Interest Groups Repairing Unconstitutionality: India's Ninth Schedule

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ABSTRACT

Scholars have called for greater judicial scrutiny to block rent seeking and lobbying by interest groups. What happens when independent judicial review successfully blocks interest groups' rent-seeking efforts? Do they abandon their efforts? This paper argues that, faced with unfavorable judicial review, interest groups lobby to repair the unconstitutionality of benefits by changing constitutional rules, shifting rent-seeking activity to the constitutional level. In India, entry to the Ninth Schedule of the Constitution of India converts statutes previously declared unconstitutional by the judiciary into constitutionally protected statutes—a goal often pursued by interest groups to repair unconstitutionality. The expansion and slowdown of the Ninth Schedule list demonstrates that interest groups determine the forum for repairing unconstitutionality by evaluating the relative costs of constitutional appeal versus constitutional amendment. The Indian experience demonstrates the limits of judicial review in curtailing rent seeking and the importance of constitutional structures in light of Epstein's contributions.

1. INTRODUCTION

Richard Epstein has demonstrated the failure of judicial review to block rent seeking[1] by interest groups and to prevent constitutional erosion in

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1. The term "rent seeking" is now used more generally to describe the resources spent in not just competing for rents as defined by Tullock (1967) and Krueger (1974) but also

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the United States (Epstein 1985, 1995, 2006, 2014). For Epstein, the use of independent judicial review to strike down unconstitutional legislation is an unassailable feature of constitutionalism and one of the most important checks in limiting special interests, an area in which the American system has frequently failed. As Epstein (1992, p. 699) puts it, if you take one view of interpretation, the action may be forbidden; with another, it is allowed; and with a third, it is required. This proliferation of interpretative approaches, Epstein argues, does not bind the judge but instead "gives that judge freedom to reach virtually any result by stressing that single factor that points most clearly to the outcome that the judge desires" (p. 702). This provides interest groups with opportunities to manipulate rules, and the judiciary has failed in limiting them.

Epstein explains the necessity of the takings clause and the appropriate role of the judiciary in limiting the power of eminent domain (Epstein 1985) and demonstrates that the judiciary expanded the eminent domain power of the state and failed to curb rent seeking by various interests (Epstein 2011b). He finds a similar pattern for the expansion of police power, emphasizing how progressives rewrote a classical liberal constitution—a trend that has changed constitutionalism and rent seeking by special interests in the post–New Deal era (Epstein 1995, 2006). Consequently, he shows how the judiciary should have interpreted the classical liberal constitution and thwarted the rent-seeking efforts of various interest groups (Epstein 2014).

Epstein's emphasis is on limiting the trend of expansive interpretation and blocking interest groups and rent seeking through independent judicial review, mainly in the US system. His assumption is that the judiciary can curb interest groups by strictly interpreting and enforcing constitutions. Therefore, it is pertinent to wonder what happens if judges in other systems follow Epstein's prescription of using strict interpretation to curb rent seeking. How do interest groups respond when their rent-seeking efforts are ruled unconstitutional by judicial review? Do they abandon such efforts, or do they explore other avenues to legitimize it? And what are the consequences of such interest group behavior?

My main argument is simple: when efforts to gain political benefits are declared unconstitutional, interest groups try to repair unconstitutionality by changing constitutional rules to accommodate their efforts and gain the consequent benefits from other branches of government. If

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obtaining and maintaining entitlements, targeted transfers, direct subsidies, tax breaks, control over licensing, price controls, quantity controls, and reassignment of property rights. For a survey on rent seeking, see Congleton, Hillman, and Konra (2008).

the benefits from unconstitutional statutes are sufficiently high, interest groups are unlikely to give up after unfavorable judicial review.

Rent seeking becomes possible at the constitutional level because constitutions are not static. Constitutions are frequently rewritten (Elkins, Ginsburg, and Melton 2009; Lutz 1994), either by the legislature changing the text (Ginsburg and Melton 2015; Lutz 1994) or by the judiciary reinterpreting the text (Epstein 2006, 2014; Greve 2012; Ginsburg 2003; Voigt 1999; Wagner 1987). And interest groups will rationally allocate their resources among alternative suppliers of rule changes.

While strict scrutiny through independent judicial review might be desirable, or even necessary, it is not sufficient to block rent seeking. This is because rent seekers forum shop between branches of government for constitutional change.

The Indian experience with judicial review demonstrates that interest groups attempt to repair the unconstitutionality of their efforts when the judiciary, strictly interpreting the rules, blocks them. After its inception in 1950, the independently appointed judiciary in India struck down land redistribution laws as unconstitutional. In 1951, the Indian Parliament responded by introducing a vehicle to repair the unconstitutionality of such legislation. The First Amendment added article 31B, which allows Parliament to suspend judicial review and protect the validity of unconstitutional legislation by adding these statutes to the Ninth Schedule through constitutional amendment. This allowed interest groups to pursue repair for specific unconstitutional statutes. The Ninth Schedule, initially intended to protect only 13 land-reform-related statutes, has expanded to include 282 statutes.

Analyzing the Ninth Schedule's seemingly inconsistent pattern of expansion reveals the importance of constitutional structure on interest group behavior. When the procedure to amend a constitution is relatively easy and its benefits high, interest groups simply choose another forum—the legislature—to pursue benefits blocked by the judiciary. This trend is witnessed in Ninth Schedule expansion from the birth of the republic until the Emergency.[2] Conversely, when the procedure to amend the constitution to heal unconstitutionality is costly, interest groups are more reluctant to lobby the legislature and more likely to appeal through the judiciary. This is seen in the post-Emergency slowdown of the Ninth Schedule.

2. The Emergency refers to a 21-month period from 1975 to 1977 when Prime Minister Indira Gandhi declared a countrywide state of emergency.

The Ninth Schedule trends show the limits to using independent judicial review to block rent-seeking efforts. Strict scrutiny through judicial review makes the legislature a more attractive forum for constitutional change. Therefore, a certain level of rent seeking at the constitutional level is inevitable unless the process of constitutional change in all fora is prohibitively costly for interest groups.

