

1997

## Secularism's Last Sigh?: The Hindu Right, the Courts, and India's Stuggle for Democracy

Brenda Cossman

*Osgoode Hall Law School of York University*

Ratna Kapur

### Source Publication:

Harvard International Law Journal. Volume 38, Issue 1 (1997), p. 113-170.

Follow this and additional works at: [https://digitalcommons.osgoode.yorku.ca/scholarly\\_works](https://digitalcommons.osgoode.yorku.ca/scholarly_works)



This work is licensed under a [Creative Commons Attribution-NonCommercial-No Derivative Works 4.0 License](#).

---

### Recommended Citation

Cossman, Brenda, and Ratna Kapur. "Secularism's Last Sigh?: The Hindu Right, the Courts, and India's Stuggle for Democracy." *Harvard International Law Journal* 38.1 (1997): 113-170.

This Article is brought to you for free and open access by the Faculty Scholarship at Osgoode Digital Commons. It has been accepted for inclusion in Articles & Book Chapters by an authorized administrator of Osgoode Digital Commons.

# Secularism's Last Sigh?: The Hindu Right, the Courts, and India's Struggle for Democracy

---

Brenda Cossman\*  
Ratna Kapur\*\*

India forces us to think, sometimes in tragic moments, of the function of religious thought within secularism. This is again a challenge for the times. If you look around the world today this is a very important issue; this particular kind of sometimes fundamentalist, of other times religious orthodoxy erupting within secularism, not simply in opposition to it.

—Homi Bhabha<sup>1</sup>

The struggle to secure the constitutional and political protection of secularism in India has been long and difficult, and secularism's enemies remain numerous. Recently, as Homi Bhabha suggests, these enemies are waging their war not in opposition to secularism, but in and through it. Increasingly, secularism has become the subject of intense political contestation in which right wing religious and fundamentalist forces endeavor to claim the secularist terrain as their own. In India, the Hindu Right—a nationalist and right wing political movement devoted to creating a Hindu State—increasingly has staked out its own claim, arguing that it alone is committed to upholding secularism. Indeed, secularism has become a central and powerful weapon in the Hindu Right's quest for discursive and political power.<sup>2</sup> These struggles over the meaning of secularism, and the place of religion in politics, have entered into the legal arena. The courts have been called

---

\* Associate Professor, Osgoode Hall Law School, York University, Canada. LL.M., Harvard Law School; LL.B., University of Toronto; B.A., Queen's University.

\*\* Director, Centre for Feminist Legal Research, New Delhi, India. LL.M., Harvard Law School; B.A., M.A.(Law), Cambridge University; B.A., University of Delhi.

1. *Secularism as an Idea Will Change*, HINDU, Dec. 17, 1995, at XIX.

2. See Ratna Kapur & Brenda Cossman, *Communalizing Gender, Engendering Community: Women, Legal Discourse and the Saffron Agenda*, 28 ECON. & POL. WKLY. 35 (1993); revised version in WOMEN AND THE HINDU RIGHT 82 (Tanika Sarkar & Urvishi Butalia eds., 1995). See generally RATNA KAPUR & BRENDA COSSMAN, *SUBVERSIVE SITES: FEMINIST ENGAGEMENT WITH LAW IN INDIA* (1996).

upon to adjudicate the claims for and against secularism, and to decide whether the strategies of the Hindu Right violate this basic constitutional principle. A series of recent and highly controversial cases involved the prosecution of elected representatives of the Hindu nationalist Shiv-Sena/Bhartiya Janta Party alliance Government in the western state of Maharashtra for corrupt practices under the Representation of the People Act, 1951. In *Manohar Joshi v. Nitin Bhaurao Patil*<sup>3</sup> and eleven other cases (collectively known as the "Hindutva" cases), the Supreme Court of India delivered a mixed message to the cause of secularism. On the one hand, the Court found several of the accused—most notably the Shiv Sena leader Bal Thackeray, one of the most militantly pro-Hindu and anti-Muslim voices within the Hindu Right—guilty of both appealing to religion to gain votes and promoting religious enmity and hatred.<sup>4</sup> The Court, however, also held that "*Hindutva*," the ideological linchpin of the Hindu Right's efforts to establish a Hindu Rashtra (Hindu state), simply represented "a way of life in the sub-continent" and was not a violation of the Representation of the People Act, 1951.<sup>5</sup> These decisions have provoked both celebration and outrage. The Hindu Right has heralded the decision as ushering in a new era of *Hindutva*. In contrast, the democratic secular forces committed to fighting the Hindu Right's communalization of political and social life have routinely denounced the decision.<sup>6</sup>

In this Article, we examine two deeply problematic aspects of the Supreme Court's judgment: (1) its conclusion on the meaning of *Hindutva* and (2) its conclusion on the secular character of the speeches of the Hindu Right. First, we argue that the Supreme Court erred in concluding that *Hindutva* constitutes a way of life of the people of the subcontinent and that it constitutes neither a violation of the prohibition on appealing to religion to gain votes nor a violation of the prohibition on promoting religious enmity and hatred. Moreover, the Supreme Court has erred in eliding the meaning of Hinduism with the meaning of *Hindutva*. Its conclusions on *Hindutva* are without legal precedent or authority. By examining the historical and political context within which the concept of *Hindutva* has acquired meaning, we contend that *Hindutva* cannot be separated from its appeal to religion nor from its assault on the legitimacy of religious minorities.

Secondly, we argue that the Supreme Court has erred in its acceptance of the secular nature of the speeches of the Hindu Right. An

3. *Manohar Joshi v. Nitin Bhaurao Patil*, 1995 S.C.A.L.E. 30.

4. *Dr. Romesh Yesbunt Prabhu v. Prabbakar Kashinath Knuse*, 1995 S.C.A.L.E. 1.

5. *Id.*

6. A writ petition seeking a review of one of the decisions, *Manohar Joshi*, 1995 S.C.A.L.E. 30, was dismissed by the Court, reaffirming the decisions of the Court in these cases.

examination of the broader struggles over the meaning of secularism in India illustrates the extent to which the Supreme Court's conclusion has effectively vindicated the profoundly anti-secular vision of secularism that the Hindu Right has long been trying to promote. We challenge the Supreme Court's view that there is nothing inconsistent between its conclusions in the *Hindutva* cases and its earlier decisions. Furthermore, the failure of the Court to take account of the Hindu Right's discursive strategies and to pay sufficient attention to manipulations of secularism by the Hindu Right has led to the decisions in the *Hindutva* cases and the significant victory it represents for the Hindu Right. As we have argued elsewhere, the Hindu Right has hijacked the dominant understanding of secularism as the equal respect of all religions in order to promote its vision of *Hindutva* and its agenda of establishing a Hindu State.<sup>7</sup> In its hands, the equal respect of all religions becomes a tool for attacking the rights of minority religious communities. Its emphasis on the formal equal treatment of all religions operates as an unmodified majoritarianism whereby the dominant Hindu community becomes the norm against which all others are to be judged. In failing to articulate more clearly an alternative vision of equality that incorporates the concept of the equal respect of all religions, the forces of democratic secularism, including the Supreme Court, have unwittingly allowed the Hindu Right to continue hijacking secularism for its own very nonsecular agenda.

In the final section, we turn to consider the crisis of secularism in India. After briefly reviewing some of the debates on secularism's future (or its lack thereof), we suggest a strategy for reappropriating the dominant discourse of secularism from the Hindu Right, and reshaping this discourse in a way that may better capture and promote a democratic political vision.

## I. THE HINDU RIGHT

By "Hindu Right," we mean the main organizations and political parties in the current phase of Hindu communalism<sup>8</sup> in India—the Bharatiya Janata Party (BJP), the Rashtriya Swayam Sevak Sangh

---

7. See sources cited *supra* note 2.

8. Communalism has been defined as a discourse based on the "belief that because a group of people follow a particular religion they have, as a result, common social, political and economic interests." BIPAN CHANDRA, *COMMUNALISM IN MODERN INDIA* 1 (1984). Communalism is a discourse that attempts to constitute subjects through communal attachment, particularly through religious community. The construction of communal identities—most notably, Hindu and Muslim—has been a central characteristic of the modern Indian polity, and continues to be an overwhelmingly important source of political fragmentation. Through communal discourse, subjects come to understand the world around them as one based on the conflict between religious groups, and Indian society is understood to be fractured by the conflict between these groups.

