



The Indian Journal for Research in Law and Management

Open Access Law Journal – Copyright © 2026

Editor-in-Chief – Dr. Muktai Deb Chavan; Publisher – Alden Vas; ISSN: 2583-9896

This is an Open Access article distributed under the terms of the Creative Commons Attribution-Non-Commercial-Share Alike 4.0 International (CC-BY-NC-SA 4.0) License, which permits unrestricted non-commercial use, distribution, and reproduction in any medium provided the original work is properly cited.

DEEMED ASSENT, DENIED DOCTRINE: THE SUPREME COURT'S SELF-REVERSAL BETWEEN THE TAMIL NADU JUDGMENT AND THE 2025 PRESIDENTIAL REFERENCE

~ D. Kavın

ABSTRACT

*This paper evaluates the Supreme Court of India's doctrinal shift regarding gubernatorial powers under Article 200 of the Constitution, analyzing the transition from the two-judge bench decision in *State of Tamil Nadu v. Governor of Tamil Nadu* (April 2025) to the five-judge Constitution Bench opinion in the subsequent Presidential Reference (November 2025). It advances three primary claims: first, the Presidential Reference substantively reverses the Tamil Nadu ruling by invalidating judicially prescribed timelines, gubernatorial binding by ministerial advice under Article 200, and the doctrine of "deemed assent" under Article 142; second, although this reversal is justified on textual, historical, and precedential grounds, the Court's surviving remedy of a "limited mandamus" against prolonged inaction remains indeterminate, functionally incomplete, and leaves key procedural questions unresolved; and third, the incident illustrates a transition from strong to weak judicial review, as conceptualized in Jeremy Waldron's constitutional framework. Employing a doctrinal, text-based methodology, the analysis highlights the paradox where the original decree granted to Tamil Nadu remains intact via the decree-doctrine distinction while future state litigants lose access to the "deemed assent" mechanism. Ultimately, the paper concludes that resolving gubernatorial delay within Indian federalism requires a formal constitutional amendment setting explicit timelines rather than sole reliance on weak judicial mandamus or executive restraint.*

I. INTRODUCTION

Under Article 200 of the Constitution of India, a Governor presented with a Bill passed by the State Legislature is supposed to assent to it, withhold assent, or reserve it for the President. But neither article specifies any deadline.¹ On 8 April 2025, a two-judge bench of the Supreme Court of India decided that the silence of the constitutional text cannot be understood to permit indefinite procrastination. In *State of Tamil Nadu v. Governor of Tamil Nadu*, the bench found outer deadlines implicit in Articles 200 and 201 and, relying on Article 142, treated ten pending Bills of the Tamil Nadu Legislature as being in receipt of assent.² Some five weeks later, on 13 May 2025, the President of India referred fourteen questions to the Court under Article 143(1).³ On 20 November 2025, a Constitution Bench of five judges answered the questions. There are no judicially mandated deadlines for the Governor or the President; the Governor is not bound by the aid and advice of the Council of Ministers when exercising his powers under Article 200; and Article 142 “does not allow for the concept of ‘deemed assent’ of Bills.”⁴ Still, the Court decided that a “prolonged, unexplained and indefinite inaction” might give rise to “a limited mandamus.”⁵

This paper advances three claims. First, the Presidential Reference reverses the very substance of the *Tamil Nadu Judgment*, despite the insistence of the Court that it did not sit in appeal over the latter. Second, this reversal is justified on two grounds advanced in the Presidential Reference – the hierarchy of judicial precedents and the text of the Constitution – yet the remedy of the “limited mandamus” remains by far the least clear part of the opinion: it preserves the premise of the earlier decision, which was that inaction can be reviewed, while discarding the means that made this premise actionable. Third, the incident offers a good case study of the debate over the legitimacy of judicial power and the distinction drawn in it by Jeremy Waldron between the strong and the weak judicial review.⁶

The title of the paper highlights a paradox. The Court denied a doctrine of “deemed assent,” yet on the basis of its own logic the judicial relief based on that doctrine remains valid.⁷ Part II of the paper outlines the constitutional text and both decisions. Part III addresses whether a judicial advisory opinion can reverse a judgment of the Court. Part IV identifies the reversal

¹ India Const. art. 200; *id.* art. 201.