Analyzing the Indian experience adds to Epstein's scholarship and its generalizability. While agreeing with both the descriptive and the prescriptive strands of his argument, this paper examines the applicability of his assumption—that rent-seeking activities are blocked if the judiciary strictly enforces constitutional rules in the United States—to other systems, in particular India.

This is pertinent because, while framing the Indian constitution, Indian framers were inspired by the American system of independent judicial review and incorporated it in the Indian constitutional scheme. However, the Indian experience shows limited applicability of the American experience with judicial review in curbing interest groups, because of weaknesses in its broader scheme of separation of powers, which has allowed interest groups to forum shop between branches of government. India's experience with judicial review and the Ninth Schedule, however, simultaneously emphasizes another important and different area of Epstein's research: the design of constitutional structures (Epstein 2011a, 2011b, 2014, 2017).

Epstein (2011a, 2017) argues for the importance of constitutional structures in constitutional design in addition to the strong emphasis of individual rights in modern constitutions. In particular, he (Epstein 2011a) emphasizes the role of the architecture of institutions for creating checks and balances vertically (federalism) and horizontally (separation of powers) as a mechanism to limit rent seeking and constitutional erosion. In this exposition, an independent judiciary is one of the constitutional safeguards and requires other structural checks like separation of powers and federalism. In this regard, the Indian system, which has weaker checks and balances in its separation of powers and constitutional structure, produces quite different incentives for rent seeking than the American system, despite having independent judicial review.

It is important to understand the consequences of judicial review for interest groups' behavior in different circumstances, as over four-fifths of the world's constitutions have given courts powers to invalidate legislation deemed unconstitutional. And in understanding the mechanisms

for judicial review blocking rent seeking, it is also necessary to explore other institutions that may be necessary in enabling the judiciary to effectively curb interest groups. Epstein (2011a, p. 301) argues that the precise constitutional design depends on factors such as "territorial expansion, ethnic composition, and social infrastructure, which vary widely across nations." This view makes cases like the Ninth Schedule and the Indian experience with judicial review an important addition to understanding the scholarship on both judicial review and constitutional design.

2. THE INDIAN CONSTITUTION

It is important to understand the structure of the Indian republic to place the creation and evolution of the Ninth Schedule in context. In 1950, India adopted its written constitution. The only time India deviated from these strong constitutional guarantees was when Prime Minister Indira Gandhi declared a state of emergency across the country under article 352 on June 25, 1975, which ended on March 21, 1977, after democratic elections. The period of the Emergency was characterized by the suspension of elections, suspension of civil liberties, imprisonment of the opposition, suppression of the judiciary, and rule by decree.

The Indian constitution provides for a weak separation of powers between the legislature and executive but a strong separation of powers between the judiciary and the legislature and the judiciary and the executive. Independent judicial review is explicitly detailed (arts. 13, 32, 139, 226), and the constitution grants the judiciary the power to invalidate any law that contravenes fundamental rights (art. 13). As a parliamentary democracy, both the executive and the legislature were made accountable to an independent judiciary that could review the constitutional validity of all legislation and executive action.

The Indian judiciary was set up to be independent, in both appointments and operations, to enforce the constitution and check the legislature and executive (Neuborne 2003; Gadbois 2011). The constitution prescribes the procedure for the executive to appoint judges to the Supreme Court (art. 124[2]) and the high courts (art. 217[1]).[3] These judges serve

3. Under these articles, the power of appointment vests in the president. This power is exercised in consultation with the chief justice of India (CJI) for Supreme Court appointments. For high court appointments, the power is exercised in consultation with the governor of the concerned state and the chief justice of the concerned high court in addition to the CJI.

until age 65 for the Supreme Court and until age 62 for high courts and may be removed only through the impeachment process (art. 124[4]).[4] Since 1993, the judges on the Supreme Court and high courts have been appointed under the same constitutional provisions as above but through a judicial collegium, in consultations with the executive, though the judiciary enjoys primacy.[5] Other than during the Emergency, the Indian judiciary has been lauded as independent, in both appointments and decision-making. The Emergency ended in 1977, and much of the damage done to the constitution during the Emergency was undone in 1977–78. However, in Indian constitutional jurisprudence, especially for judicial review, the Emergency marks a pivotal moment.

The current size of the Supreme Court is 32 judges, though nearly all decisions are made by benches with five or fewer judges. Larger benches are constituted only to review past judgments, as only a larger bench of the Supreme Court can overrule its own judgments. Similarly, the full bench of high courts never sits together, and nearly all decisions are made by benches with two or three judges. The first few years of the republic saw major clashes between Parliament and the judiciary because the judges strictly enforced constitutional rules without much consideration for the socialist agenda of the government (Austin 1999; Rajagopalan 2015).

4. No judge has ever been impeached in India. Impeachment proceedings have been initiated against two high court judges, but they resigned before the proceedings were completed.

5. The Second Judges Case (*Supreme Court Advocate-on-Records Association v. Union of India*, [1993] 4 SCC 441) established a collegium comprising the CJI and the seniormost judges of the Supreme Court, with the power to recommend judges for appointment to the president, which was binding. In the Third Judges Case (*Special Reference No. 1 of 1998,* [1998] 7 SCC 739), the Supreme Court clarified that the CJI shall consult his four seniormost colleagues for Supreme Court appointments and his two seniormost colleagues for high court appointments. These cases governed the system of judicial appointments until 2014, when Parliament passed the Constitution (Ninety-Ninth) Amendment Act of 2014, accompanied by the National Judicial Appointments Commission Act of 2014. Both the amendment and the act were an attempt to create a new system of appointments to remove the problems faced under prior processes. In October 2015, in *Supreme Court Advocates-on-Record Association v. Union of India* ([2015] 11 SCALE 1), the Supreme Court held the constitutional amendment and the statute unconstitutional. In response, the government created a Memorandum of Procedure of Appointment of Supreme Court Judges and a Memorandum of Procedure of Appointment of High Court Judges to clarify the appointment procedure. Under the memoranda, the judiciary continues to enjoy primacy over the appointment of judges, though the executive must be included in the consultations.

India has a federal structure with 28 states and eight union territories. The Parliament is bicameral, comprising a lower house (Lok Sabha)[6] and upper house (Rajya Sabha).[7] Passing federal legislation requires a simple majority of members present and voting in each house of Parliament (art. 100[1]). One-tenth of the members of each house form the minimum quorum required to pass legislation (art. 100[3]). Legislation passed in both houses of Parliament then requires presidential approval.