(RSS), and the Vishwa Hindu Parishad (VHP), as well as the militantly anti-Muslim Shiv Sena—which collectively seek to establish a Hindu state in India. The central ideology of this political movement is *Hindutva*—literally translated as “Hinduness”—which seeks to establish the political, cultural, and religious supremacy of Hinduism and the Hindu nation. The Hindu Right dates back to the nineteenth-century revivalist and nationalist movements in India, which sought to revitalize Hindu culture as a means of resisting colonialism. As it developed through the twentieth century, particularly in the writings of Vir D. Savarkar in the 1920s, *Hindutva* has taken on a distinctively right-wing, anti-minority stance. One recent book described that, “[a]t the heart of *Hindutva* lies the myth of a continuous thousand year old struggle of Hindus against Muslims as the structuring principle of Indian history. Both communities are assumed to have been homogeneous blocs [sic] of Hindu patriots, heroically resisting invariably tyrannical, ‘foreign’ Muslim rulers.”<sup>9</sup> More recently, it is said the policy of appeasement—special treatment for Muslims and other religious minorities—has perpetuated the oppression of Hindus. The contemporary social, economic and political malaise that ostensibly grips Hindu society is seen to lie in this policy of appeasement. The answer to the crisis, according to the discourse of the Hindu Right, lies in establishing a Hindu *Rashtra*: India must be a Hindu State.<sup>10</sup>

The Hindu Right has sought to promote and spread this communalized discourse to an increasingly large segment of Hindu society, particularly with the creation of the VHP in 1964. Founded at the behest of the RSS, the VHP was intended to infuse the politics of *Hindutva* with a specifically religious vision. Unlike the RSS, which had functioned as an elite organization, the VHP was intended to popularize *Hindutva* identity among the masses.<sup>11</sup> This phase of populism has been characterized by increasingly extreme and violent anti-Muslim rhetoric. Although the rhetoric of the earlier leaders of the Hindu Right, notably Sarvarkar and M. S. Golwarkar, were certainly characterized by a strong anti-Muslim stance, the attitude of recent leaders such as Bal Thackeray (the leader of the Shiv Sena) seems to have reached new heights. For example, in an interview in *Time Maga-*

---

Although India is characterized by many other sources of division—class, caste, language, region—communalism has been, and remains, amongst the most politically divisive and explosive.

9. TAPAN BASU ET AL., *KHAKI SHORTS AND SAFFRON FLAGS: A CRITIQUE OF THE HINDU RIGHT 2* (1993).

10. This movement has been variously labeled and debated as, *inter alia*, Hindu fundamentalist, Hindu fascist, and Hindu nationalist. We use the term “Hindu Right” to indicate both the communal and highly conservative nature of the movement’s agenda.

11. For a more detailed discussion, see BASU ET AL., *supra* note 9.

zine in the immediate aftermath of the Bombay riots in 1993,<sup>12</sup> Thackeray did not mince words on his agenda for the Muslim minority in India. When questioned on the role of Shiv Sena in the riots, Thackeray replied: "I want to teach Muslims a lesson."<sup>13</sup> When questioned on the fact that Muslims were fleeing Bombay in droves, Thackeray replied "If they are going, let them go. If they are not going, *kick them out.*"<sup>14</sup> In the following exchange, Thackeray expresses his admiration of Nazi Germany to validate the efforts of the Hindu Right:

Q: "Indian Muslims are beginning to feel like Jews in Nazi Germany."

A: "Have they behaved like the Jews in Nazi Germany? If so, there is nothing wrong if they are treated as Jews were in Germany."<sup>15</sup>

These are but a few of the more extreme examples of Thackeray's invective, but there is no scarcity of it. The *Dopbar Ka Saamna* (the mouthpiece of the Shiv Sena) is loaded with Thackeray's hateful attacks on the Muslims. Muslims are routinely attacked as "barbaric" and "uncivilized," as "traitors who partitioned the country," and as "traitors [who] should be condemned."<sup>16</sup> Time and again, Muslims are alleged to be the puppets of Pakistan and to be loyal only to Pakistan and, thus, to be threats to India's national security. Moreover, Thackeray is not alone in this virulently anti-Muslim rhetoric. Sadhvi Ritambhara, a leading figure with the VHP and one of the few high profile women within the Hindu Right, repeatedly lashes out against the Muslim community for allegedly keeping Hindus in a state of persecution. This general sentiment of Hindus as oppressed is then often followed by increasingly brutal rhetoric that calls on Hindus to fight back against these Muslim oppressors and often expressly calls for violent confrontation.<sup>17</sup> The rhetoric of these leaders is thus not only increasingly distrustful of Muslims but also advocates violence against them.

Although the Hindu Right has long been a player in India's political scene, its political power has dramatically increased in the last decade.

---

12. The Bombay riots broke out in the aftermath of the destruction of the mosque at Ayodhya, when communal riots swept across India. For a more detailed discussion, see Ashar Ali Engineer, *Bombay Shames India*, 28 ECON. & POL. WKLY. 81 (1993); and Flavia Agnes, *Two Riots and After: A Fact-finding Report on Bandra (East)* 28 ECON. & POL. WKLY. 265 (1993).

13. Interview with Bal Thackeray, *Time*, Jan. 25, 1993, at 43 (Canadian Edition).

14. *Id.* (emphasis added).

15. *Id.*

16. *Dopbar Ka Saamna*, Mar. 12, 1996.

17. For instance, in the time leading up to the destruction of the Mosque at Ayodhya, discussed *infra*, Sadhvi could be heard calling for a final fierce battle with the Muslims. "[I]f there has to be bloodshed let it happen once and for all." BASU ET AL., *supra* note 9, at 73. Several

The Ayodhya campaign, in which the Hindu Right sought to have the Babri Masjid, a Muslim mosque dating back to the 16th century, replaced with a Hindu temple, proved to be enormously successful in generating broad-based support for the Hindu Right. The VHP and subsequently the RSS and the BJP stirred up a controversy of enormous proportion, alleging that the mosque was built on the site of the birth of the Hindu god Ram. The Hindu Right demanded that the Babri Masjid be removed and that a temple commemorating the birth of Ram be built in its place. The campaign succeeded in mobilizing thousands of supporters, some of whom followed the marches to Ayodhya, many others of whom sent money and bricks to Ayodhya to help construct the new temple. After a steady escalation in the anti-Muslim political rhetoric and the demands for the destruction of the mosque, a mob destroyed the Babri Masjid on December 19, 1993. The destruction of the mosque triggered massive communal riots around the country in which thousands were killed.

Following the destruction of the mosque and the ensuing communal riots, the President of India dismissed the BJP governments in four states, and the central government cracked down on many of the Hindu Right organizations. However, the government was unable to break the organizations' growing support. The ban on the organizations and their publications, as well as the dismissal of the state governments, seemed only to strengthen the resolve of the Hindu Right and its claim that it alone could protect real democracy and secularism in India. While many of the political leaders of the BJP could not condone the violent destruction of the mosque, they did not condemn the action. Despite the national outcry against the Hindu Right and the role of the BJP in the destruction and the violence that followed in its wake, the political momentum of the BJP continued to grow as the state governments that were dismissed ultimately were re-elected.

In the recent 1996 national elections, the BJP, though short of a majority, emerged as the largest single political party. A.B. Vajpayee, the party's leader, became India's Prime Minister and head of the new government. Since it was unable to secure any support to form a coalition government, however, the BJP government fell within two weeks. Despite its rapid rise and fall as the nation's government, the enormous increase in the BJP's popularity among the Indian electorate cannot be ignored, and many of India's secularists fear what will happen if the current coalition government (an unlikely alignment of India's regional parties and the Congress, with the left parties supporting the coalition from the outside) cannot hold together. Indeed, the possibility of an even stronger endorsement of the BJP in a subsequent election has been a major motivating force in bringing the current coalition together.

The Hindu Right, however, is not only a political party, and therefore the political inroads of the BJP must be seen in the broader context of the struggles of the Hindu Right as a whole. The RSS-BJP-VHP triumvirate has been engaged in a discursive struggle in which they have attempted to establish their vision of *Hindutva* as ideologically dominant. Through their collective efforts, they have sought to naturalize the ideas of *Hindutva* by making these ideas a part of the common sense of an increasingly large segment of Hindu society. The Hindu Right's struggle for ideological dominance has stretched across a broad range of fields from history to politics, religion to economics. Our own focus is on the struggle for meaning within the field of law, and on the ways in which the Hindu Right has sought to deploy a host of legal concepts and constitutional principles to advance its political agenda.<sup>18</sup> In particular, we focus on what we believe to be a highly significant advance in the Hindu Right's efforts to infuse the constitutional principles of secularism and equality with meaning that is consistent with its vision of *Hindutva*: the recent Supreme Court of India's judgments in the *Hindutva* cases. We attempt to situate these judgments within the broader context of the ideological struggles of the Hindu Right and its efforts to legitimate its vision of Hindu supremacy.

