of the national income” (*Ibid.*, p. 65). “We believe that planning is not inconsistent with a democratic organization of society. On the contrary, we consider that its objects will be served more effectively if the controls inherent in it
are voluntarily accepted by the community and only enforced with its consent” (*Ibid.*, p. 91).

In fact, almost all Indian intellectuals at the time were sympathetic to some kind of socialism, with critics being few and far between. “Given these circumstances, when India attained its independence in 1947, it was strongly socialist in orientation, its intellectual atmosphere having been shaped largely by Harold Laski of the London School of Economics, who had greatly inspired Nehru” (Friedman 2000). Austin describes the leaders in New Delhi, at the time of independence as, “believers in the seamless web: confirmed democrats, advocates of social and economic reforms, and nationalists with broad perspective” (Austin 1999, p. 17).

But there were aspects of the Soviet system that the Fabians could not reconcile with, most specifically the restrictions on speech and freedom of press. While discussing the politics of the Congress Socialist Party formed in 1934, Guha writes, “At the same time, these Congress Socialists detested the so-called Socialist Fatherland, the Soviet Union. Condemning its one-party state and its political treatment of political dissidents, the CSP stood rather for a marriage of democracy and socialism” (2010, p. 264).

Nehru thought that one part of the Soviet system was over-regimented: that individuals were not politically free, and this was too high a price to pay for the economic development that USSR promised. He disliked many aspects of Soviet policies including

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7 Gandhi was opposed to socialism in theory since for him the means did not justify the ends. MS Golwalkar (2010 [1964]) believed socialism was not an ideal goal for India since it was not part of Indian tradition but an alien idea imposed from a foreign intellectual movement. Specifically, he viewed it as a movement born out of the hatred and envy of rich capitalists and not out of a higher spiritual need. The real dissent to socialism in an organized manner came much later in the late 1950s. This came from C Rajagopalachari and the Swatantra Party. The only economist to dissent against central planning was BR Shenoy (1969).
“the ruthless suppression of all contrary opinion, the wholesale regimentation, the unnecessary violence in carrying out various policies” (2004 [1936], p. 377).

This sentiment against following the Soviet model completely was not unique to Nehru, but prevalent in the socialist thinking of the time in India. This had important implications on Indians embracing socialism. The Indian freedom movement can be characterized as Gandhian - one that was non-violent, non-cooperative and which involved civil disobedience by large masses of people making it difficult for the British to govern India. That the movement must be peaceful and non-violent was so fundamental that any deviation from that value towards the Soviet system would not have received acceptance of the Congress Party or the people at large.

Indian intellectuals, at the time of independence, were also inspired by political rights offered to British citizens, which were significantly denied to citizens in the colonies. At the eve of independence in India, there was an overwhelming demand to form a Republic. Among the leaders at the time, Jawaharlal Nehru was most in favor of drafting a Constitution inspired by British, American and Soviet institutions. To Nehru, a system of governance where all were equal before the law was imperative in unifying India.⁸ To the founders, democracy meant a constitutional democracy accompanied by a framework of individual rights and the relevant checks and balances through separation of powers and federalism. But the idea of an Indian republic not only opposed the political imperialism, but also the economic imperialism of the West. With such ideals,

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⁸ Opposition to the idea of a Constituent Assembly came from two quarters. While the first was Gandhi, once it was clear that the Constituent Assembly would be completely Indian and with sufficient representation from the provinces, Gandhi also supported the idea. The second criticism came from Communists and Marxists, who believed in a social revolution to bring change and were opposed to English educated lawyers in the Congress leadership claiming to represent all of India.
Nehru led India to create two important institutions, which would define India for the future - the Constitution, which would guarantee the rights that were denied during colonial rule and the Planning Commission, which would ensure economic equality.

It is in this aspect that Fabian Socialism was as powerful as it was romantic. Fabians were against violent revolutions and over-regimentation and suppression of press; and favored political rights to all citizens. And yet they borrowed the idea of economic egalitarianism from socialism - and the combination worked perfectly given India’s needs. On one hand, Indian leaders wanted free speech, free press and freedom of association and on another they wanted economic equality and shunned free markets and freedom of business, as these were not considered conducive to economic equality.

In order to form a Constitutional Democracy, a Constituent Assembly was formed in 1946 and members were chosen through indirect election by the members of the Provincial Legislative Assemblies. Most of the members of the Constituent Assembly were current or prior members of the Congress party. The Congress Party, in its 1946 provincial election manifesto, promised the abolition of the feudal system, agrarian land reform, and the nationalization of key industries.

Given the popular political and economic ideology, India was to become a Republic with a Parliamentary democracy and also a Socialist Welfare State. Capitalism was considered incompatible with the society the Constituent Assembly envisaged, and socialism the most important means toward eliminating poverty. This was summed up in

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9 The Assembly was formed as following: (i) 292 members were elected through the Provincial Legislative Assemblies; (ii) 93 members represented the Indian Princely States; and (iii) 4 members represented the Chief Commissioners' Provinces. After the decision to partition the sub-continent into India and Pakistan, a separate Constituent Assembly was set up for Pakistan and representatives of some Provinces ceased to be members of the Assembly, reducing the membership of the Indian Assembly to 299.
Nehru’s *Objectives Resolution* toward the Indian Constitution that was debated, discussed and approved by the Constitution Assembly.\(^9\) Nehru said, “I think also of various Constituent Assemblies that have gone before and of what took place at the making of the great American nation when the fathers of that nation met and fashioned out a constitution that stood the test of so many years … Then my mind goes back to a more recent revolution which gave rise to a new type of State, the revolution that took place in Russia and out of which has arisen the Union of Soviet Socialist Republics, another mighty country, which is playing a tremendous part in the world” (1946).

In many debates in the Constituent Assembly, socialism was used, often interchangeably, to mean two different things. The first was socialist *ideals* or goals, which was mainly economic egalitarianism. The second was socialist *means* towards those goals, which was centralized state planning of the economy.\(^11\) During the debates, despite these differences of opinion, a great effort was made to find common ground and reach consensus within a constitutional framework.

The Indian Constitution adopted in 1950 constrained the state in order to preserve rule of law and protect the individual, while allowing for the socialist or welfare agenda. The Indian Constitution provides for separation of powers between the legislature, executive and the judiciary in the Constitution and independent judicial review was

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\(^9\) The Constituent Assembly discussed the *Objectives Resolution* from December 13-19, 1946 and on December 21, 1946 its consideration was postponed. The matter was discussed again on January 20-22, 1947. On the last day all members standing adopted it unanimously.

\(^11\) “Broadly, it was used synonymously with ‘social revolution’, meaning national social-economic reform with an equitable society as its goal, and tacitly including such ideas as special treatment for disadvantaged citizens. In essence, it meant social egalitarianism and political equality. Narrowly, it had a more classical meaning: central government planning, the dominance of the state sector in the economy, and so on” (Austin 1999, p. 634).
explicitly provided for in the Indian Constitution. Therefore, as a Parliamentary democracy, the executive was made accountable to the legislature. The legislature was accountable to the electorate and an independent judiciary could review legislation.

Second, the Indian Constitution created a Federal State and Part XI of the Constitution outlined the distribution of powers between Central and State governments (Articles 245-255). Third, the Fundamental Rights in Part III of the Constitution, despite some dilution by the socialists, secured a sphere protecting the individual from arbitrary actions of the state. It for the right to equal treatment and protection under the law, right to private property, freedom of speech and religion, and most importantly right to writ remedy through an independent judiciary (Articles 12-32). Therefore, the Indian Constitution, as adopted in 1950, provided principles required to constrain the state and protect the individual from coercion.

As the Constitution was being crafted carefully, another institution was being created, albeit with much less thought and debate. Preparations were in place to set up a central planning commission, a victory for Nehru’s vision and agenda for independent India. The adoption of Soviet style planning was debated in the Provisional Parliament and the Indian Planning Commission was created in March 1950 by a Resolution of the Government of India. Nehru appointed PC Mahalanobis, an Indian statistician, to travel and learn from other economists and central planners, the optimal way to utilize India’s economic potential.

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12 Separation of powers for the federal government is enumerated in Part V (Articles 52-151) of the Constitution. Separation of powers for the state governments is enumerated in Part VI (Articles 152-242) of the Constitution. Independent State and Federal Judiciary is enumerated in (Articles 13, 32, 139 and 226).

13 The Seventh Schedule of the Constitution provided a list of subjects on which the Central and State legislatures could legislate.
The Commission was Nehru’s brainchild and he was also its first Chairman. The Commission was responsible for drafting Five Year Plans (FYP). The main goal of the Planning Commission was economic egalitarianism through scientific and industrial development. Each plan was supposed to spell out the exact amount of the investments to be made by the public and private sectors and how that investment would be allocated across sectors. It also included targets to be achieved by various industries for the next five years.

In the few areas open to the private sector, a highly restrictive industrial licensing regime was formulated to direct private enterprise. The planning process was put into operation by the Industrial Policy Resolution 1948, which divided the economy’s industries into three broad categories - those on which the state had a monopoly, those where both the private sector and public sector were allowed to operate and those where private sector may operate but within the purview of state regulation. This command and control style economy was achieved through a “maze of Kafkaesque controls” imposed on India’s private sector (Bhagwati 1993, p. 50).

In Nehru’s vision, the Planning Commission was a complementary institution to the newly minted Constitution. To Nehru, the planners would execute the dream for an economically just society, which would strengthen the Indian Republic. While Nehru’s dream for a participatory and prosperous democracy was laudable, the institutions he created to achieve the goals were in conflict from the very beginning.
1.2 Incompatible Institutions

The twentieth century witnessed an increasing substitution of market institutions with socialist planning of many kinds to improve on market allocations considered unjust. Similarly, formally designed and written constitutions were used as an instrument to guarantee political and economic rights to historically oppressed masses. The ideas of a more participatory economic and political system are compatible with each other; however, the means of socialist planning and constitutionalism used to achieve the two goals are incompatible.

Socialism requires social ownership of the means of production and the abolition of private property. Mises argued that without the private ownership of the means of production, there would be no exchange of these means of production. Without exchanges, market prices, reflecting the relative scarcity, for these goods cannot emerge. And without market prices, the planners cannot rationally allocate these goods. By rational allocation requires that no want more urgently felt is unsatisfied because the same goods were allocated to a less valued use (1922). Central planning requires that the economic problem is solved by the entire nation or community, and not solved by the individual. The organizational logic of planning requires the substitution of community decision-making by its representatives to form a collective plan (Mises 1922).

Given the impossibility of rational economic calculation in socialist planning, Hayek demonstrates the institutional structure that would emerge from the failure of socialist planning to achieve its desired results. Due to the impossibility of rational economic calculation, planners require unlimited discretion to execute the plan (Hayek
1944). However, lacking the economic knowledge, these representatives are forced to rely on other forms of decision-making like non-market allocations through exercise of political power. The demands that socialist planning requires of political actors make it impossible to bind them by a set of constitutional constraints.

The above problem is really one of institutional incompatibility. Socialist planning, to be successfully executed, requires central planners to have specific end goals and all actions to be constrained by the end goal of the plan. On the other hand, constitutionalism requires that the decision-makers are constrained by rules announced beforehand generally applicable to all, instead of being bound by specific purposes of the plan.

In *The Road to Serfdom* Hayek (1944) outlines the unintended institutional consequences of socialist planning. Hayek argued that political institutions were interrelated with economic institutions and the incompatibility between socialist planning and constitutionalism would gradually transform political institutions. The gradual transformation is not a result of a single choice, but the consequence of numerous choices where each choice is a minor deviation from the rule.

Deconstructing Hayek’s argument, we can analyze three incompatibilities between socialist planning and constitutionalism. While all three are inter-related, for analytical clarity it is important to discuss the incompatibility between socialist planning and rule of law; socialist planning and individual rights; and socialist planning and democracy.
1.2.1 Planning and Rule of Law

There are three fundamental characteristics of the rule of law: the rule of law, not men; equality before the law of all persons and classes, including governmental officials; and the incorporation of constitutional law as a binding part of the ordinary law of the land (Dicey 1915). Along similar lines, for Hayek, rule of law requires that the state action be bound by rules fixed and announced beforehand. These rules must be general, known and certain, so that individuals may adjust their behavior accordingly. And the rules must apply equally to all persons and without prejudicing some categories of people at the expense of others. In short, for Hayek, certainty, generality and abstraction, and equality of the rules are requisite conditions for the rule of law (Hayek 1944, p. 92 and Hayek 2011 [1960], p. 318-9).14

Execution of socialist planning is incompatible with formal rule of law. The task of socialist planning and the knowledge requirements are so high that the planners cannot be bound by general rules. Planners must be given almost unlimited discretion to achieve the task of planning, and a discretionary state is antithetical to the rule of law.

The rule of law is certainty in legal rules, which requires the authorities to announce fixed rules beforehand, and be bound by them. Procedurally, it precludes retroactive legislation, unstable and obscure legislation, or the failure to publicize the law. Therefore, the authorities must be bound by the rules and no other constraints except the rules. However, in case of socialist planning, the plan must be based on the end goals.

14 This is the definition of the basic principles of rule of law. Rule of law, however, has no substantive content and is only a formal and procedural guideline. Also see Rajagopalan and Wagner (2013).
As circumstances change in a dynamic world, the means to achieve the end goals of the plan must keep changing and cannot be known beforehand. Legal rules, on the other hand, must be set forth in advance and cannot anticipate every eventuality that might arise in the execution of the plan.

Like Hayek, Tamanaha argues, “The fundamental tension between following rules and striving for purposes or ends cannot be eradicated because it strikes at the very meaning of a legal rule…what makes a rule a “rule” is that it specifies in general terms in advance a mandate that decision makers must follow to the exclusion of – screening out- any other considerations” (2006, p. 228).

The rule of law also requires that the rules are general and neither discriminatory nor arbitrary. Assuming that the current distribution of goods determined by demand and supply are not considered “just” and some other distribution is sought, this must necessarily result in the creation of non-market allocation mechanisms. In a world without scarcity, this is not a problem, but within the world of scarce resources, some criterion must be determined on how to distribute goods, which would necessarily involve discriminating against some individuals in favor of others. And for this purpose discretion must be given to a council of men.

The other aspect of generality is that decisions by the authority must be non-arbitrary and must follow certain principles. However, society does not naturally have a coherent, comprehensive hierarchy of values or some specific criterion on how scarce resource must be allocated. To this extent, without a given set of principles, the distributions of the planning authority will be arbitrary and determined on a case-by-case
basis. An economic planning authority “must constantly decide questions which cannot be answered by formal principles only, and, in making these decisions, it must set up distinctions of merit between the needs of different people” (Hayek 1944, p. 82). The complexity of the task implied in rationally planning an economic system would require that planners be granted almost unlimited discretion (see Hayek 1944, p. 144 and Boettke 1995, p. 12).

1.2.2 Planning and Individual Rights
Socialist planning, due to the nature of the task of planning, infringes on political and economic rights. There is an immediate inconsistency between the goals of socialist planning and the right to political equality. To fulfill the goal of central planning, which is to bring different individuals to the same end state, it is necessary to treat them differently, which is in direct conflict with the right to equality. Equal treatment before the law will necessarily lead to unequal distribution of resources and distributing the resources equally necessarily implies violating equality clause. Therefore one can either have political equality or substantive equality, but one must choose and cannot have both. (see Hayek 1979, p. 86 and Hayek 2011[1960], p. 340-41)

The right to equality requires that all individuals must be treated as equal in a formal sense under the law, irrespective of whether they are substantively equal on some other criterion. However, socialist planning violates equality, because it is particularistic (Hayek 1973, p. 85-6). The purpose of the plan is to achieve specific ends for specific people and therefore the plan must necessarily discriminate. “A necessary, and only apparently paradoxical, result of this is that the formal equality before the law is in
conflict, and in fact incompatible, with any activity of the government deliberately aimed at material or substantive equality of different people, and that any policy aiming directly at a substantive ideal of distributive justice must lead to the destruction of rule of law. To produce the same result for different people, it is necessary to treat them differently. … It cannot be denied that the rule of law produces economic inequality – all that can be claimed for it is that this inequality is not designed to affect particular people in a particular way” (Hayek 1944, p. 87-88).

Due to the discretionary behavior of the planner on account of transient circumstances of time and place, the impact of planning on different groups is different; and therefore political or formal equality cannot be attained under socialist planning.

A host of political rights, such as the right to free speech and right to freedom of religion are affected by socialist planning. If the means of private production are owned by the state and there is no right to private property, individuals cannot own a printing press, or a news company without the insecurity of nationalization. Where the central plan does not adequately allocate newsprint, the ability of an individual to print newspapers is hampered directly by the actions of the state.

Similarly, without the right to private property, an individual may not be able to establish a place for religious worship, without the threat of the central plan allocating those resources elsewhere. Since socialist planning strikes at the root of the right to private property, virtually all other political rights are infringed upon, even if this is not the intention of the planners.
1.2.3 Planning and Democracy
Planning requires widespread agreement, which typically cannot be produced through democracy, leading the system to create incentives for dictatorship. In this sense, planning is incompatible with democracy.

Socialist planning not only requires agreement of the citizens about the requirement of a central plan, but also about a particular plan. If there is a lack of agreement, this implies that representatives will find it difficult to reach consensus or will have to compromise on priorities. The more extensive the planning sought, the greater and deeper will be the conflicts among individuals. To resolve this, individuals must have consensus in two specific ways. First, individuals in society must agree on the shared values or goals that are sought. Second, individuals must collectively agree on the specific hierarchy or ranking of the values, in order to determine priorities and tradeoffs. Such a comprehensive value system does not exist. Further, it would be impossible for any mind to comprehend the infinite variety of different needs of people competing for resources and attaching a specific objective weight to each of these needs.

Hayek identified and articulated this problem regarding planning. He argued “planning creates a situation where it is necessary for us to agree on a much larger number of topics than we have been used to, and that in a planned system we cannot confine collective action to the tasks we agree can on but are forced to produce agreement on everything in order than any action be taken at all, is one of the features which contributes more than most to determining the character of the planned system” (1944, p. 62). In other words,
those who control the means must also show what ends must be served, or rate the values in society.

Therefore, if a central plan must be executed, it must be executed outside of a democratic system, since the level of agreement required for executing a particular plan cannot be achieved by democratic consensus. Planning, due to the nature of the exercise, is compatible with dictatorships and not with democracy. Hayek states, “planning leads to dictatorship since dictatorship is the most effective instrument of coercion and enforcement of ideals and, as such, essential is central planning on a large scale is to be possible. The clash between planning and democracy arises simply from the fact that the latter is an obstacle to the suppression of freedom which the direction of economic activity requires” (1944, p. 70).

Thus, it is possible to rely on state authority voluntarily formed and agreed upon only in those areas where consensus or agreement exists. Typically, this area tends to be narrow and limited to general rules. However, when the state authority attempts to control spheres of individual lives where no general agreement exists, the state, bound by its end goals, will conflict with an individual’s rights, and institutions such as rule of law and democracy which enable individual liberty.

1.3 Indian Constitution v Central Planning

The first three decades of central planning in India can be divided in two phases: from 1951-64 and then from 1965-81. The first phase, coinciding with Nehru’s tenure as Prime Minister, saw a large role for the public sector in agriculture and the imposition of licensing requirements on the private sector in various industries, but was relatively
liberal on international trade. The second phase extended a much greater role to the state, imposed enormous restrictions on large enterprises and foreign investment, created reservation for small scale industries, nationalized banks, insurance, coal and oil industries and created even greater licensing requirements for industry (Panagariya 2008, p. 48).

As India moved from a mixed economy model to Soviet style planning, there were progressively greater infringements on individual rights and violations of rule of law and democracy.

It is well established that the Fundamental Rights were most frequently and substantively amended from 1951-1978. During the first forty-four amendments thirteen amendments directly altered the Fundamental Rights. Other amendments were administrative to aid in reorganization of state borders and consolidating Indian territory post independence. India’s Constitution was amended thirteen times\(^\text{15}\) during the first five FYPs, to directly give effect to targets/objectives of these plans. These amendments were substantive, not administrative, and changed the Fundamental Rights in Part III of the Constitution. These Constitutional amendments enabled the planners to retrospectively give effect to plan objectives after the Indian judiciary had struck policy down for violating constitutional principles. These constitutional amendments were not merely rhetorical or procedural; they were substantive infringement on individual rights and important aspects of state machinery like federalism and separation of powers.

\(^{15}\) First, Third, Fourth, Seventh, Seventeenth, Twenty-Fourth, Twenty-Fifth, Twenty-Ninth, Thirty-Fourth, Thirty-Ninth, Fortieth, Forty-Second and Forty-Fourth Amendments to the Constitution were passed by the Parliament to directly give effect to unconstitutional policy enacted to execute planning.
1.3.1 First Amendment

India’s First FYP expressly stated as its objective, to “reduce disparities in wealth and income, eliminate exploitation, provide security for tenants and workers, and, finally, promise equality of status and opportunity to different sections of the rural population” (Planning Commission 1951, p. 88). Toward this goal, Nehru focused on expanding heavy industry given planners’ concern regarding the lack of economic activity in intermediate goods, especially heavy industry. But since a large part of the economy was agrarian and three-fourths of Indians lived in villages, land reform was also crucial. Therefore, the First FYP focused on agricultural output and preparations were underway to give central importance to industry in the First and Second FYPs.

The First FYP tackled the problem of land reform with two targets: first, agricultural production, and second, from the point of view of different interests in the land (Planning Commission 1951, Chapter 12). Ironically, the first target required consolidation of land holdings to increase productivity; while the second target involved breaking up large feudal estates for redistribution among landless peasants. The focus was on abolition of the feudal or zamindari system, which basically meant imposing agrarian land ceilings, and the redistribution of surplus land holdings. However, both these targets had to be achieved keeping in mind the overall goal of economic egalitarianism. Toward this end, various states formulated legislation to take land from feudal lords and redistribute it among peasants.

The takings clause of the Constitution, originally read: “No person shall be deprived of property without due process of law” and “no property... shall be taken possession of or acquired for public purposes under any law authorizing the taking of
such possession or such acquisition, unless the law provides for compensation” (Article 31). State laws implementing land reforms were challenged in courts as unconstitutional. One of these, The Bihar Management of Estates and Tenures Act, 1949, assessed the compensation payable to the owner of property acquired at 20 times the assessment for a poor owner and at 3 times the assessment for a rich owner. In *Kameshwar Singh v The Province of Bihar* (AIR 1950 Patna 392), the Patna High Court struck down the legislation as unconstitutional. The Court held that the legislation violated the right to equality under Article 14, as it did not give equal compensation and discriminated against richer zamindars. The state challenged the High Court’s ruling in the Supreme Court.16

One of the main problems faced by the state was to provide just compensation required under Article 31. The Indian state could not provide compensation for the extensive land redistribution *and also* fulfill the objectives of the First FYP. Many policies pursued to fulfill the First FYP and give meaning to the socialist principles in Part IV of the Constitution, violated other parts of the Constitution. Nehru described this tension as one between the policies of the state “which represent dynamic movement towards a certain objective” and Fundamental Rights which “represent something static, to preserve certain rights” (Nehru 1951, p. 8820). While the challenge was pending in the Supreme Court, the Constituent Assembly which, at the time, was the Provisional

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16 Other cases included questioning the right of the government on Constitutional grounds to take over a private motor bus concern; and the claim put in to the Bombay High Court by mill owners whose concern had been taken over by the government that their fundamental right to property was violated since they received no compensation in *Dwarkadas Srinivas v The Sholapur Spinning and Weaving Company Ltd.* (AIR 1951 Bombay 86).
Parliament (pending elections) passed the Constitution (First Amendment) Act, 1951, diluting the eminent domain clause and the right to private property to enable policies giving effect to the First FYP.

The Statement of Objects and Reasons forming part of the First Amendment explicitly stated, “The validity of agrarian reforms … formed the subject-matter of dilatory litigation, as a result of which the implementation of these important measures [land reform], affecting large numbers of people, has been held up. … The opportunity has been taken to propose a few minor amendments to other articles in order to remove difficulties that arise.”

The First Amendment created a list of preferred legislation called the Ninth Schedule, placed within the Constitution to supersede the Constitution. Article 31B stated that laws to be listed in the Ninth Schedule could not become void on the ground that they violated any Fundamental Right; the government proposed to protect all land reform legislation by including such legislation in the Ninth Schedule. The legislation was fully protected against any challenge in a court of law. The “few minor amendments to other articles in order to remove difficulties” essentially defeated the purpose of the constitutional constraint.

17 Members of the Provisional Parliament in 1951 were members of the Constituent Assembly that drafted the constitution. With the exception of a handful of members, these framers believed in socialist planning. With a clever legal innovation, they by-passed judicial review for legislation concerning agrarian reform and enabled legislation previously declared invalid by the Courts to become valid retrospectively. The First Amendment created the Ninth Schedule, a list of legislation not subject to judicial review, and the Amendment passed in Parliament with a majority of 228 to 20. The framers viewed the Ninth Schedule as a necessary trade-off between constitutionalism and execution of the land redistribution agenda essential for prosperity in India.

18 In 1951, the First Amendment was challenged in the Supreme Court in Shankari Prasad Singh v Union of India (AIR 1951 SC 458). The Court held that Parliament was empowered to amend the Constitution without any restrictions as long as it followed the procedure laid down for amendment in the Constitution.
For the development of the industrial sector, the Industries (Development and Regulation) Act of 1951, based on Industrial Policy Resolution 1948, instituted a highly restrictive industrial licensing regime to control the private sector. Under the Act, all private industrial undertakings had to register with the central government. Any new undertaking required state permission, and expansion of existing firms required licenses. In certain cases, the government could assume control of private industries.

During the formulation of the First FYP, there was concern that empowering the state to impose controls on private enterprise would violate the Constitution. The government had already experienced problems with the judiciary on land policy. Nehru’s government realized that fulfilling the Industrial Policy Resolution 1948 would conflict with Article 19(1)(g), which guaranteed all citizens the right “to practice any profession, or to carry on any occupation, trade or business.”

To solve this problem, the First Amendment to the Constitution added an exception to the above right which stated that nothing would prevent the State from making any law relating to “the carrying on by the State, or by a corporation owned or controlled by the State, of any trade business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise” (Article 19(1)(g) Proviso).

1.3.2 Third Amendment
In addition to land reforms and the industrial policy, the First FYP declared that the “maintenance of a structure of prices which brings about an allocation of resources in

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19 The proviso read that the right was subject to reasonable restrictions that the State may impose in the interests of the general public.
conformity with the targets defined in the Plan must be the consistent aim of economic policy” (Planning Commission 1951, Chapter 2).

However, halfway into the First FYP, problems relating to inputs for industrial sector were looming large for the government. In 1954, the central government wanted greater legislative control over pricing of means of production. The other issue affecting the central government was the federal structure of the Constitution, which impeded the government’s ability to control the production, supply, distribution and prices of inputs and essential commodities. Toward this goal, the Constitution (Third Amendment) Act, 1954 was passed to enable the Parliament (instead of state legislatures) to control prices of certain commodities. The object of the Third Amendment was “to legislate in respect of certain specified essential commodities” and to provide the “legal powers to control the production, supply and distribution of some of these essential commodities.”

The Essential Commodities Act, 1955, which was enacted based on the Third Amendment, placed a price ceiling on inputs. The Act gave the government wide powers to control “production, supply, distribution, and purchase and sales prices of essential commodities” (Panagariya 2008, p. 42).

1.3.3 Fourth Amendment
The government’s socialist agenda attempted to overhaul the agrarian system, as well as fulfill commitments made to the populace under the First FYP. It was evident that the newly formed Indian state had few resources and a very small tax base, which meant that if compensation had to be provided for all property taken over by the government, other welfare and industrial targets of the FYPs could potentially remain unfulfilled with
the magnitude of the compensation bankrupting the Indian treasury. However, High Courts across the country constantly curtailed takings without just compensation by Indian states.