² *State of Tamil Nadu v. Governor of Tamil Nadu*, (2025) 8 S.C.C. 1, 2025 INSC 481 (India Apr. 8, 2025) [hereinafter *Tamil Nadu Judgment*].

³ *In re Assent, Withholding or Reservation of Bills by the Governor & the President of India*, Special Reference No. 1 of 2025, 2025 INSC 1333, ¶ 1 (India Nov. 20, 2025) [hereinafter *Presidential Reference*].

⁴ *Id.* ¶ 165.10.

⁵ *Id.* ¶ 165.3.

⁶ Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 Yale L.J. 1346, 1354–55 (2006).

⁷ *Presidential Reference*, *supra* note 3, ¶¶ 26–27.

and Part V its survivors. Part VI discusses the incident in light of Jeremy Waldron's distinction. Part VII places it within the framework of Indian federalism. The analysis in this paper is doctrinal and relies on the texts. It does not survey how the courts have applied the "limited mandamus" since November 2025, which would be the most obvious follow-up question.

II. THE TEXT, THE JUDGMENT AND THE REFERENCE

Articles 200 and 201 provide for a simple chain of events. When a Governor is given a Bill to deal with, he may assent to it, withhold assent from it, or reserve it for the President. According to the first proviso, if the Bill is not a Money Bill, the Governor may return the Bill "as soon as possible" with a message inviting the Legislature to reconsider the matter, and then if the Legislature passes the Bill again the Governor shall not withhold his assent to it. Article 201 provides that when a reserved Bill is brought to the President, the latter may assent to the Bill or withhold his assent from it. Neither of these articles specifies any deadline within which these actions are to be done.⁸

In the *Tamil Nadu Judgment* the Court had to deal with what seemed to it a bizarre case of indefinite gubernatorial inaction.⁹ According to the Reference, the two-judge bench drew four conclusions relevant to this paper. First, the Governor ordinarily acts on the basis of the advice of the Council of Ministers of the State, regarding the second proviso to Article 200 as the only provision providing for discretion and the reservation of certain Bills as discretionary "by necessary implication."¹⁰ Second, the Court prescribed the outer deadlines of one month where the Governor acts on ministerial advice, of three months where the Governor acts contrary to ministerial advice, and of one month to grant assent once a Bill is re-passed.¹¹ Third, the Court regarded these deadlines as instruments of judicial review rather than a constitutional amendment.¹² Finally, using Article 142, the Court granted assent in cases where the deadlines were breached, which was later characterized by the Presidential Reference as a "deemed assent."¹³

The Union's response to the judgment was the Presidential Reference. Its recitals stated that Articles 200 and 201 provide no deadlines, that there is disagreement among decisions of the

⁸ India Const. arts. 200, 201.

⁹ *Presidential Reference*, *supra* note 3, ¶ 123.

¹⁰ *Presidential Reference*, *supra* note 3, ¶¶ 78, 88 (describing *Tamil Nadu Judgment*, *supra* note 2, ¶¶ 334.1–.2, 456.16.3).

¹¹ *Presidential Reference*, *supra* note 3, ¶ 111 (quoting *Tamil Nadu Judgment*, *supra* note 2, ¶ 260).

¹² *Presidential Reference*, *supra* note 3, ¶ 126 (discussing *Tamil Nadu Judgment*, *supra* note 2, ¶ 250).

¹³ *Presidential Reference*, *supra* note 3, ¶ 127.