## II. THE SUPREME COURT HINDUTVA JUDGMENTS

In the cases of *Manohar Joshi* and eleven others,<sup>19</sup> the election of Shiv Sena/BJP candidates in the December 1987 State elections in Maharashtra was challenged on the grounds that the candidates had committed corrupt practices in violation of section 123 of the Representation of the People Act, 1951. Section 123(3) of the Act prohibits candidates from any appeal to his or her religion, race, caste, community or language to further his or her prospect for election, or for prejudicially

---

efforts have been made to bring criminal charges against Ritambhara for promoting religious enmity and hatred. To date, however, these charges have all been dismissed by the courts. For a more detailed discussion of hate speech laws and the Hindu Right, see Ratna Kapur, *Feminist Reflections on Speech and Censorship*, 31 *ECON. & POL. WKLY.* 15 (1996).

18. For further discussion of the way in which the Hindu Right has sought to deploy law and legal discourse in its discursive struggles, see sources cited *supra* note 2.

19. See *supra* note 3. The other cases were, *Prabhu v. Prabhakar Kasinath Kunte et al.*, 1995 S.C.A.L.E. 1; *Bal Thackeray v. Shri Prabhakar Kasinath Kunte et al.*, 1995 S.C.A.L.E. 1; *Ramchandra G. Kapse v. Haribansh Ramakbal Singh*, 1995 S.C.A.L.E. 60; *Pramod Mahajan v. Haribansh Ramakbal Singh & Anr.*, 1995 S.C.A.L.E. 60; *Sadhvi Ritambhara v. Haribansh Ramakbal Singh & Anr.*, 1995 S.C.A.L.E. 60; *Ramakant Mayekar v. Smt. Celine D'Silva & Anr.*, 1995 S.C.A.L.E. 72; *Chhagam Bhujbal v. Smt. Celine D'Silva & Anr.*, 1995 S.C.A.L.E. 72; *Balasaheb Thackeray v. Smt. Celine D'Silva & Anr.*, 1995 S.C.A.L.E. 72; *Moreshwar Save v. Dwarakadas Yashwantrao Pathrikar*, 1995 S.C.A.L.E. 85; *Chandrakanta Goyal v. Soban Singh Jodh Singh Kohli*, 1995 S.C.A.L.E. 88; *Shri Suryakant Venkatrao Mahadik v. Smt. Saraj Sandesh Naik*, 1995 S.C.A.L.E. 92.



affecting the election of any other candidate.<sup>20</sup> Section 123(3A) prohibits candidates from promoting “feelings of enmity or hatred between different classes of the citizens of India on grounds of religion, race, caste, community or language” for the purposes of gaining votes or prejudicially affecting the votes of another candidate.<sup>21</sup> Charges were brought against twelve members of the Hindu Right, including Bal Thackeray, leader of the Shiv Sena, and Manohar Joshi, Chief Minister of Maharashtra, for violating these provisions.<sup>22</sup>

The main opinion on the interpretation of the Representation of the People Act, 1951, and whether an appeal to Hindutva constituted a violation of the Act, was set forth in *Prabhoo v. Prabhakar Kasinath Kunte et al.*<sup>23</sup> This case involved charges of corrupt practices against Dr. Prabhoo, the mayor of Bombay, and his agent Bal Thackeray. The Bombay High Court found Prabhoo and Thackeray guilty of corrupt practices on grounds that they had appealed for votes on the basis of religion and promoted feelings of enmity and hatred between different classes of citizens of India.<sup>24</sup> On appeal, Prabhoo argued that the High Court had erred in finding that an appeal to *Hindutva* constituted a violation of the Act. It was argued that *Hindutva* means Indian culture, not Hindu culture, and moreover that the public speeches of the candidate “criticized the anti-secular stance of the Congress Party in practicing discrimination against Hindus and giving undue favor to

20. “The appeal by a candidate or his agent or by any other person with the consent of a candidate or his election agent to vote or refrain from voting for any person on the ground of his religion, race, caste, community or language or the use of, or appeal to religious symbols or the use of, or appeal to, national symbols, such as the national flag or the national emblem, for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate.” Representation of the People Act, 1951, § 123(3), INDIA A.I.R. MANUAL.

21. “The promotion of, or attempt to promote, feelings of enmity or hatred between different classes of the citizens of India on grounds of religion, race, caste, community or language, by a candidate or his agent or any other person with the consent of a candidate . . . for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate.” Representation of the People Act, 1951, § 123(3A), INDIA A.I.R. MANUAL.

22. Charges were brought against 12 individuals, but several of the charges were joined into a single case, resulting in 7 separate decisions.

23. Prabhoo, 1995 S.C.A.L.E. 1.

24. The following quotes from Thackeray’s speeches were among those at issue: “We are fighting this election for the protection of Hinduism. Therefore, we do not care for the votes of the Muslims. This country belongs to Hindus and will remain so.” *Id.* at 27. “Hinduism will triumph in this election and we must become honorable recipients of this victory to ward off the danger on Hinduism . . . .” *Id.* “If any body stands against Hindustan you should show courage by performing pooja (i.e., worship) with shoes . . . . And a person by name Prabhu [*sic*] who is contesting the election in the name of religion sent ahead [in the assembly]. A ‘Jawan’ like Prabhu [*sic*] should go there [in the assembly].” *Id.* at 29. “We have come with the ideology of Hinduism. Shiv Sena will implement this ideology. Though this country belongs to Hindus, Ram and Krishna are insulted. [They] valued the Muslim votes more than your votes; we do not want the Muslim votes.” *Id.* at 6.

the minorities which is not an appeal for votes on the ground of Hindu religion . . . .”<sup>25</sup>

The Court first turned to the meaning of section 123(3) and its prohibition of appeals to religion to gain votes. In the Court’s view, the prohibition did not mean that religion could never be mentioned in election speeches. A speech with a secular stance that raised questions about discrimination against a particular religion would not be caught by section 123(3). Rather, section 123(3) was intended to prohibit a candidate from either seeking votes on the basis of his religion or trying to alienate votes from another candidate on the basis of that candidate’s religion.<sup>26</sup> The Court then considered the meaning of the prohibition on the promotion of feelings of enmity or hatred between different religious communities contained in section 123(3A). In its view, the clear objective of the section was to curb “the tendency to promote or attempt to promote communal, linguistic or any other factional enmity or hatred to prevent the divisive tendencies.”<sup>27</sup> The Court accepted the arguments of the appellants that the prejudicial effect on public order is implicit in this section.<sup>28</sup>

The Court subsequently considered and rejected the constitutional challenge to sections 123(3) and 123(3A) and went on to consider the meanings of *Hindutva* and Hinduism and whether an appeal to *Hindutva* constitutes a violation of the Representation of the People Act, 1951.<sup>29</sup> The Court first reviewed what it described as the relevant

25. *Id.* at 7.

26. *Id.* at 12.

27. *Id.* at 13.

28. In considering the meaning of this section, the Court stated,

[i]t seems to us that section 123, sub s.(2),(3) and (3)(A) were enacted so as to eliminate, from the electoral process, appeals to those divisive factors which arouse irrational passions that run counter to the basic tenets of our Constitution, and, indeed, of any civilized political and social order. Due respect for the religious beliefs and practices, race, creed, culture and language of other citizens is one of the basic postulates of our democratic system.

*Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdass Mebra et al.*, 1975 (Suppl) S.C.R. 281, quoted in *Praboo*, 1995 S.C.A.L.E. at 14.

The Court further held in *Bukhari* that:

We have to determine the effect of statements proved to have been made by a candidate, or, on his behalf and with his consent, during his election, upon the minds and feelings of the ordinary average voters of this country in every case of alleged corrupt practice . . . . In all such cases, the line has no doubt to be drawn with care so as not to equate possible impersonal attacks on religious bigotry and intolerance with personal ones actuated by bigotry and intolerance.