In *State of West Bengal vs. Bela Banerjee* (AIR 1954 SC 170), the validity of the West Bengal Land Development and Planning Act, 1948 which provided for acquisition of land after payment of compensation not exceeding the market value of the land on December 31, 1946 was challenged. The Supreme Court reasoned that while the legislature has the discretion to lay down principles on the basis of which compensation is paid for appropriated property, such principles must ensure that the compensation is “a just equivalent to what the owner has been deprived of” and that the content of such principles is adjudicated by the court.

This decision of the Supreme Court prompted the Parliament to pass the Constitution (Fourth Amendment) Act, 1955 to continue acquisition of land in keeping with plan objectives. “It is considered necessary, therefore, to re-state more precisely the State’s power of compulsory acquisition and requisitioning of private property and distinguish it from cases where the operation of regulatory or prohibitory laws of the State results in deprivation of property.” The Amendment also added three state land reform laws in the Ninth Schedule.

In addition to land reforms, the focus on industry continued. The constitution prevented the government from taking over private firms or control of management, and the Fourth Amendment was used to get around this roadblock. The Fourth Amendment amended Article 31(2A) to state, “no such law [which transfers ownership or possession
of property to the State or a Corporation] shall be called in question in any court on the ground that the compensation provided by the law is not adequate.” Through the Fourth Amendment, Chapter III-A of the Industrial Disputes Act, 1951 was added to the Ninth Schedule. The Chapter empowered the state to assume management or control of an industrial undertaking in certain cases. Similar provisions involving insurance and the railways were also enabled through the Ninth Schedule.

1.3.4 **Seventh Amendment**

During the First FYP, the National Development Council (NDC) was set up in 1952 to incorporate the recommendations of Chief Ministers in the planning process. However, this soon turned into a formality and state Chief Ministers complained that the planning process was overly centralized while discussing the Second FYP. Many complained that by the plans were sent to NDC for approval *after* it was approved by the Parliament (Austin 1999, p. 164).

The Second FYP was explicit in its goal of centralizing the most important sectors of the economy. “The second five year plan accords high priority to industrialisation, and especially to the development of basic and heavy industries. A large expansion of public enterprise in-the sphere of industrial and mineral development is envisaged. It is, in fact, intended to strengthen further the programmes of development in respect of heavy industries, oil exploration and coal and to make a beginning with the development of atomic energy. **The main responsibility for these programmes rests upon the Central Government.**” (Planning Commission 1956) (emphasis added).
Additionally, Parliament was legislating in areas constitutionally earmarked for the state legislatures, to fulfill objectives and targets of the second plan. Once again there was a need to amend the Constitution to provide greater power to the Central government. This amendment was to alter the distribution of legislative powers listed in the Seventh Schedule of the Constitution; mainly moving entries from the State List, to the Concurrent List, to allow the Parliament to legislate on these matters.

The Object of the Constitution (Seventh Amendment) Act, 1956 was to “avoid these [multiple entries on acquisition of property] difficulties and simplify the constitutional position, it is proposed to omit the entries in the Union and State List and replace the entry in the Concurrent List by a comprehensive entry covering the whole subject.”

Khilnani observes, “during this period the idea of Planning Commission directing India’s economic development within the framework of constitutional democracy was in crisis” (1998, p. 86). The crisis referred to here is the crisis of the Constitution as a roadblock in economic progress. However, PC Mahalanobis, the architect of the FYPs, recognized this and responded by moving toward economics, science and technology and away from political problems. He held a view that objective science was key to increased economic growth, and that political and constitutional problems were merely roadblocks Nehru must deal with. (Ibid., p. 87)

While the planning process continued and preparations were being made for the Third FYP, the battle between legislation - giving life to the planning process, and the Constitution - protecting individual rights, continued with Nehru at its helm.
1.3.5 Seventeenth Amendment

The Third FYP once again prioritized agriculture because the performance in the largest sector of the economy was well below the expectations and targets of the previous plans. "Experience in the first two Plans, and especially in the Second, has shown that the rate of growth in agricultural production is one of the main limiting factors in the progress of the Indian economy. Agricultural production has, therefore, to be increased to the largest extent feasible, and adequate resources have to be provided under the Third Plan for realising the agricultural targets. ... Both in formulating and in implementing programmes for the development of agriculture and the rural economy during the Third Plan, the guiding consideration is that whatever is physically practicable should be made financially possible, and the potential of each area should be developed to the utmost extent possible" (Planning Commission 1961, Chapter 4).

To give the new land redistribution and tenancy laws legitimacy, Nehru repeatedly amended the Constitution and his final act, as Prime Minister, was to introduce the Seventeenth Amendment to the Constitution. With this amendment, Nehru continued to remove roadblocks in the path of land reform, industrialization, and nationalization. The Constitution (Seventeenth Amendment) Act, 1964 “proposed to amend the Ninth Schedule by including therein certain State enactments relating to land reform in order to remove any uncertainty or doubt that may arise in regard to their validity.” The Act added 44 laws pertaining to land reform, land consolidation, and tenancy, to the Ninth Schedule.

The Seventeenth Amendment also amended the definition of "estate" in Article 31A of the Constitution because “The expression “estate” has been defined differently in
different States, and as a result of the transfer of land from one State to another on account of the reorganisation of the States, the expression has come to be defined differently in different parts of the same State. Moreover, many of the land reform enactments relate to lands, which are not included in an estate. Several State Acts relating to land reform were struck down on the grounds that the provisions of those Acts were violative of Articles 14, 19 and 31 of the Constitution and that the protection of Article 31A was not available to them” (Statement of Objects and Reasons - Constitution (Seventeenth Amendment) Act, 1964).

Nehru died after the introduction but before the passing of the Seventeenth Amendment. The constitutional validity of the Seventeenth Amendment was challenged in the Supreme Court in 1964 in *Sajjan Singh v State of Rajasthan* (AIR 1965 SC 845). The main question before the Supreme Court was once again the power of the Parliament to amend the Constitution. The majority opinion of the Supreme Court held that the Parliament had the power to amend the constitution, and as long as the procedure laid down in Article 368 was followed, amendments would be considered constitutional.

1.3.6 Commanding Heights

After Nehru’s death, which was mid-term, the question of succession was discussed within the Congress Party. The Congress Party elected Lal Bahadur Shastri Prime Minister and party members also clamored to include Nehru’s daughter, Indira Gandhi, for a more prominent role in the Party. She was appointed through the upper house (she had not stood for elections in the 1962 elections) and given a Cabinet.

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20 Party President K. Kamaraj discussed potential successors with Congress cabinet ministers and powerful party members (collectively known as the Syndicate). The Syndicate preferred Lal Bahadur Shastri, Nehru’s Deputy Prime Minister whose policy agenda was a continuation of Nehru’s plan.
portfolio. She was considered inexperienced and timid in both Parliament and Party meetings.

Shastri died in 1966 and when the question of succession arose again, Congress President K. Kamaraj and the Congress Party “Syndicate” unreservedly supported Indira Gandhi who served as Prime Minster for the rest of the term.\(^{21}\) In the 1967 elections, also Indira Gandhi’s first general election, the Syndicate preferred Indira Gandhi for the post of Prime Minster.

Indira Gandhi soon realized that her position as Prime Minster was controlled by the Syndicate and threatened by Morarji Desai. She intended to create a place for herself and identified herself as a socialist following her father Jawaharlal Nehru. An important factor in this decision was her Chief Advisor PN Haksar\(^{22}\) who encouraged her to embrace socialist ideology (Guha 2007, p. 436). The Syndicate that dominated the organizational wing of the Congress “favored dilution of planning, a reduced role for the public sector, and greater reliance on private enterprise and foreign capital.” Indira Gandhi on the other hand wanted “to go farther left in her policies.” Some suggest that Indira Gandhi wanted to take a political and ideological stand that was different from the Syndicate and yet popular enough to hold her position as Prime Minster.\(^{23}\)

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\(^{21}\) Some suggest that it was her timid and quiet nature that led to her approval. The Syndicate thought she would be easy to control and hers would be a “collective” leadership. Morarji Desai, the frontrunner, was considered too headstrong and controversial to be controlled by the Syndicate. (Guha 2007, p. 404)

\(^{22}\) Haksar was a socialist polymath, who was educated at the London School of Economics. He was unabashedly pro-state and anti-market in his leanings. Particularly pro-Soviet, he was considered one of Harold Laski’s best students of his generation and wanted to carry out Laski’s vision in India.

\(^{23}\) Pre-1967, Indira Gandhi had never identified herself as a socialist. The generous interpretation of this move by historians is that she wanted to identify herself with the electorate, which favored socialist policies, in order to get elected. An alternate is that she embraced socialism to increase the public sector and create a position for concentration of power. Historians place her ideological leaning at a different and lower level than Nehru’s (see Austin 1999, p. 290; Das 2000, p. 174; and Guha 2007, p. 518).
In May 1967, she announced the Ten-Point Program, which included policies like nationalization of banks and insurance, curbing monopolies, land reforms, urban land ceiling, rural housing, and abolition of privy purses\(^{24}\) – which was a hugely popular agenda. (Panagariya 2008, p. 50). She followed Haksar’s advice and positioned herself as the “real” socialist relative to Morarji Desai (who was opposed to bank nationalizations) and the Syndicate (which wanted to move away from socialist policies altogether).\(^{25}\) Armed with her Soviet style socialism, Indira Gandhi set out to nationalize important sectors of the economy.

Before the government could launch and execute this Ten-Point program, the eminent domain power of the state and the power of Parliament to amend the Constitution was again raised before the Supreme Court in a challenge to one of the entries in the Ninth Schedule, the Punjab Security of Land Tenures Act, 1953, on the ground that it deprived individuals of their right to private property. In *Golak Nath v State of Punjab* (AIR 1967 SC 1643), (hereinafter referred to as *Golak Nath Case*) the question of the power of the Parliament to amend the constitution and the Fundamental Rights was heard by an eleven-judge bench. The majority opinion stated that though prior amendments would not be affected, in future Parliament could not amend the Constitution to abridge any of the Fundamental Rights. In other words, constitutional amendment could not be used to give unconstitutional laws validity. This was the

\(^{24}\) All programs other than abolishing privy purses were detailed in the Fourth and Fifth Five Year Plan. Privy Purses were payments made to the royal families of erstwhile Indian princely states as part of their initial agreements to integrate with independent India.

\(^{25}\) Subsequently, the Syndicate split away and created a new Party called Congress (O).
beginning of what would become routine clashes between the government and the judiciary, in the attempt to control means of production.

1.3.7 Twenty-Fourth Amendment
As a backlash to the ruling in Golak Nath Case, the Indira Gandhi-led government first enacted the Twenty-Fourth and Twenty-Fifth Amendment to the Constitution. The Constitution (Twenty-fourth Amendment) Act, 1971 expressly stated that the Parliament could amend Fundamental Rights as laid out in Part III of the Constitution. The Statement of Objects and Reasons stated: “The Supreme Court in the well known Golak Nath’s Case ... reversed by a narrow majority, its own earlier decisions upholding the power of Parliament to amend all parts of the Constitution including Part III relating to fundamental rights. ... It is, therefore, considered necessary to provide expressly that Parliament has power to amend any provision of the Constitution so as to include the provisions of Part III within the scope of the amending power” (emphasis added). This amendment also enabled Parliament to amend any part of the Constitution under the amendment procedure specified in Article 368. Through this unprecedented legislative move, Indira Gandhi amended the amendment procedure to the constitution itself, to overcome the hurdles posed by judicial review.

1.3.8 Twenty-Fifth Amendment
Even prior to passing the Twenty-Fourth Amendment, undeterred by the judicial pronouncement in the Golak Nath Case, Indira Gandhi’s government sought to nationalize banks in India without legislation, through executive ordinance. In 1969, almost overnight, Indira Gandhi’s government nationalized 14 banks with assets over 500
million rupees and brought 54% of India’s bank branches into the public sector. This was done first by an Ordinance (Banking Companies (Acquisition and Transfer of Undertakings) Ordinance, 1969) promulgated on July 19, 1969, followed by the government passing the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1969, which had retrospective effect from July 19, 1969.

In a popular radio speech, Indira Gandhi argued, “control over the commanding heights of the economy is necessary, particularly in a poor country where it is extremely difficult to mobilize adequate resources for development”. She committed the newly nationalized banks to serve the common good and to give credit not only to the rich and big businesses, but also to “millions of farmers, artisans and other self-employed persons” (Gandhi 1969).

As the Chairman of the Planning Commission, Indira Gandhi had previously stated her mission in the Preface to the Fourth Five-Year Plan. “The nationalisation of the fourteen big banks is evidence of our determination to bring a greater volume of resources within the area of social decision. It has effected a major change in our economic structure. It enables us to pay more attention to the "small man's" needs, and it restricts the scope for the monopolistic operations of the privileged few. Among other areas where social considerations have still to make a comparable impact are the enforcement of land laws, the management of public sector enterprises, and the toning up of the administration as a whole” (Planning Commission 1969, Preface).

The nationalization of banks was challenged in the Supreme Court for violating the right to private property of a shareholder and the question of adequate compensation
was again raised. In holding the Act void the majority judgment of the Supreme Court reasoned, “in all States where the rule of law prevails, the right to compensation is guaranteed by the Constitution or regarded as inextricably involved in the right to property. … In India, which is a state, the rule of law prevails. Therefore the Constitution of India provides for just compensation” (R.C. Cooper v Union of India (1970) 3 SCR 530, p. 605-6). The Supreme Court struck down the government’s proposed bank nationalization due to inadequate compensation.

To remove the problems posed by the Supreme Court enforcing Fundamental Rights, Indira Gandhi was advised to amend the Constitution to give effect to social legislation furthering the Directive Principles. The Twenty-Fifth Amendment took away the supremacy of Fundamental Rights. It explicitly stated that laws giving effect to the Directive Principles shall not be deemed void, even if they were inconsistent with Fundamental Rights. This amendment remains on the books till date and, certain welfare policies under Directive Principles trump Fundamental Rights. The Statement of Objects and Reasons for the Constitution (Twenty-fifth Amendment) Act, 1971 provided “that if any law is passed to give effect to the Directive Principles contained in clauses (b) and (c) of article 39 and contains a declaration to that effect, such law shall not be deemed to be void on the ground that it takes away or abridges any of the rights contained in article 14, 19 or 31.”

1.3.9 Twenty-Sixth Amendment

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26 On grounds that (i) the Act makes hostile discrimination, preventing the 14 banks from carrying on their business whereas other Indian and foreign banks may continue to carry on business (ii) the Act restricts banks from carrying on business under Article 19, (iii) the Act violates the guarantee of compensation guaranteed under Article 31(2) because the compensation is not according to relevant principles.
Privy Purses were payments made to the royal families of Indian princely states as part of their initial agreements to integrate with independent India. The Indian Constitution protected these agreements. Indira Gandhi made the abolition of Privy Purses a political agenda in her campaigns and the first attempt to abolish the Privy Purses of the princely states lost by one vote in Parliament in 1969. In 1971 with a renewed majority, the government passed the Constitution (Twenty-sixth Amendment) Act, 1971 with the following objective: “The concept of rulership, with privy purses and special privileges unrelated to any current functions and social purposes, is incompatible with an egalitarian social order. Government has, therefore, decided to terminate the privy purses and privileges of the Rulers of former Indian States. It is necessary for this purpose, apart from amending the relevant provisions of the Constitution, to insert a new article therein so as to terminate expressly the recognition already granted to such Rulers and to abolish privy purses and extinguish all rights, liabilities and obligations in respect of privy purses.”

1.3.10 Twenty-Ninth and Thirty-Fourth Amendment

Indira Gandhi’s government argued that despite land reform measures since the 1950s, inequality in the agrarian system remained. It was therefore important to revise existing laws and reduce the ceiling limit on land holdings held by a family. After a conference of all state governments in 1972, various states passed laws and amendments to reduce the ceiling limit, but many of these laws were pending judicial review. Two land reform laws passed by the state government of Kerala were added to the Ninth Schedule by the Constitution (Twenty-Ninth Amendment) Act, 1972.
Once again, the power of the Parliament to amend the Constitution was challenged in the Supreme Court and a constitution bench comprising 13 judges was convened in 1973 for *Keshavananda Bharati v State of Kerala* (AIR 1973 SC 1461). The Supreme Court formulated the ‘basic structure’ doctrine and held that the amending power of the Parliament could not be exercised in a manner as to destroy or emasculate the basic structure or the fundamental features of the Constitution. The Court enumerated a non-exhaustive list of such features including but not limited to: supremacy of the Constitution, republican and democratic form of government, separation of powers, federal character of the Constitution, etc. However, the right to private property was not considered part of the ‘basic structure’ of the Constitution.

Since Parliament had the authority to amend the Constitution, it enacted the Thirty-Fourth Amendment adding twenty state laws to the Ninth Schedule.

**1.3.11 Thirty-Ninth and Fortieth Amendment**

Now having acquired the power to legitimately amend the Constitution, and given that the right to private property was not basic to the Constitution, the government did not intend to stop its socialist agenda at land reforms. As the Chairman of the Planning Commission, Indira Gandhi had previously stated her mission in the Preface to the Fourth Five-Year Plan. “There can be no doubt that the responsibilities devolving upon the public sector — without diminishing those of the private sector, in our mixed economy — will grow in range and volume. Socialism involves a reordering of society on a rational and equitable basis and this can only be achieved by assigning an expanding role to the public sector. Following the reorganisation of credit policies resulting from the
nationalisation of major banks, the public sector can be expected more and more to occupy the commanding heights of the economy. It alone would be in a position to undertake investments of the requisite magnitude in such industries of vital importance to us as steel, machinery, machine tools, power generation, ship-building, petrochemicals, fuels and drugs. Naturally, the administration of public enterprises poses some problems of its own (here as in other countries) but they are not insuperable and will be overcome as we gain experience” (Planning Commission 1969, Preface).

Indira Gandhi’s government continued its mission to capture the “commanding heights.” In October 1971, the government took over the management of coking coalmines and coke oven plants pending nationalization (Coking Coal Mines (Emergency Provisions) Act, 1971). The nationalization was done in two phases, the first with the coking coalmines in 1971-2 (The Coking Coal Mines (Nationalisation) Act, 1972) and then with the non-coking coalmines in 1973 (The Coal Mines (Taking Over of Management) Act, 1973 and The Coal Mines (Nationalisation) Act, 1973). Coalmines were nationalized as being an important input for steel production, which was critical for the success of the Fourth FYP. In 1972, Indian Copper Corporation Ltd, was nationalized and made part of Hindustan Copper Ltd (The Indian Copper Corporation (Acquisition of Undertaking) Act, 1972).

The next sector was insurance; life insurance had already been nationalized in 1956. In 1972, general insurance was nationalized (General Insurance Business Nationalization Act 1972) as part of the Ten-Point Program and one of the objectives of the Fourth FYP.
Another spate of nationalizations was sick firms, mostly textile mills. In 1968, The National Textile Corporation was incorporated to manage sick textile undertakings, taken over by the Government (The Sick Textile Undertakings (Taking Over of Management) Act, 1972). Starting with 16 mills in 1968, this number gradually rose to 103 by 1972-73. In 1974, all these units were nationalized (The Sick Textile Undertakings (Nationalisation) Act, 1974). Legislation was passed in 1973 to nationalize the undertakings of the Alcock Ashdown Company Ltd “for the purpose of ensuring rational and coordinated development and production of goods essential to the needs of the country in general, and defence department in particular” (The Alcock Ashdown Company Limited (Acquisition of Undertakings) Act, 1973.) This was arbitrary, even by the standards of Indira Gandhi’s government, since legislation was passed to nationalize a single firm.

A new layer of regulation was added through the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP), which was aimed specifically at large firms. In 1973, the government restricted any new production activity of companies covered by MRTP to a very narrow set of industries. In addition to the usual licensing procedures, these firms required additional approval from the Central government for all new undertakings, expansion, mergers, amalgamations, and takeovers (for details on MRTP policy, see Panagariya 2008, p. 59-60 and Bhagwati and Desai 1970).

In 1973, the government enacted the Foreign Exchange Regulation Act, 1973 (FERA), which required all non-bank foreign branches, and companies incorporated in India with over 40% foreign equity, to obtain permission from the central bank in order to
conduct business. Foreign non-banks, which did not dilute their foreign equity, were not
given “national treatment” and had to wind up their business. (for details on FERA policy
see Panagariya 2008, p. 61 and Bhagwati and Desai 1970).

All these laws were challenged in the courts and were either pending review or
declared unconstitutional by the courts. Indira Gandhi however was dedicated to central
planning. She famously said “We should be vigilant to see that our march to progress is
not hampered in the name of the Constitution” (The New York Times, December 28,
1975).

After much litigation, the Indira Gandhi-led government passed the Constitution
(Thirty-Ninth Amendment) Act, 1975 to add these controversial legislations in the Ninth
Schedule. The Statement of Objects and Reasons of the Thirty-Ninth Amendment stated
“Recourse was had in the past to the Ninth Schedule whenever it was found that
progressive legislation conceived in the interests of the public was imperilled by
litigation. It has become necessary to have recourse to this device once again now.
Between 1971 and 1973 legislation was enacted for nationalizing coking coal and coal
mines for conservation of these resources in the interests of steel industry. These
enactments have been brought before courts on the ground that they are unconstitutional.
So is the case of sick textile undertakings which were nationalized in 1974. To prevent
smuggling of goods and diversion of foreign exchange which affected the national
economy, Parliament enacted legislation which again has been challenged in the Supreme
Court and in High Courts. These and other important and special enactments which it is
considered necessary should have the constitutional protection under article 31B, are proposed to be included in the Ninth Schedule.”

As a consequence of these constitutional amendments and the government’s pursuit of a centrally planned, closed economy, black markets, especially for foreign goods, became rampant. To counter this problem, the government introduced another layer of regulation related to foreign exchange and foreign goods (The Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976) and revived legislation regulating prices of essential commodities (The Essential Commodities Act, 1955). As part of this process, the Constitution (Fortieth Amendment) Act, 1976, stated in its Objects and Reasons: “Certain Central laws like the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976, the Urban Land (Ceiling and Regulation) Act, 1976, the Essential Commodities Act, 1955 and certain provisions of the Motor Vehicles Act, 1939 require protection of article 31B.”

1.3.12 The Emergency and the Forty-Second Amendment
The Thirty Ninth Amendment was challenged in the Supreme Court, but the main challenge was not regarding licensing and nationalization. The government’s main reason for passing the Thirty Ninth Amendment was that Indira Gandhi’s power was threatened due to a series of events beginning with the 1971 election.

Raj Narain, a politician who lost to Indira Gandhi in the 1971 Parliamentary election, filed a petition alleging that she had won the election through corrupt practices and had used government officials and official machinery in her campaign. On June 12,
1975, the Allahabad High Court found Indira Gandhi guilty and her election to Parliament was declared null and void.

While her appeal was pending in the Supreme Court and she was under pressure to resign, Indira Gandhi issued an Ordinance on June 25, 1975 declaring a state of internal emergency. Elections and civil liberties were suspended, Indira Gandhi ruled by decree.

On August 10, 1975, the government passed the Thirty Ninth Amendment. The Amendment sought three things - to withdraw the election of the Prime Minister from the scope of the judicial review process; to declare the decision of Allahabad High Court, invalidating Indira Gandhi’s election, void; and to exclude the Supreme Court’s jurisdiction to hear an appeal on the matter of the election (Section 4 Article [329A(3-5)] The Constitution (Thirty-Ninth Amendment) Act, 1975).

The amendment was challenged in the Supreme and the Court declared the parts of the Thirty-ninth Amendment unconstitutional as it violated three essential features of the Constitution. It destroyed the democratic institution of India, it violated the principle of separation of powers in the Constitution and finally violated the right to equality of status and opportunity by creating a privileged position for the Prime Minister (Indira Nehru Gandhi v Raj Narain (AIR 1975 SC 1461)).

With the declaration of Emergency, the command and control nature of state policy assumed new proportions. The state controlled all aspects of everyday activity from the timings of trains to demographics.
The Planning Commission declared that population control and Family Planning were “of the highest priority” (Planning Commission 1974, Chapter 18). Food shortage and poverty were blamed on “over-population” in the seventies. Typical of the Planning Commission, targets for the number of health centers, doctors, nurses and contraception were specified in the FYP. The FYP also provided positive incentives, such as small cash payments on undergoing sterilization procedures like male vasectomy. Another incentive was the introduction of technology in free state hospitals to aid gender selection and abort female fetuses, as traditionally and culturally the male child is preferred in India. Introduction of this during Emergency has now led to the wide-spread problem of female foeticide problem in India.

In April 1976, a new vigor was associated with the population-planning program as Indira Gandhi’s son, Sanjay Gandhi made it a priority and engaged in “continual verbal harrassment of the regional political leaders over whom they had influence” (Gwatkin 1979, p. 40). Sanjay Gandhi catalyzed a competitive political process for population planning, “He would tell one chief minister of what another had claimed to have done” (Guha 2007, p. 514). Sanjay Gandhi’s speeches and discussion incited officials and led “to a wave of unilaterally raised sterilization targets” (Gwatkin 1979, p. 40). These targets were passed on the district level bureaucrats. Soon the bureaucracy resorted to coercive measures in order to meet the sterilization targets, including the forced vasectomy of thousands of men. By the beginning of 1977, 14 million people had been sterilized (Gwatkin 1979, p. 49). The exact figures for the number of forced sterilizations are unavailable.
“The new economic programme launched last year served to focus attention on those elements in our Plan which had the twin objectives of increasing production and promoting social justice. The drive against economic offences and the general atmosphere of discipline and efficiency which national emergency helped to foster led to a significant and all-round improvement in economic performance” (Planning Commission 1974) (emphasis added).

Though Indira Gandhi had declared emergency and suspended democracy, the constitution was amended to legitimize the new regime. A committee led by Swaran Singh was appointed to “suggest amendments to the Constitution of India” and the recommendation of this committee was the foundation for the Forty-Second Amendment (Singh 1976).

The Constitution (Forty-Second Amendment) Act, 1976 stated as its Object and Reasons, “The question of amending the Constitution for removing the difficulties which have arisen in achieving the objective of socio-economic revolution. … The democratic institutions provided in the Constitution have been subjected to considerable stresses and strains and that vested interest have been trying to promote their selfish ends to the great detriment of public good. … It is, therefore, proposed to amend the Constitution … to make the directive principles more comprehensive and give them precedence over those fundamental rights which have been allowed to be relied upon to frustrate socio-economic reforms for implementing the directive principles.”

The Amendment declared the supremacy of the Parliament, both above the Constitution and the judiciary. The Fundamental Rights in Part III of the Constitution,
which expressly protected the individual from the excesses of the State, were now subject to Directive Principles, or socialist welfare agenda of the State.

It is perhaps fitting, that the Forty-Second amendment, which was the most undemocratic and unconstitutional move by the Indian Parliament, should also declare India a ‘Socialist’ state in the Preamble to the Constitution.

It is important to clarify, that the Fourth or the Fifth Five Year Plans did not cause the declaration of Emergency. However, central planning led to transforming institutions such that over three decades checks and balances in the Constitution, such as separation of powers, federalism, and individual rights were weakened; and the power of centralized in the office of the Prime Minister, who was also the Chairman of the Planning Commission.

In this sense, the Emergency was the logical conclusion to the path that was chosen by Nehru in gradually weakening constitutional constraints to make way for welfare policies and five year plans.

1.3.13 Forty-Fourth Amendment

In 1977, the Janata Party was formed under the leadership of Morarji Desai and supported by Jayaprakash Narayan. Desai was a staunch socialist, though more in the Nehruvian way. Indira Gandhi’s other political opponent, Jayaprakash Narayan had proposed a 14-point program eerily similar to Indira Gandhi’s views in 1952, which was rejected by Nehru. Even in the constituency where Indira Gandhi lost in the 1977 election, the candidate elected was Raj Narain, an old school Gandhian Socialist. Both
Desai and Narayan were confirmed democrats, and they campaigned on the promise of restoring democracy and reversing Forty Second Amendment.