Twenty-two states in India have a unicameral legislature, and six states have a bicameral legislature. Three of the eight union territories have a legislature; two are unicameral, and one is bicameral. To pass state legislation, a simple majority is required in each house of the state legislature (art. 189[1]). One-tenth of the members of each house form the minimum quorum required to pass legislation in states (art. 189[3]). Once legislation passes in the state legislature, it requires the state governor's approval.

The constitution also includes specific provisions to amend itself (art. 368). Only Parliament can pass constitutional amendments. 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 each house, with not less than two-thirds of the members present and voting in each house, and presidential approval.[8] Amending provisions pertaining to separation of powers and federalism, also called entrenched clauses,[9] requires an additional step: ratification by at least half the state legislatures. Fundamental rights are not entrenched provisions and can be amended relatively easily because amending part III of the constitution does not require ratification by the states. Since the Ninth Schedule protects only unconstitutionality of statutes for violating fundamental rights, adding statutes to the Ninth Schedule does not require ratification by the states.

6. The Lok Sabha has a maximum strength of 552 members.

7. The Rajya Sabha has a maximum strength of 250 members.

8. The only exception to this rule is the enactment of the First Amendment, which was passed by a unicameral legislature, since it was enacted by the Provisional Parliament of India before the bicameral legislature was set up in 1952.

9. Under article 368(2), the following are protected as entrenched clauses of the constitution and require ratification by at least one-half of the state legislatures, passage in Parliament, and presidential approval: articles 54, 55, 73, 162 or 241, and 368; chapter IV of part V, chapter V of part VI, and chapter I of part XI; any of the lists in the Seventh Schedule; and the representation of states in Parliament.

3. REPAIRING UNCONSTITUTIONALITY: BIRTH OF THE NINTH SCHEDULE

In 1950, India suffered from extreme inequality in wealth, especially in the agrarian sector, as a consequence of feudalism and colonialism. The election manifestos for the first general and state elections after independence focused on abolishing the feudal system (the *zamindari* system), which required breaking up large feudal estates and redistributing land among landless farmers. Various states passed statutes enabling land redistribution, and the constitutionality of these statutes was challenged. The main problem was that providing just compensation to existing landowners would both bankrupt the new Indian state and defeat the purpose of a policy to dismantle *zamindari* (feudalism) and redistribute wealth. Landowners challenged the statutes for taking land without just compensation, and land reform policy became the subject of litigation between wealthy landlords and state governments (Austin 1999). State high courts declared some of these laws pertaining to land redistribution unconstitutional on the grounds that they violated the right to equality (art. 14) and the eminent domain clause (art. 31) of the constitution.

In *Kameshwar Singh v. Province of Bihar* (AIR 1950 Patna 392), the Patna High Court struck down the Bihar Management of Estates and Tenures Act (1949) as unconstitutional for violating the right to equality (art. 14)—the statute assessed the compensation to be paid to the owner of property acquired at 20 times the assessment for a poor owner and at three times the assessment for a rich owner. In contrast, the Allahabad High Court upheld the validity of Uttar Pradesh's land-reform legislation in *Surya Pal Singh v. State of Uttar Pradesh* (AIR 1951 All 674). These and similar statutes in other states were pending appeal to the Supreme Court when states requested that the Provisional Parliament[10] resolve the matter.

The unconstitutionality of land reform legislation created immediate problems for candidates standing for elections. Since land and agriculture were under the purview of state legislation (Constitution of India, Seventh Schedule, list II), the political future of incumbent and potential state legislators was the most affected by these judicial decisions. In 1950, the new Supreme Court was the British Federal Court of India under a different name. The judges were not chosen by representatives of the Indian electorate; for example, Chief Justice H. J. Kania of the British

10. The Provisional Parliament was the Constituent Assembly of India, which took on the duties of a unicameral legislature while awaiting the first general election.

Federal Court of India continued as the first chief justice of the Supreme Court. Most Supreme Court and state high court judges were trained in the English liberal tradition of restraint in lawmaking. The courts gave a strict interpretation of constitutional rules and emphasized procedural fairness instead of addressing populist political matters. There were fears that the Supreme Court would strictly apply the text of the new constitution and invalidate the land reform agenda.

Unsurprisingly, the main coalition pushing to repair unconstitutionality to enable land reform was composed of state legislators. They lobbied the cabinet and the Provisional Parliament since state legislators cannot initiate a constitutional amendment. At the time of the First Amendment, Parliament was still a unicameral legislature (pending elections), without an upper house representing states' interests. India granted universal adult suffrage from the very beginning, in 1950, when over 90 percent of the farmers were landless. In those circumstances, the crucial election promise was land reform, and failure to deliver land redistribution could mean a swift end to many political careers.

There were three main alternatives[11] before the members of the Provisional Parliament debating the First Amendment to the constitution: to remove the protection of private property, to amend the constitution to suspend independent judicial review, or to suspend judicial review only for land reform legislation for violating fundamental rights. In exploring the latter, a parliamentary select committee was appointed to review a proposed constitutional amendment, and various regional and state farmers' associations, members of Parliament, and state legislators made their case (Parliament of India 1951).

In June 1951, the Provisional Parliament passed the First Amendment, creating a new constitutional vehicle under article 31B called the Ninth Schedule. Any statute added to the Ninth Schedule is protected from judicial review, even if it is deemed unconstitutional for violating fundamental rights. The intention to repair the unconstitutionality of land reform statutes was made extremely clear in the statement of objects and reasons introducing the First Amendment: "The validity of agrarian reform measures passed by the State Legislatures in the last three years has, in spite of the provisions of clauses (4) and (6) of article 31, 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

11. Jawaharlal Nehru fleetingly mentioned these alternatives as he justified the creation of the Ninth Schedule in Parliament (Nehru 1951).

held up. The main objects of this Bill are, accordingly to amend article 19 for the purposes indicated above and to insert provisions fully securing the constitutional validity of zamindari abolition laws in general and certain specified State Acts in particular" (Constitution [First Amendment] Act of 1951).