Court about the justiciability of the President's assent, and that the doctrine of deemed assent "is alien to the constitutional scheme."¹⁴ The States opposed to the Reference contended that eleven of the fourteen questions have been already answered in the *Tamil Nadu Judgment* and that the Reference was an indirect attack on it.¹⁵ However, the bench of five judges (CJI Gavai, Justices Surya Kant, Vikram Nath, Narasimha, and Chandurkar) rejected this objection and answered the remaining questions. It returned two questions as irrelevant to the Reference and treated a third one on Article 142 as too general.¹⁶

III. THE DOORWAY: CAN AN ADVISORY OPINION REVERSE A JUDGMENT?

The first ground of unfitness was jurisdictional. Citing *Cauvery* (2), the opposing States argued that the overlapping nature of the questions asked with those determined in the *Tamil Nadu Judgment* made the Reference an appeal in disguise, which could not overrule a precedent of the Court under Article 143 jurisdiction.¹⁷

The Court answered in two steps. First, it cited the opinion of Chandrachud J. in *Special Courts Bill*, according to which the Court could always revise and if needed overrule its own view, and other courts would be bound by its view of law whether it was expressed in advisory jurisdiction or not.¹⁸ Second, it cited *Natural Resources Allocation*, which distinguishes a "decision" from a "view of law". A decision between parties could be reviewed only by means of a review or curative petition. A view of law announced in a decision could be reviewed, subject to a discipline imposed on the Court that restricted overruling to exceptional cases such as *per incuriam* decision or a manifestly wrong decision.¹⁹ Thus, on this footing the Court held that the Reference did not require it to "vacate, amend, or modify" the relief granted in the *Tamil Nadu Judgment*, and the Court agreed with the Union that the Reference sought the clarification of principles for future governance rather than setting aside an awarded decree.²⁰

Four conclusions can be drawn. First, the Court applied the distinction between decree and doctrine consistently. The distinction has a long pedigree, and the opinion is correct in stating

¹⁴ *Presidential Reference*, *supra* note 3, ¶ 1.

¹⁵ *Id.* ¶ 13.

¹⁶ *Id.* ¶¶ 28, 165.12–14.

¹⁷ *Presidential Reference*, *supra* note 3, ¶ 18; *see In re Cauvery Water Disputes Tribunal*, 1993 Supp. (1) S.C.C. 96, ¶¶ 83, 85 (India).

¹⁸ *In re Special Courts Bill*, 1978, (1979) 1 S.C.C. 380, ¶ 101 (India) (Chandrachud, J.), *quoted in Presidential Reference*, *supra* note 3, ¶ 19.

¹⁹ *In re Natural Resources Allocation*, Special Reference No. 1 of 2012, (2012) 10 S.C.C. 1, ¶¶ 47–48 (India), *quoted in Presidential Reference*, *supra* note 3, ¶¶ 22–23.

²⁰ *Presidential Reference*, *supra* note 3, ¶¶ 26–27.

that an overruling of a precedent does not undo the decree. Second, the imposed discipline is reflected in the opinion, yet it is not, in the maintainability analysis, applied case-by-case.²¹ The reason for deviation from the precedent can be found in the hierarchy of precedents, according to which State of Punjab did not refer to the larger bench decisions in *Kameshwar Valluri* and *Hoechst*; the *Tamil Nadu Judgment* was in conflict with them, and the two judgments “could not have deviated from the binding precedents of larger Bench decisions.”²² This argument is the most convincing if applied to a two-judge bench decision. If applied to the three-judge decision in State of Punjab, it rests on the two five-judge decisions, because the opinion itself refers to the decision in *Hoechst* as a three-judge decision.²³

Third, the method of reversal brings about an anomaly that the opinion accepts, yet does not discuss. The relief provided by the Court in the earlier case is preserved, so the ten Bills are where the previous judgment put them, although the principle that put them there is now considered unconstitutional.²⁴ A later litigant in the position of the State of Tamil Nadu could not obtain the same relief. The first litigant has retained the advantage of the principle, whereas every later litigant has lost it. This is the cost of the distinction between decree and doctrine, and this is the way in which the Reference reverses the *Tamil Nadu Judgment* without disturbing its result. Fourth, the opinion binds. In accordance with the logic of *Special Courts Bill*, which the Court followed, other courts are bound by the view expressed by the Court in advisory jurisdiction, so High Courts cannot consider the Reference just as persuasive.²⁵

IV. WHAT WAS REVERSED?

The opinion makes clear how far the reversal has gone. It stated that the reading of *Samsher Singh* in the *Tamil Nadu Judgment* “cannot be relied upon as good law,” called its timelines “erroneous,” and described its distinction between timelines as yardsticks and timelines as deeming “an artificial distinction without a difference.”²⁶ The following table summarises the differences.²⁷

²¹ See *Presidential Reference*, *supra* note 3, ¶¶ 23, 26–28.