In 1978, under a Desai-led Janata Party government, the Forty Fourth Amendment to the Constitution was debated and passed in the Parliament. This amendment undid most of the mischief of the Indira Gandhi government, but retained the socialist features. The government retained Article 31C and to this day in India, Fundamental Rights, which expressly protected the individual from the excesses of the State, are subject to Directive Principles. The Forty-Fourth Amendment also deleted what was left of the right to private property and also remained all restrictions on the power of eminent domain. The Constitution (Forty-Fourth Amendment) Act, 1978 stated as its Object and Reasons, “the right to property, which has been the occasion for more than one amendment of the Constitution, would cease to be a fundamental right and become only a legal right.”

Once again, even though Indira Gandhi’s government was rejected in the election and there was a strong movement against the Emergency, the ideological consensus was towards a socialist society. The excesses of the Emergency as well as the weakening of institutions were blamed on some individuals like Indira Gandhi, and socialism was still embraced by the state and citizens.

1.4 Concluding Remarks

The constant clash between socialist planning and the Indian Constitution changed the Constitution through several amendments. In the process, rule of law, federalism, property rights, separation of powers and the independence of Indian
judiciary were adversely affected. The contradictory mixture of socialism and rule of law led to economic and political deprivations that were never intended by the founding fathers. Socialist policies gradually undermined the constitution by placing the expediency of the welfare policy at hand above constitutional principles. Nehru, universally praised as the constitutional democrat, crafted legal innovations like the Ninth Schedule and made amendments to the Constitution, to legitimize socialist planning. The same legal tools were used to undermine the rule of law in India by Indira Gandhi to legitimize the Emergency.

Socialist planning led India into decades of the Hindu rate of growth and alarming levels of poverty and starvation. By the late seventies, with Indira Gandhi’s totalitarian policies during the Emergency, all political rights and freedoms that had promised to Indians were also lost. While both these consequences have been well documented, there is a third, important, and long lasting, consequence of the conflict between socialist planning and the Constitution, one that changed the fundamental institutions in India affecting its long-term growth. The Indian experience serves as a cautionary tale in institutional design highlighting the importance of congruent political and economic institutions.
THE ROLE OF IDEOLOGY IN CONSTITUTIONAL CRAFTSMANSHIP:
EVIDENCE FROM INDIA*

The Indian Parliament has formally amended the Indian Constitution ninety-seven times since its ratification in 1950. The frequency of formal constitutional amendments in India comes as no surprise; the Indian constitution is relatively easy to amend.27 This is because the stringency of amendment processes, specifically the number of veto points, affects the frequency of formal changes to modern democratic constitutions. This theory has found theoretical and empirical support (see Lutz 1994; Ferejohn 1997; Cooter 2000; and Rasch and Congleton 2006).

The provisions of the Indian Constitution can be divided in three categories based on the formal procedure required to amend them. First, amendments to most provisions of the Constitution, including Fundamental Rights, may be initiated in either House of Parliament and require a majority of the total membership of the House with not less than two-thirds of the members of present and voting in each House of Parliament, and Presidential approval.28 Second, to amend provisions pertaining to separation of powers

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27 When compared with other constitutions, the Indian Constitution has a low Index of Difficulty for amendments and a correspondingly high rate of amendment (Lutz 1994, p.369).
28 The only exception to this rule until date has been the enactment of the First Amendment, which was passed by a unicameral federal legislature, the Provisional Parliament of India in 1951 before the bicameral legislature was established in 1952.

* For comments and suggestions on this chapter, I thank Peter Boettke, Mario Rizzo, Richard Wagner, and Larry White.
and federalism, also called “entrenched clauses” of the Constitution, requires ratification by at least half the state legislatures, in addition to a supporting vote by a majority of the total membership of the House with not less than two-thirds of the members of present and voting in each House of Parliament, and Presidential approval. Third, some clauses of the Constitution may be amended by simple majority, similar to that required for ordinary legislation.

Economists have emphasized the importance of amendments to constitutional rules. “Rules the sovereign can readily revise differ significantly in their implications for performance from exactly the same rules when not subject to revision … the sovereign or government must not merely establish the relevant set of rights, but make a credible commitment to them” (North and Weingast 1989, p. 803). In constitutions with more than one decision-making rule, property rights are typically “entrenched” i.e. amendments to property rights require a higher majority (Buchanan and Tullock 1999[1962]). The logic for this constitutional choice is to ensure that the ruling elite credibly commits to protect property rights in post constitutional interactions (North and Weingast 1989; Acemoglu and Robinson 2006).

The Indian experience with amendment procedure contradicts this prevailing view. The Fundamental Rights are not “entrenched” in the Indian Constitution. They can be amended with a majority of the votes of the membership of each House in Parliament and do not require ratification by states. While other important constitutional provisions

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29 In the Indian Constitution, Articles 54, 55, 73, 162, 124-47, 214-31, 241, 245-55, 368 and any of the Lists in the Seventh Schedule can be amended using this procedure.

30 In the Indian Constitution, Articles 2, 11, 59(3), 73(2), 75(6), 97, 105(3), 124(1), 125(2), 133(3), 135, 137, 148(3), 158(3), 171(2), 221(2), 343(3), 348(1) and Schedules 5 and 6 can be amended using this procedure.
like federalism, separation of powers, and judicial review, are “entrenched”; it is puzzling why Fundamental Rights guaranteed by the Constitution are amendable with only a majority requirement.

Economists have said nothing about this puzzle of the Indian amendment clause.\textsuperscript{31} The prevailing literature on the choice of constitutional rules following the work of Buchanan and Tullock (1999 [1962]) emphasizes the role that interests play in the formation of constitutional rules. Acemoglu (2003), while attempting to explain inefficient policies, highlights the role of interests over beliefs or ideology of individuals. Acemoglu and Robinson use political interests as the foundation, while expanding to other frameworks, to explain non-constitutional and dictatorial regimes (2006). These models explain constitutional formation as a function of costs and benefits faced by individuals and the constitutional contract as an outcome of exchange or bargaining. These models are constructed in an ideologically neutral or sterile environment and do not account for the effect ideology has on determining the interests of an individual.

In this paper, in addition to the role of interests, I argue for the importance of ideology behind the veil of ignorance in choosing the appropriate decision-making rule for amending rules. I argue that ideology informs an individual of his interests - it helps the individual form expectations on costs and benefits in the future. I explain that constitutions will “entrench” property rights when individuals have a constrained vision of individuals, and are more fearful of public predation behind the veil of uncertainty.

\textsuperscript{31} Legal historians have chronicled the multiple clauses in the amendment process as a compromise worked out between two divergent camps of Members of the Constituent Assembly - the first emphasizing the adoption of the American federal pattern with a certain amount of rigidity and the second laying stress on amendment through simple majority of Parliament (Markandan 1972, p. 108; Austin 1966, p. 255).
However, the result changes if, at the point of constitutional choice, individuals have an unconstrained vision of individuals, and are fearful of private predation.

Evidence for such a claim is difficult to come by and usually found in comparative constitutions. I discuss the various proposals for the amending provision in many draft constitutions written by Indians in the first half of the twentieth century. Initial versions of the draft amendment provision placed before the Indian Constituent Assembly were inspired from liberal constitutions in other countries. However, under the influence of Jawaharlal Nehru and his followers, the final amendment provision reduced the majority requirements to amend Fundamental Rights. A closer look of the evolution of the amendment clause, in conjunction with the ideologies of the various members of the Assembly, suggests that Socialist members of the Constituent Assembly, perceived future costs from public and private predation differently from Liberals a generation before them. I provide evidence for this proposition using constitutional drafts and Constituent Assembly debates from India.

In addition to the puzzle on amendment to the Indian Constitution, this research contributes to three literatures. The first is the literature on the economic analysis of constitutional design and maintenance (see Hayek 1944, 1967, 2011 [1960]; Buchanan and Tullock 1999[1962]; Buchanan 1999; Wagner 1988, 1989, 1993, 1998; Niskanen 1990; Boudreaux and Pritchard 1993; Voigt 1997; Ostrom 1997, 2008; Cooter 2000; Elkin 2006; Congleton and Rasch 2006; Ginsburg, Elkins and Melton 2009; and Martin and Thomas 2013). The second is the related literature in new comparative economics highlighting the importance of institutional choice (Djankov et al 2003; Boettke at al
The third is the research on how ideology may affect human institutions and thereby economic outcomes. Scholars have agreed on the importance of ideas in shaping institutions (see Hayek 1949; North 1988; Buchanan and Wagner 1999; Sowell 2002; Boettke 2010; Martin 2010; and White 2012).

2.1 Ideology and Institutional Design
The economic analysis of the formal amendment procedure is focused on how to credibly commit to rules. But, before credibly committing, how does one choose the rules? This has been the fundamental focus of political economy for centuries. On one end of the spectrum, Hobbes proposed the Leviathan to control disorder or the war of each against all (1651). On the other end, Hume proposed constraints to control the rulers and prevent dictatorships (1738).

Economists have approached this question by focusing on the costs associated with each rule or institution. Djankov et al discuss the various possibilities of institutional rules, based on the trade-offs that exist in policing public predation and private predation. They analyze four possibilities on the institutional possibilities frontier (IPF): (1) private ordering, (2) independent judicial enforcement, (3) regulatory state, and (4) state ownership (2003, p. 599). Private self-governance would minimize public predation, but will increase social losses due to private predation. On the other extreme lies state ownership under socialism, which would minimize social losses due to private predation, but increases the possibilities of loss due to public predation. This approach emphasizes the importance of enforcement costs associated with the different possibilities on the IPF. Given the costs associated with given institutional capabilities, one can predict the sort of governance regime that will emerge.
The IPF approach is from the point of view of an expert choosing or designing institutions. Buchanan and Tullock answered this question half a century ago from the perspective of an individual. They analyze “the calculus of a single individual as he confronts the question of the appropriate decision making rule for group choices” (1999 [1962], p. 78). The rational self-interested individual, making decisions behind the veil of uncertainty, is center-stage in Buchanan and Tullock’s analysis.

An individual will find it profitable to organize activity collectively to either eliminate some external costs imposed by the private action of others, or to secure some external benefits that cannot be secured through purely private behavior. However, there is a cost of organization itself faced by the individual, or the cost of organizing decisions collectively. Buchanan and Tullock analyze two distinct elements in the expected costs of any human activity: external costs imposed by others and the costs to take a decision in a group. The fundamental insight is that the choice of a decision making rule, among several possible rules, is not independent to the choice of the method of organization (1999 [1962], p. 44).

While Djankov et al. discuss the minimization of social costs associated with private and public predation, Buchanan and Tullock only focus on an individual minimizing the costs from public and private predation, or external costs. Conceptual unanimity as described by Buchanan and Tullock is akin to the private ordering on the IPF, where public predation is minimized. And socialism on the IPF is akin to conceptual dictatorship in Buchanan and Tullock’s model.

The spectrum between private ordering and socialism as forms of government is
very wide. Similarly, for any particular collective action, there are many decision-making rules between unanimity and dictatorship. Choosing the appropriate rule depends on an individual’s expected costs, i.e. the individual’s expectations about predation from the individuals and the state in the future. So an important question at this point is, how does an individual form expectations about future costs from public and private predation? Since an individual’s interests inform him of his expected costs and benefits arising from a particular decision making rule, it is important to ask how an individual determines his interests.

Ideology is the foundational belief of the nature of reality in the world; and therefore, ideology tells a man what his interests are at the point of choice (Mises 2007 [1957], p. 138). Ideology is an economizing device by which individuals come to terms with their environment and are provided with a “world view” so that the decision-making process is simplified. It is inextricably interwoven with moral and ethical judgments about the fairness of the world individuals perceive (North 1981, p. 49). Institutions, which are humanly devised constraints on repeated human interaction, cannot be viewed independent of individuals’ worldview. Within this construct, ideology affects individuals’ interests and thereby affects the choice of constraints or rules by individuals. Especially, given the uncertainty regarding the future, the individual will pursue his self-interest using his mental model of the world.

Sowell describes “visions” as precursory views of how the world works, which influence the construction of mental models (2002). Given the complexity and ever-changing nature of reality, visions are like maps to help an individual navigate reality. In
a world where other individuals may take many possible actions in the future, it is imperative that one weights the various possibilities and outcomes to take decisions. These weights are “logical constructs used to identify the constituents of a decision” and are “fully subjective attributes of the methodological mind construct” (O’Driscoll and Rizzo 1996, p. 30).

Sowell starts at the most basic view of how an individual views the nature of individuals. “The capacities and limitations of man are implicitly seen in radically different terms by those whose explicit philosophical, political, or social theories are built upon different visions. Man’s moral and mental and moral natures are seen so differently that their different respective concepts of knowledge and of institutions necessarily differ as well” (2002, p. 10).

There are two basic visions of human nature discussed by Sowell that are useful for our analysis of forming the appropriate decision-making rule. The first is the “constrained vision” of man, where one views individuals as selfish, morally limited, and with dangerous impulses. Given these limitations, the goal for is to find ways in which, with all these limitations, an individual could be induced to produce benefits for others in society, in the process of pursuing one’s own interest. The contrasting view is the “unconstrained vision” where the problem is not nature, or the nature of the individual, but institutions. In this view, it is not in the fundamental nature of an individual to act selfishly or in a morally limited way; the behavior of man is a result of a combination of circumstances or institutions. Therefore an individual could be improved, to be morally
superior, and capable of justice and virtue; and not require the aid of incentives (2002, p. 9-34).

Therefore, depending on whether an individual holds the constrained or the unconstrained vision, an individual forms expectations on whether he is likely to encounter costs in the future from public predation, or from private predation. The cost minimization approach of economists, hinges on the vision of man and expectations of where the costs are likely to arise. Within the constrained vision of man, efforts are expended in seeking the best constraints, instead of attempting to change the fundamental nature of individuals. On the other hand, scholars who hold the unconstrained vision, seek ways in society to help individuals better themselves in their moral behavior.

Within the constrained vision, through private ordering via market institutions, the self-interest of an individual may be channeled to socially optimal outcomes. However, given the narrowly self-interested nature of individuals, rules must be formed to constrain public officials who fall outside the realm of the disciplining mechanism of markets. An individual holding the constrained vision therefore expects to incur costs from public predation.

On the other hand, an individual holding the unconstrained vision would expect to incur costs from private predation, and not from public predation. This is because institutions governing property, money, social relations, etc. are viewed as the source of the selfish and morally inferior actions of an individual. Therefore, effort is expended in

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32 Storr critiques the arguments of scholars holding the unconstrained vision that the market encourages vice and has little or no scope for virtue (2009).
reducing or eliminating such relations and circumstances; and creating a strong state, which would allow individuals to improve their nature.

While there may be some differences of opinion, I assume that there is no ideological polarization within the group. In constitutional craftsmanship, it is well established that ideological consensus is a prerequisite for constitutional consensus. Brennen and Buchanan refer to this generally as “commonality of norms” (1985, p. 162). Vanberg and Buchanan (1994) go a step further and assume that convergence of ideology is likely in constitutional debate.

Given the ideological consensus within a group, different groups may espouse different ideologies. Following Sowell (2002) in the most basic form, I create two different models based on the two different “visions of man.” I analyze the decision-making rule to amend the constitution that an individual considers optimal within a given ideological setting.

**2.2 Visions, Interests, and Constitutional Rules**

While crafting constitutional rules, Buchanan and Tullock situate the individual behind the veil of uncertainty and specify a type of generational uncertainty that prevents the individual from predicting precisely how the choice of constitutional rule will influence his welfare in the future. The future, in their setting, is unknowable, however it is not unimaginable. The individual is able to predict the form of issues that will come up for decision under whatever rule is adopted by the group. Therefore, the individual can form some expectation of costs and benefits in the future, where he will attempt to minimize costs at the point of choice of constitutional rule. Thus, constitutional choice differs from ordinary policy level decision-making in that it is more distant from the
direct self-interest involved in specific policy questions. Because the direct interest in a specific policy is unknown, the mental model of the world, or the visions of man, play a greater role (1999 [1962], p. 79).

In the context of constitution making, ideology is the tool that enables an individual to form a mental model of how other individuals in the group will approach collective activity. Behind the veil of uncertainty, external costs are unknown; however, individuals can form expectations of external costs they may face in the future. These external costs are also a function of the number of persons required to reach a decision in a group of fixed size. There are two elements in arriving at the expected costs for an individual. The individual’s ideology tells an individual what he perceives as an adverse decision or what the external costs are, that could be imposed on him in the future. The decision-making rule helps the individual form expectations on the form in which adverse decisions will be imposed. Buchanan and Tullock (1999 [1962]) create a model using external costs and decision-making costs to arrive at the appropriate decision-making rule for collective action. Buchanan and Tullock have a constrained vision of man and model the costs and benefits for an individual accordingly.

Constitutional rules are different from ordinary rules governing human activity in that they include rules on how to amend the rules of the constitution. There are two reasons individuals agree to a rule for amending the constitution behind the veil of uncertainty. The first is to ensure that a policy in the future, that is generally beneficial to the group, is not abandoned. The second is to ensure that a policy that is against general interest, but allowed by the constitutional rules, does not persist due to rigidity of
constitutional rules. In the following section, I analyze the choice of the decision-making rule to amend the constitution, specifically rules to amend property rights protected by the constitution. Property rights can never be defined once and for all at the time of drafting a constitution, and a space for quasi property rights that are loosely defined will exist. These quasi rights may become the subject of collective activity in the future, and therefore, the amendment procedure of the constitutional rule gains importance.

I first discuss the traditional model created by Buchanan and Tullock to analyze the decision-making rule. Then I use their model and analyze the costs and benefits as perceived by an individual with an unconstrained vision of man, seeking to create constitutional rules.

2.2.1 The Constrained Vision: Expected Costs from Public Predation
In the constrained vision of man, the limitations of an individual are acknowledged and accepted as a fundamental fact. An individual, in pursuit of his interest or self-love, can lead to the economic prosperity of society under certain conditions (Smith 1981 [1776]). Therefore, the intellectual pursuit is to channelize the passions and interests of the individual (Hirschman 1977). Individual interest leading to social coordination and cooperation through institutions of the market was dependent on the rules of the game. For Hume, constitutional rules were simply “stability of possession, transference by consent, and the performance of promises. ‘Tis on the strict observance of those three laws, that the peace and security of human society entirely depend; nor is there any possibility of establishing a good correspondence among men, where these are neglected. Society is absolutely necessary for the well-being of men; and these are as
necessary to the support of society” (1896 [1738], III.VI.1).

While discussing countering of human vices or passions with interests, the emphasis was on the invisible hand of the market, which directs the private passions of individuals to unintended social good. However, absent the disciplining mechanism of the market in the affairs of the state, to Hume, a constitution creates circumstances where it is in the interest, even of bad men, to act for the public good. This view is best embodied in the writings of Hume. “In contriving any system of government and fixing several checks and controls of the constitution, every man ought to be supposed a knave and to have no other end, in all his actions, than private interest. By this interest, we must govern him, and by means of it, notwithstanding his insatiable avarice and ambition, co-operate to the public good.” (Hume 1978 [1777], I.VI.1)

Like Hume, for Buchanan, individuals do not undergo any fundamental change in their nature or behavior when they shift from market activity and don the role of political actors. “Individuals must be modeled as seeking to further their own narrow-self interest, narrowly defined, in terms of measured net wealth position, as predicted or expected” (1989, p. 21).

Therefore, through the constitutional contract, Buchanan and Tullock seek to create rules that will constrain individuals in future periods. Given that individuals can behave in a narrowly self-interested manner, an individual will find it profitable to organize activity collectively to either eliminate some external costs imposed by the private action of others, or to secure some external benefits that cannot be secured through purely private behavior. However, there is a cost of organization itself faced by
the individual, or the cost of organizing decisions collectively. “There are two separable
and distinct elements in the expected costs of any human activity” (1999 [1962], p. 44).

First, are external costs, or “the costs that an individual expects to endure as a
result of the actions of others over which he has no direct control. To the individual these
costs are external to his behavior” (Ibid. 1999 [1962], p. 45). External costs are a function
of the number of persons required to reach a decision in a group of fixed size. Thus, the
function may be expressed as:

\[ C_i = f(N_a), i = 1, 2, 3, \ldots N \quad (1) \]

where \( C_i \) is the present value of the expected external cost imposed on the \( i^{th} \) individual as
a result of an adverse (to him) collective decision, and \( N_a \) is the number of persons
required to agree (the decision rule) from a group size of \( N \) persons before collective
action can be taken (Ibid. 1999 [1962], p. 64). In the case of a decision rule, which
requires unanimous consent \( (N_a = N) \), expected external costs are zero because the
individual has veto power. If \( N_a = 1 \), the external costs will be very high because each
individual is vulnerable to the detrimental action of any other individual. External costs,
then, will be expected to decline as \( N_a \) increases. The expected external-cost function for
an individual is represented by curve (C) in Figure 2.

Behind the veil of uncertainty, if a decision-making rule allows few individuals to
amend the constitution to expropriate or redistribute existing property rights, an
individual will expect high external costs. This is because for an individual holding the
constrained vision of man, he expects others in the group, including those holding public
office, to behave in a narrowly self-interested way, which could be to his detriment. If only expected external costs are considered, the optimal rule for the individual is unanimity. Conversely, if unanimity is required to amend constitutional rules, especially property rights, an individual will expect no external costs. The present value of the expected external cost of the amendment rule is depicted in Figure 2.

![Figure 2: Present value of expected external costs of the amendment rule](image)

An individual, holding the constrained view of man expects a threat from other individuals in the group. The individual perceives the protection of property rights as an external benefit and the expropriation of his property as an external cost.
The second category of costs defined by Buchanan and Tullock (1999 [1962]) are decision costs, the costs in time and effort required to reach a decision. Decision costs vary with the number of participants required to reach agreement and may be expressed as:

\[ D_i = f\left(N_a\right), i = 1, 2, 3..N \]  

(2)

and \( N_a \leq N \)

where \( D_i \) is the present value of the expected cost in time and effort required to reach a decision imposed on individual \( I \); \( N_a \) is the number of persons required to agree (the decision rule) from a group size of \( N \) persons before collective action can be taken. If \( N_a = 1 \), the decision-making costs will be very low because no effort is required to arrive at a consensus (Ibid. 1999 [1962], p. 69). The present value of the expected decision costs for an individual is represented by curve (D) in Figure 3.
Interdependence costs, or the cost of organization, are the total of the present value of expected external costs and the present value of expected decision costs. The rational individual choosing the constitutional rule will minimize costs and therefore the appropriate decision-making rule is one that minimizes interdependence costs.

\[ G_i = \{C_i + D_i\}, \quad i = 1, 2, 3, \ldots N \quad (3) \]

Figure 4 represents the combined cost curve of the present value of expected external and decision-making costs denoted by curve (C+D) (Buchanan and Tullock 1999 [1962], p.71).
For the individual whose expected costs are depicted in Figure 4, the optimal decision-making rule will be at the lowest point of the curve (C+D) or where the interdependence costs are minimized. In this case the individual will choose the rule that requires \( \left( \frac{K}{N} \right) \) of the group to agree. Buchanan and Tullock demonstrate that the introduction of decision-making costs is required before any departure from the adherence to the unanimity rule can be rationally supported. In the case of an individual holding the constrained vision, the decision-making rule \( \left( \frac{K}{N} \right)_{CV} \) is the optimal rule to amend the constitution.
2.2.2 The Unconstrained Vision: Expected Costs from Private Predation

In contrast to those holding the constrained vision of man, those holding the unconstrained vision do not view the individual as he is, but as he could be given the right circumstances. For them, the fundamental problem is not the nature of an individual, but institutions. In this view, certain institutions and circumstances incentivize an individual to engage in narrowly selfish behavior, and replacing those institutions will allow the individual to follow more virtuous paths.

Perhaps the clearest proponent of this vision is Rousseau who believed, “Men are not naturally enemies, if only because when they live in their primitive independence the relationship among them is not sufficiently stable to constitute either a state of peace or a state of war. It is the relation between things and not between men that constitutes war, and since the state of war cannot arise from simple personal relations but only from property relations, private war or war between one man and another can exist neither in the state of nature, where there is no stable property, nor in the social state, where everything is under the authority of the laws” (1997 [1762], p. 46).

For Rousseau, capitalist institutions led to inequality that would undermine the social relations necessary for civil society. Following Rousseau, for communists and socialists, the concentration of property and capital in the bourgeois class and the continual exploitation and alienation of the proletariat would inevitably lead to class warfare and a proletariat revolution. In this sense, not only did the bourgeois class impose external costs on the proletariat; the capitalist system, rather than channeling the selfish
behavior of individuals to social good, would bring about social discord, unrest, and dissolution of civil society.

However, individuals outside of a capitalist system are altruistic and benevolent, when placed in the appropriate economic setting of collective ownership. Self-interest is replaced with ideals of brotherhood, social solidarity and community interest, in which collectivist values can be institutionalized, by controlling the means of production. Within the socialist system, no single individual’s interests are served and therefore, no individual can be detrimental to social interest.

Once there is ideological consensus over the vision, an individual who believes in the unconstrained vision expects certain external benefits from collectivization. Further, collectivizing into a centrally planned economy will remove the negative externality imposed by capitalism. However, state ownership of property under socialism does not necessitate democratic decision-making.

Sydney and Beatrice Webb, the founders of the Fabian Society argued for substituting the capitalist order with a socialist democracy. Their main argument was that capitalism created a society where “mere ownership of the instruments of production gives to a relatively small section of the community control over the actions of their fellow-citizens and over the mental and physical environment of successive generations. Under such a system personal freedom becomes, for large masses of the people, little better than a mockery” (1920: xiii, xiii-xvi and p. 80-81). George Bernard Shaw argued that within the system of capitalism present in nineteenth century Britain, “wealth cannot be enjoyed without dishonour, or foregone without misery.” In his view, capitalists
imposed severe costs on the rest of society or labor class and to offset the same, the “State should compete with all its might in every department of production” and produce without profit (Shaw 1884).

The main thread joining these two ideas, critiquing economic individualism and embracing socialism, was that political equality was meaningless unless there was economic equality. Fabian Socialists felt that “one man one vote” or the traditional system of personal rights had not produced the ideal society; and the purpose of collective action must be for the state to intervene to remove many of the external costs imposed by a few capitalists upon all individuals.

In socialist democracies prescribed by individuals and scholars holding the unconstrained vision, a system of property rights cannot be clearly defined at the time of constitution making. Especially in case of Fabian socialism, with gradualism as its foundation, property rights or any constitutional rules cannot be completely defined.

Behind the veil of uncertainty, where a strong state is expected to regulate property rights and competition, an individual will foresee that the amendment of the constitution may impose costs on him. Due to the imminent possibility of some reorganization of property rights, as well as redistribution in society, the individual may expect costs from the expropriation or redistribution of his property. An individual will expect high external costs with a decision-making rule that allows a few individuals to amend the constitution to expropriate or redistribute property. This is depicted in Figure 5 in external cost curve $C_1$. 
However, $C_i$ does not represent all the external costs expected by the individual in a Fabian system. Since the Fabian socialist believes that the property rights system creates economic inequalities through competition, the capitalist system left unregulated imposes an external cost on the individual. This external cost is different from $C_i$ (which is the fear or expropriation of his property).

The system of competition creates a society continuously in flux, which the Fabians perceive as an external cost. Therefore, behind the veil of uncertainty, the individual will want a rule to amend the Constitution, which allows for regulation of competition as well as gradual nationalization of means of production in sectors and industries unknown at present. In this case, the individual expects to face external costs
from other individuals, who may prevent reorganization of the means of production in the future. In Figure 6, I depict the second set of expected external costs $C_2$. This represents costs that may arise due to private predation while taking collective action.

Those believing in the unconstrained vision expect costs from private predations because institutions of property, money, and capital, corrupt the incentives faced by an individual and therefore may lead him to prevent socially beneficial reorganization of means or production. As more people needed to take the decision, higher the expected costs from this type of private predation. Expected external costs are a function of number of individuals required to take the decision. In this context of Fabian Socialists, expected external costs $C_2$ increase as the decision-making rule approaches unanimity.