The First Amendment to the Constitution is telling. In 1950, the judiciary was independent, and the Supreme Court and high court judges were not chosen by representatives of the Indian electorate. Land reform policies were struck down as unconstitutional by judges narrowly interpreting and enforcing constitutional rules. Those judges, focusing on procedural fairness and striking down the potential abuse of eminent domain power, can be said to have followed Epstein's prescription of independent judges striking down statutes enabling rents and transfers.

But despite this success of the courts, interest groups found another way to preserve unconstitutional benefits: through the legislature. The very creation of the Ninth Schedule shows that independent judicial review following narrow interpretation of the rules and striking down statutes as unconstitutional, while desirable, is not sufficient for blocking rent seeking. This became evident over the decades, as state legislators lobbied to have unconstitutional statutes protected after unfavorable judicial review, and the Ninth Schedule expanded rapidly.

4. INTEREST GROUPS AND THE NINTH SCHEDULE

The First Amendment essentially created a vehicle for repairing unconstitutionality and overcoming independent judicial review, but only to enable land reforms. While presenting the reasons for creating the Ninth Schedule, Prime Minister Jawaharlal Nehru said, "It is not with any great satisfaction or pleasure that we have produced this long schedule. We do not wish to add to it. . . . [T]he schedule consists of a particular type of legislation [land-reform laws], generally speaking, and another type should not come in" (Nehru 1951, col. 9632). Despite this intention to restrict the use of the Ninth Schedule, the list of protected statutes started with 13 statutes and expanded to protect 282 statutes. This includes 65 statutes that are expressly not related to land reform, and not all of the 217 statutes relating to land use are related to breaking up the feudal system.

Scholars have observed that after the expansion of the Ninth Schedule in the early decades, there was a marked slowdown in its use, and it is now dormant, with no new additions since 1995 (Deva 2016). From the

creation of the Ninth Schedule in 1951 until the end of the Emergency in 1977, 185 statutes were added to the Ninth Schedule—an average of seven per year. Since the end of the Emergency in 1977, only 97 statutes have been added (2.3 statutes per year).

Scholars hold Prime Minister Indira Gandhi's policies and dictatorial attitude, culminating in the Emergency, responsible for the indiscriminate expansion and colorable use[12] of the Ninth Schedule (Dhavan 1978; Sathe 1989; Deva 2016). They attribute the dormancy of the Ninth Schedule since 1995 to the rise of coalition governments in contrast to the overwhelming majorities enjoyed in Parliament from 1950 until the Emergency (Deva 2016; Chandrachud 2017).

At first glance, the pattern seems to fit with the narrative of Indira Gandhi's unconstitutional excesses ending with her imposition of a national emergency. However, the content and timing of the statutes added to the schedule shows this to be implausible. While Gandhi's government was responsible for the maximum number of additions, Nehru's governments added 64 statutes, and Prime Minister V. P. Singh's fragile coalition government added 55 statutes to the schedule. Further, although the Ninth Schedule has not expanded since 1995, the issue is far from dead. Most parties have Ninth Schedule expansions on their manifesto, listing protections for specific groups and policies. Many state legislatures passed statutes in the last decade and, knowing that they may be struck down for violating the constitution, lobbied for Ninth Schedule protection. Therefore, more detailed analysis of the Ninth Schedule is required to explain relevant trends.

Upon economic analysis, I find that almost all of the statutes in the Ninth Schedule enable some kind of transfer or rent creation. There are four broad categories of statutes (though there is some overlap) in the Ninth Schedule: land redistribution, nationalization, tenancy and rent regulation, and price and quantity controls (see Table 1). The statutes in the first two categories enable wealth transfers, and the last two categories create artificial rents. Only three statutes passed during the Emer-

12. According to the Indian doctrine of colorable use (also known as doctrine of colorability), if the legislature is not permitted an action directly, it cannot do the same indirectly. Therefore, the legislature cannot overstep its competence by camouflaging legislative actions to make them appear within its competence. Scholars like Deva (Deva 2016) argue that that Indira Gandhi's actions to expand the Ninth Schedule were a colorable use of legislative power because the power under article 31B is exercised for curbing free speech and weakening separation of powers, a departure from the original intent of the Ninth Schedule to protect land reform.

Table 1. Descriptive Statistics of Ninth Schedule Statutes and Constitutional Amendments

Amendment	Land Redistribution	Nationalization	Tenancy and Rent Regulation	Price and Quantity Controls	Other	Total
First (1951)	13					13
Fourth (1955)	4			3		7
Seventeenth (1964)	35		9			44
Twenty-Ninth (1972)	2					2
Thirty-Fourth (1974)	19		1			20
Thirty-Ninth (1975)	19	10		7	2	38
Fortieth (1976)	46	4	4	9	1	64
Forty-Fourth (1978)					−3	−3
Forty-Seventh (1984)	10		4			14
Sixty-Sixth (1990)	46		9			55
Seventy-Sixth (1994)				1		1
Seventy-Eighth (1995)	23		4			27
Total	217	14	31	20	0	282

gency regulate areas other than property and transfers (elections, domestic terrorism, and censorship), and they were deleted from the Ninth Schedule immediately after the Emergency ended through a constitutional amendment in 1978.

Analyzing these categories illuminates the interests vying for unconstitutional benefits. Most of the statutes were addressing populist demands, such as land redistribution and rent control, and they spread benefits across specific groups of constituents while hurting very specific property interests. The most organized and cohesive interest group lobbying for Ninth Schedule protection is state-level legislators. Most (88 percent) of the 282 statutes in the Ninth Schedule were passed by state legislatures and pertain to legislative areas reserved for the states; there are only 34 central statutes in the Ninth Schedule. State legislators passing these statutes were the most affected when statutes were deemed unconstitutional, since they would lose support if they did not deliver benefits and transfers to their main constituency. And interests directly seeking rents and transfers in each of the states were too dispersed to directly lobby Parliament for a constitutional amendment. So state legislators organized and lobbied Parliament to repair the unconstitutionality of the statutes. This was seen from the very beginning in 1951, when state legislators sent emissaries to present the case for unconstitutional land reform statutes before the Parliamentary Select Committee (Parliament of India 1951). The most famous example of state legislators lobbying their case was in 1994, when the chief minister of Tamil Nadu J. Jayalalitha successfully led a delegation to petition Prime Minister Narasimha Rao for a constitutional amendment to add a single unconstitutional statute passed by her government to the Ninth Schedule (Subramanian 1994).