*Id.*

29. In considering whether section 123 constituted a reasonable restriction to the right of free expression that was permissible under article 19(2) of the Constitution, the Court concluded that the provision should be upheld in the interests of “decency or morality.” The Court held that this clause was not confined to sexual morality, but included action that was against the current standards of behavior or propriety. *Praboo*, 1995 S.C.A.L.E. at 16. The Court held that “[i]n a secular polity, the requirement of correct behavior or propriety is that an appeal for votes should

Supreme Court jurisprudence on the meanings of "Hindu," "Hinduism," and "*Hindutva*." After reviewing several cases on the meanings of these terms, the Court concluded that these Constitutional Bench decisions "indicate that no precise meaning can be ascribed to the terms 'Hindu', '*Hindutva*' and 'Hinduism' and no meaning in the abstract can confine it to the narrow limits of religion alone, excluding the content of Indian culture and heritage."<sup>30</sup> On the meaning of *Hindutva*, the Court concluded:

that the term "*Hindutva*" is related more to *the way of life of the people in the subcontinent*. It is difficult to appreciate how in the face of these decisions the term "*Hindutva*" or "Hinduism" per se, in the abstract, can be assumed to mean and be equated with narrow fundamentalist Hindu religious bigotry, or be construed to fall within the prohibition in [section 123(3) or (3A)].<sup>31</sup>

In the Court's view, *Hindutva* is ordinarily to be understood "as a way of life or state of mind and it is not to be equated with, or understood as religious Hindu fundamentalism."<sup>32</sup> The words Hinduism and *Hindutva* should not be construed narrowly to refer only to the "strict Hindu religious practices unrelated to the culture and ethos of the people of India," but rather, these terms should simply be seen to reflect the "way of life of the Indian people."<sup>33</sup> Accordingly, the Court concluded that simply referring to *Hindutva* or Hinduism in a speech does not automatically make the speech one based on the Hindu religion and thus an appeal to religion. Nor, in the Court's view, does such a reference necessarily "depict an attitude hostile to all persons practicing any religion other than the Hindu religion" but rather, it is the particular "use made of these words and the meaning sought to be conveyed in the speech which has to be seen."<sup>34</sup> Such words may be used in a speech "to promote secularism or to emphasize the way of life of the Indian people and the Indian culture or ethos or to criticize the policy of any political party as discriminatory or intolerant."<sup>35</sup> The Court thus rejected the argument that the use of *Hindutva per se*

---

not be made on the ground of the candidate's religion which by itself is no index of the suitability of a candidate for membership of the House." The soliciting of votes during an election on the grounds of a candidate's religion in a secular state was considered by the Court to be against the "norms or decency and propriety of the society," and a provision restricting such activity constituted a reasonable fetter on the right to free expression. *Id.*

30. *Id.* at 22 (emphasis added).

31. *Id.* at 22 (emphasis added).

32. *Id.*

33. *Id.* at 24.

34. *Id.*

35. *Id.* at 24-25.

constitutes a violation of sections 123(3) or (3A) of the *Representation of the People Act, 1951*. Instead, the Court was of the view that whether a particular reference to *Hindutva* or Hinduism constitutes a violation of these sections must be a question of fact to be decided in each case.

In the case against Prabhoo and his agent, Thackeray, the Court found that all three of Thackeray's speeches at issue constituted a clear appeal to the Hindu voters to vote for Prabhoo because he was a Hindu, and thus violated section 123(3).<sup>36</sup> Further, the Court ruled that one of Thackeray's speeches included derogatory references to Muslims that were clearly meant to promote feelings of enmity and hatred between Hindus and Muslims and therefore violated section 123(3A).<sup>37</sup> Both Prabhoo and Thackeray were found guilty of corrupt practices. By way of contrast, in the case against Manohar Joshi, for a speech in which he stated that "the first Hindu State will be established in Maharashtra," the Court held that Joshi was not guilty of violating section 123(3) or (3A).<sup>38</sup> Such a statement was not an appeal to voters on the basis of religion, but simply "the expression, at best, of such a hope."<sup>39</sup>

The outcomes of other cases were similarly divided, though most dismissed the rulings of the Bombay High Court. The conviction of Professor R.G. Kapse (an elected BJP candidate to the Lok Sabha), joined with notices against Pramod Mahajan<sup>40</sup> and Sadhvi Rithambhara,<sup>41</sup> were overturned by the Supreme Court. According to the Court, the speeches made by Mahajan and Rithambhara were not made with Kapse's consent since the fact that Rithambhara participated in a public meeting at which Kapse allegedly was present could not be taken as consent to the content of those speeches.<sup>42</sup> Moreover, Kapse denied that he was even present at the meeting, and the Court found no reliable evidence to prove his alleged misconduct. The charges in relation to Mahajan's speech were similarly dismissed on evidentiary grounds: there was not sufficient evidence to prove that he had used the words *Hindutva* or Hindu religion in his speeches or that he had raised the issue of the construction of the Ram Temple in Ayodhya, or

36. *Id.* at 22.

37. *Id.*

38. *Joshi*, 1995 S.C.A.L.E. 30.

39. *Id.* at 59.

40. Pramod Mahajan has been a longstanding member of the BJP national executive and a leading spokesman for the party. He is currently sitting as a member of Parliament from the northern state of Himachal Pradesh.

41. Sadhvi Ritambhara, a high-profile member of the VHP, has been one of the most vociferous proponents of hate propaganda against Muslims.

42. *Ritambhara*, 1995 S.C.A.L.E. 60. The notices against Ritambhara were also dismissed, on the basis that she had not been given notice as required under the *Representation of the People Act, 1951*, and she was thus denied the opportunity to defend herself against the allegation of corrupt practices.

otherwise had appealed to religion.<sup>43</sup> The Court further held that the fact that these issues were raised in the BJP Manifesto was not sufficient to find an individual candidate guilty of corrupt practices.<sup>44</sup> The charges against Shiv Sena candidate Ramkant Mayekar were also dismissed. The fact that Bal Thackeray, the leader of the Shiv Sena, was found guilty of corrupt practices was not in itself sufficient evidence to establish that other members of the party were also guilty. Rather, a candidate's consent to the corrupt practices of the leader had to be proved. In the Court's view, there was insufficient evidence to prove that the candidate had even been present at the speeches in question.<sup>45</sup>

In contrast, in *Suryankant Venkatrao Mahadik v. Saroj Sandesh Naik*, the Supreme Court held that the particular use of the term *Hindutva* did constitute a violation of section 123(3).<sup>46</sup> Mahadik's speech "was an appeal by a Hindu to a congregation of Hindu devotees in a Hindu temple during a Hindu religious festival with emphasis on the Hindu religion for giving votes to a Hindu candidate espousing the cause of the Hindu religion."<sup>47</sup> According to the Court, the use of the word *Hindutva* in that speech "at that time, place and occasion ha[d] to be understood only as an appeal on the ground of Hindu religion."<sup>48</sup> Following its holding in *Prabhuo*, the Court held that although in its general or abstract meaning the word *Hindutva* refers only to the Indian culture and heritage, in this particular context it could only be interpreted as an appeal to religion.<sup>49</sup>

In our view, the Court erred in the original decisions on two significant points, the interpretation of the meaning of *Hindutva* and the secular nature of the speeches of the Hindu Right. In the sections that follow, we take a closer look at these particular dimensions of the *Hindutva* decision, and reveal the dangerous implications of the errors made by the Court.

43. *Mahajan*, 1995 S.C.A.L.E. 60.

44. *Id.* at 69.

45. Again, on the question of the video tape that allegedly contained express appeals to *Hindutva* and the Hindu religion, the Court held that neither the content of the videos nor the candidate Ramkant Mayekar's consent to them had been proven. *Mayekar*, 1995 S.C.A.L.E. 72. The conviction against Chandrakanta Goyal, a BJP member, was dismissed on similar grounds. In the Court's view, there was no direct evidence of the appellant's consent to the speeches of Thackeray or Mahajan. *Goyal*, 1995 S.C.A.L.E. 88.

46. *Mahadik*, 1995 S.C.A.L.E. 92.

47. *Id.* at 99.

48. *Id.*

49. *Id.*

### III. VINDICATING *HINDUTVA*

The apex Court has fully and Unambiguously endorsed the concept of *Hindutva* which the [BJP] has been propounding since its inception.<sup>50</sup>

The Supreme Court decision was immediately claimed by the Hindu Right as a vindication of their vision of *Hindutva*.<sup>51</sup> The front page of the December 24 edition of the *Organiser* proudly declared victory and several articles trumpeted what the decisions meant for the forces of *Hindutva*.<sup>52</sup> Conversely, the Supreme Court's comments on *Hindutva* came under immediate fire from those committed to democratic secularism.

In this section, we shall take a closer look at how the Supreme Court renewed the controversy about the past and present meanings of *Hindutva*. By failing to ground its holding in the record, the Court has afforded the Hindu Right a prominent and otherwise untenable position for its political rhetoric.

#### A. "A Way of Life" without Precedent

In reaching its conclusions about the meaning of *Hindutva*, the Court quoted extensively from two earlier decisions by the Constitutional Bench of the Supreme Court. The opinion in *Sastri Yagnapurushadji and Others v. Muldas Bhudardas Vaishya and Another*<sup>53</sup> included a lengthy discussion about the identities of Hindus and provided extensive commentary on the meaning of Hinduism:

Unlike other religions in the world, the *Hindu religion* does not claim any one prophet; it does not worship any one God; it does not subscribe to any one dogma; it does not believe in any one philosophic concept; it does not follow any one set of religious rites or performances; in fact, it does not appear to satisfy the

50. ORGANISER, Editorial, Dec. 24, 1995. The *Harvard International Law Journal* was unable to obtain the *Organiser* materials and was, therefore, unable to verify those cites. The materials are on file at the Nehru Memorial Library in New Delhi, India.