![Figure 6: Present value of expected costs of private predation](image)

Figure 6: Present value of expected costs of private predation
An individual embracing the unconstrained vision, while creating a socialist democracy, will face external costs that are the total of both types of external costs discussed above in Figures 5 and 6. This is depicted in Figure 7 where the present value of external costs is represented by the curve \((C_1 + C_2)\). The decision-making rule that minimizes the external costs is \(F\) individuals or the \(\left(\frac{F}{N}\right)\). If only the expected external costs were considered and the amendment rule was determined in the absence of any decision costs, the rule would be \(\left(\frac{F}{N}\right)\) and not unanimity.

At this point, it is important to note that the unconstrained vision attempting to create a socialist democracy, leads the individual to perceive external costs such that the minimization of external costs no longer implies unanimity. In this case, the decision-making rule requires for \(F\) individuals to agree where \(F < N\).
Figure 7: Present value of total expected external costs of the amendment rule

Decision costs vary with the number of participants required to reach agreement within a group. If \( N_a = 1 \), the decision-making costs will be very low because no effort is required to arrive at a consensus. Decision costs increase as the number of individuals required for consensus increases. This standard relationship is depicted in Figure 8.
Interdependence costs, or the cost of organization, are the total of the present value of expected external costs and the present value of expected decision costs.

\[ G_i = \{ C_{1i} + C_{2i} + D_i \}, \ i = 1, 2, 3 \ldots N \ (3) \]

Figure 9 represents the combined cost curve of the present value of expected external and decision-making costs shown by \((C_1 + C_2 + D)\) in Figure 9.
The optimal decision making rule for the individual is when total costs are minimized. In this case, the minimum value of \((C_1 + C_2 + D)\) is at point K where \((K<F<N)\) and the optimal decision making rule for an individual embracing the unconstrained vision is \(\left(\frac{K}{N}\right)_{UV}\). Inclusion of decision costs moves the optimal decision-making rule further away from unanimous consensus.

Therefore, in the constrained vision of Buchanan and Tullock model, if decision making-costs could be reduced to negligible proportions, the rational individual should *always* support the requirement of unanimous consent. In is due to large decision-making costs under a unanimity rule, that the individual agrees to a less inclusive decision rule.
than unanimous consensus. By changing the ideological setting from the constrained to the unconstrained vision, the choice of the optimal rule will be a departure from conceptual unanimity, even without including decision making costs.

Given the same group size, and therefore the same decision costs, in both ideological settings, the optimal rule chosen to amend the constitution can be expressed as follows:

\[
\left( \frac{K}{N} \right)_v < \left( \frac{K}{N} \right)_{CV}
\]

Thus, different visions of the nature of an individual can lead an individual to consider different decision-making rules as “optimal.” These rules acquire tremendous significance in the post-constitutional setting. The fewer the number of individuals required to amend property rights or redistribute property, the more potential for inefficient redistribution and transfers.

2.3 Evidence from India

2.3.1 Pre-Constitutional Ideas

The Indian independence struggle was founded on the idea of “self rule” or Swaraj. Indians were in awe of the political rights offered to British citizens, which were significantly denied to citizens in the colonies. Indian intellectuals of the nineteenth century, like Ram Mohun Roy, Dadabhai Naoroji, Mahadev Govind Ranade, Gopal Krishna Gokhale, and Sir Syed Ahmed Khan, were influenced by British and continental liberal philosophers (see Roy 1823; Gokhale 1903; Doctor 1997; and Guha 2010).

According to Arnot, Ram Mohun Roy was an advocate of “a limited government presenting a variety of checks on any abuse of its powers” (1834, p. 212). Roy argued for
constitutional limitations constraining the British East India Company. He believed a strong free press and independent judiciary along with an elected citizenry were the future of India (Bayly 2007).

Over the decades prior to independence, liberals who believed in British values and wanted to make them available to Indian citizens of the Crown had founded the Indian National Congress Party, which went on to play a leading role in the independence movement. Gopal Krishna Gokhale was inspired by liberal thinkers such as Burke and John Stuart Mill and believed in a free society with a limited role for the state in provisioning of public goods and free education (Guha 2010, p. 99). Gandhi, perhaps the most important Indian leader in the early twentieth century, considered Gokhale his teacher and mentor. However, Gandhi felt Gokhale was too liberal in his ideas and faith in western institutions. Gandhi believed more in village-level grassroots institutions that were Indian. Dadabhai Naoroji was also a liberal thinker involved in the independence movement and “first and foremost a constitutionalist” (Doctor 1997, p. 28). Even though both Gokhale and Naoroji supported self-rule in India, they were advocating reform by remaining within the Empire. They believed that a liberal constitution that granted political equality would be the step forward. But with time, and with the passing of leaders like Gokhale and Naoroji, Hindu nationalists and Socialists diluted the strong liberal fervor within the Indian National Congress Party.

In the 1920s, the movement for some form of home rule or Swaraj gained momentum. One of the first attempts at creating a working Constitution for self-rule in India was made in August 1928 when an All Parties Conference was held in Lucknow.
The Conference appointed a committee led by Indian leader Motilal Nehru, father of Jawaharlal Nehru, which wrote a draft Constitution known as “The Nehru Report,” calling for a democratic republic. This was the first constitution written by Indians only and conceived of dominion status for India within the Empire.\textsuperscript{33} The draft had a section on rights (very similar to the Bill of Rights in the US constitution) and protected life, liberty and property from excesses of the state.

With the presence of liberal jurists like Motilal Nehru and Tej Bahadur Sapru on the committee, the Report contained principles for a liberal constitutional democracy along the lines of the American Constitution. The provision to amend the constitution required the Bill to be “passed by both Houses of Parliament sitting together and at the third reading shall be agreed to by not less than two-thirds of the total number of members of both Houses” (Nehru 1928). The Nehru Report was debated at an All Parties Convention with diverse attendance of Muslims and other minorities in December 1928. A subsequent proposal by Muslims was accepted, and the clause to amend the constitution made much more rigid to state “a majority of four-fifths of the two houses first sitting separately and then together being necessary for the amendment or alteration of the constitution by Parliament” (Kidwai 1929). At this point, the question of ratification by states for amendments to the Constitution never came up, since the draft Constitution was in its early stages and it did not envisage a federal structure.

\textsuperscript{33} Tej Bahadur Sapru (1926) had drafted a Constitution for India, but this draft did not call for independence from colonialism or for self rule and did not prescribe a bill of rights. The suggestions in this draft were largely ignored and the first important draft of a Constitution is the Nehru Report in 1928.
Tej Bahadur Sapru, an eminent lawyer, jurist and leader of the Indian Liberal Party, made the next attempt at a draft constitution in 1944. He formed and led a committee in pursuit of a constitutional Republic of India where communal harmony is maintained between Hindus and Muslims. Toward this, the Sapru Committee Report outlined the principles of a draft Constitutions along liberal lines in 1944 before the formation of the Constituent Assembly of India.

In the Sapru Report, the clause to amend the constitution read as follows: “No proposal for amendment should be deemed to be carried unless it has secured the support, in each of the two Chambers, of majority of not less than two-thirds of its sanctioned strength. We have further provided that no amendment shall be considered to be effective unless it has been approved by the legislatures of not less than two-thirds of the Units. These constitute a necessary protection against hasty amendments dealing with the substance of the constitution” (Sapru 1945, p. 304). The Sapru Report was the first draft constitution to explicitly require ratification by the states before amending the constitution. The report also recommended that the Constitution may not be amended in the first ten years of operation (Ibid., p. 450).

However, the Sapru Report was submitted to the Viceroy, not accepted by Indians in general and no further action was taken. Sapru was not a popular leader, since the Indian Liberal Party was never popular with common Indians, and distrusted intensely by Indian nationalists and socialists. Motilal Nehru had died in 1931 and the liberal leadership within Indian National Congress weakened further.
The next generation of Congress leaders was more inspired by socialist ideas. Many scholars have discussed the influence of Fabian ideas on Indian intellectuals (see Bhagwati 1993, Austin 1999, Das 2000, Guha 2007, Varma 2007, White 2012). This generation of intellectuals was skeptical of capitalism, which they equated to mercantilism, and international trade in particular, due to India’s historical experience with colonial firms like the British East India Company. Many believed that a socialist welfare state would uplift the masses deprived and exploited by 200 years of colonial rule (Das 2000 and Varma 2008). It was from this colonial past that the idea of an independent India was formed; the Indian independence movement was the coming together of ‘national’ and ‘social’ revolutions. “The national revolution focused on democracy and liberty- which the colonial rule had denied to all Indians- whereas the social revolution focused on emancipation and equality, which tradition and scripture had withheld from women and low castes” (Guha 2007, p. 107).

The most prominent among this generation of intellectuals was Jawaharlal Nehru, the liberal Motilal Nehru’s son. A lawyer trained in England, Jawaharlal Nehru developed strong socialist leanings during his time in England. He believed that capitalism could not strengthen either political or socio-economic equality. Nehru wrote, "Democracy and capitalism grew up together in the nineteenth century, but they were not mutually compatible. There was a basic contradiction between them, for democracy laid stress on the power for many, while capitalism gave real power to the few” (Nehru 2004 [1936], p. 547).
Fabian Society members Sydney and Beatrice Webb, George Bernard Shaw and Harold Laski’s ideas left a mark on Nehru during his time at Harrow and Cambridge (Nehru 2004 [1936], p. 27). On his visit to the Soviet Union for the tenth anniversary of the Bolshevik revolution, Nehru believed he had witnessed a system, which had achieved the idea of equality in every sense. Nehru concluded that the Soviet system treated its workers and peasants, its women and children, even its prisoners better than any liberal system (Nehru 1929). Like Nehru, others were also inspired by socialism as a cure for other social evils. Most important among them was Jayaprakash Narayan, who founded the Congress Socialist Party in 1934 as an attempt to give voice to Nehru’s wishes of instilling a commitment toward economic equality and social change within the Congress party. These ideas were so popular that within a few years, the Congress Socialist Party was more than one-third the strength of the All India Congress Committee with its influence spreading to the grassroots (Devasahayam 2012, p. 9). With the strength of the socialists increasing in the Congress Party, in 1938 the Congress constituted the National Planning Committee, based on the Soviet system, with Nehru as its first chairman (Nehru 2004 [1946], p. 435).

But there were aspects of the Soviet system that the Fabians could not reconcile with, most specifically the restrictions on speech and press. While discussing the politics of the Congress Socialist Party formed in 1934, Guha writes, “At the same time, these Congress Socialists detested the so-called Socialist Fatherland, the Soviet Union.

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34 The Congress Socialist party leadership included Kamaladevi Chattopadhyay (2010[1944]) who believed socialism would lead to more equal status for women in society. Ram Manohar Lohia (2010[1964]), another devoted member, believed socialism would eliminate caste differences by giving preferential treatment to lower castes for a few decades (Guha 2010, p. 395). Young activists like Narendra Dev, Yusuf Meherally and Achyut Patwardhan also joined the Congress Socialist Party.
Condemning its one-party state and its political treatment of political dissidents, the Congress Socialist Party stood rather for a marriage of democracy and socialism.” (2010, p. 264)

Nehru thought the Soviet system was over-regimented, that individuals were not politically free, and this was too high a price to pay for the economic development that USSR promised. He disliked many aspects of Soviet Russia including “the ruthless suppression of all contrary opinion, the wholesale regimentation, the unnecessary violence in carrying out various policies” (Nehru 2004 [1936], p. 377).

This sentiment against following the Soviet model completely was not unique to Nehru, but prevalent in the socialist thinking of the time in India. This had important implications on India embracing socialism. The Indian freedom movement can be characterized as Gandhian - one that was non-violent, non-cooperative and which involved civil disobedience by large masses of people making it difficult for the British to govern India. That the movement must be peaceful and non-violent was so fundamental to Indian independence, that a movement away from that value towards the Soviet system would not have received acceptance of the Congress Party or the people at large.

It is in this aspect that Fabianism was as powerful as it was romantic. It was against violent revolutions and over-regimentation and suppression of press; and offered political rights to all. And yet it borrowed the idea of economic egalitarianism from socialism - and the combination worked perfectly given India’s needs. On one hand, Indian leaders wanted free speech, free press and freedom of association and on another
they wanted economic equality and shunned free markets and freedom of business, as these were not considered conducive to economic equality.

2.3.2 Constituent Assembly Debates
Austin describes the leaders in New Delhi, at the time of independence as,

“believers in the seamless web: confirmed democrats, advocates of social and economic reforms, and nationalists with broad perspective” (Austin 1999, p. 17).35

At the eve of independence in India, there was an overwhelming demand for a forming a Republic. Indians were skeptical of monarchy in general, as many Indian princes had benefitted from Colonial rule and the feudal system. Among the leaders at the time, Jawaharlal Nehru was most in favor of drafting a Constitution with British, American and Soviet institutions. To Nehru, a system of governance where all were equal before the law, was imperative in unifying India.36 But the idea of an Indian republic not only opposed the political imperialism, but also the economic imperialism of the West.

In order to form a Constitutional Democracy, a Constituent Assembly was formed in 1946 and members chosen through indirect election by the members of the Provincial Legislative Assemblies. The Assembly was formed as following: (i) 292 members were elected through the Provincial Legislative Assemblies; (ii) 93 members represented the Indian Princely States; and (iii) 4 members represented the Chief

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35 "It [the Indian Constitution] may be summarized as having three strands: protecting and enhancing national unity and integrity; establishing the institutions and spirit of democracy; and fostering a social revolution to better the lot of the mass of Indians. The framers believed, and Indians today agree, that the three strands are mutually dependent and inextricably intertwined."

36 Opposition to the idea of a Constituent Assembly came from two quarters. While the first was Gandhi, once it was clear that the Constituent Assembly would be completely Indian and with sufficient representation from the provinces, Gandhi also supported the idea. The second criticism came from Communists and Marxists who believed in a social revolution to bring change and were opposed to English educated lawyers in the Congress leadership claiming to represent all of India.
Commissioners' Provinces. After partition, a separate Constituent Assembly was set up for Pakistan and representatives of some Provinces ceased to be members of the Assembly, reducing the membership of the Indian Assembly to 299. Dr. Rajendra Prasad was appointed President of the Constituent Assembly; BR Ambedkar was the Chairman of the Drafting Committee and Sir BN Rau was appointed the Constitutional Advisor. Most members of the Constituent Assembly were current or prior members of the Indian National Congress Party.

The vast majority of the Constituent Assembly members were socialists. One group was the Marxists and Communists who supported the state control of all means of production. The second group, which included Nehru and most members of the Congress Socialist Party, supported socialism because they were skeptical of capitalism. They all believed that state socialism would lead to economic progress, but the trade-off was the suppression of individual liberty, especially political rights. This group believed in gradualism. The third group was Gandhian Socialists, many of whom belonged to the Congress. They believed State socialism led to tyranny and the only way to be free was to create democratic village republics and neither be a slave to capitalism or central planning. But almost all members of the Constituent Assembly believed in some form of socialism, the debate was on the degree of centralization and planning.

37 Many years later in a letter to State Chief Ministers, Nehru wrote, “Thus far we see a full-blooded socialism, if that is the right term, working in Communist countries, together with the accompaniment of authoritarian control and an absence of the democratic approach. That is, practically everything is State-controlled and that develops bureaucracy in an extreme measure, apart from suppressing individual freedom. Certain economic results are undoubtedly obtained that way, but the price paid is heavy” (Nehru 2010 [1953]).

38 “The State under Socialism threatens, as in Russia, far from withering away, to become an all-powerful tyrant maintaining a strangle-hold over the entire life of the citizen. This leads to totalitarianism of the type
Given prevailing political and economic ideology, it was proposed that India become a Republic with a Parliamentary democracy and also a Socialist Welfare State. This was summed up in Nehru’s “Objectives Resolution” toward the Indian Constitution that was debated, discussed and approved by the Constitution Assembly. On December 13, 1946 Nehru said, “I think also of various Constituent Assemblies that have gone before and of what took place at the making of the great American nation when the fathers of that nation met and fashioned out a constitution that stood the test of so many years … Then my mind goes back to a more recent revolution which gave rise to a new type of State, the revolution that took place in Russia and out of which has arisen the Union of Soviet Socialist Republics, another mighty country, which is playing a tremendous part in the world” (Nehru 1946).

Multiple notes and letters were submitted to the President of the Constituent Assembly with suggestions for various clauses of the draft constitution. Socialist KT Shah was one of the first to send a detailed note demanding abolition of all property rights and provided no protection from takings. Shah wrote “The Union of India shall be free and entitled to acquire any private property held by any private individual or corporation as may be authorized or permitted under the law” (Shah 1946).

With the right to private property abolished, his draft amendment provision included an extremely rigid amendment process with high majority requirement with the

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we witness in Russia today. By, dispersing the ownership and management of industry and by developing the village into a democratic village republic, we break this strangle-hold to a very large extent and attenuate the danger of totalitarianism. Thus my picture of a socialist India is the picture of an economic and political democracy. In this democracy, men will neither be slaves to capitalism nor to a party or the State. Man will be free.” – Jayaprakash Narayan quoted by MR Masani (1946).

39 The Constituent Assembly discussed it from December 13-19, 1946, on December 21, 1946 and again on January 20-22, 1947. On the last day, all members standing adopted it unanimously.
following requirements - “No alteration or amendment of the fundamental rights shall be made except by direct reference to the people of the Union made by reference of the Head of State. No amendment shall be made unless it passes with three-fifths majority of each house and is approved by two-third of the State Legislature with a two-thirds majority” (*Ibid.*, Clause 90).

At the other end of the spectrum was the liberal leader KM Munshi, a strong advocate of constitutional protection of property rights and limited government. Munshi suggested a Madisonian takings clause inspired by the American Bill of Rights. To protect the same, Munshi suggested that “Amendments to the legislature may be moved in either house of the union legislature and any such amendment shall take effect if it is supported by at least two-thirds of the members voting in each house or a majority of the whole number of members of one house and a majority of the other; and by a majority in the Legislature of a majority of states” (Munshi 1963, p. 553-4).

The drafting of the amendment process began in March 1947 with the Constitutional Advisor, Sir BN Rau’s Questionnaire circulated to members of the Assembly. The questionnaire also included a note compiling the amendment processes by other liberal constitutional democracies like UK, Canada, Australian, South Africa, USA, Switzerland and Ireland.

Responses received from members of the Constituent Assembly were based mainly on the clauses of other constitutions, without any reference to the extreme views of KT Shah or KM Munshi. Only six members responded to the Questionnaire circulated,
and their responses varied. KM Pannikar (1947)\textsuperscript{40} and SP Mookherjee (1947)\textsuperscript{41} suggested that the amendment clause must require two-thirds majority in both Houses and ratification by State Legislatures. BG Kher (1947)\textsuperscript{42} suggested the two-thirds majority in both Houses, and no ratification requirement by state legislatures. Dr Subbarayan (1947)\textsuperscript{43} only required two-thirds majority for clauses concerning minorities and felt a simple majority would suffice for amending the rest of the Constitution. Brijlal Biyani (1947) suggested that a majority in the Provincial and not the Federal Legislature be sufficient to amend the Constitution. And Rajkumari Amrit Kaur (1947)\textsuperscript{44} argued that amendment to the Constitution must be decided through referendum with a two-thirds majority.

Based on these responses, BN Rau circulated a Memorandum in which the amendment clause was drafted as follows “An amendment to the Constitution may be initiated in either House of the Union Parliament and when the proposed amendment is passed in each House by a majority of not less than two-thirds of the total number of members of that House and is ratified by the legislatures of not less than two-thirds of the units of the Union, excluding the Chief Commissioners’ Provinces, it shall be presented

\textsuperscript{40} “Two-thirds majority in both Houses of the Union Legislature and ratification by the legislature of each unit." In his note, he extensively quoted extensively from world constitutions including Hamilton’s Federalist and Dicey’s Law of the Constitution on federal relations.

\textsuperscript{41} “Two-thirds majority in both Houses of the Union Legislature, and two-thirds majority of the Constitution Convention or ratification by two-thirds of the Legislatures of units (Lower House).” The Constitution Convention to be composed of members either directly elected or by the Legislatures of the units (Lower House).

\textsuperscript{42} “Approval of two-thirds of each House of Legislature, both of the Union and the Province. At least six months to elapse between the date of taking the initiation and the date of its final enactment.”

\textsuperscript{43} “The Constitution to be altered by an Act of the Union Legislature on the recommendation of the Provincial Legislature. Where minority interests are affected, consent of at least two-thirds of the members of the minorities concerned necessary.”

\textsuperscript{44} “To be brought into effect by the Legislature, subject to a referendum which shall have been carried by a two-thirds majority.”
to the President for his assent; and upon such assent being given the amendment shall come into operation” (Constitutional Adviser 1947a).

In a subsequent Joint Memorandum in June 1947, Gopalaswamy Ayyangar and Alladi Krishnaswami Aiyar submitted the following revisions. “Amendments of the Constitution will be made by the Union Legislature but no amendment will be deemed to have been approved by the Legislature unless it has secured the support in each of the two chambers of a majority of not less than two-thirds of its sanctioned strength. Further, such amendment will not have effect unless it is also approved by the Legislatures of not less than two-thirds of the units” (Ayyangar and Aiyar 1947).

At this stage, to a certain extent, these suggestions for the amendment to the Constitution were meaningless, because it was still unclear what rights the Constitution would protect. The Fundamental Rights were still under debate and consideration, along with several other important provisions relating to separation of powers and federalism, which needed to be defined before discussing the amending procedure.

Within the Fundamental Rights, the most controversial and frequently debated was the right to private property and the state’s power to take property. The first draft of this provision, proposed by KM Munshi, read almost exactly like America’s Fifth Amendment (Munshi 1947). This clause was re-drafted to read as “No property, movable or immovable, of any person or corporation, including any interest in commercial or industrial undertaking, shall be taken or acquired for public use unless the law provides for the payment of just compensation for the property taken or acquired and specifies the
principles on which and the manner in which compensation is to be determined”
(Subcommittee on Fundamental Rights: Minutes of the Meetings: March 28, 1947).

BN Rau observed that while such a clause may prevent “predatory legislation” in the future, it might also stand in the way of “beneficial social legislation” (Constitutional Adviser 1947b). This clause was likely the most debated; multiple members worried that such a strict limit on governmental power would prevent land reforms and control of important natural resources.” Even liberal members of the Assembly like C Rajagopalachari conceded that a strict clause would prevent or delay abolishing the feudal zamindari system. The socialists members like Damodar Swaroop Seth, KT Shah and Jayapraakash Narayan opposed a clause that prohibited expropriation without compensation. Narayan described the draft takings clause as “Magna Carta in the hands of capitalists of India” (Constituent Assembly Debates III, p. 514-16).

Given the enormous debate over the property rights guaranteed by the Constitution, it was important to consider the amendment rule to the Constitution with respect to the takings clause. To consider the amendment rule in conjunction with other parts of the Constitution, a Union Constitution Committee (UCC) was formed, with Jawaharlal Nehru as the Chairman. The UCC adopted the amendment procedure as recommended by BN Rau (see Constitutional Advisor 1947a).

In its July 4, 1947 report, the UCC had taken into account the debates over the right to private property and socially beneficial legislation and watered down the amendment clause. “An Amendment to the Constitution may be initiated in either House of the Federal Parliament and when the proposed amendment is passed in each House by
a majority of not less than two-thirds of the members of the House present and voting and is ratified by Legislatures of not less than one-half of the units of the Federation, it shall be presented to the President for his assent; and upon such assent being given, the amendment shall come into operation.” Further, in the meeting of the UCC, it was decided that “The ratification of the amendment to the Constitution should be a majority of the legislatures of each class of units, that is the Provinces, the Federated States and where States are grouped together to form a unit, such group States” (Nehru 1947, Part X) (emphasis added).

The most important change in this meeting was that the majority requirement was brought down from two-third of the votes to one-half of the votes; and the quorum for voting was specified at two-third of the total membership of each House. However, members of the Constituent Assembly were dissatisfied with such a rigid provision, since there was no clear picture of the Fundamental Rights guaranteed by the Constitution. To look into this provision in further detail, the Sub-Committee on Ratification of Amendments was appointed.45

The Sub-Committee on Ratification of Amendments met on July 11-12, 1947 and Nehru submitted a supplementary report to the President of the Constituent Assembly, on July 13, 1947. These were perhaps the most important meetings, because they drastically changed the form in which the amendment procedure would be debated by the Constituent Assembly.

45 Members of this committee included Jawaharlal Nehru, Gopalaswami Ayyangar, BR Ambedkar, VT Krishnamachari, KM Munshi, KM Panikkar, BH Zaidi, Alladi Krishnaswami Ayyar and GB Pant, with Constitutional Advisor BN Rau present at the meetings.
BR Ambedkar chaired the meeting of the Sub-Committee on July 11, 1947 where the draft clause from the July 4, 1947 meeting was accepted. However, Jawaharlal Nehru was not present at this meeting and he called for a second meeting the very next day. In this subsequent meeting, on July 12, 1947 the Sub-Committee on Ratification of Amendments created two categories of constitutional clauses: one that could be amended by the Federal parliament without requiring ratification\textsuperscript{46} and a second category\textsuperscript{47} of entrenched clauses that required ratification by the state units. Per this draft clause, **Fundamental Rights could be amended with a majority of the votes**, with a quorum of two-thirds present and voting and **did not require ratification** by a majority of state legislatures.

On the following day, July 13, 1947, the Supplementary Report of the Union Constitution Committee embodied the above decision. This was done with great haste by Nehru, who personally wrote the letter to the President of the Constituent Assembly submitting the recommendation for the Amendment procedure.\textsuperscript{48} This draft clause was

\begin{verbatim}
(1) An amendment of the Constitution in respect of any provision thereof other than those relating to matters specified in paragraph (2) below shall not be operative, unless it is passed in each House of the Federal Parliament by a majority of the total membership of that House and also by a majority of not less than two-thirds of the members of that House present and voting and that it will not be necessary for such amendment to be ratified by the legislatures of the Units of the Federation.”

(2) An amendment of the Constitution in respect of any provision thereof relating to any of the following matters, namely:
(a) changes in the Federal Legislative List,
(b) representation of Units in the Federal Parliament, and
(c) powers of the Supreme Court,
will not become operative unless it is passed in each House of the Federal Parliament in the manner provided in paragraph (1) above and also ratified by the Legislatures of Units representing a majority of the population of all the Units of the Federation in which Units representing at least one-third of the population of the Federated States are included.

This was included as Clause X of the Memorandum and read as follows: “The amendment of the Constitution may be initiated in either House of the Federal Parliament and when the proposed amendment is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President for
\end{verbatim}
the basis for all the debates that followed and closely resembled the final amendment provision in Article 368. This was eerily close to the amendment clause in the Soviet Constitution of 1936. “The Constitution of the U.S.S.R. may be amended only by decision of the Supreme Soviet of the U.S.S.R. adopted by a majority of not less than two-thirds of the votes cast in each of its Chambers” (Constitution of the USSR, Article 146).

Austin also suggests that this overnight change in the clause, i.e. removing the requirement of ratification by state legislatures for Fundamental Rights, was due to Nehru’s influence. He argues that Nehru always wanted a simpler amendment procedure and he did not attend the first meeting on July 11, 1947 but attended the meeting on July 12, 1947 with the sole purpose of changing the amendment procedure (1966, p. 259).

This is unsurprising as Nehru, long before he had any political power, was of the view that representatives of the people should easily be able to amend the constitution. As early as 1927, during his travel to Moscow for the tenth anniversary of the Bolshevik revolution, Nehru observed the easily amendable Soviet Constitution. In his travelogue he praises the USSR 1922 Constitution for being flexible. “The Constitution of the Union can be changed just like any other law. It is thus flexible and easily adaptable to new conditions … The supreme authority is the All Union Congress” Nehru (1929, p. 27).

The foundation of these ideas that Nehru had regarding the flexibility of Constitutional
rules can be traced back to his teacher Laski. Laski argued that, “Law is not a body of eternal and immutable principles which, on discovery the judge forthwith applies. Law is a body of rules made and changed in given times and places by men to secure ends which they deem desirable” (1933, p. 129).