²² *Id.* ¶ 40; see *State of Bihar v. Kameshwar Singh*, (1952) 1 S.C.C. 528 (India); *Union of India v. Valluri Basavaiah Chowdhary*, (1979) 3 S.C.C. 324 (India); *Hoechst Pharmaceuticals Ltd. v. State of Bihar*, (1983) 4 S.C.C. 45 (India); *State of Punjab v. Governor of Punjab*, (2024) 1 S.C.C. 384 (India).

²³ *Presidential Reference*, *supra* note 3, ¶ 11 n.21, ¶ 40 n.48.

²⁴ *Id.* ¶¶ 26–27.

²⁵ *Id.* ¶¶ 19–20.

²⁶ *Id.* ¶¶ 78, 114, 127.

²⁷ The table is compiled from *Presidential Reference*, *supra* note 3, ¶¶ 78, 88, 111, 114, 126–27, 165.1–10, and the descriptions there of the *Tamil Nadu Judgment*, *supra* note 2.

Issue	Tamil Nadu Judgment (Apr. 2025)	Presidential Reference (Nov. 2025)
Governor's discretion under Article 200	Governor generally bound by aid and advice; second proviso the only express discretion	Discretion in choosing among three options; not bound by aid and advice (¶ 165.2)
Time limits	One month on advice, three months against advice, one month after re-passage	No judicially prescribed timelines (¶¶ 165.5, 165.7)
Deemed assent	Assent granted under Article 142 on breach of the limits	Article 142 does not allow deemed assent (¶ 165.10)
Inaction	Reviewable once the limits lapse	Limited mandamus for prolonged, unexplained and indefinite inaction; no merits review (¶ 165.3)
The President under Article 201	Timelines and observations on the President	Not justiciable; earlier observations obiter (¶¶ 114, 165.6)

A. Discretion. The most far-reaching reversal pertains to discretion. The *Tamil Nadu Judgment* interpreted the seven-judge decision in *Samsher Singh* as having stated that the second proviso to Article 200 is the only place where a Governor can act at discretion. The Reference held that this interpretation cannot stand; that the Governor enjoys discretion in choosing among three options and that the first proviso restricts these options, and creates not a fourth one.²⁸ The decision also held that for Bills containing provisions such as Articles 31A, 31C and 254(2), the Governor is expressly required to reserve them for the President, and that this is not done

²⁸ *Presidential Reference*, *supra* note 3, ¶¶ 78, 88, 165.1–.2; see *Samsher Singh v. State of Punjab*, (1974) 2 S.C.C. 831 (India); *Nabam Rebia & Bamang Felix v. Arunachal Pradesh Legislative Assembly*, (2016) 8 S.C.C. 1 (India).

through discretion by “necessary implication.”²⁹ This is important, because the timelines were based on this premise. The earlier judgment drew a distinction between a Governor acting on advice and one acting against it, and the Reference noted that when the Governor is not bound by advice, a single set of timelines becomes legally problematic.³⁰ Therefore, the reversal on discretion undermines the basis of the timelines even before the argument about the timelines themselves can be brought up.

B. Timelines. The case made by the Court against judicial timelines is based on text, history and precedent. As for the text, the only definite period in Articles 200 and 201 is the six months allotted for reconsideration of the Legislature under the proviso to Article 201, which means that the framers included time limits only where they wanted to do so.³¹ The Court referred to the history of debates in which the Constituent Assembly accepted the amendment proposed by Dr. Ambedkar deleting “six weeks” from the article that became Article 111, despite the support of the draft amendment by H.V. Kamath.³² Concerning precedent, the Court relied on the Constitution Bench decision in *Purushothaman Nambudiri*, which treated the absence of time limits in Articles 200 and 201 as significant.³³ It interpreted “as soon as possible” as a qualification of the option to withhold and return and not the other two.³⁴ It distinguished *Keisham Meghachandra Singh*, in which a speaker, acting as a tribunal, could be directed to take his decision in a reasonable time from the constitutional role of the Governor, and Ministry of Home Affairs circulars from the constitutionally sanctioned time periods.³⁵

The textual and historical arguments of the Court are strong. The further argument that the text gives the constitutional authorities “a sense of elasticity” to deal with various situations is not very convincing.³⁶ The “elasticity” belongs to the Governor, and the opposing States had relied on the reports of the Sarkaria and Punchhi Commissions, the latter suggesting a maximum

²⁹ *Presidential Reference*, *supra* note 3, ¶¶ 88, 90.