For the purposes of constitutional amendment, state legislators are interest groups, not part of the legislative branch of government, since they cannot initiate constitutional amendments, vote to amend the constitution, or ratify the amendments to the constitution's fundamental rights (and therefore Ninth Schedule protections). State legislators were also well organized compared to other special interests, especially in the early years, as most state governments were formed by the Indian National Congress Party, providing direct connections to parliamentarians. Since the upper house (Rajya Sabha) represents states proportional to the size of the state legislature, state interests mainly lobbied the lower house (Lok Sabha).

Even though the Ninth Schedule has had no additions since 1995,

state legislators from the states of Andhra Pradesh (PTI 2018), Gujarat (Prakash 2016), Haryana (Surai 2016), Jharkhand (PTI 2016), Karnataka (TNN 2016), Madhya Pradesh (*Hindustan Times* 2019), Maharashtra (Mahamulkar 2018), Odisha (Patnaik 2013), Rajasthan (Anshuman 2019; *Scroll* 2015), Telangana (Apparasu 2017), and Uttar Pradesh (TNN 2011) have made public demands for Ninth Schedule protection. The demands and the stage of legislation are detailed in Table 2. State legislators from different states (many of them listed in Table 2) have also attempted to form a more cohesive group. For instance, in October 2013, 20 state governors convened a meeting with Pranab Mukherjee, the president of India, to discuss Ninth Schedule protection for affirmative action policies.[13]

State legislatures, like Parliament, have a quorum requirement of 10 percent and require only a simple majority and the governor's assent. However, it is easier to pass statutes at the state legislature than at Parliament because of two key differences. First, most of the state legislatures are unicameral.[14] A second reason is that state legislatures, on average, meet for less than half the number of days as the Lok Sabha.[15] Consequently, there is little time for debate or discussion of tabled legislation, and state statutes are passed more quickly and easily. State legislative assemblies have gained notoriety for passing tens of statutes in a given day, often without any debate, on the same day the statute is introduced.[16]

Ninth Schedule protection typically plays out as follows. State legislators pass a statute (under art. 189) benefiting a core constituency by

13. The meeting was called off because state elections were announced, and the model code of conduct does not allow policy announcements related to election promises close to elections.

14. Of the 28 states, only Andhra Pradesh, Bihar, Karnataka, Maharashtra, Telangana, and Uttar Pradesh have a bicameral legislature.

15. On the basis of average sitting days for 18 state legislatures over 2012–16 (see PRS 2014b), state legislatures sit for an average of 31 days a year, compared with 69 days for the 15th Lok Sabha (2009–14) (see PRS 2014a) and 66 days for the 16th Lok Sabha (2014–19) (see PRS 2019).

16. For instance, during its 12th term (2009–14), the Haryana Assembly was in session for only 11 days per year on average, with the budget session occupying 70 percent of total session time. In the remaining time, the assembly passed 129 statutes, all on the day they were introduced, and 23 statutes were passed on a single day (PRS 2014c). In the Goa Assembly, on average, each statute was discussed for 4 minutes (PRS 2014b). In 2012, in the Delhi Assembly, only one of the 11 statutes passed was discussed for more than 10 minutes (PRS 2014b). In the 12th Gujarat Assembly (2008–12), which was in session for half the number of days on average as Parliament, over 90 percent of all bills were passed on the day they were introduced in the legislature (PRS 2012). This is also the pattern for West Bengal, Chhattisgarh, and Bihar for the same period (PRS 2014b).

transferring wealth or creating rents. If independent judicial review at the high court (under art. 226) has deemed the statute unconstitutional (or deemed a similar statute unconstitutional in the past), then the interest group has three options: appeal the decision to the Supreme Court to reinterpret the constitutional rule, amend the constitution to repair the unconstitutionality of the statute by adding it to the Ninth Schedule, or abandon the benefits from the unconstitutional statute and abide by the decision of the high court.

Interest groups compare the net expected value of each of these choices before choosing a course of action. Positive net expected value of seeking a constitutional amendment depends on Parliament granting Ninth Schedule protection. It is relatively easy to amend the Indian constitution, especially to add to the Ninth Schedule, as there is no ratification requirement. Amendments require only a majority of the total membership of each house, with no less than two-thirds of the members present and voting in each house, and presidential approval.[17] Further, there is no limit on how many statutes are added to the Ninth Schedule through a single constitutional amendment, and as the number of statutes increases in a given amendment, the per-statute cost is reduced.

One factor that reduces uncertainty is the office of the whip. Historically, it has been frowned on in the Indian parliamentary system to vote against party policy. This became official after 1985 through a constitutional amendment in which no member is permitted to vote against the party position (the Constitution [Fifty-Second] Amendment Act of 1985). If the government has the numbers, which is known in advance, the amendment will pass. Therefore, decision-making procedures in the legislature (unlike the judiciary) may impose higher costs but entail lower uncertainty.

Similarly, successfully appealing the unconstitutionality of a statute results in a stream of benefits for an interest group. However, the appeal imposes some organizational costs. Its positive net expected value depends on the prior belief that the statute will be held constitutional, that is, the chances of winning the appeal. If the chances of the Supreme Court holding the statute constitutional are high, then the expected value of the appeal is high. However, if the costs of the appeal process are high—for

17. The only exception to this rule was the enactment of the First Amendment, which was passed by the unicameral legislature, since the Provisional Parliament of India enacted it before the bicameral legislature was set up in 1952.