The draft clause amended in July 1947 was modified slightly and added to the October 1947 draft of the Constitution circulated by the Constitutional Advisor. In addition to the above clauses, there were two important additions in the October 1947 draft. The proviso to the amendment procedure stated that any provision pertaining to reservation of seats for Muslims, Sikhs, Christians, Schedule Castes, and Schedule Tribes should not be amended for ten years (Constitutional Advisor 1947c, Article 232 Proviso). Another important clause, which was introduced in this draft, was borrowed from the Irish Constitution, which gave the Parliament the power to modify or amend the Constitution in the first three years, by an Act of Parliament (Ibid., Article 238).

The October 1947 draft was extremely important because a draft for the Fundamental Rights was also included. It was clear at this point, that the right to private property would be included in the Constitution. In this context, the dilution of the amendment clause and the power to remove difficulties is crucial.

After submitting the Draft Constitution in October 1947, BN Rau, the Constitutional Advisor, visited the UK, USA, Canada and Ireland and submitted a report of various discussions with constitutional scholars and practitioners in these countries. One of the most important conversations in the context of amendments took place in Ireland with the Attorney-General who said that “the Fundamental rights guaranteed in
the Irish Constitution were proving very inconvenient, particularly the one relating to property.” Another important meeting was with Éamon de Valera, head of the Irish Government at the time, who was instrumental in introducing the Irish Constitution. De Valera said that if he could rewrite the Irish Constitution, among a few other changes, he would “make the right to private property expressly subject to laws intended for general welfare.” De Valera also recommended that the draft clause in the Indian Constitution, which gave the Parliament the power to amend the Constitution by a simple Act for the first three years be extended to five years (Constitutional Adviser 1947d).

Based on his discussions in Washington DC and Ottawa, BN Rau recommended that in the event of a conflict between the principles of welfare and policy set forth in the Chapter on Directive Principles of State Policy, and the individual rights in Chapter on Fundamental Rights, the general welfare must take precedence over individual rights (Constitutional Adviser 1947d, Appendix I).

The Order of Business Committee recommended that the October 1947 Draft Constitution prepared by BN Rau as Constitutional Adviser should be “scrutinized” by a Drafting Committee. The Drafting Committee was chaired by BR Ambedkar and considered each article in the draft over 42 days from October 27, 1947 to February 21, 1948. On February 6 1948, the committee\(^{49}\) revised the procedure to amend the constitution. In the revision, there were two changes. First, constitutional amendment pertaining to states could be initiated in a state legislature. Second, provisions in the draft Constitutions relating to reserved seats for minority groups like Muslims, Sikhs,

\(^{49}\) Committee meetings were attended by BR Ambedkar, Alladi Krishnaswami Ayyar, Maulavi Saiyid Muhammad Saadulla, and N. Madhava Rao.
Christian, Schedule Castes and Schedule Tribes could not be amended for ten years. This was added for consideration because minorities were insecure with the dilution of the amendment clause (see Minutes of the Meetings of the Drafting Committee, Appendix C, Part XIII).

All these provisions were retained in the Draft Constitution circulated for consideration in February 21, 1948 (see Draft Constitution prepared by Drafting Committee, Article 305). In addition to these provisions, a new provision was added where the President was given the power to remove difficulties and could amend the constitution “by way of variation, addition, or repeal, as he may deem to be necessary or expedient” (Ibid., Article 313). Both these provisions were left out of future drafts.

One would imagine that diluting the voting requirements to amend the constitution would have met much opposition. On the contrary, the Drafting Committee came under attack for making the Constitution difficult to amend. Ambedkar defended the Drafting Committee and argued “The provisions relating to the amendment of the Constitution have come in for virulent attack at the hands of the critics of the Draft Constitution. It is said that the provisions contained in the Draft make amendment difficult. It is proposed that the Constitution should be amendable by a simple majority at least for some years. … To know how simple are the provisions of the Draft Constitution in respect of amending the Constitution, one only has to study the provisions for amendment contained in the American and Australian Constitutions. Compared to them those contained in the Draft Constitution will be found to be the simplest. The Draft Constitution eliminated the elaborate and difficult procedures such as a decision by a
convention or a referendum. The powers of amendment are left with the Legislatures - Central and Provincial. It is only for amendments of specific matters—and they are only a few—that the ratification of the State legislatures is required. All other Articles of the Constitution are left to be amended by Parliament. The only limitation is that it shall be done by a majority of not less than two-thirds of the members of each House present and voting and a majority of the total membership of the each House. It is difficult to conceive a simpler method of amending the Constitution” (Ambedkar 1948) (emphasis added).

The concern for Socialist policies in the future was the main reason for simultaneously reducing majority requirements for amending the Fundamental Rights, while simultaneously requiring ratification by state legislatures for other “entrenched clauses.”

While discussing amendments to fundamental rights, Nehru argued “Normally speaking one presumes that any Parliament representing the entire community of the nation will certainly not permit a fraud on its own Constitution and will be very much concerned in doing justice to the individual as well as to the community” (Nehru 1949). During the drafting of the Indian Constitution, Jawaharlal Nehru summarized these two types of expected external costs outlined in Figures 5 and 6. A distinction had to be made between petty acquisitions and large schemes of social reform and social engineering, which could hardly be considered from the point of view of the individual. “Here is a piece of legislation that the community, as represented by its chosen representatives, considers quite essential for the progress and the safety of the State and it is a piece of
legislation which affects millions of people. Obviously you cannot leave that piece of legislation to long, widespread and continuous litigation in the courts of law. Otherwise the future of millions of people might be affected, otherwise the whole structure of the State may be shaken to its foundations... If we have to take the property, if the State so wills, we have to see that fair and equitable compensation is given, because we proceed on the basis of fair and equitable compensation. But when we consider the equity of it we always have to remember that the equity does not apply only to the individual, but to the community. No individual can override ultimately the rights of the community at large. No community should injure and invade the rights of the individual unless it be for the most urgent and important reasons. How are we going to balance all this? You may balance it to some extent by legal means, but ultimately the balancing authority can only be the Sovereign Legislature of the country which can keep before it all the various factors - all the public, political and other factors - that come into the picture” (Nehru 1949).

Constituent Assembly members, like Nehru, held the unconstrained vision of man and attempted to dilute the requirements to amend the constitution to avoid private or market predation in the future.

2.4 Concluding Remarks
My analysis offers the following conclusions. First, the effect of ideology in determining of the rules of the game is generally not considered in the interest-based theories of constitutions. Ideology is the tool through which an individual perceives the reality of the world and therefore predicts the conduct of other individuals. Therefore,
ideology is an important ingredient while forming expectations about the future. In the context of constitution making, ideology determines the expected external costs and the expected decision making costs of an individual. In the economic analysis of constitution making, the focus is on the expected costs and benefits perceived by an individual acting behind the veil of ignorance. Therefore, ideology becomes an important element in the decision-making rule. Ignoring ideology while analyzing expected costs and benefits leaves a gap in the traditional constitution political economy analysis, as ideology affects the way an individual perceives costs and benefits.

Second, the unconstrained vision of man leads individuals to espouse collectivist ideologies. Fear of market or private predation leads individuals to form expectations on external and decision costs, and the optimal decision-making rule deviates farther from the Paretian unanimity standard. Thus, the ideological vision may result in choosing a decision-making rule that allows for inefficient public goods and transfers in the future.

Third, it is evident through the debates that the members of the Constituent Assembly of India held the unconstrained vision and did not conceive of opportunistic behavior in the future with an easy amendment clause. They were preoccupied with the problems of market predation, for which the state required a lot of discretion and easy amendment rules.
CHAPTER 3: CONSTITUTIONAL RULES, INDEPENDENT JUDICIARY AND
RENT SEEKING: EVIDENCE FROM THE NINTH SCHEDULE*

The Indian Constitution allows, through constitutional amendment, the suspension of independent judicial review and immunity from Fundamental Rights, for a list of preferred wealth transferring legislation (Article 31B). The Indian Parliament created this provision in response to an independent judiciary blocking wealth transfers. These laws enabling wealth transfers are listed in a unique constitutional provision called the Ninth Schedule. Through ten constitutional amendments over forty-five years, the Ninth Schedule has expanded to protect 282 laws enabling contrived rents, transfers, and redistribution, more generally described as inefficient legislation.50

Economists have argued that an independent judiciary enforces bargains made by the incumbent legislature with special interests, beyond the legislative term. Independent

* For comments and suggestions on this chapter I thank Peter Boettke, Peter Leeson, Mark Koyama, Nandakumar Rajagopalan, Mario Rizzo, Richard Wagner, Larry White, Simon Bilo, and participants of the Colloquium on Market Institutions & Economic Processes at the Department of Economics, New York University, and GSP Workshop at George Mason University.
50 Individuals wasting resources in competing to buy and maintain artificially contrived rents and transfers is called rent seeking (Tullock 1967; Krueger 1974). The term rent seeking is now used more generally to describe the resources spent in competing not just for rents (as defined by Krueger 1974), but also obtaining and maintaining transfers, redistribution of resources, and re-assignment of property rights (Benson 1984; Tollison 1982). Tullock (1967, 1971) argued that the mere possibility of rents transfers imposes certain costs on society as it leads individuals to invest resources in either obtaining the transfer or preventing it. These are inefficient, in the Paretian sense, that there are potential changes that could benefit some without harming others.
judicial review, by enforcing wealth transfers and rents arising from special interest bargains, increases the durability of such rents and wealth transfers, and thereby rent seeking (Landes and Posner 1975). This theory has found theoretical and empirical support (see Crain and Tollison 1979; Tollison 1988; Anderson et al 1989; Spiller and Gely 1992; Salzberger 1993; Cooter 2000; and Hanssen 2004a, 2004b). Extending this model, Crain and Tollison (1979) predict that with an independent judiciary, there will be fewer constitutional amendments, because the durability provided by an independent judiciary for any legislation substitutes for the durability provided by a constitutional amendment. They confirm this result using tenure of judges and amendments to US state constitutions.

The Indian experience with an independent judiciary contradicts the predictions of the prevailing view. From its inception in 1950, the independently appointed judiciary in India overruled land redistribution laws. In 1951, the Indian Parliament responded by amending the Constitution to protect land reform legislation from judicial review. Judicial review prompted the Parliament to repeatedly amend the Constitution, not as a substitute for the judiciary enforcing interest group bargains, but to suspend independent judicial review blocking interest group bargains. Therefore in the Indian case, durability of wealth transfers and rents increased due to the suspension of independent judicial review through a constitutional amendment.
Economists have said nothing about the Ninth Schedule in the Indian Constitution.\textsuperscript{51} And the prevailing view that an independent judiciary enforces wealth transfers and rent seeking bargains made by the legislation does not explain the creation of the Ninth Schedule. The failure of this literature to explain the Ninth Schedule is due to two omissions. First, these models implicitly assume that the bargains made between the legislature and interest groups are constitutionally valid, and therefore fail to account for unconstitutional legislation. Second, economists supporting these models evaluate the impact of an independent judiciary in isolation from constitutional rules, and therefore do not account for the consequences arising from the interactions of rules, such as constitutional amendments. They correctly predict that the increase in durability of inefficient legislation will lead to more rent seeking. However, the argument that an independent judiciary increases the durability of rents is contingent upon a specific constellation of constitutional rules and is not a general theory of an independent judiciary.

The objective of this paper is to provide a more general framework to analyze the impact of independent judicial review on inefficient legislation and rent seeking, and thereby to explain the creation, expansion and recent dormancy of Ninth Schedule legislation in India.

I argue that an independent judiciary enforces constitutional rules, and therefore the impact of an independent judiciary on rent seeking cannot be viewed in isolation of

\textsuperscript{51} Indian constitutional scholars and historians have commented on the Ninth Schedule (see Austin 1966, 1999; Dhavan 1978, 2007; and Seervai 2008[1991]). For an economic analysis on the general erosion of property rights in India, see Singh (2006).
constitutional rules. It is not the “independence” of the judiciary that increases rent
seeking, but the procedural and substantive constitutional rules within which an
independent judiciary functions. Given an independent judiciary, it is important to
analyze different constellations of constitutional rules to predict (1) which constitutional
rules allow or curtail interest groups, (2) if constitutional amendments are likely, and (3)
whether these constitutional amendments will be *intra vires* or *ultra vires*.

Evidence for this type of question is not easy to come by because changes in the
institutional framework are difficult to discern and measure. This article overcomes the
problem by analyzing the 282 laws protected from judicial review, in two different
constellations of constitutional rules, in India. Analyzing the impact of an independent
judiciary under two different constellations of constitutional rules in post-independence
India allows me to test specific predictions on independent judicial review and
constitutional amendments. From Indian legislative and constitutional history, I provide
evidence that supports these specific predictions.

This paper is important because the Indian experience serves as a cautionary tale
for constitutional design and maintenance. I show that the relative strength, as well as the
combination, of procedural and substantive rules, explains the differences in an
independent judiciary either facilitating or curtailing inefficient legislation. This paper
contributes to three literatures.

The first is the prevailing view that an independent judiciary enforces interest
group bargains (see Landes and Posner 1975; Crain and Tollison 1979; Anderson et al
1989; Spiller and Gely 1992; Salzberger 1993; and Hanssen 2004a, 2004b) and the critics
of this theory working within the interest group framework (see Buchanan 1975; Samuels 1975; Macey 1986; Epstein 1987; Easterbrook 1990; Boudreaux and Pritchard 1993, 1994; and Padovano et al 2003). Second, this paper contributes to the literature on the economic analysis of constitutional design and maintenance (see Hayek 1944, 1967, 2011[1960]; Buchanan and Tullock 1999[1962]; Buchanan 1999; Wagner 1988, 1989, 1993, 1998; Niskanen 1990; Boudreaux and Pritchard 1993; Voigt 1997; Ostrom 1997, 2008; Cooter 2000; Elkin 2006; Ginsburg, Elkins and Melton 2009). Third, this paper contributes to the literature on rent seeking in India. This existing literature has mainly focused on the impact of specific policies and legislation on economic growth (see Krueger 1974; Mohammed and Whalley 1984; Rajan 1988; Kamath 1989; and Bhagwati 1980, 1982, 1993), but has ignored rules at a constitutional level that may systematize rent seeking.

I begin with a brief discussion in Section 3.1 analyzing why the existing literature does not explain the Ninth Schedule. In Section 3.2, I provide a framework of constitutional rules enforced by an independent judiciary, within which interest groups operate. I use different combinations of constitutional rules to predict the effect of interactions of these rules on the amount and durability of rents and transfers. In Section 3.3, using the theory of an independent judiciary and constitutional rules, I make two predictions for Ninth Schedule legislation and provide supporting evidence from Indian constitutional and legislative history. In Section 3.4, I conclude this chapter.
3.1 The Puzzle posed by the Ninth Schedule

Judicial independence is the idea that a judge ought to be free to decide a matter without fear or anticipation of extra-legal punishments or rewards. Landes and Posner define an independent judiciary as “one that does not make decisions on the basis of the sorts of political factors (for example, the electoral strength of the people affected by a decision) that would influence and in most cases control the decision were it to be made by a legislative body” (1975, p. 875).52

The Indian judiciary was set up to be independent, in both appointment and operations, to enforce the constitution and serve to check the legislature and executive (Neuborne 2003 and Gadbois 2011).53 The Indian Constitution prescribes the procedure for the executive to appoint judges (Article 124(2)). These judges serve until age 65 and may only be removed through the impeachment process (Article 124(2) proviso). To appoint the Chief Justice of India, the convention is to honor the rule of seniority among

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52 It must be clarified that an independent judiciary does not mean a judiciary that is independent of the political process. Macey (1988) and Boudreaux and Pritchard (1994) have modified it to state a dependent independent judiciary, because the judiciary cannot stand alone. Feld and Voigt (2003) introduce an additional two-fold concept of judicial independence – de jure independence, as described in the constitutional establishment of the supreme court, and de facto independence, that is judicial independence as it is actually implemented in practice. This distinction does not matter much for this analysis. I assume that judiciary independence is both de facto and de jure. Analysis of the Indian judiciary seems to support this view (Neuborne 2003).

53 The Indian Constitution provides for separation of powers between the legislature, executive and the judiciary. Separation of powers for the federal government is enumerated in Part V of the Constitution - Articles 52-151. Separation of powers for state governments is enumerated in Part VI of the Constitution - Articles 152-242. In addition, independent judicial review was explicitly provided for in the Indian Constitution (Articles 13, 32, 139, 226). The Constitution grants the judiciary the power to invalidate any law that contravenes Fundamental Rights (Article 13). As a parliamentary democracy, the executive was made accountable to the legislature, the legislature to the electorate and an independent judiciary could review all legislation.
the sitting judges. The purpose of the rule is to appoint the head of the Indian judiciary without interference from the executive.\textsuperscript{54}

Landes and Posner argue that an independent judiciary provides stability to the deals struck between legislators and interest groups in the political market. They assert that “the independent judiciary is not only consistent with, but essential to, the interest-group theory of government” (1975, p. 877). The judiciary may, in their role as independent judges, deliberately or inadvertently increase the durability of inefficient legislation, and therefore rent seeking.

In this model, an interest group successfully “buys” legislation in its favor from the legislature in term. The composition of the legislature changes in a subsequent term and the new legislature does not favor the legislation bought by the interest group. However, the new legislature finds it difficult to repeal the legislation. If the judges are perfect agents of the legislature i.e. not independent, they will refuse to enforce the original legislation, and effectively repeal the legislation (Landes and Posner 1975, p. 879). An independent judiciary, by contrast, will uphold the original intention of legislation, increasing the durability of the rents arising from the legislation. The legislature has powerful incentives to create procedures that increase the durability of the legislation. Creating an independent judiciary is one such procedure, since an

\textsuperscript{54} The first Supreme Court bench as well as some state High Courts preceded the Republic of India. The Supreme Court was the British Federal Court under a different name and Chief Justice Kania of the British Federal Court, the first Chief Justice of the Supreme Court of India. When the Chief Justice died in office, the senior-most judge on the Bench, Justice Sastri was appointed Chief Justice. It is believed that Nehru personally preferred Justice MC Mahajan, who was also on the bench at the time. However, the Supreme Court judges threatened to resign if there was any executive interference by breaking the rule of seniority, and the government yielded (Gadbois 2011, p. 39). Of the appointment of 39 judges as the Chief Justice of India, this rule was broken only twice - during Indira Gandhi’s tenure as Prime Minister - with the appointments of Chief Justice AN Ray and Chief Justice Beg.
independent judiciary would interpret and enforce the legislation in accordance to the original legislative intent (1975, p. 882). This theory has found empirical support (see Crain and Tollison 1979; Anderson et al 1989; Spiller and Gely 1992; and Salzberger 1993).

Applied to India, this theory predicts that the independent Indian judiciary would enforce the wealth transfers and rents legislated by the Parliament or state legislatures. Such legislation came up for judicial review in post-independent India. Facing a pressing need to dismantle the feudal or zamindari system of land ownership, Indian state legislatures passed various laws breaking up large feudal estates to implement large-scale land reform through imposition of agrarian land ceilings, and the redistribution of surplus land holdings. Landowners challenged these laws for taking land without just compensation and the land reform policy became the subject of litigation between wealthy zamindars and newly formed Indian state governments. State High Courts declared some of these laws pertaining to land redistribution unconstitutional on the grounds that they violated the right to equality and the takings clause in the Constitution (Kameshwar Singh v The Province of Bihar (AIR 1950 Patna 392)). Contrary to the predictions of economists, the Indian judiciary curtailed these wealth transfers and rents by holding them unconstitutional.

To overcome the problem posed by an independent judiciary blocking rents and wealth transfers, the Parliament amended the Constitution to override independent

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55 Landes and Posner (1975) have been criticized for arguing that independent judges enforce the original intent of the legislation (see Buchanan 1975; Macey 1986; Epstein 1987; and Boudreaux and Pritchard 1994).
judicial review. There were three main alternatives before members of Parliament while considering the amendment.\textsuperscript{56} The first was to delete the protection of the takings clause from the Fundamental Rights.\textsuperscript{57} The second option was to amend the Constitution and suspend independent judicial review of Parliament.\textsuperscript{58} The third alternative, which was adopted, was to suspend judicial enforcement of Fundamental Rights only for legislation enabling agrarian land redistribution.

To continue with the land reform agenda despite its unconstitutionality, Parliament amended the newly minted constitution. The First Amendment effectively removed the hurdles posed by the judiciary by placing a list of preferred legislation relating to agrarian land reform within a newly created Ninth Schedule in the Constitution to supersede judicial review in order to escape constraints imposed by Fundamental Rights.\textsuperscript{59}

In the context of using constitutional amendments to increase the durability of legislation, Crain and Tollison (1979) hypothesized that where judicial independence prolongs the life of wealth-transferring legislation, the frequency of state constitution amendments should be negatively correlated with judicial independence. Crain and Tollison (1979, p. 173), using the tenure of the chief justice of a state’s highest court as a proxy for judicial independence, found support for the proposition that the independence

\textsuperscript{56} Nehru fleetingly mentions these alternatives as he justifies the creation of the Ninth Schedule in Parliament (see Constitution (First Amendment Bill), Parliamentary Debates, May 29-30, 1951).
\textsuperscript{57} There was support for this option. The takings clause and the constraints it placed on land reforms were debated even at the stage of constitutional drafting (see Shiva Rao 2006, p. 281-299).
\textsuperscript{58} This alternative is not discussed in the Parliamentary debates of the First Amendment. It was previously considered in Constituent Assembly Debates while discussing the British system of parliamentary supremacy and the American principle of separation of powers.
\textsuperscript{59} See Section 5 and Section 14 of The Constitution (First Amendment) Act, 1951
of a state’s judiciary negatively affects the proportion of constitutional-to-legislative protections secured by interest groups. They confirm that, with an independent judiciary, fewer constitutional amendments will be enacted, because the durability provided by an independent judiciary substitutes for durability provided by a constitutional amendment.

The creation and expansion of the Ninth Schedule shows the opposite pattern in India, constitutional amendments were needed to override judicial independence, which had struck down inefficient legislation. The Statement of Objects and Reasons introducing the First Amendment to the Constitution stated that “the validity of agrarian reform measures passed by the State Legislatures ... formed the subject-matter of dilatory litigation, as a result of which the implementation of these important measures, affecting large numbers of people, has been held up.” Consequently, it was essential to amend the constitution for “securing the constitutional validity” of laws enabling land redistribution (The Constitution (First Amendment) Act, 1951). Since the creation of the Ninth Schedule, the Constitution has been amended ten times to expand the Ninth Schedule to protect 282 laws from judicial review. Each amendment clearly stated that additions were made to the Ninth Schedule to secure constitutional validity for laws blocked by the judiciary.60

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Table 1: Constitutional Amendments and Additions to the Ninth Schedule

<table>
<thead>
<tr>
<th></th>
<th>Constitution Amendment Act</th>
<th>Year</th>
<th>Additions to Ninth Schedule</th>
<th>Government</th>
</tr>
</thead>
<tbody>
<tr>
<td>Phase 1 (1951-66)</td>
<td>First Amendment</td>
<td>1951</td>
<td>13</td>
<td>INC - Jawaharlal Nehru</td>
</tr>
<tr>
<td></td>
<td>Fourth Amendment</td>
<td>1955</td>
<td>7</td>
<td>INC- Jawaharlal Nehru</td>
</tr>
<tr>
<td></td>
<td>Seventeenth Amendment</td>
<td>1964</td>
<td>44</td>
<td>INC - Bill under Nehru, Act under Shastri</td>
</tr>
<tr>
<td>Phase 1 Total</td>
<td></td>
<td></td>
<td>64</td>
<td></td>
</tr>
<tr>
<td>Phase 2 (1966-78)</td>
<td>Twenty-Ninth Amendment</td>
<td>1972</td>
<td>2</td>
<td>INC - Indira Gandhi</td>
</tr>
<tr>
<td></td>
<td>Thirty-Fourth Amendment</td>
<td>1974</td>
<td>20</td>
<td>INC - Indira Gandhi</td>
</tr>
<tr>
<td></td>
<td>Thirty-Ninth Amendment</td>
<td>1975</td>
<td>38</td>
<td>INC - Indira Gandhi (Emergency)</td>
</tr>
<tr>
<td></td>
<td>Fortieth Amendment</td>
<td>1976</td>
<td>64</td>
<td>INC - Indira Gandhi (Emergency)</td>
</tr>
<tr>
<td>Phase 2 Total</td>
<td></td>
<td></td>
<td>124</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Forty-Seventh Amendment</td>
<td>1984</td>
<td>14</td>
<td>INC - Indira Gandhi</td>
</tr>
<tr>
<td></td>
<td>Sixty-Sixth Amendment</td>
<td>1990</td>
<td>55</td>
<td>National Front - VP Singh</td>
</tr>
<tr>
<td></td>
<td>Seventy-Sixth Amendment</td>
<td>1994</td>
<td>1</td>
<td>INC - PV Narasimha Rao</td>
</tr>
<tr>
<td></td>
<td>Seventy-Eighth Amendment</td>
<td>1995</td>
<td>27</td>
<td>INC - PV Narasimha Rao</td>
</tr>
<tr>
<td>Phase 3 Total</td>
<td></td>
<td></td>
<td>94</td>
<td></td>
</tr>
<tr>
<td>Phase 4 (1998 onward)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total (All Phases)</td>
<td></td>
<td></td>
<td>282</td>
<td></td>
</tr>
</tbody>
</table>

Land redistribution laws were the first type of legislation included in the Ninth Schedule. In the following decades, the Ninth Schedule took a life of its own, and legislation beyond the purview of the original policy of land reforms were added through
constitutional amendments. The Schedule now provides immunity to laws regulating mines and minerals, monopolies, industrial and labor regulation, requisition of property, price controls, nationalization of coal, copper, general insurance, and sick industries; and increased reservation for admissions of backward caste students in government jobs and educational institutions. After rapidly expanding in the seventies, no new laws have been added since the mid-nineties even though the Ninth Schedule continues to remain a legitimate constitutional escape from judicial review and the Fundamental Rights.

Based on the content of the legislation, laws in the Ninth Schedule protected from judicial review primarily fall in 4 categories: land redistribution without compensation, nationalization, tenancy and rent regulations, and price and quantity controls. The first two types of laws facilitated direct wealth transfers while the latter two types created artificial rents. The Indian Parliament effectively used constitutional amendments to suspend judicial review blocking such wealth transfers and rents.

<table>
<thead>
<tr>
<th>Phase 1 (1951-66)</th>
<th>Constitution Amendment Act</th>
<th>Land Redistribution</th>
<th>Tenancy &amp; Rent Regulation</th>
<th>Price &amp; Quantity Controls</th>
<th>Nationalization</th>
<th>Other</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>First Amendment</td>
<td>13</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>13</td>
</tr>
<tr>
<td>Fourth Amendment</td>
<td>4</td>
<td>-</td>
<td>3</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>7</td>
</tr>
<tr>
<td>Seventeenth Amendment</td>
<td>40</td>
<td>4</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>44</td>
</tr>
<tr>
<td>Phase 1 Total</td>
<td>57</td>
<td>4</td>
<td>3</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>64</td>
</tr>
</tbody>
</table>

Table 2: Inefficient Legislation in the Ninth Schedule

61 Three laws not specifically related to wealth transfers or rents were placed in the Ninth Schedule in the 1970s; they intended to protect from legal challenge, the election of Indira Gandhi, the Prime Minister, to Parliament. All three laws were repealed in the Forty-Fourth Amendment, by the subsequent government. No other law has been repealed from the Ninth Schedule.
<table>
<thead>
<tr>
<th>Phase 2</th>
<th>Twenty-Ninth Amendment</th>
<th>Thirty-Fourth Amendment</th>
<th>Thirty-Ninth Amendment</th>
<th>Forieth Amendment</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Phase 2 Total</td>
<td>90</td>
<td>5</td>
<td>16</td>
<td>10</td>
</tr>
<tr>
<td>Phase 3</td>
<td>Forty-Fourth Amendment</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td>12</td>
<td>2</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td>12</td>
<td>2</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Phase 3 Total</td>
<td>81</td>
<td>15</td>
<td>1</td>
<td>-</td>
</tr>
<tr>
<td>Phase 4</td>
<td>Forty-Seventh Amendment</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td>12</td>
<td>2</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td>46</td>
<td>9</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Phase 4 Total</td>
<td>23</td>
<td>4</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Total (All Phases)</td>
<td>228</td>
<td>24</td>
<td>20</td>
<td>10</td>
</tr>
</tbody>
</table>

In the Indian experience, despite an independent judiciary curtailing inefficient legislation, there were durable wealth transfers and rents due to constitutional amendments. It is even more puzzling, that India continues to have an independent judiciary, but no new laws have been added since the mid-nineties even though the Ninth Schedule remains on the books.