³⁰ *Id.* ¶¶ 111, 125.

³¹ *Presidential Reference*, *supra* note 3, ¶ 109; India Const. art. 201, proviso.

³² *Presidential Reference*, *supra* note 3, ¶ 106 & nn.98–99 (citing 8 Constituent Assembly Debates 192, 194 (May 20, 1949)).

³³ *Presidential Reference*, *supra* note 3, ¶ 110 (quoting *Purushothaman Nambudiri v. State of Kerala*, 1961 INSC 331 (India)).

³⁴ *Presidential Reference*, *supra* note 3, ¶ 108.

³⁵ *Presidential Reference*, *supra* note 3, ¶¶ 112–13; see *Keisham Meghachandra Singh v. Speaker, Manipur Legislative Assembly*, (2021) 16 S.C.C. 503 (India).

³⁶ *Presidential Reference*, *supra* note 3, ¶ 115.

period of six months.³⁷ The history referred to by the Court relates to Article 111, and the opinion draws an analogy from it to Article 200.³⁸

C. Deemed assent. This is the most elaborate part of the opinion. The Court began from the observation that the framers of the Constitution knew how to include deeming clauses. Articles 109(4)-(5) and 198(4)-(5) deem a Money Bill passed if the upper House did not return it within fourteen days, and there is no similar clause in Articles 200 and 201.³⁹ Comparative practice supports this argument: where a constitution needs a silence to ripen into law, it includes such a clause.⁴⁰ In addition, the Court added that the deeming provision presupposes a “substitutional role” for the Court to perform instead of another constitutional official, which is contrary to the separation of powers as part of the basic structure.⁴¹ The Court rejected the claim that the timelines and deeming were just gap-filling under Article 142, holding that Article 142 could not be used to achieve a result inconsistent with the express provisions of the Constitution, and citing *Prem Chand Garg*, *Supreme Court Bar Association* and *Shilpa Sailesh*.⁴² The opinion refused to take A.G. Perarivalan as a starting point, because the latter dealt with Article 161 and a Governor bound by ministerial advice.⁴³ Finally, the Court dismissed the distinction between timelines as yardsticks and timelines as deeming introduced by the earlier bench, as “virtually a takeover, and substitution” of the executive functions by the judiciary.⁴⁴

D. The President and Article 143. The opinion limited the earlier judgment on two points. It held that the timelines and conclusions concerning the President under Article 201 were “merely obiter” as they did not arise in the particular case.⁴⁵ And the Court held that the earlier statement that the President should ask for advice under Article 143 was a mere suggestion.⁴⁶

Together, these holdings make the architecture of the earlier decision hardly standing. It is correct to say that the Reference is a reversal, even though the Court presented its task as

³⁷ *Id.* ¶ 105.

³⁸ *Id.* ¶ 106.

³⁹ *Id.* ¶ 117.

⁴⁰ See U.S. Const. art. I, § 7, cl. 2 (Bill becomes law without signature if not returned within ten days, Sundays excepted, unless Congress’s adjournment prevents return); *The Pocket Veto Case*, 279 U.S. 655 (1929).

⁴¹ *Presidential Reference*, *supra* note 3, ¶ 118.

⁴² *Id.* ¶¶ 119–22; see *Prem Chand Garg v. Excise Comm’r*, A.I.R. 1963 S.C. 996 (India); *Supreme Court Bar Ass’n v. Union of India*, (1998) 4 S.C.C. 409 (India); *Shilpa Sailesh v. Varun Sreenivasan*, (2023) 14 S.C.C. 231 (India).