51. The *Organiser* is a weekly English language newspaper published by the Hindu Right. See the following articles in the *Organiser*: *Triumph of Truth*, Dec. 24, 1995, at 1; *Satyameva Jayate*, Dec. 24, 1995, at 2; *Cultural Nationalism Wins Over Pseudo-Secularism*, Dec. 24, 1995, at 3; *Hindutva is the Soul of India—H.V. Seshadri*, Dec. 31, 1995, at 7; Justice Guman Mal Lodha, *Reference to Establishment of Hindu State is not a Religious Appeal*, Dec. 31, 1995, at 7; *Hindutva, A Uniting Force*, Jan. 7, 1996, at 16; *M. Rama Josi SC Judgement on Hindutva Flawless*, Jan. 21, 1996, at 2; *Arise, Awake, Act: H.V. Seshadri's Address March 8, 1996*, Mar. 17, 1996, at 9; and Jagmohan, *Hinduism, Hindutva and the Supreme Court*, Mar. 31, 1996, at 8.

52. *Id.*

53. *Sastri Yagnapurushadji and Others v. Muldas Bhudardas Vaishya and Another*, 1996 (3) S.C.R. 242.

narrow traditional features of any religion or creed. *It may broadly be described as a way of life and nothing more . . . .*

When we consider this broad sweep of the Hindu philosophic concepts, it would be realized that under Hindu philosophy, there is no scope for ex-communicating any notion or principle as heretical and rejecting it as such . . . .

Hinduism takes it for granted that there is more than one valid approach to truth and to salvation and these different approaches are not only compatible with each other, but are complementary.<sup>54</sup>

The second case, *Comm'r. Of Wealth Tax, Madras, and Ors. v. Late R. Sridharan by L.Rs.*,<sup>55</sup> also contained a considerable discussion on the meaning of Hinduism:<sup>56</sup>

It is a matter of common knowledge, that Hinduism embraces within self [sic] so many diverse forms of beliefs, faiths, practices and worship that it is difficult to define the term "Hindu" with precision.<sup>57</sup>

The Sridharan court, however, further elaborated on the nature of Hinduism, which it described as "incorporat(ing) all forms of belief and worship without necessitating the selection or elimination of any. The Hindu is inclined to revere the divine in every manifestation, whatever it may be, and is doctrinally tolerant, leaving others—including both Hindus and non-Hindus—whatever creed and worship practices suit them best."<sup>58</sup>

Guided by these two decisions, the Court in *Prabboo* concluded that it could not give precise meaning to the terms Hindu, Hinduism, or *Hindutva*:

no meaning in the abstract can confine it to the narrow limits of religion alone, excluding the content of Indian culture and heritage. It is also indicated that the term "*Hindutva*" is related more

54. *Prabboo*, 1995 S.C.A.L.E. at 18–20 (emphasis added).

55. *Comm'r. Of Wealth Tax, Madras, and Ors. v. Late R. Sridharan by L.Rs.*, 1976 Supp. S.C.R. 478.

56. The decision included various dictionary and encyclopedia definitions of Hinduism. For example, Webster's International Dictionary defined Hinduism as "a complex body of social, cultural and religious beliefs and practices evolved in and largely confined to the Indian subcontinent . . . an outlook tending to view all forms and theories as aspects of one eternal being and truth." *Prabboo*, 1995 S.C.A.L.E. at 20. This passage also referred to listings in the Encyclopedia Britannica and the works of B.G. Tilak.

57. *Id.* at 20.

58. *Id.*

to the way of life of the people in the sub-continent. It is difficult to appreciate how in the fact of these decisions the term "*Hindutva*" or "Hinduism" *per se*, in the abstract, can be . . . equated with narrow fundamentalist Hindu religious bigotry, or [how it might] . . . fall with the prohibition of . . . Section 123 of the [Representation of the People Act].<sup>59</sup>

These words have troubling ramifications for the secular debate. For instance, while the Court could not define Hinduism, it refused to limit it to the narrow confines of religion. That Hinduism should extend beyond these secular restraints presents a contentious and, ultimately erroneous, perspective. The very definitions cited by the Court in *Sridharan* all point to the common understanding of Hinduism as a religion that embraces many gods, texts, and rituals.

Despite its emphasis on these precedents from the Constitutional Bench, the Court seemingly ignored the fact that neither of these two decisions mentioned the word "*Hindutva*." The Court nevertheless described this term as the way of life or state of mind of the people on the subcontinent, a meaning that confuses *Hindutva* with prior notions of Hinduism. Its citation to the work of Maulana Wahiduddin Khan highlights this disparity:

The strategy worked out to solve the minorities problem was, although differently worded, that of *Hindutva* or Indianisation. This strategy, briefly stated, aims at developing a uniform culture by obliterating the differences between all of the cultures co-existing in the country. This was felt to be the way to communal harmony and national unity. It was thought that this would put an end once and for all to the minorities problem.<sup>60</sup>

This passage is used by the Court to support its conclusion that *Hindutva* is a synonym of "Indianisation," the "development of uniform culture by obliterating the differences between all the cultures co-existing in the country."<sup>61</sup> What remains unstated here is the fact that the passage quoted is a description of a particular strategy worked out by a particular political party, the Bharatiya Jona Songh, the ideological precursor of the BJP. Although this discourse did equate *Hindutva* with Indianization, the political rhetoric of the Hindu Right should create considerable cause for concern. The Court, however, did not question this strategy of Indianization. It did not consider that the creation of a uniform (Hindu) culture might require the obliteration

---

59. *Id.* at 22.

60. *Id.*

61. *Id.*



of Muslim identity and religion. The Court instead took the passage out of its proper context and used it as authority for the proposition that *Hindutva* is synonymous with a way of life for the Indian people.

The Court also quoted at length from *Kultar Singh v. Mukhtiar Singh*, in which the Constitutional Bench of the Supreme Court held that a poster containing the word "Panth" did not constitute a religious appeal for votes.<sup>62</sup> It held that the word "Panth" made no reference to the Sikh religion and reiterated this basic conclusion:

Thus, it cannot be doubted, particularly in view of the Constitution Bench decisions of this Court that the words "Hinduism" or "*Hindutva*" are not necessarily to be understood and construed narrowly, confined only to the strict Hindu religious practices unrelated to the culture and ethos of the people of India, depicting the way of life of the Indian people. Unless the context of a speech indicates a contrary meaning or use, in the abstract these terms are indicative more of a way of life of the Indian people and are not confined merely to describe persons practicing the Hindu religion as a faith.<sup>63</sup>

The Court further emphasized that nothing inherent to the terms Hinduism or *Hindutva* depicted any hostility or intolerance to other religious communities. Although some may have misused the terms to promote communalism, such departures did not change "the true meaning of these terms."<sup>64</sup> The Court finally concluded that mere references to the words Hinduism or *Hindutva* in a speech did not violate sections 123(3) or 123(3A) of the Representation of the People Act, 1951 (Act).<sup>65</sup> It held that it is "the kind of use made of these words and the meaning sought to be conveyed in each particular speech must be considered."<sup>66</sup>

What is most extraordinary about the Court's reasoning, from a strictly legal point of view, is that it drew such an unequivocal conclusion about the meaning of *Hindutva* without listing any relevant authorities. None of the Constitutional Bench decisions cited addressed the meaning of the term *Hindutva*, but simply the meaning of Hindu or Hinduism. The Supreme Court, however, took no notice of the possibility that these terms might not converge. It simply conflated their meanings, understanding both *Hindutva* and Hinduism to refer to the way of life of the people of the subcontinent.

62. *Kultar Singh v. Mukhtiar Singh*, 1964 (7) S.C.R. 790.

63. *Prabboo*, 1995 S.C.A.L.E. at 24.

64. *Id.* at 24.

65. *Id.* at 24-25.

66. *Id.* at 24.

This conclusion on the meaning of *Hindutva* exemplifies the way in which the unstated norms of the majority have become inscribed in legal principles. Through this assimilation, Hinduism, the religion of the majority of Indians, comes to reflect the way of life of *all* Indians. *Hindutva*, abstracted from the religion of the majority, similarly becomes the way for *all* people on the subcontinent. Thus, the Court uncritically assumes that the norms of the majority can simply apply to all Indians, regardless of their religious or cultural identity. "Indianization" is similarly assumed to represent the political and cultural aspirations of all Indians, through the construction of a uniform culture. The Court fails to consider that this uniformity is based on the assimilation of religious and cultural minorities and the reconstitution of all Indian citizens in the image of the dominant Hindu norm. The Court simply assumes that majoritarian norms provide the appropriate measure for judging the practices and rhetoric of the Hindu Right.