There are two omissions made by economists supporting the Landes and Posner view of independent judiciary. First, these models implicitly assume that the bargains...
made between the legislature and interest groups are constitutionally valid. Landes and Posner argue that an independent judiciary will uphold the original intention of legislation, increasing the durability of the rents arising from the legislation. They seem to suggest that the legislation passed is constitutionally valid, and the courts are merely interpreting it “in accordance with the original legislative understanding” or intent (1975, p. 879). In the context of judicial review, this implies that judges need to determine if the legislation is constitutional before applying any other test like the “original intent” of the legislation.

Since Landes and Posner do not specify the exact type of legislative change in their model, there are two possibilities. One possibility is that the legislature is bound by the constitution and the types of legislative deals in their model are constitutionally valid. In this case, the constitutionality of the legislation is not questioned and the independent judiciary merely enforces a past commitment (thereby increasing its durability). However, there may be situations where the legislature has stepped beyond its purview and violated the rules that were agreed upon in the constitution, in which case the courts are not merely interpreting the original intent, but also determining the constitutional validity of the legislation.

Because Landes and Posner (1975) and the extensions to their model do not consider unconstitutional legislation; in these models, constitutional amendment is only viewed as an alternative option to increase the durability of rents. However, constitutional amendments need not only act as substitutes to the durability provided by the judiciary.

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62 This view has been criticized because an important role of judges is to enforce constitutional rules (see Buchanan 1975; Macey 1986; Epstein 1987; and Boudreaux and Pritchard 1994).
Often, judicial resistance to enforce legislation may lead interest groups to pursue constitutional amendments. In this case, constitutional amendments are necessary to override judicial pronouncements. An interest group lobbying for a legislation that is permitted by the constitution to be placed within such constitution to increase its durability must be treated differently from an interest group lobbying for a constitutional change to overcome a hostile judicial pronouncement. In the first case, the constitution is used as the means to acquire greater durability. But in the second case, the constitution is the object of the lobbying efforts. The existing literature does not account for the latter and therefore fails to explain the Ninth Schedule.\(^{63}\)

The second omission in the existing literature is in analyzing judicial review in isolation of constitutional rules.\(^{64}\) Their analysis is contingent upon a particular institutional framework and does not take into account interaction of constitutional rules within which political entrepreneurs lobby for rents and transfers. The importance of constitutional rules on rent seeking is acknowledged, but the precise way in which different combinations of rules affects an interest group lobbying the judiciary has not been explored. The literature has largely assumed only one such combination.

To explain the puzzle of the Indian experience, a more general theory of independent judiciary and rent seeking, is required. Before exploring other combinations,

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\(^{63}\) In this literature, only Boudreaux and Pritchard (1993) consider that judicial hostility to a provision may require the more drastic approach of constitutional amendment to ensure that such provision will succeed.

\(^{64}\) Analyzing the judiciary in isolation is critiqued by Padovano et al (2003). They argue that the interest group theories of independent judiciary are neither couched in terms of models of checks and balances, nor do they explain whether and how the judiciary’s behavior influences the overall accountability of the political system. They describe the literature as “‘partial equilibrium’” analyses of the judicial branch. While Padovano et al (2003) improve on this literature by looking at the question of independent judicial review in more than one branch of government, even in this setting, they only look at the three branches of government; they do not look at the importance of substantive and procedural constitutional rules.
I create a framework of constitutional rules, enforced by an independent judiciary, within which interest groups operate. Using different combinations of constitutional rules, I show that an independent judiciary may constrain wealth transfers under one set of constitutional rules or institutions, and may facilitate wealth transfers under another.

3.2 A Theory of Independent Judiciary and Rent Seeking
Entrepreneurs can engage in rent creation through innovation, or rent seeking through politically contrived rents, to maximize their return (Buchanan 1980). Baumol (1990) argues that entrepreneurship is omnipresent; its form is simply guided by the institutional context in which it operates, which shapes whether entrepreneurial activity is positive or negative sum. In this framework, we tend to associate positive-sum entrepreneurial activity with recombining resources or seizing profit opportunities in the context of a well-functioning system of property rights. We tend to associate negative-sum entrepreneurial activity with predation where there is no such system. The decision of whether to engage in rent creation or rent seeking is a result of the institutional environment of the individual or group.

Constitutional rules governing the legislative or judicial process impact the expected costs and benefits for an interest groups and political entrepreneurs. In addition to the differences in constitutional rules, interactions between constitutional rules also impact the expected costs and benefits for an interest group. Consequently, individuals in pursuit of rents may respond differently to an independent judiciary under different systems of rules or within different combinations of rules.
3.2.1 Constitutional Rules
Constitutional rules determine two types of constraints: first, the domain of what can be collectively decided (substantive rules) and second, the process by which the collective decision making will be made (procedural rules). An independent judiciary enforces both substantive and procedural rules. Constitutional rules act as a pre-commitment device to place certain actions beyond the scope of majority coalitions (Pritchard and Zywicki 1999).65

Procedural Rules to Enact Legislation
Procedural rules determine how legislative decisions will be made. Procedural rules to enact legislation specify the type of legislature, the veto power of the President or council, the majority requirements of the voting rule, etc. A simple-majority voting rule is one where the option chosen by 50% +1 members of a group is the chosen outcome for the whole group. With a simple-majority voting rule, two types of inefficient laws may be enacted. The first are laws which benefit a small group and disperse the costs on to a majority.66 The second are laws to benefit the majority at the expense of a minority group.67 A simple-majority rule allows for factions that organize and attempt to enact and maintain inefficient wealth transfers. Often, to pass certain types of legislation, a super-

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65 Predatory politics, or the taking from some for the benefit of others, is a danger in democracies. With a simple-majority rule, transfers can be made to enrich a majority coalition at the expense of the minority. To prevent discriminatory and distributive politics, constitutional rules can specify protected rights of individuals and groups, for example, against takings. Secondly, they can specify procedural constraints under which certain collective decisions are to be made, for example, simple or super-majority rules (Brennen and Buchanan 1985).

66 The closer the rule is to unanimity, there will be fewer laws or transfers benefiting a few at the cost of many.

67 A less inclusive rule than unanimity leaves room for some legislative actions that may impose the majority will on a minority group.
majority rule is required, in order to make it procedurally more difficult to enact inefficient wealth transfers that are contrary to general interest.

In interest group theory, procedural rules impose costs on individuals or special interests seeking a rule change. Voting rules with simple-majority requirements impose lower organizational costs on a group seeking a favorable rule change, relative to voting rules that require super-majority or unanimity. Bi-cameral legislatures, super-majority requirements, ratification by states, and assent by the president, etc. are all procedural constraints to reduce inefficient legislation. However, due to the increased organizational costs imposed by these rules, legislation that is enacted is also more difficult to repeal and therefore more durable. While higher majority requirements or procedural constraints impose greater costs of organization on interest groups, higher majority requirements also make the law more difficult to repeal once passed. With this increased durability of the rents or wealth transfers, interest groups benefit more and are therefore willing to expend more resources in order to gain transfers. As the benefit from the legislation increases, legislators may demand a higher payment, i.e. the “sale price” may increase.

**Substantive Rules governing Legislation**

Unlike formal or procedural rules, substantive rules specify requirements with respect to the content of legislation, or what may not be the content of legislation. Most common substantive rules include individual rights within the framework of procedural

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68 For factors affecting the durability of legal rules, see Ben-Shahar 2005.
69 The payment for this kind of an exchange may take many forms: legal payments such as contribution to political party funds or for election campaigns, votes of the interest group members, future favors, or illegal payments such as bribes in cash or kind to the holder of public office.
or formal rules. The constitution incorporates procedures and then depending on the
general goals of the group, adds various content specifications (Tamanaha 2004). For
instance, if individuals at a constitutional stage specifically want to protect dwellings or
property, or protect the religious beliefs of minorities, these concerns can be specified
through substantive rules. Typically, substantive rules attempt to restrain the state from
action on certain spheres. However, substantive rules may also be written to require a
positive action by the state.

In the context of rent seeking and wealth transfers, substantive rules can become
the subject of lobbying or change by political entrepreneurs, with procedural rules used as
means to change the substantive rules. Since substantive rules restrict the state from
making wealth transfers and favoring specific groups, it may be in the interest of these
groups to seek exceptions to these substantive rules (see Martin and Thomas, 2013).

Substantive rules deviating from the generality norm, allowing for classification
of groups or exceptions to certain rules, encourage interest groups to seek wealth
transfers and rent creation. General substantive rules with few exceptions leave fewer
avenues for interest groups.

### 3.2.2 Independent Judiciary: Enforcement of Constitutional Rules

Judicial independence implies that judges do not make decisions based on the
preferences of the legislature. The role of an independent judiciary is to enforce

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70 Substantive rules attempt to specify content of the law based on certain “end-states” that individuals have agreed upon at a constitutional stage. Buchanan argues that while procedural rules are important, the choice or selection among procedural rules is empty unless it accounts for the end-states that will be generated under the rules (1975).

71 Many constitutions list the right to food, right to education or the right to work as part of the Bill of Rights. These rights require positive action by the state.
constitutional rules. Therefore, the independent judiciary will allow or curtail inefficient legislation only to the extent that the constitutional rules permit or prevent such legislation.

There are two ways an independent judicial enforcement may impact inefficient legislation: first, is the amount or frequency of inefficient legislation and second, the durability of such legislation. Both these aspects are initially determined by procedural and substantive rules to enact legislation. If substantive rules are weak and allow for exceptions to special interests, then more inefficient legislation passed by the legislature will be upheld by an independent judiciary. Conversely, if substantive rules are strong and do not allow for exceptions, fewer inefficient legislation will pass judicial review.

The strength or the weakness of substantive rules determines if judicial review will curtail or not curtail legislation. If a wealth transfer is permitted by the constitutional rules, then an independent judiciary will not curtail the durability of that law. It, however, does not extend durability through positive action.

3.2.3 Amendment of Constitutional Rules

In a system where an independent judiciary enforces strong substantive rules and prevents interest groups from gaining rents and transfers, amendment to the constitution assumes importance as an alternative avenue to gain transfers or rents. The success or failure of an interest group depends on the procedure to amend the constitution and the rents or benefits arising from the rule change.

Voting rules to amend the constitution typically tend to require higher majority than passing ordinary legislation. It is also more difficult to repeal changes made to
constitutional rules than repealing ordinary legislation. The costs associated with obtaining constitutional amendment are usually greater than an ordinary legislation, given the requirement for a higher majority. Therefore, constitutional amendment tends to be more durable than ordinary legislation. The durability of legislative action directly affects the durability of the transfers or stream of rents flowing from such legislation. The present value of the rents from a constitutional amendment would be greater than the present value of the rents of an ordinary legislation with identical content. Even when the independent judiciary curtails inefficient legislation, rent seeking may increase because interest groups find it beneficial to lobby for constitutional rule change.

Given a specific framework of procedural rules, there may be two types of constitutional amendments. The first type is where the legislature is using the more rigorous process as a means to increase the durability of the transfer already permitted by the constitutional rules. In this case, the transfer or the rent is already constitutional and the main objective is to increase durability to increase the stream of rents. Interest groups seek constitutional amendments when it is an efficient way to increase the expected durability of a provision (Landes and Posner 1975, p. 892; Crain and Tollison 1979, p. 169-9; Mueller 1991, p. 329). A second type of constitutional amendment is where the transfer or rent is not permitted by the prevailing constitutional rules or has been blocked by the judiciary as unconstitutional. Here, the constitutional amendment is a means to repeal a judicial order to override the existing constitutional rule. In this case, the constitutional rule is the subject of the lobbying effort in order to provide validity to the transfer (Boudreaux and Pritchard 1993). In this case, rent seeking is impacted in two
ways. A new avenue is created for wealth transfer or rents. And this new type of transfer or rent is more durable due to the constitutional amendment. For simplicity, I refer to the first type of amendment as “*intra vires* amendments” and the second type as “*ultra vires* amendments.”

### 3.2.4 Interaction of Rules and Rent Seeking

Each type of rule discussed above affects the frequency and durability of inefficient legislation in a specific way. However, interaction between different constitutional rules may lead to different results. When a rule is considered in isolation, the object of analysis is the absolute cost or benefit arising from the rule. However, when a rule is analyzed in conjunction with other rules, it is the relative costs and benefits that guide individuals or interest groups. As different rules within a constellation of constitutional rules interact, the relative costs and benefits change, which explain changes in interest group behavior. Therefore, it is not useful to analyze the costs imposed by an independent judiciary or the benefits arising from decisions of an independent judiciary in isolation.

Interest groups can use political activity to gain rents in several ways: direct subsidies or tax breaks, direct transfer of wealth, control over entry of potential rivals, price fixing, and control of policies affecting substitutes and complements, etc. An interest group can pursue the above ends, *at the level of ordinary legislation*, through different branches of the government. First, it can lobby the executive in two ways: either to favor it in enforcement or to make favorable changes in administrative directives and procedures. Second, it can lobby the legislature to enact a statute in its favor. Third,
interest groups can petition the judiciary for a favorable interpretation of existing statutes in order to maximize the stream of rents.\textsuperscript{72}

If the efforts to gain rents or transfers at the policy level are not successful, there is an alternate or a higher \textit{constitutional level} on which entrepreneurial efforts may focus to change the constitutional rules or existing property rights. At this higher level, one option is to petition the judiciary for a favorable interpretation of constitutional provisions. A second option is to lobby the legislature to amend the constitutional rules.\textsuperscript{73}

The decision on the appropriate level and appropriate venue is determined by the relative costs and benefits of a rule within the constellation in which the individual or interest groups operates. Typically, to lobby for constitutional change is relatively more costly than lobbying for legislative change. However, enforcing the legislative change through the judiciary represents further cost. This additional requirement of judicial enforcement may change the \textit{relative price} of ordinary legislation compared to constitutional amendment.

Within a different constellation, it may be relatively more costly to enact legislation and wait for judicial pronouncement, than to lobby for constitutional change. To understand and analyze interest group behavior and its consequences, attention must be paid to the constellation of rules within which interest groups seek gains.

\textsuperscript{72} The rich literature on the various avenues for interest groups to seek political benefits is surveyed in Tollison (1988) and Voigt (1997). For the legislative change, see Stigler (1971) and Peltzman (1976); for seeking executive enforcement, see Olson (1990); and for favorable judicial interpretation, see Samuels (1971).

\textsuperscript{73} For a discussion on constitutional change as a substitute for judicial enforcement, see Tollison (1988), Crain and Tollison (1979), Mueller (1991), and Boudreaux and Pritchard (1993).
Super-majority voting rules are rarely required to enact ordinary legislation. Typically, simple-majority voting rules are used. Therefore, in the following analysis, I assume that to enact legislation a simple-majority is required. An independent judiciary enforces constitutional rules within which ordinary legislation is passed. With these rules as given, I discuss four different constellations of rules, varying substantive rules and the procedure to amend the constitution.

**Constellation # 1**

*Simple-Majority to Enact Legislation + Strong Substantive Rules + Super-Majority Rule to Amend the Constitution + Independent Judicial Review*

A simple-majority rule to enact legislation allows factions and special interests to pass inefficient legislation. If these inefficient transfers are challenged, an independent judiciary will enforce the rules of the constitution. With a super-majority rule to amend the constitution, the high cost imposed by the judiciary in curtailing inefficient transfers may have two effects. First, it leaves the relative prices of ordinary legislation and constitutional amendment largely unaltered. For the interest group, it is relatively costly to obtain constitutional change. In this case, the ability to pass a constitutional amendment to favor one group is constrained and the independent judiciary would have successfully curtailed the legislation and strong procedural rules will prevent constitutional amendments and exceptions. There may be a second case, though unlikely, where the judiciary imposes such high costs while blocking ordinary legislation, that it

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74 If however, the super-majority rule is used for ordinary legislation, fewer laws motivated by interest groups and therefore, lesser inefficient or wealth transferring legislation will be enacted. Fewer laws, which infringe on others rights, will be challenged in the judiciary. For making predictions on rent seeking behavior, this case is less important. However, the analysis that follows holds even if super-majority rules are required for passing ordinary legislation.
becomes relatively beneficial to seek a constitutional change, despite the super-majority requirement. However, super-majorities are unlikely to support a rule change allowing special interests to transfer wealth.

There are two forces at work in this case. A judiciary enforcing strong substantive rules prevents rents and wealth transfers, providing interest groups the incentive to seek ultra vires constitutional amendments. However, super-majority rules to amend the constitution impose high costs on interest groups and make such amendments unlikely. Traditional jurisprudence on constitutional constraints often discusses this combination of institutions where both substantive and procedural rules are strong and constrain the state.

**Constellation # 2**

*Simple-Majority to Enact Legislation + Weak Substantive Rules + Super-Majority Rule to Amend the Constitution + Independent Judicial Review*

A simple-majority rule to enact legislation allows factions and special interests to pass inefficient legislation. If the substantive rules are weak and provide many exceptions to the general rule, inefficient legislation may escape constitutional challenge. An independent judiciary, while enforcing constitutional rules, will allow these rents and transfers. Two points must be noted here: (1) once it is determined that the transfer or rent is constitutional, in future legislative terms a judiciary may interpret the legislation by its original intention and not curtail the durability as Landes and Posner suggest; (2) beyond the legislative term, inefficient legislation may be less durable due to weak procedural rules, as it will be relatively easy for the next legislature to repeal the legislation.
Table 3 shows the four different constellations and places the institutional framework that Landes and Posner discuss. In envisaging an independent judiciary enforcing bargains between interest groups and legislators, Landes and Posner are essentially describing interest group behavior within Constellation #2, where an independent judiciary enforces weak substantive rules and it is difficult to amend the constitution due to a super-majority procedure.

From the point of view of interest groups, ordinary legislation is relatively less costly than enacting a constitutional amendment. While enforcing weak substantive rules, the judiciary does not curtail inefficient legislation. Such judicial enforcement imposes low costs on interest groups and therefore interest groups may find it beneficial to seek ordinary legislation enforced by the judiciary instead of a constitutional amendment. Since the rent or transfer is constitutional, the only incentive of an interest group to seek constitutional amendments is to increase the durability of the legislation i.e. *intra vires* constitutional amendments.

**Constellation # 3**

*Simple-Majority to Enact Legislation + Strong Substantive Rules + Majority Rule to Amend the Constitution + Independent Judicial Review*

As discussed in Constellation #1, with a simple-majority rule to enact legislation, more inefficient legislation will be passed. An independent judiciary enforcing strong substantive rules, will likely block wealth transfers and rents as unconstitutional, and therefore curtail the durability of these transfers and rents.
From the point of view of the interest group, ordinary legislation may still be less costly than enacting a constitutional amendment (depending on the exact number of votes required). But strong substantive rules enforced by the judiciary impose high costs on the interest group as the judiciary curtails the rent or transfer. This additional cost imposed by the judiciary enforcing strong rules, may change the relative prices of ordinary legislation and constitutional amendment, especially since only a majority is required to amend the constitution. For an interest group, it may be beneficial to seek constitutional change instead of ordinary legislation which are curtailed by the judiciary. In this scenario, interest groups may pursue constitutional changes to increase the durability of the inefficient transfer.

An independent judiciary enforcing strong substantive rules prevents rents and wealth transfers, providing interest groups the incentive to seek *ultra vires* constitutional amendments. A majority-rule to amend the constitution will allow such *ultra vires* constitutional amendments. It is also possible that interest groups lobby for some *intra vires* constitutional amendments to increase the durability of the transfer, but *ultra vires* constitutional amendments are more likely because strong substantive rules will not allow too many *intra vires* wealth transfers.

Therefore, with a majority requirement to amend the constitution, even if an independent judiciary enforces the strong substantive rule and curtails the legislature from enacting wealth-transferring legislation, the weak procedural rule may make the

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75 For instance, a simple-majority rule means the majority among members present and voting. But a majority rule means the majority of the membership of the House. So in some cases, majority rule may still be more costly than a simple-majority rule.
legislature vulnerable to interest groups that demand a change in the constitution. This is essentially the institutional setting of post-independence India during 1951-78 discussed in detail in Section 3.3.1.

**Constellation # 4**

*Simple-Majority to Enact Legislation + Weak Substantive Rules + Majority Rule to Amend the Constitution + Independent Judicial Review*

As discussed in Constellation #2, simple-majority rules to pass legislation allow factions and special interests to pass inefficient legislation. If the substantive rules are weak and provide many exceptions to the general rule, these inefficient laws will easily escape constitutional challenge because an independent judiciary will enforce the rules of the constitution. An independent judiciary upholding these laws while enforcing constitutional rules does not curtail the durability of these laws. The specific substantive rule will determine the costs imposed by the judiciary and whether it is relatively costly to enact a constitutional amendment or an ordinary legislation. In this case, there is no need to seek an *ultra vires* constitutional amendment or a rule change because the weak procedural rules imposed by the judiciary impose low costs. However, interest groups may still pursue *intra vires* constitutional amendments to increase the durability of inefficient legislation.76

The different combinations of procedural and substantive rules enforced by the judiciary create different incentives for interest groups. Therefore, as shown in the four

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76 However, beyond the legislative term, the inefficient legislation will be less durable due to weak procedural rules, as it will be relatively easy for the next legislature to repeal the legislation.
constellations, an independent judiciary may constrain wealth transfers under one set of constitutional rules or institutions, and may facilitate wealth transfers under another.\textsuperscript{77}

Table 3: Constellations of Constitutional Rules

<table>
<thead>
<tr>
<th>Super Majority for Constitutional Amendment</th>
<th>Strong Substantive Rights</th>
<th>Weak Substantive Rights</th>
</tr>
</thead>
<tbody>
<tr>
<td>Traditional Jurisprudence</td>
<td>Landes and Posner Theory</td>
<td></td>
</tr>
<tr>
<td>Constellation #1</td>
<td>Constellation #2</td>
<td></td>
</tr>
<tr>
<td>Indian Constitution 1951-78</td>
<td>Indian Constitution 1978 onward</td>
<td></td>
</tr>
<tr>
<td>Constellation #3</td>
<td>Constellation #4</td>
<td></td>
</tr>
</tbody>
</table>

Table 3 compares the four Constellations in the literature. Landes and Posner’s predictions are contingent on the rules in Constellation #2 and therefore do not explain the Indian experience. Constitutional rules in India are reflected in Constellations #3 and #4. Using this, I make predictions on judicial enforcement and constitutional amendments in India.

3.3 Predictions and Evidence from India’s Ninth Schedule

Using constitutional rules in India within which interest groups operate, I now make specific predictions for the Ninth Schedule that I test with legislative and constitutional history.

\textsuperscript{77} Hayek made this claim more generally for rules. “Any given rules of individual conduct may prove beneficial as part of one set of such rules, or in one set of external circumstances, and harmful as part of another set of rules or in another set of external circumstances” (1967, p. 70). Through the interaction of rules in the four constellations, the same is true for an independent judiciary.
India has a federal structure with 28 states and 7 Union Territories. The Indian legislature is bi-cameral at the federal level, comprising of a lower house and an upper house. To pass federal legislation requires a simple-majority of members present and voting in each house of the Parliament (Article 100(1)) with one-tenth of the members of the House sufficient to qualify as a quorum (Article 100(3)). Once legislation is passed in both Houses of Parliament, it requires Presidential approval, which the President may withhold.

To pass ordinary legislation in a state requires the majority of members present and voting in the state legislature (Article 189(1)), with one-tenth of the members of the House sufficient to qualify as a quorum for legislative matters in the State (Article 189(3)). Once legislation is passed in the state legislature, it requires the State Governor’s approval, which the Governor may withhold. 22 states in India have a unicameral legislature and 6 states have a bi-cameral legislature. 2 of the 7 union territories have a legislature and both are unicameral.

In addition to the procedural rules, the Indian Constitution guaranteed substantive rules in Part III. The Fundamental Rights in Part III of the Constitution provided for the right to equal treatment and protection under the law, right to private property, freedom of speech and religion, and most importantly right to writ remedy through an independent

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78 The lower house, or the Lok Sabha, has a maximum strength of 552 members.
79 The upper house, or the Rajya Sabha, has a maximum strength of 250 members.
80 Of these 22 states, Tamil Nadu has a unicameral legislature since 1986.
81 Andhra Pradesh, Bihar, Jammu & Kashmir, Karnataka, Maharashtra and Uttar Pradesh have a bicameral legislature. Andhra Pradesh was a uni-cameral legislature from 1985-2007.
82 These are Delhi and Puducherry. Another Union Territory, Daman and Diu, has representation in the Goa legislature and the other union territories, Chandigarh, Andaman and Nicobar Islands, Dadra and Nagar Haveli, and Lakshwadeep have no legislature - for these territories, legislation is passed in Parliament.
judiciary. The members of the Constituent Assembly insisted upon the inclusion of the Bill of Rights as included in the American Constitution. The Constitution also included certain Directive Principles of State Policy, which provided some positive rights for citizens.\textsuperscript{83}

The Constitution also included specific provisions relating to the powers of the legislature to amend the Constitution (Article 368). Only Parliament can enact amendments to the Constitution. The Indian Constitution can be divided in three categories based on the procedure required to amend these clauses. First, some clauses of the Constitution may be amended with simple majority required for ordinary legislation.\textsuperscript{84} Second, to amend provisions pertaining to separation of powers and federalism, also called “entrenched clauses” of the Constitution, requires ratification by at least half the state legislatures, in addition to a supporting vote by a majority of the total membership of the House with not less than two-thirds of the members of present and voting in each House of Parliament, and Presidential approval.\textsuperscript{85} Third, amendments to most provisions of the Constitution, including Fundamental Rights, may be initiated in either House of the Parliament and require a majority of the total membership of the House with not less than

\textsuperscript{83} Some of these guidelines were “the right to an adequate means of livelihood;” “that the ownership and control of the material resources of the community are so distributed as best to subserve the common good”; and that “the economic system does not result in the concentration of wealth and means of production to the common detriment” (Article 39). And “The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases

\textsuperscript{84} Articles 2, 11, 59(3), 73(2), 75(6), 97, 105(3), 124(1), 125(2), 133(3), 135, 137, 148(3), 158(3), 171(2), 221(2), 343(3), 348(1) and Schedules 5 and 6.

\textsuperscript{85} Articles 54, 55, 73, 162, 124-47, 214-31, 241, 245-55, 368; any of the Lists in the Seventh Schedule.
two-thirds of the members of present and voting in each House of Parliament and Presidential approval.\footnote{The only exception to this rule until date has been the enactment of the First Amendment, which was passed by a unicameral federal legislature, the Provisional Parliament of India in 1951 before the bicameral legislature was established in 1952.}

The Ninth Schedule was created through the Constitution (First Amendment) Act, 1951. The Ninth Schedule provides immunity from Fundamental Rights (which are not protected as entrenched clauses). Therefore, to add legislation to the Ninth Schedule requires a majority of the total membership of the House with not less than two-thirds of the members of present and voting in each House of Parliament and Presidential approval. Enacting ordinary legislation requires a simple-majority of the members present and voting in each House of the Parliament or the state legislature. Therefore, to place legislation in the Ninth Schedule is procedurally more difficult than enacting ordinary legislation. However, there is no limit to the number of ordinary legislation that can be added to the Ninth Schedule through any single constitutional amendment. A single constitutional amendment can include a substantial number of ordinary laws passed by state or federal government, to the Ninth Schedule, thereby reducing the per-legislation cost of adding each such legislation into the Ninth Schedule. Consequently, even if the costs are too high for a single legislation or the associated interest group, it may still end up in the Ninth Schedule by piggybacking on other laws.