⁴³ *Presidential Reference*, *supra* note 3, ¶¶ 123–24; see *A.G. Perarivalan v. State of Tamil Nadu*, (2023) 8 S.C.C. 257 (India).

⁴⁴ *Presidential Reference*, *supra* note 3, ¶¶ 127–28.

⁴⁵ *Presidential Reference*, *supra* note 3, ¶ 114.

⁴⁶ *Id.* ¶ 152.

reconsideration “the view of law expressed, differently.”⁴⁷ The Court’s own characterization of the contested paragraphs is “erroneous.”

V. WHAT SURVIVED: THE LIMITED MANDAMUS

In its decision in the Reference, the Court did not restore the law to its status prior to April 2025. Rather, the Court concluded that although the decision of a Governor as to which of the three available options to pursue cannot be reviewed as to its merits, the scheme provided in the Constitution works only if it is actually worked. Thus, a failure to act on the part of the Governor could not serve as grounds for invoking the discretionary powers of a Governor.⁴⁸ When that inaction is “prolonged, unexplained and indefinite,” the Court may order a Governor to act within a reasonable time without any comments upon the merits of the choice.⁴⁹ Factors listed by the Court as illustrations include the complexity of the Bill, the emergent nature of the enactment, and the consultative process followed by the Governor, and the Court emphasized that the Court could not order a specific line of action or formulate a formulaic timeline.⁵⁰ Its precedent for such a remedy was the *Aeltemesh Rein* case, where the Court ordered the Union to reconsider whether the time had come to bring a provision into force, although the A.K. Roy case had ruled out issuance of mandamus for bringing a constitutional amendment into force.⁵¹

The reasoning is quite familiar for those dealing with administrative law. In the *Padfield* case, the House of Lords held that a discretion vested in a public officer by Parliament should be used to achieve the goals of the statute, and an official refusing to refer a complaint could be directed to consider it in accordance with the law.⁵² Article 200 provides the Governor with a discretion; however, it does not provide for a power to freeze the legislative process. Thus, the remedy provided in the Reference is a *Padfield*-type directive, not an order to decide a matter in a certain way.

The Court also closed another line of defence for the Governor, i.e., that Article 361 barred the very limited relief the Reference sought to provide. In keeping with the *Rameshwar Prasad* case, the Court held that immunity of a Governor did not bar consideration of the validity of

⁴⁷ *Id.* ¶ 26.

⁴⁸ *Id.* ¶¶ 154–56.

⁴⁹ *Id.* ¶¶ 158, 165.3.

⁵⁰ *Id.* ¶ 159.

⁵¹ *Id.* ¶ 157; see *Aeltemesh Rein v. Union of India*, (1988) 4 S.C.C. 54 (India).

⁵² *Padfield v. Minister of Agric., Fisheries & Food*, [1968] A.C. 997, 1030 (H.L.) (appeal taken from Eng.) (Lord Reid).

an action, and “constitutional office of the Governor” remained subject to judicial review to prevent prolonged and evasive inaction.⁵³ The approach is similar to the narrow interpretation of ouster clauses associated with the *Anisminic* case.⁵⁴

However, there are still three issues to be resolved. First, the decision suffers from indeterminacy. The Court rejected the earlier bench’s timelines as being “one-size-fits-all,”⁵⁵ but the proposed replacement is a reasonable time determined in each case in relation to the set of factors whose weight has not been established by the Court. At least the earlier timelines were announced in advance, and the Governor could plan in light of those. Second, the remedy offered in the Reference lacks a definite endpoint. A direction to act does not provide for what to do when a Governor reserves the Bill with the President, which is one of the three options that the Governor has.⁵⁶ For the President, the operative conclusions confirm non-justiciability and the lack of judicially prescribed timelines, but they do not indicate whether the limited mandamus applies to inaction under Article 201.⁵⁷ Thus, a delay can be shifted from one office to the other. Third, the opinion of the Court in the passages dealing with the remedy does not state what would happen if a Governor disregards the direction.⁵⁸ The effectiveness of the remedy is dependent on answering this question.