Although judicial reasoning often demonstrates an implicit reliance on dominant norms, the implications of these norms for religious and cultural minorities who deviate from these customs can be very damaging. As we reveal in the sections that follow, the implications of these unstated majoritarian norms in the Supreme Court's rulings on *Hindutva* have particularly devastating effects on those minorities targeted by the Hindu Right.

### B. *Hindutva and the Hindu Right*

In concluding that *Hindutva* was neither an appeal to religion, nor an expression of enmity, the Supreme Court has obscured both the historical background and the contemporary context within which the term has acquired meaning. As several commentators have pointed out, the Court failed to recognize that the term *Hindutva* had a very particular historical meaning associated with the political philosophy of Vir Savarkar and M.S. Golwalkar, two early leaders who shaped the political agenda of the Hindu Right.<sup>67</sup>

---

67. See, e.g., Anil Nauriya, *The Hindutva Judgments: A Warning Signal*, 31 ECON. & POL. WKLY. 11 (1996) (noting that the Court has failed "to recognize that *Hindutva* as an expression has a special meaning . . . associated with the social and political philosophy of Savarkar and Golwalkar, that is, the Hindu Mahasabha and the RSS."). For a discussion of the concept of *Hindutva* in the writings of the Hindu Right, see generally Rizwan Qaiser, *The Conceptualization of Communalism and Hindu Rashtra*, in *SECULARISM AND LIBERATION: PERSPECTIVES AND STRATEGIES FOR INDIA TODAY*, 100 (Rudolf C. Heredia & Edward Mathias eds., 1995) [SECULARISM AND LIBERATION]. Having traced the history of the term "Hindu Rashtra" and "*Hindutva*," Qaiser argues that Hindu *Rashtra* initially had no communal overtones. It merely served as a strategy of resistance to British colonial rule and cultural domination. In the 1930s and 1940s, however, certain Hindu organizations wanted to establish a Hindu *Rashtra* that would subjugate all non-Hindus to a "master" race. Qaiser also noted that the main exponents for this version of a Hindu *Rashtra* were V.D. Savarkar, Shyama Prasad Mookerjee, and M.S. Golwalkar.

The contemporary meaning of *Hindutva* particularly has its roots in the writings of Savarkar.<sup>68</sup> In first articulating the concepts of *Hindutva* and Hinduness as political concepts, Savarkar emphasized that *Hindutva* is different from Hinduism.

Hindutva is not identical with what is vaguely indicated by the term Hinduism. By an "ism" is generally meant a theory or a code more or less based on spiritual or religious dogma or system. But when we attempt to investigate into the essential significance of *Hindutva* we do not primarily—and certainly not mainly—concern ourselves with any particular theocratic or religious dogma or creed. Had not linguistic usage stood in our way then "Hinduness" would have certainly been a better word than Hinduism as a near parallel to *Hindutva*. *Hindutva* embraces all the departments of thought and activity of the whole Being of our Hindu race.<sup>69</sup>

In rather striking contrast to the Supreme Court decisions, Savarkar posited the concept of *Hindutva* as something distinct from Hinduism. *Hindutva* served as a means for achieving the superiority of the Hindu race, rather than its religion. According to Savarkar, "Hindus are not merely the citizens of the Indian state because, they are united not only by the bonds of love they bear to a common motherland but also by the bonds of a common blood . . . All Hindus claims [sic] to have in their veins the blood of the mighty race incorporated with and descended from the Vedic fathers."<sup>70</sup> This definition equates Hindu with race.<sup>71</sup> Savarkar, however, did not limit this concept of a common fatherland and a common racial bond. He saw a Hindu as one who inherited Indian civilization "as represented in a common history, common heroes, a common literature, a common art, a common law and a common jurisprudence, common fairs and festivals, rites and rituals, ceremonies and sacraments."<sup>72</sup> He thus defined Hindus in terms of their common cultural heritage.

---

68. V.D. SAVARKAR, WHO IS A HINDU? 3 (4th ed., S.P. Gokhale 1949) (1929). Savarkar served as ideological leader for the Hindu nationalists and later headed the Hindu Mahabashat, a Hindu communalist party that was intensely involved in the struggle for Independence. His writings on *Hindutva* continue to represent the ideological foundations of the contemporary Hindu Right.

69. *Id.* at 3-4.

70. *Id.* at 68.

71. As Purshottam Agarwal has argued, "Savarkar was by no means the first to attempt a racial reconstruction of the traditional religious community. But he was undoubtedly the most articulate. It was in his discourse that attempts to theoretically construct a Hindu political community which shared the same racial bonds and historical memories came into shape." Savarkar, *Surat and Draupadi*, in WOMEN AND THE HINDU RIGHT, *supra* note 2, at 40-41.

72. SAVARKAR, *supra* note 68, at 81.

Savarkar further viewed a Hindu as one who followed the religion of the people peculiar and native to this land (i.e., Hinduism). In his view, a Hindu was one whose fatherland (*pitribhumi*) and holyland (*punyabhumi*) were one and the same.<sup>73</sup> This fusion of fatherland and holyland allowed Savarkar to construct the political category of Hindu in opposition to non-Hindus (Muslims and Christians). Despite the fact that Muslims and Christians “have inherited along with Hindus a common Fatherland and [a] greater part of the wealth of common culture—language, law, custom, folklore and history—[they] are not and cannot be recognized as Hindus . . . . Their Holyland is far off in Arabia or Palestine.”<sup>74</sup> The construction of a Hindu race was thus achieved by continuously positing a conflict between the “Hindu” and “others”, most notably, the “Muslim invader”.<sup>75</sup>

Although Savarkar distinguished *Hindutva* from Hinduism, he also recognized that Hinduism was an important part of being Hindu. He effectively transformed the role of religion in constituting the category of Hindu. “In religious discourse the community is defined in terms of a shared creed or dogma. In the political discourse of communalism, the community is defined primarily as a race. Religion, instead of being a defining criterion, is transformed into a fetish owned by an already defined community.”<sup>76</sup> For Savarkar, Hindus constituted a race that followed a particular religion in opposition to Muslims and Christians, whose very existence presented a threat of disloyalty. Although Muslims and Christians were constituted in racial terms, they posed a threat because their Holyland lay outside India. Despite the emphasis on racial differences, it was the differences of religion that remained as a constituting moment of the oppositional identities.

Golwalkar further articulated definitions of Hindu and *Hindutva* in his writings. Golwalkar’s vision of a Hindu nation included five components:

[T]he idea contained in the word Nation is a compound of five distinct factors fused into one indissoluble whole the [sic] famous five “Unities”: Geographical (Country), Racial (Race), Religious (Religion), cultural (culture) and linguistic (Language).<sup>77</sup>

---

73. *See id.* at 94.

74. *Id.* at 92.

75. Savarkar noted that “[I]n this prolonged furious conflict our people became intensely conscious of [them]selves as Hindus and were welded into a nation to an extent unknown in our history . . . .” *Id.* at 36.

76. Agarwal, *supra* note 71, at 40.

77. M.S. GOLWALKAR, *WE OR OUR NATIONHOOD DEFINED* 18 (1939).

He argued that the Hindus qualify as a nation under each of these categories. "Hindustan, the land of the Hindus is a definite geographical unity" that constitutes a country. Hindus "united together by common traditions . . . memories . . . culture . . . language . . . [and] customs" form a race.<sup>78</sup> Regarding religion and culture, Golwalkar observed that:

This great Hindu Race professes its illustrious Hindu Religion, the only religion in the world worthy of being so denominated, which in its variety is still an organic whole . . . . Guided by this Religion in all walks of life, individual, social, political, the Race evolved a culture which despite the degenerating contact with the debased "civilizations" of the Mussalmans and the Europeans, for the last ten centuries, is still the noblest in the world.<sup>79</sup>

In Golwalkar's view, "[n]o race is more fortunate in being given a Religion, [sic] which could produce such a culture."<sup>80</sup> He recognized the problem that each region apparently had its own language. Nevertheless, he argued that "[t]here is but one language, Sanskrit, of which these many 'languages' are mere offshoots."<sup>81</sup> Golwalkar thus concluded that "this country, Hindustan, the Hindu Race with its Hindu Religion, Hindu Culture and Hindu Language . . . complete the Nation concept."<sup>82</sup>

Although religion is but one of the five qualifying categories of the Hindu Nation, it underlies each of the other four categories. Race is defined not so much in terms of a common blood line (per Savarkar's definition), as it is in terms of a common culture. Race is more a cultural than a biological category, with culture being defined almost wholly in terms of a common religion. Despite assertions that the category of Hindu is broader than that of Hinduism, Hinduism as a religion remains the constituting moment of this broader political category. The remaining two categories of country and language also derive from this religious category. Country is simply the geographical territory where a people united by religion, culture, and race live, and language, similarly, that which a people united by religion, culture, and race speak. The priority of religion within this construct reveals that, despite Golwalkar's efforts to distinguish these five categories, it is Hinduism that defines the Hindu Nation.