Table 2. Interest Groups Lobbying for Ninth Schedule Protection for Unconstitutional Legislation

State	Interest Group	Policy	Years	Legislation	Status	Demand	Source
Andhra Pradesh	Kapus	Inclusion under OBC category	2015–19		Groups are drafting legislation	Pass and include in Ninth Schedule	PTI (2018)
Gujarat	Patidars	10% Reservation	2015–19	Gujarat Unreserved Economically Weaker Sections Ordinance, 2016	Invalidated as unconstitutional by Gujarat High Court	Inclusion in Ninth Schedule	Prakash (2016)
Haryana	Jats	10% Reservation	2004–19	Haryana Backward Classes Act, 2016	Upheld by Punjab and Haryana High Court; currently pending challenge in the Supreme Court	Inclusion in Ninth Schedule	Surai (2016)
Jharkhand	SC, ST, and OBCs	Additional 23% reservation	2001–19		Draft legislation	Enact and include in Ninth Schedule	PTI (2016)
Karnataka	SC, ST, and OBCs	Additional 20% reservation	2008–19		Draft legislation	Enact and include in Ninth Schedule	TNN (2016)
Madhya Pradesh	SC, ST, and OBCs	Additional 13% for OBC and 10% for Economically Weaker Section	2008–19	Madhya Pradesh Lok Seva Amendment Bill, 2019	Passed unanimously in the legislative assembly pending governor's assent; Bhopal High Court stayed ordinance on the same matter in March 2019	Inclusion in Ninth Schedule	*Hindustan Times* (2019)
Maharashtra	Marathas	16% Reservation	2014–19	Maharashtra State Reservation for SEBC Act, 2018	Challenged and upheld as constitutional in the Bombay High Court	Inclusion in Ninth Schedule	Mahamulkar (2018)

Odisha	SEBC groups	27% Reservation	2006–19	Orissa Reservation of Posts and Vacancies Act, 2008	Invalidated by Orissa High Court; reservation reduced to 11.5% by the government as an interim measure	Inclusion in Ninth Schedule	Patnaik (2013)
Rajasthan	Gujjars, Banjaras, Gadiya Lohars, Rebaris and Gadariyas	5% Reservation	2008–19	Rajasthan Special Backward Classes Act, 2015	Invalidated by Rajasthan High Court	Inclusion in Ninth Schedule	TNN (2009); *Scroll* (2015)
Rajasthan	Gujjars, Banjaras, Gadiya Lohars, Rebaris and Gadariyas	5% Reservation	2015–19	Rajasthan Backward Classes Amendment Bill, 2019	Passed in the legislative assembly	Inclusion in Ninth Schedule	Anshuman (2019)
Telangana	Muslims	12% Reservation under OBC category	2014–19	Telangana Backward Classes, SC, ST Reservations Bill, 2017	Unanimously passed in the legislative assembly; awaiting approval of the legislative council and governor	Inclusion in Ninth Schedule	Apparasu (2017)
Uttar Pradesh	Most Backward Classes	Additional reservation extending to posts in the judiciary	2009–19		Draft legislation	Enact and include in Ninth Schedule	TNN (2011)

Note. The information was compiled from news archives from January 1997 to July 2019. OBC = Other Backward Classes; SC = Scheduled Caste; ST = Scheduled Tribe; SEBC = Socially and Economically Backward Classes.

example, high litigation costs because of large bench sizes[18]—then the expected value will reduce. The interest group will abandon the unconstitutional statute only if the net expected benefits from appealing the decision before the judiciary and from seeking Ninth Schedule protection from the legislature are both negative.

If we assume that a granting of constitutionality results in the same stream of benefits irrespective of the forum that grants it, then interest groups evaluate only the relative costs of repairing constitutionality—that is, the expected cost of the appeal versus the constitutional amendment process and the chances of acquiring constitutionality through the appeal or amendment process. Like litigants, interest groups forum shop between jurisdictions (Rubin, Curran, and Curran 2001). In the case of repairing unconstitutionality, rent seekers forum shop between different branches of government, in the Indian case between Parliament and the Supreme Court.

5. INCONSISTENT USE OF THE NINTH SCHEDULE

If interest groups respond to incentives created by the constitutional structure and maximize net expected value while repairing unconstitutionality, then Ninth Schedule expansion and slowdown can be explained by changes in the relative expected value of seeking Ninth Schedule protection. Analyzing the statutes in the Ninth Schedule and major events in Indian constitutional jurisprudence and history shows changes in relative costs (and therefore relative net expected benefits) of approaching the legislature versus the judiciary. These changes in relative costs can be explained by three factors.

18. In the Indian Supreme Court, larger benches (five or more judges) are associated with a much longer hearing, longer opinions, and a higher chance of a split opinion from the bench (Robinson et. al 2011). Parties to the suit are also asked more questions from the bench when appearing before benches of five or larger. Each of these aspects increases the litigation costs (nontrivial) for the parties in question. To navigate larger benches, parties typically need to contract a senior advocate—a member of an elite club of lawyers forming less than 1 percent of the lawyers enrolled at the Bar Council of India. Given their elite nature and caseloads, senior advocates charge very high legal fees ranging between 500,000 and 1,500,000 rupees (approximately $7,000–$22,000) per appearance in court (Shrivastava 2015). Senior advocates in the Supreme Court and high courts do not work under a fixed-fee or a contingency-fee model in India and typically charge per appearance, and an increase in the duration of the case can significantly increase the legal costs. Smaller benches, typically with two or three judges, tend to issue quick orders and shorter opinions.

First, in 1973 it became more difficult to formally amend the text of the constitution, as amendments now effectively required ex post judicial ratification, which increased interest groups' costs of securing constitutional amendments. In *Kesavananda Bharati v. State of Kerala* (AIR 1973 SC 1461), the Supreme Court, in a 7–6 opinion, recognized Parliament's power to amend the constitution but held that some parts of the constitution were inviolable and therefore beyond that amending power. The Supreme Court enumerated a nonexhaustive list of such features, including republican and democratic form of government, separation of powers, and federalism. However, the court did not protect the entire set of fundamental rights, and it held that some rights (such as the takings clause in article 31) were not part of the basic structure. Nor did it provide an exhaustive list of all the provisions that formed the basic structure. The question of whether an amendment violated the basic structure would be judicially determined on a case-by-case basis every time a constitutional amendment was challenged. Therefore, it was not known ex ante which amendments would pass the basic-structure test. The effect of *Kesavananda Bharati* was that constitutional amendments could be vetoed or approved ex post by the judiciary, thereby posing an additional hurdle for interest groups seeking constitutional amendments through Parliament (Rajagopalan 2016).