VI. READING THE REVERSAL THROUGH WALDRON

Waldron’s argument is targeted against strong judicial review of legislation. In a system of strong review, courts have the power to refuse to apply a statute or to modify it in such a way that it would conform to the rights, and to establish that they will not be applying the statute. In a system of weak review, courts review legislation, but cannot refuse to apply it.⁵⁹ Waldron notes that review of the actions of executive officials to ensure compliance with the relevant legal authorization is almost universally accepted, and he treats the extension of his argument to the actions of the executive officials as an open question.⁶⁰ Waldron also stresses that his

⁵³ *Presidential Reference*, *supra* note 3, ¶¶ 163–64, 165.4; see *Rameshwar Prasad v. Union of India*, (2006) 2 S.C.C. 1 (India).

⁵⁴ *Cf. Anisminic Ltd. v. Foreign Compensation Comm’n*, [1969] 2 A.C. 147 (H.L.) (appeal taken from Eng.).

⁵⁵ *Presidential Reference*, *supra* note 3, ¶ 125.

⁵⁶ *Id.* ¶ 165.1.

⁵⁷ *Id.* ¶¶ 165.6–.7.

⁵⁸ *Id.* ¶¶ 158–59, 164.

⁵⁹ Waldron, *supra* note 6, at 1354–55.

⁶⁰ *Id.* at 1354 & n.21.

argument is conditioned on four assumptions, including democratic and judicial institutions functioning reasonably well.⁶¹

However, the target of Waldron's criticism is not the Governor's compliance with the law. Mandamus forcing the Governor to act under Article 200 is the review of an official as to the compliance with the relevant legal authorization, which is described by Waldron as uncontroversial. The question Waldron asks is a different one. Deemed assent in the *Tamil Nadu* judgment enforced not the limit on an official, but supplied the missing constitutional act. Assent is the step turning a Bill into a law, and the earlier bench, by deeming it, modified the operation of the constitutional scheme in a way inconsistent with the constitutional text. This is the structure of strong review: the Court modified the operation of an enactment in a way inconsistent with the constitutional text. The limited mandamus provided in the Reference has the structure of weak review: the Court scrutinized, ordered a response and left the substantive decision to the actor designated by the Constitution, very much like the declaration of incompatibility in the United Kingdom has the effect but not displace the decision of the political branches.⁶² Moreover, the language of the Reference of a "dialogic process" point in the same direction.⁶³

The analogy has its limitations, however. Waldron's criticism addresses the issue of democratic legitimacy, which means who has the power to resolve disputed issues. The *Tamil Nadu judgment* does not fit the familiar format of that dispute. The Bickel's counter-majoritarian difficulty assumes that judicial review interferes with an elected majority.⁶⁴ However, here the Court acted on behalf of the elected assembly against the appointed Governor, and then the Reference restored the discretion of the Governor in the name of the separation of powers. The legitimacy issue was not the outcome, but the procedure used. The Reference, like Waldron, insists that the decision procedure is important regardless of the result reached.⁶⁵

Conditionality also helps. Waldron's criticism is predicated on the assumption that the institutions are in reasonable working order.⁶⁶ The Governor dispute, however, is in part an argument that one of the institutions is not. Khaitan describes the Governor's office appointed

⁶¹ *Id.* at 1360.

⁶² *Id.* at 1355.

⁶³ *Presidential Reference*, *supra* note 3, ¶ 156.

⁶⁴ Alexander M. Bickel, *The Least Dangerous Branch* 16–17 (2d ed. 1986).

⁶⁵ *See generally* Waldron, *supra* note 6.

⁶⁶ *Id.* at 1360.

by the centre as the longstanding design flaw that has been misused by many administrations.⁶⁷ If this is correct, the Tamil Nadu dispute is the example of non-core case in Waldron's terminology, in which additional judicial intervention is more easily justified. Nevertheless, the kind of intervention is still an issue, and on that issue the Reference's weak-form remedy is more defensible one, though it is incomplete in its functionality.