There are two types of laws in the Ninth Schedule - ordinary legislation protected by the Ninth Schedule, and amending acts to legislation already protected by the Ninth Schedule. These amending acts were added to the Ninth Schedule because they did not
automatically receive the immunity granted to the original legislation. These amending acts were added to the Ninth Schedule to extend the benefits and durability of existing protection provided to a given legislation. By analyzing the amendments to existing legislation in the Ninth Schedule, I can infer laws added to overcome the judiciary \textit{(ultra vires constitutional amendments)} and laws added to only increase durability of the existing protection \textit{(intra vires constitutional amendments)}.

Using the constitutional rules governing India, I make two predictions for laws in the Ninth Schedule that the historical record allows to test. The evidence from Indian legislative and constitutional history supports these predictions. The interaction between the procedural and substantive rules in post-independence India led to many changes in these rules.

\textbf{3.3.1 Prediction 1}  
In India, the period during 1951-78 was characterized by an independent judiciary, strong substantive rules, and an easy procedure to amend the Fundamental Rights provided in the Constitution. The arrangement of constitutional rules are similar to Constellation #3 discussed above. According to my theory:

\textit{Strong Substantive Rights and a Weak Procedure to Amend the Constitution would lead to more ultra vires constitutional amendments.}

If the interaction between the constitutional rules in India enforced by an independent judiciary reflects this (1) there will be additions to the Ninth Schedule; and (2) these additions to the Ninth Schedule will be \textit{ultra vires} constitutional amendments.

\footnote{See \textit{Sri Ram Ram Narain v State of Bombay} AIR 1959 SC 459 and \textit{Godavari Sugar Mills v SB Kamble} AIR 1975 SC 1193}
I analyze additions made to the Ninth Schedule in this period and examine relevant case law in the Supreme Court and High Courts, with a focus on judicial precedent determining the constitutional validity of these laws. In addition, I examine the Constitution amendment acts, to understand the intent of the legislature in amending these constitutional rules. I present evidence by detailing the interaction between constitutional rules and the branches of government through constitutional history. I also provide evidence on the 188 laws added to the Ninth Schedule during 1951-78. In presenting this evidence, I divide this period during 1950-78 into two distinct phases. The first phase from 1951 to 1966 was the post-independence government, led for the majority of the phase by Jawaharlal Nehru and the second phase from 1967 to 1978 was Indira Gandhi’s controversial tenure as Prime Minister, including the declaration of Emergency.

**Phase 1: 1951-66**

Post-independence, Indian political leaders were under tremendous public pressure to dismantle the feudal or zamindari system of land ownership. State legislatures passed various laws breaking up large feudal estates to implement large-scale land reform through agrarian land ceilings, and the redistribution of surplus land holdings.

The takings clause of the Constitution, originally read: “No person shall be deprived of property without due process of law” and “no property... shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation” (Article 31).
Various state laws implementing land reforms were challenged in courts as unconstitutional. The judiciary gave a strict interpretation to substantive rights, in particular the takings clause (Article 31) and right to equality (Article 14). In *Kameshwar Singh v The Province of Bihar* (AIR 1950 Patna 392), the Patna High Court struck down the Bihar Management of Estates and Tenures Act, 1949, as unconstitutional. The Court held that the legislation violated the right to equality under Article 14, as it assessed compensation to be paid to the owner of property acquired, at 20 times the assessment in case of a poor owner and at 3 times the assessment in case of a rich owner, and therefore did not give equal compensation and discriminated against richer zamindars.\(^88\) The judiciary imposed high costs on interest groups and Members of Parliament by enforcing the strong substantive rules in the Constitution.

In similar situations in other states, interest groups and Members of Parliament found the judicial process relatively more costly and therefore chose the relatively easy constitutional amendment procedure as the appropriate venue for implementing land redistributions.\(^89\) Consequently, the First Amendment to the Constitution was enacted, creating the Ninth Schedule and adding 13 laws pertaining to agrarian reform (Seervai 2008, p. 1369), including the unconstitutional Bihar Management of Estates and Tenures Act, 1949. It is unclear how many of these laws were unconstitutional, as litigation on the

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\(^88\) The state challenged the High Court’s ruling in the Supreme Court.

\(^89\) Nehru justified this course of action during debates in the Parliament. “A schedule attached of a number of Acts passed by State Legislatures, some of which have been challenged or might be challenged and we thought it best to save them from long delays and these difficulties, so that this process of change which has been initiated by the States should go ahead. . . . lawyers represent precedent and tradition and not change not a dynamic process. Above all the lawyer represents litigation.” (Nehru’s speech in Parliamentary Debate on the Constitution (First Amendment) Bill, May 16, 1951, p. 8830-31).
matter was not settled.90 Questions were also raised in Parliament, as no rule was formed on which laws should be added to the Ninth Schedule.91

The Statement of Objects and Reasons of the Constitution (First Amendment) Act, 1951 stated:

“The validity of agrarian reform measures passed by the State Legislatures in the last three years has ... formed the subject-matter of dilatory litigation, as a result of which the implementation of these important measures, affecting large numbers of people, has been held up. The main objects of the Bill are accordingly to ... insert provisions fully securing the constitutional validity of zamindari abolition laws in general and certain specified State Acts in particular.”

In 1951, the creation of the Ninth Schedule was challenged in Shankari Prasad Singh v Union of India (AIR 1951 SC 458). The Supreme Court held that the Parliament was empowered to amend the Constitution without any restrictions, as long as procedures laid down in the Constitution for amendment were followed.

With the Ninth Schedule passing constitutional muster, it became a legitimate vehicle for wealth transfers. However, while drafting the amendment, no clear safeguard to prevent other types of law from being added were incorporated, which implied that

90 There are many references to litigation in other states, but no clear detrimental decision other than the Patna High Court decision. The Select Committee Report (1951, p. 13) as well as debates in Parliament point to litigation in the Allahabad High Court, which held the Uttar Pradesh legislation constitutional and in the Nagpur High Court, which held the Madhya Pradesh law constitutional. Even the High Court decision in Kameshwar Singh v Province of Bihar (AIR 1950 Patna 392) was being appealed to the Supreme Court, when the First Amendment was introduced (see SP Mookerjee’s speech in Constitution First Amendment Bill, Parliamentary Debates, May 16, 1951, p. 8848-49).
91 Parliamentarian and Select Committee Member SP Mookerjee complained that the Select Committee has not been furnished a list of laws to be protected in the Ninth Schedule (Select Committee Report, Constitution (First Amendment) Bill, 1951, p. 5).
laws in the Ninth Schedule could contravene the entire Fundamental Rights and not just the takings clause as was originally intended.\textsuperscript{92}

Given this institutional structure of strong substantive rights and an easy constitution amendment process, where the judiciary imposed high costs on implementing wealth transfers, laws added to the Ninth Schedule are likely to be of two types: (1) laws added to the Ninth Schedule after being declared unconstitutional by the courts - the main reason for the creation of the Ninth Schedule; (2) laws likely to be declared unconstitutional by one of the courts where they were under review added to the Ninth Schedule pre-emptively. In both cases, additions to the Ninth Schedule will be \textit{ultra vires} to the Constitution.

Due to the government’s socialist agenda, Nehru attempted to overhaul the agrarian system, as well as fulfill commitments made to the populace under the First and Second Five-Year Plans initiated by the government. It was evident that the newly formed Indian state had few resources and a very small tax base, which meant that if compensation had to be provided for all property taken over by the government, other welfare and industrial targets of the Five-Year Plans of the socialist state could potentially remain unfulfilled with the magnitude of the compensation bankrupting the Indian treasury.

However, High Courts across the country constantly curtailed takings without just compensation by Indian states. In the \textit{State of West Bengal v Bela Banerjee} (AIR 1954

\textsuperscript{92} A Select Committee debated this aspect of the First Amendment. G Durgabhai, HN Kunzru, SP Mookerjee, Hukum Singh, KT Shah and Naziruddin Ahmed wrote Minutes of Dissent to the Select Committee Report for the Constitution (First Amendment) Bill. They wanted more stringent provisions and were worried that the Ninth Schedule would be abused by Parliament. However, none of these suggestions were considered.
SC 170), the validity of the West Bengal Land Development and Planning Act, 1948 was challenged because it provided for compensation not exceeding the market value of the land on December 31 1946. The Supreme Court reasoned that while the legislature has the discretion to lay down principles on the basis of which compensation is paid for appropriated property, such principles must ensure that the compensation is “a just equivalent to what the owner has been deprived of” and that the content of such principles should be adjudicated by the court.

This decision prompted the Parliament to pass Fourth Amendment and provide seven laws, including the West Bengal Land Development and Planning Act, 1948, the protection of the Ninth Schedule. The Statement of Objects and Reasons of the Constitution (Fourth Amendment) Act, 1954 stated:

“It will be recalled that the zamindari abolition laws which came first in our programme of social welfare legislation were attacked by the interests affected mainly with reference to articles 14, 19 and 31, and that in order to put an end to the dilatory and wasteful litigation and place these laws above challenge in the courts, articles 31A and 31B and the Ninth Schedule were enacted by the Constitution (First Amendment) Act. Subsequent judicial decisions interpreting articles 14, 19 and 31 have raised serious difficulties in the way of the Union and the States putting through other and equally important social welfare legislation ... it is proposed in clause 5 of the Bill to include in the Ninth Schedule to the Constitution two more State Acts and four Central Acts.”

The policies of agrarian land reform were almost continuously under challenge in one or more state High Courts in India. The Kerala Agrarian Relations Act, 1961 was
challenged and in *Kunhi Koman v State of Kerala* (AIR 1962 SC 723), the Supreme Court held that the type of lands that the legislation sought to acquire were not protected under the exceptions to the takings clause in Article 31A(1)(a) and the law was unconstitutional. To overcome this problem, the Parliament expanded the exceptions to the takings clause by enacting the Seventeenth Amendment. In addition, amending the Constitution to provide validity to other unconstitutional legislation continued, and 44 laws were added to the Ninth Schedule, bringing the total number of laws in the Ninth Schedule to 64. The Statement of Objects and Reasons accompanying the Constitution (Seventeenth Amendment) Act, 1964 stated:

“The Constitution provides that a law in respect of the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights shall not be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14, article 19 or article 31. ... It is also proposed to amend the Ninth Schedule by including therein certain State enactments relating to land reform in order to remove any uncertainty or doubt that may arise in regard to their validity.”

The Seventeenth Amendment was reviewed by the Supreme Court in the case of *Sajjan Singh v State of Rajasthan* (AIR 1965 SC 845) on the question of Parliament’s power to amend the Constitution. The Supreme Court’s ruling confirmed that Parliament’s powers to amend the Constitution were absolute as long as the proper amendment procedure was followed. The interaction between strong substantive rules enforced by an independent judiciary and a relatively easy procedure to amend these
Substantive rules led to the creation and expansion of the Ninth Schedule to 64 laws in this period. Table 1 shows the number of laws added through each constitutional amendment to the Ninth Schedule in Phase 1. The primary focus of these laws was to implement agrarian land reform, and 57 of the 64 laws (89%) were on the subject (Table 2). 58 of the 64 laws were passed by state legislatures and the other 6 were federal laws passed by the Parliament (Table 4). 29 of the 64 laws were passed by uni-cameral legislatures and 35 laws by bi-cameral legislatures (Table 5). Figure 10 shows the expansion of the Ninth Schedule.

**Table 4: Federal and State Legislation in the Ninth Schedule**

<table>
<thead>
<tr>
<th>Constitution Amendment Act</th>
<th>Federal</th>
<th>State</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Phase 1 (1951-66)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>First Amendment</td>
<td>-</td>
<td>13</td>
<td>13</td>
</tr>
<tr>
<td>Fourth Amendment</td>
<td>3</td>
<td>4</td>
<td>7</td>
</tr>
<tr>
<td>Seventeenth Amendment</td>
<td>3</td>
<td>41</td>
<td>44</td>
</tr>
<tr>
<td>Phase 1 Total</td>
<td>6</td>
<td>58</td>
<td>64</td>
</tr>
<tr>
<td>Phase 2 (1966-78)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Twenty-Ninth Amendment</td>
<td>-</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Thirty-Fourth Amendment</td>
<td>-</td>
<td>20</td>
<td>20</td>
</tr>
<tr>
<td>Thirty-Ninth Amendment</td>
<td>21</td>
<td>17</td>
<td>38</td>
</tr>
<tr>
<td>Fortyith Amendment</td>
<td>10</td>
<td>54</td>
<td>64</td>
</tr>
<tr>
<td>Phase 2 Total</td>
<td>31</td>
<td>93</td>
<td>124</td>
</tr>
<tr>
<td>Phase 3 (1978-98)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Forty-Fourth Amendment</td>
<td>-3</td>
<td>-</td>
<td>-3</td>
</tr>
<tr>
<td>Forty-Seventh Amendment</td>
<td>-</td>
<td>14</td>
<td>14</td>
</tr>
<tr>
<td>Sixty-Sixth Amendment</td>
<td>-</td>
<td>55</td>
<td>55</td>
</tr>
<tr>
<td>Seventy-Sixth Amendment</td>
<td>-</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Seventy-Eighth Amendment</td>
<td>-</td>
<td>27</td>
<td>27</td>
</tr>
<tr>
<td>Phase 3 Total</td>
<td>-3</td>
<td>97</td>
<td>94</td>
</tr>
<tr>
<td>Phase 4</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>-----------------</td>
<td>---</td>
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<td>---</td>
</tr>
<tr>
<td>(1998 onward)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total (All Phases)</td>
<td>34</td>
<td>248</td>
<td>282</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Table 5: Ninth Schedule Legislation and Type of Legislature</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constitution Amendment Act</td>
</tr>
<tr>
<td>Phase 1</td>
</tr>
<tr>
<td>(1951-66)</td>
</tr>
<tr>
<td>First Amendment</td>
</tr>
<tr>
<td>Fourth Amendment</td>
</tr>
<tr>
<td>Seventeenth Amendment</td>
</tr>
<tr>
<td>Phase 1 Total</td>
</tr>
<tr>
<td>Phase 2</td>
</tr>
<tr>
<td>(1966-78)</td>
</tr>
<tr>
<td>Twenty-Ninth Amendment</td>
</tr>
<tr>
<td>Thirty-Fourth Amendment</td>
</tr>
<tr>
<td>Thirty-Ninth Amendment</td>
</tr>
<tr>
<td>Fortieth Amendment</td>
</tr>
<tr>
<td>Phase 2 Total</td>
</tr>
<tr>
<td>Phase 3</td>
</tr>
<tr>
<td>(1978-98)</td>
</tr>
<tr>
<td>Forty-Fourth Amendment</td>
</tr>
<tr>
<td>Forty-Seven Amendment</td>
</tr>
<tr>
<td>Sixty-Sixth Amendment</td>
</tr>
<tr>
<td>Seventy-Sixth Amendment</td>
</tr>
<tr>
<td>Seventy-Eighth Amendment</td>
</tr>
<tr>
<td>Phase 3 Total</td>
</tr>
<tr>
<td>Phase 4</td>
</tr>
<tr>
<td>(1998 onward)</td>
</tr>
<tr>
<td>Total (All Phases)</td>
</tr>
</tbody>
</table>

In addition to the expansion of the Ninth Schedule, most laws were added were ordinary legislation, either declared unconstitutional by courts, or pending court decision.
on a constitutional challenge, and likely to be declared unconstitutional. Only 6 (9.3%) of the 64 laws were amendment acts, enacted to expand the existing constitutional protection (Table 6). Therefore, the independent judiciary enforcing the Fundamental Rights in the Indian Constitution, led to an increase in the expansion of the Ninth Schedule. The constitution was amended explicitly to overcome the problem of the judiciary curtailing wealth transferring legislation.

Table 6: Legislation and Amending Acts in the Ninth Schedule

<table>
<thead>
<tr>
<th>Phase 1 (1951-66)</th>
<th>Constitution Amendment Act</th>
<th>Legislation</th>
<th>Amendment to Legislation</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>First Amendment</td>
<td>12</td>
<td>1</td>
<td>13</td>
</tr>
<tr>
<td></td>
<td>Fourth Amendment</td>
<td>7</td>
<td>-</td>
<td>7</td>
</tr>
<tr>
<td></td>
<td>Seventeenth Amendment</td>
<td>39</td>
<td>5</td>
<td>44</td>
</tr>
<tr>
<td></td>
<td>Phase 1 Total</td>
<td>58</td>
<td>6</td>
<td>64</td>
</tr>
<tr>
<td>Phase 2 (1966-78)</td>
<td>Twenty-Ninth Amendment</td>
<td>-</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>Thirty-Fourth Amendment</td>
<td>6</td>
<td>14</td>
<td>20</td>
</tr>
<tr>
<td></td>
<td>Thirty-Ninth Amendment</td>
<td>20</td>
<td>18</td>
<td>38</td>
</tr>
<tr>
<td></td>
<td>Fortieth Amendment</td>
<td>34</td>
<td>30</td>
<td>64</td>
</tr>
<tr>
<td></td>
<td>Phase 2 Total</td>
<td>60</td>
<td>64</td>
<td>124</td>
</tr>
<tr>
<td>Phase 3 (1978-98)</td>
<td>Forty-Fourth Amendment</td>
<td>-3</td>
<td>-</td>
<td>-3</td>
</tr>
<tr>
<td></td>
<td>Forty-Seventh Amendment</td>
<td>3</td>
<td>11</td>
<td>14</td>
</tr>
<tr>
<td></td>
<td>Sixty-Sixth Amendment</td>
<td>17</td>
<td>38</td>
<td>55</td>
</tr>
<tr>
<td></td>
<td>Seventy-Sixth Amendment</td>
<td>1</td>
<td>-</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>Seventy-Eighth Amendment</td>
<td>3</td>
<td>24</td>
<td>27</td>
</tr>
<tr>
<td></td>
<td>Phase 3 Total</td>
<td>21</td>
<td>73</td>
<td>94</td>
</tr>
</tbody>
</table>
Towards the end of Phase 1, in addition to adding laws in the Ninth Schedule, the Seventeenth Amendment also amended the takings clause (Article 31A). This amendment clarified that the acquisition or nationalization of any estate, firm, or lease or license, would not be declared void because such acquisition abridged Articles 14, 19 or 31. Essentially, all prior constitutional challenges were based on the right to private property and the right to equal protection under the law. With this exception added to the takings clause, substantive rules in the Indian constitution were weakened.

**Phase 2: 1966-78**

Toward the end of Phase 1, Nehru died in 1964 while in office, after the Seventeenth Amendment was introduced in Parliament, but before it was passed. On the death of his successor, Lal Bahadur Shastri in 1966, the ruling Congress Party unreservedly supported Indira Gandhi’s candidature for Prime Minister. Indira Gandhi wanted to go even farther left in her policies than Nehru, and in May 1967, she announced the Ten-Point Program, which included policies like nationalization of banks, insurance and other means of production, curbing monopolies, land reforms and urban land ceiling, etc.

Before the government could execute this program, the matter of the eminent domain power of the state and the power of the Parliament to amend the Constitution was again raised before the Supreme Court in a challenge to one of the entries in the Ninth

<table>
<thead>
<tr>
<th>Phase 4</th>
<th>(1998 onward)</th>
<th>-</th>
<th>-</th>
<th>-</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total (All Phases)</td>
<td>139</td>
<td>143</td>
<td>282</td>
<td></td>
</tr>
</tbody>
</table>
Schedule, the Punjab Security of Land Tenures Act, 1953, on the ground that it deprived individuals of their right to private property. In *Golak Nath v State of Punjab* (AIR 1967 SC 1643), the question of the power of the Parliament to amend the constitution and the Fundamental Rights was heard by an eleven-judge bench. Chief Justice Subba Rao, in the majority opinion stated, though the earlier amendments would not be affected, in future the Parliament could not amend the Constitution to abridge any of the Fundamental Rights. In other words, constitutional amendment could not be used to give unconstitutional laws validity.

Undeterred by this judicial pronouncement, Indira Gandhi’s government sought to nationalize banks in India without legislation, through executive ordinance. The Supreme Court struck down the government’s proposed bank nationalization due to inadequate compensation. This was the beginning of what would become routine clashes between the government and the judiciary, in the attempt to control means of production.

As a backlash to the ruling in *Golak Nath v State of Punjab* (AIR 1967 SC 1643), the Indira Gandhi led government first enacted the Twenty-Fourth and Twenty-Fifth

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93 In 1969, almost overnight, Indira Gandhi government nationalized 14 banks with assets over 500 million rupees and brought 54% of India’s bank branches into the public sector. This was done first by an Ordinance promulgated on July 19, 1969, followed by the government passing the Banking Companies (Acquisition and Transfer Undertakings) Act, 1969, which had retrospective effect from July 19 1969. The nationalization of banks was challenged in the Supreme Court for violating the right to private property of a shareholder and the question of adequate compensation was again raised. In holding the Act void in *R.C. Cooper v Union of India* (1970) 3 SCR 530 at 605-6, the majority judgment of the Supreme Court reasoned “in all States where the rule of law prevails, the right to compensation is guaranteed by the Constitution or regarded as inextricably involved in the right to property. ... In India, which is a state, the rule of law prevails. Therefore the Constitution of India provides for just compensation” (also see Seervai 2008[1991], p. 1387).
The Twenty-Fourth Amendment expressly stated that the Parliament could amend Fundamental Rights as laid out in Part III of the Constitution. This amendment also enabled Parliament to amend any part of the Constitution under the amendment procedure specified in Article 368. Through this unprecedented legislative move, Indira Gandhi amended the amendment procedure to the constitution itself, to overcome the hurdles posed by judicial review.

After regaining the right to amend the Fundamental Rights (by amending the Constitution!) the Parliament set out to amend the Constitution. The Kerala Land Reform Act, 1963 which was already included in the Ninth Schedule, was extensively amended by the Kerala legislature. These amendments were challenged and in Kunjukutti v State of Kerala (AIR 1972 SC 2097), declared unconstitutional by the Supreme Court.

Consequently, Parliament enacted the Twenty-Ninth Amendment to protect the two amending acts. The Statement of Objects and Reasons of the Constitution (Twenty-Ninth Amendment) Act, 1972 stated:

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94 The Twenty-Fifth Amendment took away the supremacy of Fundamental Rights. It explicitly stated that laws giving effect to the Directive Principles of State Policy shall not be deemed void, even if they are inconsistent with Fundamental Rights.

95 The Statement of Objects and Reasons of the Constitution (Twenty-Fourth Amendment) Act, 1971 read: “The Supreme Court in the well known Golak Nath’s Case ... reversed by a narrow majority, its own earlier decisions upholding the power of Parliament to amend all parts of the Constitution including Part III relating to fundamental rights. ... It is, therefore, considered necessary to provide expressly that Parliament has power to amend any provision of the Constitution so as to include the provisions of Part III within the scope of the amending power.”

96 The Statement of Objects and Reasons of the Twenty-Fourth Amendment Act also stated “The Bill seeks to amend article 368 suitably for the purpose and makes it clear that article 368 provides for amendment of the Constitution as well as procedure therefor. The Bill further provides that when a Constitution Amendment Bill passed by both Houses of Parliament is presented to the President for his assent, he should give his assent thereto. The Bill also seeks to amend article 13 of the Constitution to make it inapplicable to any amendment of the Constitution under article 368”.

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“In the course of implementation, the State Government faced serious practical difficulties and to overcome them, that Act was extensively amended by the Kerala Land Reforms (Amendment) Act, 1969 (Act 35 of 1969) and by the Kerala Land Reforms (Amendment) Act, 1971 (Act 25 of 1971). Certain crucial provisions of the principal Act as amended were challenged in the High Court of Kerala and in the Supreme Court, creating a climate of uncertainty in the effective implementation of land reforms. ... The Supreme Court in its judgments delivered on 26th and 28th April, 1972, have generally uphold the scheme of land reforms as envisaged in the principal Act as amended but agreed with the High Court invalidating certain crucial provisions. ... It is, therefore, proposed to include the Kerala Land Reforms (Amendment) Act, 1969 and the Kerala Land Reforms (Amendment) Act, 1971 in the Ninth Schedule to the Constitution so that they may have the protection under article 31B and any uncertainty or doubt that may arise in regard to the validity of those Acts is removed.”

These additions to the Ninth Schedule were again challenged before and reviewed by the Supreme Court in Kesavananda Bharati v State of Kerala (AIR 1973 SC 1461) [hereinafter Kesavananda Bharati Case]. In a highly fractured 7-6 opinion, the Supreme Court recognized Parliament’s power to amend the Constitution, but also protected individual rights by formulating the Basic Structure Test. The result of this case was that Parliament could amend Fundamental Rights, but amendments had to pass the Basic Structure Test.97 The Supreme Court’s ruling in Kesavananda Bharati Case, curtailed,

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97 According to the Basic Structure test, the amending power of the Parliament could not be exercised in a manner as to destroy or emasculate the basic structure or the fundamental features of the Constitution. In Kesavananda Bharati Case, the Supreme Court also enumerated a non-exhaustive list of such features,
procedurally and substantively, the power of the Parliament to amend the Constitution. The ruling clarified that some parts of the constitution were out of bounds of the amendment power of Parliament. This Supreme Court judgment assumed much greater importance post-Emergency when it was upheld as a valid and important precedent.

Indira Gandhi’s government argued that despite land reform measures since the 1950s, the inequality in the agrarian system remained. It was therefore important to revise existing laws and reduce the ceiling limit on land holdings held by a family. After a conference of all state governments in 1972, various states passed laws and amendments to reduce the ceiling limit, but many of these laws were pending judicial review. Since Parliament had the authority to amend the Constitution, it enacted the Thirty-Fourth Amendment adding twenty state laws to the Ninth Schedule. The Statement of Objects and Reasons of Constitution (Thirty-Fourth Amendment) Act, 1974 stated:

“The Chief Ministers’ Conference held on the 23rd July, 1972, had made important suggestions with regard to reduction in the level of ceiling on land holdings, application of ceiling on the basis of land held by a family and the withdrawing of exemptions. The suggestions of the Chief Ministers’ Conference were accepted by the Government of India and necessary guidelines were issued to the State Governments for the revision of ceiling laws. It is proposed to amend the Ninth Schedule to the Constitution to include therein the revised ceiling laws which have so far been enacted in broad conformity with the aforesaid guidelines so that they may have the protection under article 31B of the Constitution and any uncertainty or doubt that may arise in
regard to the validity of those laws is removed. In addition, two Acts dealing with the
abolition of intermediary tenures are also proposed to be included in the Ninth Schedule
... so that they may also have the same protection.”

In addition to the ongoing policy of land reform, Indira Gandhi’s government
wanted to implement Soviet-style central planning and nationalize means of production.
In October 1971, the government took over the management of coking coalmines and
coke oven plants pending nationalization (Coking Coal Mines (Emergency Provisions)
Act, 1971). The nationalization was done in two phases, the first with the coking
coalmines in 1971-72 (The Coking Coal Mines (Nationalisation) Act, 1972) and then
with the non-coking coalmines in 1973 (The Coal Mines (Taking Over of Management)
Act, 1973 and The Coal Mines (Nationalisation) Act, 1973). Coalmines were nationalized
as being an important input for steel production, which was critical for the success of the
Fourth Five-Year Plan. In 1972, Indian Copper Corporation Ltd, was nationalized and
made part of Hindustan Copper Ltd (The Indian Copper Corporation (Acquisition of
Undertaking) Act, 1972) and general insurance was nationalized under one of the
objectives of the Fourth Five-Year Plan (General Insurance Business Nationalization Act,
1972). In 1968, The National Textile Corporation was incorporated to manage sick textile
undertakings taken over by the government (The Sick Textile Undertakings (Taking Over
of Management) Act, 1972). Starting with 16 mills in 1968, this number gradually rose to
103 by 1972-73. In 1974, all these units were nationalized (The Sick Textile
Undertakings (Nationalisation) Act, 1974). Legislation was passed in 1973 to nationalize
a single firm, the Alcock Ashdown Company Ltd “for the purpose of ensuring rational
and coordinated development and production of goods essential to the needs of the country in general, and defence department in particular” (The Alcock Ashdown Company Limited (Acquisition of Undertakings) Act, 1973).