The specific question regarding the validity of the Ninth Schedule in light of *Kesavananda Bharati* came up in *Waman Rao v. Union of India* (AIR 1980 SC 1789). The court followed the doctrine in *Kesavananda Bharati* and held that the Ninth Schedule was constitutionally valid since it was created before the *Kesavananda Bharati* precedent. The court also held that any inclusions in the Ninth Schedule after the *Kesavananda Bharati* judgment were open to challenge on the ground of violating the basic structure of the constitution. The new precedent made Ninth Schedule benefits less certain and increased the chances of incurring litigation costs in the future. Since the courts could scrutinize Ninth Schedule statutes ex post, it became more attractive for interest groups seeking unconstitutional benefits to approach the judiciary directly and seek constitutional change through interpretation.

Second, from 1951 to 1978, Parliament amended the constitution 44 times with 12 amendments[19] to fundamental rights. These amendments

19. They are the First, Third, Fourth, Seventh, Seventeenth, Twenty-Fourth, Twenty-Fifth, Twenty-Ninth, Thirty-Fourth, Thirty-Ninth, Fortieth, and Forty-Second Amendments.

diluted the constraints imposed by fundamental rights and therefore allowed more wealth transfers and rent seeking within constitutional rules. This increased subconstitutional (that is, within existing constitutional rules) rent seeking, because more rent creations and transfers were constitutional. The most important is the Forty-Fourth Amendment (1978), passed immediately after the Emergency, which deleted the takings clause and abridged the right to private property. Consequently, post-Emergency, more of the subsequent wealth-transferring legislation passed constitutional scrutiny. The expectation that courts would uphold the constitutionality of rent-seeking statutes reduced the need to engage in constitutional repair through the legislature. Or in cases in which lower courts held a statute unconstitutional based on some past precedent, it incentivized interest groups to engage in unconstitutionality repair through the Supreme Court, which would clarify and enforce the newly amended diluted fundamental rights.

Third, after the Emergency, the Supreme Court started a new phase of judicial activism and reducing costs of approaching the judicial forum by diluting locus standi[20] requirements, taking *suo moto*[21] action on matters, and initiating judicial inquiries. Traditionally, the law required that only individuals whose rights had been violated or who were adversely affected by the action could approach the courts. In 1981, the Supreme Court held that "[w]here a legal wrong or a legal injury is caused to a person . . . and such person . . . [is] unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ" (*S. P. Gupta v. Union of India,* [1981] Supp SCC 87 [17]). Post-Emergency, groups previously unable to access judicial remedies were represented in the courts because of a dilution in standing requirements, which consequently reduced the cost of approaching the courts. This was accompanied by a trend of smaller benches. In the 1950s, almost half the constitutional benches of the Supreme Court had more than five judges. This decreased to 15 percent by the late 1970s and steadily decreased thereafter, which meant that the cost of acquiring a favorable decision was lower post-Emergency (Robinson et al. 2011).

These three factors resulted in an increasing trend to lobby the courts to reinterpret constitutional rules so frequently that different benches in

20. Locus standi requires a party to prove standing in court, that is, to demonstrate sufficient connection to, and harm from, the law of action challenged in court in order to support the party's participation in the case.

21. *Suo moto* action describes situations in which the court acts on its own and initiates cases.

the same court can often contradict one another (Bhuwania 2017). Rajagopalan (2016) demonstrates how the Supreme Court became the center for interest group lobbying as a consequence of these changes in costs imposed by the institutional constraints. The Supreme Court changed its posture, taking on populist and socialist stances to regain legitimacy after the Emergency. Bhuwania (2017) argues that judicial populism since the 1980s has produced a radical instability that continually pushes the limits of what a court can do. Post-Emergency, interest groups continued to remain active, formal constitutional amendments became costlier and less beneficial, and the judiciary became more approachable as a people's court. So rent-seeking activity shifted to the judiciary to change inconvenient constitutional rules through interpretation. These factors explain how the legislature became relatively costly and the judiciary became relatively cheaper for repairing the unconstitutionality of statutes, leading to a slowdown in the use of Ninth Schedule protection.

6. DORMANCY OF THE NINTH SCHEDULE

With no Ninth Schedule additions since 1995, it appears that interest groups are no longer seeking constitutional repair, and the Ninth Schedule is no longer relevant. Scholars have dismissed the Ninth Schedule as an artifact of the past because of the end of majority governments and the rise of coalition governments (Deva 2016; Chandrachud 2017). However, it is far from dead, as election manifestos of many political parties explicitly promise to enact unconstitutional legislation for reserving jobs in educational institutions through the Ninth Schedule (Anshuman 2019; TNN 1999, 2002; Gupta 2001; Zaidi 1998).

This raises the question, why did interest groups stop seeking Ninth Schedule protection from Parliament after 1995? Once again, there was a change in the relative costs of acquiring Ninth Schedule protection. After considering the matter for a decade (1997–2007), the Supreme Court made it more difficult to secure unconstitutionality repair through the Ninth Schedule in its 2007 opinion.

The status of the Ninth Schedule as established in *Waman Rao* came under judicial challenge in 1997 for clarification, and the Supreme Court ruled in 2007.[22] The lack of activity in the Ninth Schedule from 1997

22. In 1997 the judges reaffirmed *Waman Rao* and referred the matter to a larger Supreme Court bench (*I. R. Coelho v. State of Tamil Nadu,* [1999] 7 SCC 580) to clarify whether the basic-structure test can be applied to individual statutes in the Ninth Schedule or only to the constitutional amendments amending the Ninth Schedule.

to 2007 can be attributed to the fact that the matter was sub judice, and the legitimacy of Ninth Schedule protection was unclear. In 2007, a nine-judge bench of the Supreme Court unanimously held in *I. R. Coelho v. State of Tamil Nadu* (AIR 2007 SC 861) that if a statute 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 damages the basic structure of the constitution. Therefore, not just the constitutional amendments but the individual statutes would be subject to the basic-structure test. The courts would determine the validity under the basic-structure test after addition to the Ninth Schedule only on a case-by-case basis. Once again, this made the benefits less certain and increased the chances of incurring litigation costs after securing Ninth Schedule protection even more.