VII. FEDERALISM AND THE POLITICS OF DELAY

The Court has situated Article 200 in a federal context, devoting a section of its opinion to the interpretation of the provision in light of the federal structure as being a basic structure.⁶⁸ It has also cited *Bommai*'s characterisation of Indian federalism as being pragmatic, along with its statement that in the realm assigned to them, the States are supreme and not just appendages of the Centre.⁶⁹

Stepan, Linz and Yadav's understanding of India as a "state-nation" provides a reason why the politics of delay under Article 200 should be seen as a federal problem rather than just an administrative one. Under their understanding, India manages a deeply divided society by means of an asymmetrical, holding-together federalism where regional majorities rule in their own languages and regional parties participate in coalition governments at the centre.⁷⁰ They cite Tamil Nadu as an example of this scheme being at work.⁷¹ In such a federal structure, a non-elected official with the capacity to keep the Bills of a regional majority pending without any limitation possesses the power over regional legislation that is based entirely on timing and not reasoning. Khaitan's discussion of the abuse of the Governor's office demonstrates the seriousness of the matter.⁷²

The Court's response is that the Constitution has placed trust in these offices and has made them flexible. It has emphasised the respect that must be accorded to the Governor and the President and the need for flexibility in dealing with Bills of various types.⁷³ This is a consistent position but it leaves the danger in the structure to be remedied by limited mandamus and it suggests another path for reform. The Court's own rationale about deeming provisions

⁶⁷ Tarunabh Khaitan, *Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India*, 14 Law & Ethics Hum. Rts. 49, pt. IV(4) (2020).

⁶⁸ *Presidential Reference*, *supra* note 3, pt. V.F.

⁶⁹ *Id.* ¶ 58 (quoting *S.R. Bommai v. Union of India*, (1994) 3 S.C.C. 1, ¶ 276 (India) (Jeevan Reddy, J.)).

⁷⁰ Alfred Stepan, Juan J. Linz & Yogendra Yadav, *The Rise of "State-Nations"*, 21 J. Democracy 50, 60–61 (2010).

⁷¹ *Id.* at 63–64, 67.

⁷² Khaitan, *supra* note 67, pt. IV(4).

⁷³ *Presidential Reference*, *supra* note 3, ¶¶ 109, 115.

is that time limits and their consequences are a matter of constitutional text.⁷⁴ The Parliament is therefore free to fix a period in Articles 200 and 201 and to attach a consequence by amending the Constitution, in the same way as Articles 109(4) and 198(4) do for Money Bills. The six-month limit that appears in the Punchhi report serves as an obvious model.⁷⁵

VIII. CONCLUSION

The Presidential Reference sets aside the Tamil Nadu Judgment in everything that was important to its framework: the assumption that the Governor acts on the advice, the time limits and the use of Article 142 to deem assent. The Court arrived at this outcome via the door that its earlier precedents had opened up, the distinction between a decree and a view of law, and it has justified the outcome by relying on the hierarchy of precedents and the text of the Constitution. This makes the reversal defensible on these grounds. The Court would have been better off in stating clearly that it was reversing, since the language of clarification is out of place in face of its own word “erroneous.”

The more interesting part of what the Court retains is what it is all about. By finding that prolonged, unexplained and indefinite inaction can be ordered, the Court retains the critical insight of the earlier bench that the legislative process cannot be allowed to be stalled, while rejecting the earlier bench’s remedy. The result is the weak form of remedy in the sense of Waldron, which is consistent with the principle of separation of powers, but is an incomplete one. There are three questions left open by the text of the Court: the effect of disregard of the order by the Governor, the inaction at the President’s desk and the way courts decide on what is reasonable time without the benchmarks provided by the earlier judgment.

Two further points emerge from this. First, because of the decree, the ten Bills of Tamil Nadu and the Bills of the next State will be placed on different footing, and litigation may arise testing the boundary between the two categories. Second, the more permanent solution lies in text and not adjudication. Parliament can do what the Court found a court cannot do by fixing the period and attaching a consequence. Till that time, the Constitution, in the words of the Court, functions only if it is made to function and the decision leaves the working of Article 200 more dependent on the restraint of the Governor than the Tamil Nadu Judgment would allow.

⁷⁴ *Id.* ¶ 117.

⁷⁵ *Id.* ¶ 105.