78. *Id.* at 40.

79. *Id.* at 40-41.

80. *Id.* at 42.

81. *Id.* at 43.

82. *Id.*

The primacy of religion is further evident in Golwalkar's discussion of Muslims and Christians who live in Hindustan outside the Hindu race, religion, and culture. In his view, those who were not a part of the Hindu Race could still join the Hindu Nation under certain conditions:

[They] can have no place in the national life, unless they abandon their differences, adopt the religion, culture and language of the Nation and completely merge themselves in the National Race. So long, however, as they maintain their racial, religious and cultural differences, they cannot but be only foreigners . . . [T]he strangers have to acknowledge the National religion as the state Religion and in every other respect inseparably merge in the National community.<sup>83</sup>

For Golwalkar the constituting moment of this racial category remains one of religion. As in Savarkar's writings, the problem with Muslims and Christians is not that they do not share a common land, a common language, or even part of a common culture. The decisive problem lies in the fact that they lack a requisite "mental allegiance." Golwalkar shows great concern that Muslims and Christians do not look upon India as their holy land and that they continue to display their *religious* allegiance to a foreign land. His call for these communities to "give up their present foreign mental complexion and merge in the common stream of our national life" is thus a demand that they relinquish their religion.<sup>84</sup> Despite the fact that Golwalkar speaks of racial and cultural differences, these differences only make sense in relation to the underlying category of religion. The call for assimilation first and foremost represents a call for religious assimilation, for minorities to return to the folds of Hinduism. It only secondly serves as a call to assimilate into culture and race, so far as these components are derived from the religious category.

These discussions show the extent to which the political category of Hindu has been constituted in opposition to religious minorities and premised on the very elimination of these minorities through assimilation or violence. Religious minorities are constituted as posing a threat to the integrity of the Hindu Nation and cannot be recognized or accommodated as a legitimate part of this entity. Golwalkar was very clear that there was no place for religious minorities who failed to assimilate; minorities must "lose their separate existence to merge in the Hindu race, or . . . stay in the country, wholly subordinated to

---

83. *Id.* at 45–46.

84. M.S. GOLWALKAR, BUNCH OF THOUGHTS 130 (1966).

the Hindu Nation, claiming nothing, deserving no privileges, far less any preferential treatment—not even citizen's rights."<sup>85</sup> Golwalkar's vision of the Hindu Nation thus attacked the very legitimacy of religious minorities and denied them any protection of minority rights within the Hindu Nation.

These conceptualizations of the Hindu Nation continue to shape the political agenda of the Hindu Right today. *Hindutva* aspires to the establishment of a Hindu *Rashtra*—a Hindu state based on a Hindu way of life. Following Savarkar, contemporary ideologues of the Hindu Right emphasize a distinction between Hindu and Hinduism and insist that Hindu embodies an attitude of allegiance.<sup>86</sup> Nevertheless, the constituting element of Hinduness continues to center around religion. Hinduism is still the religion practiced by Hindus, and it continues to be asserted as the only religion premised on the notion of toleration. This claim, in turn, is used to justify the claim that only Hindus are truly secular. The supremacy of Hinduism remains the basis of the political claims against minorities with religions that afford neither toleration nor secularism. While the political dimension of Hindu continues to take precedence, Hinduism itself serves as a crucial dimension of this category.

The salience of religion in the discourse of the Hindu Right has only increased since the advent of the VHP. Its emphasis on Hindu as a racial category and its distinction between Hindu and Hinduism has blurred with the rise of the VHP. Since the VHP has claimed to represent the totality of Hinduism, it has attempted to reconstitute Hinduism as an organized religion under its central auspices. Some commentators have argued that this appeal to religion through the VHP has been part of the phase of popularizing *Hindutva*.<sup>87</sup> They have written of the VHP's moving beyond the elite cells of the RSS shakhas and popularizing the message of *Hindutva* among the Hindu masses.<sup>88</sup> The campaign to destroy the Babri Masjid and to construct a Ram temple in its place has made the religious nature of the political rhetoric behind the Hindu Right abundantly evident. The ascendance of the Ram legend, as well as the political mobilization of numerous "holymen" (*sants* and *sadhus*) into the popular front of the Hindu Right,

85. GOLWALKAR, *supra* note 77, at 47–48 (emphasis added).

86. For example, Seshadri writes:

"Hindu" is not the name of a religious faith like the "Muslim" or the "Christian." It denotes the national way of life here. All those who feel firmly committed to the unity and sanctity of our country and our people, and look upon our great forebear as their national heroes [sic] and the sublime values of our cultural life as their points of veneration and emulation, are all Hindus.

H.V. SESHADRI, *THE WAY* 55 (1991).

87. BASU ET AL., *supra* note 9.

88. *See id.*

has given the Hindu Right a distinctly religious quality. Although traces of racial identity of Hindus remain in evidence, particularly in the ongoing attacks against the Muslim community, the VHP is unapologetic in its emphasis on religion. In its contemporary deployment, the subtle distinctions among Hindu, Hindutva, and Hinduism are often lost. The political and religious discourse has sometimes espoused the superiority of Hinduism, while it has alternatively punctuated political appeals with the language, symbology, and ceremony of Hinduism. Nevertheless, the relationship between Hindu as a political category and Hinduism as a religious category remains complex. For example, the explicitly religious claims of the VHP on behalf of all Hindus only make sense when Hindu is seen as a racial category.<sup>89</sup> Moreover, while the call to religion has grown, the concepts of Hindu Rashtra and Hindutva continue to mean more than an appeal to religion. The Hindu Right has continued to use Hindutva to attack the legitimacy of minority rights. Hindutva continues to mean the assimilation of all minorities into the majoritarian way of life. The concept of Hindutva retains its oppositional meaning; i.e., it continues to be constituted largely in relation to that which it opposes—Muslims and Christians. This onslaught on the legitimacy of religious minorities goes to the very core of Hindu Rashtra and Hindutva. From Savarkar and Golwalkar to contemporary ideologues, it has been this effort to assimilate minorities back into the folds of Hinduism that has given Hindutva its political character. The current phase of popularizing the agenda of the Hindu Right through the VHP has not fundamentally changed this political attack but, rather, simply popularized it through the invocation of religious discourse.

In the contemporary political terrain, Hindutva comprises a political category that is different from Hinduism. It nevertheless relies on religion in constituting the political category of Hindu. The Supreme Court has completely failed to understand these complex relationships.<sup>90</sup> It has inaccurately inferred the meaning of Hindutva from its review of jurisprudence on the meanings of Hinduism and Hindu. Furthermore, its conclusion that an appeal to Hindutva is not *per se* an appeal to religion misrepresents the complex relationship between these terms in the contemporary strategies of the Hindu Right. Although the concept of Hindutva has developed as distinct from Hin-

---

89. *See id.*

90. The Supreme Court has similarly misread the historical use of the term "Indianization." It failed to recognize that Jana Sangh leaders used the term in the 1960s to insinuate that Muslims were not "Indian" enough. "For the [C]ourt to suggest that '{H}indutva' is merely to be understood as a synonym of 'Indianization,' therefore, contains an element of truth quite different from what the [C]ourt may have had in mind; it is such a synonym but principally in the RSS discourse." Nauriya, *supra* note 67, at 11.



duism, it is a concept that nevertheless presupposes the religion of its constituency. And in recent years, the political usage of the term has become more and more imbued with explicitly religious discourse. When used in the context of electoral politics, Hindutva is an appeal to religion and, as such, ought to constitute a violation of Section 123(3) of the Representation of the People Act, 1951.

Secondly, Hindutva continues to be a political category that at its core is an attack on the legitimacy of minority rights. For the Court to conclude that there is nothing inherent in the concept of Hindutva that involves the promotion of religious enmity, hatred, or disharmony is again simply inaccurate. From its roots in the writings of Savarkar to its contemporary deployment by the likes of Bal Thackeray, Manohar Joshi, Sadhvi Rithambhara, and L.K. Advani, Hindutva has been based on the idea of Indian society fractured by the conflict between religious communities, particularly between the Hindus and Muslims, wherein the majority of Hindus have been and continue to be oppressed at the hands of the Muslim minority. Hindutva is a call to unite against these religious minorities; at best it is a call to assimilate these minorities into the ostensibly more tolerant fabric of Hinduism, and at its more extreme it is a call to simply destroy them.