If the cost of Ninth Schedule protection increases or benefits become more uncertain, interest groups will either abandon the unconstitutional statute until the benefits from securing the constitutional validity are higher than the costs or create broader coalitions to share the costs of Ninth Schedule protection such that the benefits exceed the costs. State legislators who have passed statutes deemed unconstitutional and are seeking Ninth Schedule protection often declare this intent publicly but have not yet managed to acquire protection through a constitutional amendment. Table 2 details the interest groups seeking affirmative action protection for minority interests in educational institutions and public employment.

Affirmative action in India typically takes the form of a certain percentage of positions (in government jobs or educational institutions) reserved for historically disadvantaged groups. In *Indra Sahwney v. Union of India* (AIR 1993 SC 477), the Supreme Court held that the affirmative action policy was constitutionally valid but must not exceed 50 percent of all jobs. Politicians, especially state legislators, routinely promise these protections to groups previously left out of the policy. However, including new interest groups without affecting the benefits of incumbents would require violating the 50 percent rule and would therefore be unconstitutional. The groups listed in Table 2 explicitly intend these statutes (or draft bills) passed by state legislatures to violate the constitutional limit of 50 percent on reservations to increase the benefits to their constituents.

Expecting courts to enforce the 50 percent rule, interest groups have explicitly demanded that their benefits be added to the Ninth Schedule, as

with the Tamil Nadu statute added in 1994. The states listed in Table 2 are attempting to pass or have passed statutes that require Ninth Schedule protection. Some state legislatures have also passed resolutions to approach Parliament to add these unconstitutional statutes to the Ninth Schedule. However, repair of unconstitutionality through the Ninth Schedule has not been attempted since 1995, and no new constitutional amendment bills expanding the Ninth Schedule have been introduced in Parliament. While these legislators publicly demand Ninth Schedule protection, they have not yet successfully lobbied Parliament to include the statutes in Ninth Schedule protection through a constitutional amendment. Despite the various public demands to protect unconstitutional statutes, there is no constitutional amendment bill, in either draft form or tabled, in either house of Parliament, seeking Ninth Schedule protection. Parliament has passed nine formal constitutional amendments on other matters since 2007, but it has not passed a constitutional amendment to extend Ninth Schedule protection to the state statutes listed in Table 2.

The reason for this inactivity at the constitutional amendment level is that even if state legislators undertake the high costs of lobbying Parliament and are successful in passing a constitutional amendment, after the *Coelho* judgment (AIR 2007 SC 861) these protections may still come under judicial review on a case-by-case basis. This makes the potential benefits less certain and increases the chances of incurring litigation costs even after securing Ninth Schedule protection. One interpretation of the current situation is that the *Coelho* judgment has made it prohibitively costly for interest groups to successfully acquire Ninth Schedule protection, and that is the reason for much discussion but no action toward constitutional amendments. Another possibility is the emergence of a large coalition of states' interests, as the only way to successfully overcome this barrier is if the coalition of state legislators is large enough and stable enough to undertake the costs of lobbying Parliament and of the inevitable challenge of the constitutional amendment in the Supreme Court. In the future we may see a large coalition emerge to secure Ninth Schedule protection. Alternatively, and perhaps more likely, a large enough coalition could use the resources to lobby the Supreme Court to relax the 50 percent limit on affirmative action, thus eliminating the need for Ninth Schedule protection.

The experience with the Ninth Schedule highlights the persistence of rent seeking and the importance of optimal constitutional structures. The Ninth Schedule expanded when the relative cost of amending the consti-

tution was lower than that of appealing the court decisions as witnessed from the 1950s until the Emergency. Conversely, when it became relatively costlier to amend the constitution and receive Ninth Schedule protection because of *Kesavanda Bharati* (AIR 1973 SC 1461) and *Waman Rao* (AIR 1980 SC 1789), Ninth Schedule activity slowed down, and the judiciary became the relatively less costly forum for interest groups. Since the mid-1990s, the high costs of acquiring Ninth Schedule protection and the uncertainty over the benefits since *Coelho* (AIR 2007 SC 861; [1999] 7 SCC 580) have contributed to the recent dormancy. The Indian experience shows how institutional changes affect the incentives of interest groups and consequently the choice to repair unconstitutionality of political benefits.

7. CONCLUSION

The creation and expansion of the Ninth Schedule shows that when political benefits are blocked by the judiciary, interest groups may shift activities to the constitutional level to preserve the benefits by repairing the unconstitutionality of the statute. And interest groups evaluate the relative costs of repairing unconstitutionality through different branches of government.

Strict scrutiny through judicial review makes the legislature a more attractive forum for constitutional change, as demonstrated by the expansion and abuse of the Ninth Schedule from 1950 until the Emergency. But there are limits to the entrenchment of constitutional rules, as strict amendment procedures make constitutional change through the judiciary more attractive to interest groups as seen from the increased judicial activism and the slowdown of Ninth Schedule use post-Emergency and the recent dormancy since the mid-1990s. Therefore, a certain level of rent seeking at the constitutional level is inevitable unless the process of change in all fora is prohibitively costly, incentivizing interest groups to abandon such repair of unconstitutionality.

This paper shows that even when the judiciary strictly enforces constitutional rules, it may not successfully block interest groups, because they can change the inconvenient rules enforced by the judiciary through the legislature. Interest groups determine the forum of such repair on the basis of the relative costs of constitutional appeal versus the constitutional amendment process.

The Indian experience with the Ninth Schedule extends the generalizability of Epstein's scholarship. He argues for the judiciary to use narrow interpretation to block interest groups from seeking political benefits. This holds for the specific context of the US Constitution, as it is prohibitively costly to amend it through the formal amendment process in article V. Consequently, interest groups place an extraordinary emphasis on lobbying the federal judiciary, making Epstein's prescriptions of the judiciary relevant. However, an easier constitutional amendment process provides a way to overcome a judiciary blocking rent seeking. Therefore, to extend this view to relatively less entrenched constitutions, like the Indian case, requires incorporating Epstein's scholarship on constitutional design.

The recent experience with the dormancy of the Ninth Schedule highlights Epstein's (2011a, 2017) scholarship on optimal constitutional structure. No single institution can curtail political ambitions, as it may make other, weaker institutions more attractive as vehicles to pursue political benefits. Checks and balances in the form of separation of powers and federalism, as advocated by Epstein, take renewed importance in light of India's experience with the Ninth Schedule.

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