In addition to the government’s nationalization agenda, a new layer of regulation was introduced. In 1973, the government restricted any new production activity of companies covered to a very narrow set of industries through the new anti-trust laws called Monopolies and Restrictive Trade Practices Act, 1969, which was aimed specifically at large firms. In addition to the usual licensing procedures, these firms required approval from the Central Government for all new undertakings, expansion, mergers, amalgamations, and takeovers. In 1973, the government enacted legislation mandating all non-bank foreign branches, and companies incorporated in India with over 40% foreign equity, to obtain permission from the central bank in order to conduct business (Foreign Exchange Regulation Act, 1973). Foreign non-banks, which did not dilute their foreign equity, were not given “national treatment” and had to wind up their business. These laws were challenged in the courts and many were declared unconstitutional. Indira Gandhi’s tenure was an almost continuous clash between government policy and judicial review.

Indira Gandhi faced another problem as her election to the Parliament was invalidated by the Allahabad High Court. To remain in power as Prime Minister, Indira Gandhi issued an Ordinance on June 25, 1975 declaring a state of internal emergency. The Constitution (Thirty-Ninth Amendment) Act, 1975 was enacted - to withdraw the election of the Prime Minister from the scope of the judicial review process; to declare
the decision of Allahabad High Court, invalidating Indira Gandhi’s election void; and to exclude the Supreme Court’s jurisdiction to hear an appeal on the matter of the election.

Taking this opportunity, Indira Gandhi’s government also used the Thirty-Ninth Amendment to add unconstitutional laws nationalizing the means of production to the Ninth Schedule. The Statement of Objects and Reasons of the Constitution (Thirty-Ninth Amendment) Act, 1975 stated:

“Recourse was had in the past to the Ninth Schedule whenever it was found that progressive legislation conceived in the interests of the public was imperilled by litigation. It has become necessary to have recourse to this device once again now. Between 1971 and 1973 legislation was enacted for nationalizing coking coal and coal mines for conservation of these resources in the interests of steel industry. These enactments have been brought before courts on the ground that they are unconstitutional. So is the case of sick textile undertakings which were nationalized in 1974. To prevent smuggling of goods and diversion of foreign exchange which affected the national economy, Parliament enacted legislation which again has been challenged in the Supreme Court and in High Courts. These and other important and special enactments which it is considered necessary should have the constitutional protection under article 31B, are proposed to be included in the Ninth Schedule.”

As a consequence of these constitutional amendments and the government’s pursuit of a centrally planned, closed economy, black markets, especially for foreign goods, became rampant. To counter this problem, the government introduced another layer of regulation related to foreign exchange and foreign goods (The Smugglers and
Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976) and revived legislation regulating prices of essential commodities (The Essential Commodities Act, 1955).

As part of this process, the Constitution (Fortieth Amendment) Act, 1976, stated in its Objects and Reasons:

“Recourse was had in the past to the Ninth Schedule whenever it was found that progressive legislation conceived in the interest of the public was imperilled by litigation. Certain State legislations relating to land reforms and ceiling on agricultural land holdings have already been included in the Ninth Schedule. ... Certain Central laws like the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976, the Urban Land (Ceiling and Regulation) Act, 1976, the Essential Commodities Act, 1955 and certain provisions of the Motor Vehicles Act, 1939 require protection of article 31B. If these legislations are allowed to be challenged in courts of law thereby delaying the implementation of these laws, the very purpose of enacting these laws would be frustrated and the national economy may be severely affected. These and other important and special enactments which it is considered necessary should have the constitutional protection are proposed to be included in the Ninth Schedule.”

In addition to these amendments, during the Emergency, Indira Gandhi attempted to stack the Supreme Court with judges favorable to the government policy. Immediately after the loss in the Kesavananda Bharati Case, Indira Gandhi broke the convention of seniority in appointing the Chief Justice of India. Justice AN Ray, who had unequivocally
supported the government and led the minority opinion, was appointed Chief Justice, superseding three senior judges in the Supreme Court.

These attempts to capture the highest level of the judiciary and undermine its independence were unsuccessful. Supreme Court judges, including some of the government’s appointees were largely independent in their rulings. The government also lost many constitutional challenges in state High Courts with independent judges. After unsuccessful attempts to influence the judiciary, Indira Gandhi changed course and decided to reduce the purview of the courts through constitutional amendment. The Forty-Second Amendment stripped the Supreme Court of jurisdiction to review state laws and stripped the High Courts of the states of the power to review central laws among other procedural changes. The Constitution (Forty-Second Amendment) Act, 1976 was the most comprehensive constitutional amendment and had important implications on the procedure to amend the constitution as well as on substantive rights. To nullify the effect of Kesavananda Bharati Case, the amendment held “that there shall be no limitation whatever on the constituent power of Parliament to amend” the Constitution and that no amendment “shall be called in question in any court on any ground.” The Amendment explicitly declared the supremacy of the Parliament, both above the Constitution and the judiciary. Before these changes could take effect, Indira Gandhi lost the election after the Emergency and toward the end of 1977, another amendment was introduced in Parliament to undo the restrictions on the judiciary.98

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98 For a detailed review of the Forty-Second Amendment, see Dhavan (1978), Austin (1999), Seervai (2008[1991])
This was a clear departure from constitutional conventions formed in Indian democracy and this institutional arrangement was not witnessed again in India. Overall, uncertainty over the substantial and procedural rules as well as the clash between Indira Gandhi’s socialist planning and the judiciary led to substantial litigation. Table 1 shows that during Phase 2, 124 laws were added to the Ninth Schedule through four constitutional amendments. 93 of the 124 laws were passed by state legislatures and 31 were federal laws passed by the Parliament (Table 4). 52 of the 124 laws were passed by uni-cameral legislatures and 72 laws by bi-cameral legislatures (Table 5). Figure 10 shows the expansion of the Ninth Schedule.

There are two reasons for this sudden increase in Ninth Schedule legislation in this period. First, the Soviet-style planning implemented by Indira Gandhi was not the type of social legislation envisaged by the drafters of the Constitution. These laws infringed on all Fundamental Rights, and not just the takings clause. Second, due to the weak takings clause with a number of exceptions, amendments made to laws already in the Ninth Schedule were added to the Ninth Schedule to extend their durability. 64 (51.6%) of the 124 laws were amendment acts, added to the Ninth Schedule to expand the existing constitutional protection (Table 6).

In addition to the increase in the laws in the Ninth Schedule in Phase 2, the content of these laws was also a little different from Phase 1. 90 of 124 laws (72.5%) added in this period were pertaining to land reform (Table 2). Nehru had already weakened the takings clause by adding exceptions to the Ninth Schedule and Indira Gandhi continued that trend. Therefore, the independent judiciary enforced relatively
weaker Fundamental Rights. Many transfers were now constitutional and the amendment acts were enacted to expand the benefit of the existing protection.

The overall period from 1951-78 was characterized by an expansion of the Ninth Schedule, mostly comprising *ultra vires* constitutional amendments. As the historical evidence suggests, this was because the judiciary enforced relatively strong fundamental rights and Parliament used the relatively easy amendment procedure to amend the Constitution. Due to the frequent amendment of the Constitution, by the end of the Emergency, the Fundamental Rights were severely compromised.

### 3.3.2 Prediction 2

In India, the period since 1978 is characterized by an independent judiciary, weak substantive rules (due to continuous amendment), and a weak procedure to amend the Constitution by the Parliament (due to amendment of the amendment clause). However, due to *Kesavananda Bharti Case* emerging as a strong precedent, and creating the requirement of judicial ratification, *relatively* the procedure to amend the constitution has become more costly. The constitutional rules are similar to Constellation #4 discussed above. According to my theory:

*Weak Substantive Rights and Weak Procedure to Amend the Constitution would lead to fewer, and *intra vires*, constitutional amendments.*

If this is reflected in the interaction between the constitutional rules in India as enforced by an independent judiciary: (1) there will be few additions to the Ninth Schedule; and (2) these additions to the Ninth Schedule will be *intra vires* constitutional amendments.
I present evidence by detailing the interaction between constitutional rules and the branches of government, by providing constitutional history. I also provide evidence on the 97 laws added to the Ninth Schedule after 1978. I divide this period into two phases. The first is the post-emergency phase, where the Parliament made an attempt to restore democratic institutions and which also witnessed political turmoil with liberalization and unstable coalition governments in the nineties. The second phase begins in 1998 with the National Democratic Alliance (NDA) government and the United Progressive Alliance (UPA) government continuing liberalization and political stability.

**Phase 3: 1978-1998**

Post the Emergency, the Indian National Congress under the leadership of Indira Gandhi lost the next general elections. The new government led by Morarji Desai made a sincere attempt to restore credibility and certainty in the law. The government passed the Constitution (Forty-Third Amendment) Act, 1977 and the Constitution (Forty-Fourth Amendment) Act, 1978, which undid most of the changes made by Indira Gandhi’s government, and restored democratic institutions. In particular, the restrictions on judicial review were removed by these amendments. However, in keeping with its socialist leanings, the new government also deleted the takings clause or the right to private property. The Constitution (Forty-Fourth Amendment) Act, 1978 stated in its Object and Reasons “the right to property, which has been the occasion for more than one amendment of the Constitution, would cease to be a fundamental right and become only a legal right.” Parliament also did not delete Article 31C, which gave Directive Principles.

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99 The Forty-Fourth Amendment either deleted the changes made by the Forty-Second Amendment to Articles 131A, 139A, 144A, 145, 217, 225, 226, 226A, 227, 228A and 329A.
of State Policy primacy over the Fundamental Rights. This meant that Fundamental Rights could be infringed upon to give force to progressive and socialist legislation.

In understanding the impact of the Kesavananda Bharti Case, it is important to note that the Supreme Court’s ruling did not protect the entire Fundamental Rights. The Kesavananda Bharti Case precedent was upheld in Minerva Mills v Union of India (AIR 1980 SC 1789) [hereinafter Minerva Mills Case], which clarified that the Basic Structure Test limiting Parliament’s powers to amend the Constitution was the prevailing rule. The Supreme Court clearly established that Articles 14, 19 and 21 which were the right to equality, free speech and expression and due process were un-amendable and protected by the Basic Structure Test. However, other Fundamental Rights, which also protect the individual from the excesses of the State, may not be part of the basic structure of the Constitution, for instance, the right to property under Article 31.

In light of the Basic Structure Test, a specific question regarding the validity of the Ninth Schedule came up in 1981 in Waman Rao v Union of India (AIR 1981 SC 271) [hereinafter Waman Rao Case]. The court followed the doctrine laid down in Kesavananda Bharti Case and held that the Ninth Schedule was in itself constitutionally valid since it was created before 1973 (before the Kesavananda Bharti Case precedent). The court also held that any inclusions to the Ninth Schedule after April 24, 1973 (the date of the Kesavananda Bharti Case ruling) were open to challenge on the

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100 The argument of the court in Waman Rao Case was “A large number of properties must have changed hands and several new titles must have come into existence on the faith and belief that the laws included in the Ninth Schedule were not open to challenge on the ground that they infringe Articles 14, 19 and 31. We will not be justified in upsetting settled claims and titles and in introducing chaos and confusion into the lawful affairs of a fairly orderly society.”
ground that these laws violate the basic structure of the Constitution i.e. all additions to
the Ninth Schedule after 1973 would have to pass the scrutiny of the basic structure test.

The *Waman Rao Case* had important implications for the durability of legislation
in the Ninth Schedule. If the opinion was followed, the durability of any new addition to
the Ninth Schedule was not longer guaranteed. A key feature of the Ninth Schedule was
to provide durability to legislation through constitutional amendment and protection from
judicial scrutiny. However, with the precedent set by *Kesavananda Bharati Case*, upheld
in *Waman Rao Case*, laws included in the Ninth Schedule after 1973 no longer received
the same protection and were potentially less durable as these could be reviewed by the
Supreme Court and their constitutional validity questioned.

The Supreme Court’s rulings in *Minerva Mills Case* and *Waman Rao Case*
created an interesting situation. Both cases held that the basic structure of the
 Constitution could not be amended. However, the Court also ruled that the question of
whether an amendment violated the Basic Structure was to be judicially determined. In
substance, constitutional amendments had to be ratified by the judiciary to ensure that
they did not violate the basic structure test. This presented another procedural hurdle in
the amendment procedure and made both constitutional amendments and additions to the
Ninth Schedule more difficult.

Substantive rules were severely weakened during the Emergency, which affected
the post-Emergency era. Fundamental Rights continue to remain subject to the Directive
Principles of State Policy. There is no constitutional protection for the right to private
property. The deletion of the substantive right to property means that even though laws
already included in the Ninth Schedule may be scrutinized under judicial review for potential violations of the basic structure test, there is no substantive right for the judiciary to enforce in attempting to curtail inefficient legislation. The result is that these weak substantive rights in the Constitution allow many types of transfer. Therefore, there was less demand to add inefficient legislation to the Ninth Schedule, since the deletion of the taking clause made most wealth transfers constitutional.

Procedural rules fared better in this phase. The draft of the Forty-Fourth Amendment included an attempt to strengthen the procedural rules to amend the constitution by adding the requirement of a referendum. However, this measure did not get sufficient votes in Parliament and was removed from the Bill. The only real constraint on constitutional amendments amending the Fundamental Rights was they had to pass the Basic Structure Test. The *Waman Rao Case* enabled threats to durability for legislation added to the Ninth Schedule after 1973.

Due to the interaction between constitutional rules in this period: (1) substantive rules were weakened as a result of frequent amendment; transfers previously held unconstitutional and requiring the protection of the Ninth Schedule, were now constitutional; (2) it was more difficult to amend the Constitution (due to the precedent set by the *Kesavananda Bharti Case*); and (3) the benefit of adding laws to the Ninth Schedule was even lower after the *Waman Rao Case*. According to my theory, there should be fewer additions to the Ninth Schedule and these should be mostly *intra vires*.

81 of the 97 laws added to the Ninth Schedule in this period were land reform laws (Table 2). Due to the deletion of the takings clause in 1978, these laws were
constitutional, but frequently challenged in court. The Statements of Objects and Reasons of the Constitution (Forty-Seventh Amendment) Act, 1984; Constitution (Sixty-Sixth) Amendment, 1990; and Constitution (Seventy-Eighth) Amendment Act 1995 stated: “whenever it was found that progressive legislation, conceived in the interest of the public was imperilled by litigation, recourse was taken to the Ninth Schedule.” It also added that the government had “decided to include all land reform laws in the Ninth Schedule so that they are not challenged before the courts.” These statements also clarified “Since the amendment to Acts which are already placed in the Ninth Schedule are not automatically immunised from legal challenge, a number of amending Acts along with a few principal Acts are also proposed to be included in the Ninth Schedule so as to ensure that implementation of these Acts is not adversely affected by litigation.” 73 of the 97 laws (75%) were amendment acts, enacted to expand the existing constitutional protection (Table 6).

Table 1 shows the number of laws added through each constitutional amendment to the Ninth Schedule in Phase 3. All 97 laws were passed by state legislatures (Table 4). 61 of the 97 laws were passed by uni-cameral legislatures and 36 laws by bi-cameral legislatures in Phase 3 (Table 5).

In addition to the policy of land reforms, in the early nineties, the policy for a quota system for minorities in education and state jobs became a controversial issue. In 1992, the VP Singh led Government decided to create a 27% quota of all government
jobs for “Other Backward Classes.” This was in addition to the 22.5% of all government jobs reserved for Schedule Castes and Schedule Tribes. This caused public protests and much litigation and in *Indira Sahwney v Union of India* (AIR 1993 SC 477), the Supreme Court held that the reservation policy was constitutionally valid under Article 16(4) (one of the exceptions to the equality clause), but that such reservations must not exceed 50% of all jobs.

The state of Tamil Nadu had created a quota of 69% for government jobs and admissions to educational institutions. The state legislature resolved to call upon the Central Government to amend the Constitution. Enacting a legislation, the Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes (Reservation of Seats in Educational Institutions and of appointments or posts in the Services under the State) Act, 1993, the state government led an All Party Delegation to lobby Members of Parliament (*The Times of India*, January 1, 1998) to include the new legislation in the Ninth Schedule. In response, Parliament enacted the Constitution (Seventy-Sixth Amendment) Act and its Statement of Objects and Reasons stated:

“The Tamil Nadu Government requested ... that the aforementioned Tamil Nadu Act ... be included in the Ninth Schedule ... for the reasons given below:—

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101 This was based on a report by the Second Backward Classes Commission (popularly known as the Mandal Commission) (Mandal 1980). The Mandal Commission was appointed in 1979 to investigate the conditions of socially and educationally backward classes within India. The terms of reference of the Commission were: (1) to determine the criteria for defining the socially and educationally backward classes; (2) to recommend steps for their advancement; (3) to examine the desirability or otherwise of providing for reservation of appointments in favor of such citizens which are not adequately represented in public services; and (4) present to the President a report setting out the facts and making such recommendations as thought proper. The Commission classified over 50% of the population as “Other Backward Classes (OBC)” and recommended a quota system of state jobs for this group.
... The Act has been passed relying on the directive principles of State Policy ... the said Act will get the protection of article 31C of the Constitution and therefore, cannot be challenged under articles 14 and 19 of the Constitution, with reference to which article 14, the reservation exceeding 50 per cent has been struck down by the Supreme Court. Now it has been decided to address the Government of India for including the Act in the Ninth Schedule to the Constitution, so that the law cannot be challenged as violative of any of the fundamental rights contained in Part III of the Constitution including articles 15 and 16, and gets protection under article 31B of the Constitution...

The Government of India has already supported the provision of the State legislation by giving the President’s assent to the Tamil Nadu Bill. ... it is now necessary that the Tamil Nadu Act 45 of 1994 is brought within the purview of the Ninth Schedule to the Constitution so that it gets protection under article 31B of the Constitution in regard to the judicial review.”

This amendment is interesting because the Constitution provided for exceptions to the right to equality in Article 15 and 16. The Supreme Court enforced weak substantive rules and as a result, enforced bargains made by the government with special interests i.e. the protected castes. In this case, the judiciary enforcing a weak rule led to an ultra vires constitutional amendment. This is an exception to the other additions in the period since 1978.

In the prior phase, Indira Gandhi’s tenure weakened substantive rules by frequently amending the constitution. The Forty-Fourth Amendment deleted the takings clause, the right to private property. Therefore, the independent judiciary enforced
relatively weaker Fundamental Rights. Many transfers were now constitutional and the amendment acts were enacted to expand the benefit of the existing protection. Overall, expansion was at a much slower pace than the previous period under Indira Gandhi’s tenure.

**Phase 4: 1998-Present**

The procedure regarding amendment of the constitution and judicial scrutiny of the Ninth Schedule as established in *Waman Rao Case* continues to hold. In *IR Coelho v State of Tamil Nadu* (1999 7 SCC 580), the Supreme Court referred the matter to a larger bench and upheld the precedent of the *Waman Rao Case*.\(^\text{102}\) The Court, in making a review to a larger Supreme Court Bench, clearly suggested that not only constitutional amendments, but all unconstitutional legislation, had to adhere to the discipline of *Kesavananda Bharti Case* i.e. that due to the changes in procedural and substantive rules, Ninth Schedule legislation may no longer receive complete immunity.

Reviewing this question in 2007, a nine-judge bench of the Supreme Court in *IR Coelho v State of Tamil Nadu* (AIR 2007 SC 861) held that if a law is deemed to have violated Fundamental Rights, and was included in the Ninth Schedule after April 24, 1973, it may be challenged in court on the grounds that it destroys or damages the basic structure of the Constitution.\(^\text{103}\) This is essentially a clearer reiteration of the decision in

\(^{102}\) The referral order further stated that the judgment in *Waman Rao Case* needed to be reconsidered by a larger bench so that it is made clear “whether an Act or regulation which ... is or has been found by the courts to be violative of one or more of the fundamental rights conferred by articles 14, 19 or 31 can be included in the ninth schedule or whether it is only a constitutional amendment amending the ninth Schedule which damages or destroys the basic structure of the Constitution that can be struck down” (*IR Coelho v State of Tamil Nadu* (1999) 7 SCC 580, p. 583).

\(^{103}\) In the ruling in *IR Coelho v State of Tamil Nadu* (AIR 2007 SC 861), the Supreme Court also clarified that where the validity of any Ninth Schedule law has already been upheld by the Supreme Court, such law would not be open to challenge again on the principles declared by this judgment.
the *Waman Rao Case*. The *IR Coelho v State of Tamil Nadu* (AIR 2007 SC 861) judgment in 2007 created three categories of legislation in India: (1) ordinary legislation, which is open to independent judicial review; (2) permanent or durable legislation, which was inserted into the Ninth Schedule pre-1973 and is completely protected from judicial review; and (3) legislation inserted into the Ninth Schedule post-1973, which may be considered more durable than ordinary legislation, but less durable than pre-1973 Ninth Schedule legislation (since such legislation can potentially be challenged in court and invalidated as violating the Basic Structure test).

Table 7: Ninth Schedule Legislation and the Basic Structure Test

<table>
<thead>
<tr>
<th>Added to Ninth Schedule before April 24, 1973 (pre <em>Kesavananda Bharti Case</em>)</th>
<th>Added to Ninth Schedule after April 24, 1973 (post <em>Kesavananda Bharti Case</em>)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Amendment Act</strong></td>
<td><strong>Number of Laws</strong></td>
</tr>
<tr>
<td>First Amendment</td>
<td>13</td>
</tr>
<tr>
<td>Fourth Amendment</td>
<td>7</td>
</tr>
<tr>
<td>Seventeenth Amendment</td>
<td>44</td>
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<tr>
<td>Twenty-Ninth Amendment</td>
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<tr>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>66</td>
</tr>
</tbody>
</table>
Due to the interaction between constitutional rules that emerged through the case laws in this period: (1) it was more difficult to amend the Constitution (due to *Kesavananda Bharti Case* precedent); (2) the benefit of adding laws to the Ninth Schedule was even lower after both *IR Coelho* decisions in 1999 and 2007; and (3) the substantive rules were weakened as a result of frequent amendment over decades; and therefore transfers previously unconstitutional and requiring the protection of the Ninth Schedule, were now constitutional. This is similar to Constellation #4 where both substantive and procedural rules are weak. However, in the period post-1998, due to the pattern of enforcement of constitutional rules, procedurally it became relatively more costly to amend the constitution. According to my theory, there should be few additions to the Ninth Schedule and mostly *intra vires*.

In fact, there were no additions to the Ninth Schedule in this period, despite multiple demands from various special interests. The election manifestos of many parties, including the governing Indian National Congress contained explicit promises to enact unconstitutional legislation and place it in the Ninth Schedule (Zaidi 1998). In this time period, state and regional parties have routinely appealed to the federal government to add laws to the Ninth Schedule. In 1999, the Republican Party of India petitioned Prime Minister Vajpayee that reservations be brought under the Ninth Schedule (*The Times of India*, December 28, 1999). In 2001, the Tourism Minister in the Uttar Pradesh state government, Ashok Yadav, stated that since the Supreme Court disallows any quota above 50%, amendment of the constitution was the only method to increase the reservation quotas (*The Times of India*, July 27, 2001). Even Parliamentarians have
routinely lobbied for such additions. In 2002, the Parliamentary Committee Chairman on Scheduled Caste and Scheduled Tribe matters assured members that he would attempt to resolve the enactment of reservation of jobs in the private sector and its inclusion in the Ninth Schedule (*The Times of India*, January 4, 2002). The *Indian National Congress Party Election Manifesto* (Indian National Congress 2004) explicitly promised to enact unconstitutional legislation reserving jobs in private firms and admissions in educational institutions and add such legislation to the Ninth Schedule.

It is possible that in the future, the Indian Parliament will simply amend the constitution instead of adding the unconstitutional law to the Ninth Schedule. Some special interests have already commenced demanding constitutional amendments since the Ninth Schedule is no longer guaranteed the durability of laws. Tamil Nadu Chief Minister Jayalalithaa assured the state’s populace that she has petitioned Prime Minister Vajpayee for *even greater protection than the Ninth Schedule* for unconstitutional legislation. She requested the Prime Minister to introduce an amendment to the Constitution to ensure more “permanent” protection to Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes Act, 1993, than that currently provided by the Ninth Schedule (*The Times of India*, May 14, 1998).

As recently as August 2012, three months after the Supreme Court ruled that reservation-based promotions for Scheduled Castes, Scheduled Tribes and Other Backward Classes in government jobs in Uttar Pradesh were unconstitutional, the Federal government has announced its decision to introduce a Constitution Amendment Bill (*The Indian Express*, August 9, 2012).
3.3.3 Four Phases: A Comparison

The evidence supports the predictions made for the Ninth Schedule in the four phases in post-independence India. In the initial decades, due to the strong substantive rules enforced by the Indian judiciary, there are additions to the Ninth Schedule. Post-Emergency, due to weakened substantive rules, there are fewer additions to the Ninth Schedule. This can be seen in Figure 10 - there is a rapid expansion of the Ninth Schedule from 1951-78, a slower expansion from 1978-1998 and no new additions since 1998.

![Figure 10: Ninth Schedule: 1951-Present](image-url)
The content of these laws also supports my predictions. In Phase 1, only 9.3% of the laws in the Ninth Schedule are amending acts to laws already included in the Ninth Schedule. In Phase 2, with weaker substantive rules, 51.6% of the laws included in the Ninth Schedule are amendments to legislation already in the Ninth Schedule. By Phase 3, after the deletion of the right to private property, 75.2% of acts added to the Ninth Schedule are amending acts. Figure 11 shows amending acts as a percentage of Ninth Schedule legislation.

![Figure 11: Amending Acts as a Percentage of Ninth Schedule Legislation](image)

This trend shows that when substantive rules are strong, the additions to the Ninth Schedule are *ultra vires* to overcome judicial review. As the substantive rules weaken, constitutional amendments are used to increase the durability of the existing protection of the Ninth Schedule.
3.4 Concluding Remarks

When an independent judiciary is considered in the context of enforcing constitutional rules, there is strong evidence that it is the combination of procedural and substantive rules that determines the durability of inefficient legislation. In the Indian context, when the newly minted constitution provided a strong framework of Fundamental Rights, and a relatively weak rule to amend those Fundamental Rights, constitutional amendments were used to overcome the independent judiciary that blocked inefficient legislation. In the post-Emergency period, the independent judiciary allowed inefficient legislation permitted by the weak Fundamental Rights in the Constitution.

The rapid expansion and recent dormancy of the Ninth Schedule is a puzzle, if the independent judiciary is analyzed in isolation. However, when an independent judiciary is analyzed within the constellation of rules, the changes in the constitutional rules explain the creation, expansion, and recent dormancy of the Ninth Schedule. The period 1951-78 witnessed an expansion of the Ninth Schedule at an alarming rate because of strong Fundamental Rights combined with an easy constitution amendment procedure. Since 1978, additions to the Ninth Schedule have been less frequent, and since 1995, there have been no new additions due to the weakened Fundamental Rights that allow inefficient legislation.

The implications of this research, however, extend beyond explaining the puzzle of the Ninth Schedule. While designing constitutional rules, it must be emphasized that it is not the “independence” of the judiciary that causes or increases rent seeking; but the combination of an independent judiciary, and the procedural and substantive rules that it enforces.
This assumes importance because the focus in modern constitution design is often on human rights or positive rights. However, procedural rules assume importance in constitutional maintenance. While substantive rights get more attention, they will remain ineffective, if easily amendable. Procedural rules to pass legislation as well as to amend the constitution are crucial in determining the amount and durability of wealth transferring legislation.
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Constitution (Forty-Third Amendment) Act, 1977
Constitution (Forty-Fourth Amendment) Act, 1978
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