In either mode, Hindutva is an attack on the rights, indeed, on the very legitimacy of religious minorities. As a call to assimilate or otherwise undermine the very identity and integrity of minority communities, it is based on a total disregard and lack of respect for other religious groups. As a result, its political deployment can only be seen as promoting enmity, disharmony, and often hatred between religious groups. The Supreme Court has simply failed to understand the political agenda that informs the meaning of Hindutva in the contemporary political landscape, where an appeal to Hindutva is both an appeal to religion and an appeal promoting enmity and hatred between religious groups. Such appeals ought to constitute a violation of both Sections 123(3) and 123(3A) of the Representation of the People Act, 1951.

For the Hindu Right, Hindutva is indeed a way of life, a way of life of the Hindus who, by definition, practice Hinduism. It is not about the way of life of the Muslims or the Christians in India. For the Hindu Right, Hindutva, both in its historic and contemporary context, is about the assimilation and ultimate negation of these religious minorities. It is in this light that the Supreme Court's conclusions that Hindutva simply represents a way of life of the people of the subcontinent must be evaluated and, ultimately, rejected. Hindutva is *not* the way of life of all the people of the subcontinent. At best, it aspires to represent the Hindu people and to assimilate non-Hindus into its folds by whatever means possible. The Supreme Court has not only effec-

tively condoned this political vision, it has elevated it to a description of an existing state of affairs.<sup>91</sup> It can hardly come as a surprise that the Hindu Right has claimed the decision as an unequivocal victory.<sup>92</sup>

The efforts of the Supreme Court to clarify its views have allayed the fears of many of those committed to secular democracy.<sup>93</sup> But we remain unpersuaded. In our view, the conclusions of the Court have left the legal framework of the democratic politics considerably weakened against the political use of religion by the Hindu Right. In its rejection of the review petition, the Court has failed to appreciate how its conclusions on the meaning of the term *Hindutva* will allow those forces committed to establishing a Hindu *Rashtra* to continue to pursue their agenda, fearless of the implications of appealing to the concept of *Hindutva*. Despite the prohibition on such an appeal in the Representation of the People Act, 1951 and the Supreme Court's emphasis that it has not sanctioned such appeals, the *Manohar Joshi* case has, perhaps unwittingly, given the Hindu Right a green light to continue with its *Hindutva* campaigns, and its efforts to establish a Hindu *Rashtra*. Although, strictly speaking, an appeal to *Hindutva* has not been completely immunized from prosecution under the Act insofar as the Court has emphasized that it is the *specific context* in which it is used that must be examined, the Court's conclusions on the meaning of *Hindutva* have nevertheless legitimized the term. The Hindu Right is free to continue its appeal to *Hindutva* and to the establishment of a Hindu state if it is careful not to appeal too directly to the religion of the candidate.<sup>94</sup> And, the Hindu Right has wasted no time in doing

91. The Court did attempt to distinguish the meaning of the word in the abstract from the way in which communists and/or fundamentalists may have attempted to *misuse* the word. For instance, the Court stated, in *Prabhu v. Kunte*, 1995(7) S.C.A.L.E. 1, 24:

The mischief resulting from the misuse of the terms by anyone in his speech has to be checked and not its permissible use. It is indeed very unfortunate, in spite of the liberal and tolerant features of "Hinduism" recognized in judicial decisions, these terms are misused by anyone during the elections to gain any unfair political advantage. Fundamentalism of any color or kind must be curbed with a heavy hand to preserve and promote the secular creed of the nation.

In so doing, the Court was attempting to distance itself from the communalist agenda of the Hindu Right and should not be seen to be *explicitly* endorsing this agenda. Our point, however, is that the term "Hindutva" cannot be abstracted from the political and historical context that has given meaning to "*Hindutva*." It is simply not possible to speak of *Hindutva* as a abstract representation of "a way of life of the subcontinent," and in so doing, the Court has, perhaps inadvertently, condoned the discursive agenda of the Hindu Right.

92. We do not mean to suggest that the Court has done so intentionally. In other words, we are not suggesting that the Court has been communalized and is now simply espousing the views of the Hindu Right. Rather, the flaws in the Supreme Court's reasoning lie in the Court's failure to appreciate the political and historical context of the term "*Hindutva*," as well as the unstated norms of the majority that are so often reflected in legal decisions.

93. See, e.g., *SC: No Misuse of Religion*, COMMUNALISM COMBAT, Apr. 1996, at 4.

94. In addition, the Court has established a very strict test for establishing that a candidate has consented to the views of other speakers associated with his/her political party and/or other

just so. Its main electoral platform in the 1996 national elections was once again *Hindutva*.<sup>95</sup>

The prohibition on the promotion of religious enmity and hatred is also left weakened in the aftermath of the decision. Although the Court did condemn Thackeray for promoting hatred towards the Muslim community, the Court did not recognize the extent to which the concept of *Hindutva* itself implies an attack on minority rights. While the Court's findings against Thackeray signal that his rhetoric remains beyond the realm of legitimate political speech, it is difficult to imagine speeches more loaded with hatred toward a minority religious group than those of Thackeray.<sup>96</sup> If the prohibition on the promotion of enmity and religious hatred to garner votes were to mean anything at all, it would have to capture such speech.<sup>97</sup> At the same time, the more technical aspects of the Supreme Court decisions have created

organization of the Hindu Right. The mere presence of a candidate, on stage with another speaker who appeals to religion or promotes enmity and hatred, is not sufficient proof of that candidate's consent. The implication of this conclusion is that the Hindu Right can carefully orchestrate its rallies and ensure that the appeals to religion and the promotion of religious enmity come from speakers other than the candidates. The BJP and Shiv Sena will thus be able to continue to reap the benefits of the dirty work done by the RSS and the VHP and, indeed, even by the non-electoral members/leaders of their own parties. This question of consent is to be heard by the Constitutional Bench of the Supreme Court. *Larger Bench Must Dwell on Candidate's 'Consent,' says SC*, TIMES OF INDIA, Apr. 14, 1996, at 7.

95. See BHARATIYA JANATA PARTY, ELECTION MANIFESTO 64 (1996).

96. Interestingly, even one of the articles in the *Organiser* agreed that in finding Thackeray guilty of a corrupt practice, "the Court right deplored bigotry." *Cultural Nationalism Wins Over Pseudo-Secularism*, ORGANISER, Dec. 24, 1995, at 3. However, the article continued, "Bigotry is bad whether it is religious or linguistic, or for that matter casteist. Pseudo-secularists indulging in minorityism and casteists masquerading as messiahs of 'social justice' stand exposed before the bar of public opinion. They are guilty of spreading communalism and creating social disharmony." *Id.* While condemning Thackeray's speech as bigotry, the *Organiser* article nevertheless used the opportunity to turn the criticism back onto the so-called "pseudo-secularists", who are alleged to be the real bigots. It is also interesting to note that in the 1996 national election campaign, the BJP has distanced itself from some of its more vociferous proponents of hate speech towards Muslims, most notably Uma Bharati and Sadhvi Ritambhara. *BJP No Longer Using Ritambhara, Bharati as 'Star Attractions'*, TIMES OF INDIA, Apr. 15, 1996, at 8. This shift also keeps with the decision to have the more moderate Vajjaypee lead the party, displacing the more militant Advani who had lead the party through the Ayodhya campaign. It is, however, too early to tell whether this shift, obviously calculated to maximize their popularity at the polls, represents anything more permanent. Despite the condemnation of the shift in the party strategy from within its own ranks, most notably by Uma Bharati, there is ample evidence to suggest that the BJP retains its commitment to undermining minority rights. For instance, one of the election advertisements of the BJP, significantly with Advani's picture and not Vajjaypee's, continues the attack on Muslim minorities under the traditional slogan, "Justice for all, Appeasement for None." Likely, the shift is simply an effort to be somewhat more careful during the election campaign not to violate the prohibition on the promotion of religious enmity, as well as a part of its bid for political power—an attempt to attract voters who are disillusioned with the Congress Government, but are uncomfortable with the more militant face of the party.

97. There is increasingly a question of whether the laws directed at prohibiting hate speech can mean anything at all, with the increasing legitimacy being accorded to the speech of the Hindu Right. As the speech of the Hindu Right becomes more mainstream, and more part of the collective common sense of an increasing number of Hindu subjects, the efficacy of the hate

ample opportunity for the Hindu Right to continue its often vehement attacks on minorities. The narrow test established by the Court for proving that a candidate consented to the speeches of another will allow the Hindu Right to carefully orchestrate its campaigns, ensuring that speakers other than electoral candidates are assigned the task of spewing the most hateful rhetoric.<sup>98</sup> Moreover, as we discuss in the next section, the Court's conclusions on the secular nature of some of the speeches of the Hindu Right will continue to allow considerable latitude to electoral candidates to attack the legitimacy of minority rights, provided that the attack is adequately disguised within the discourse of secularism and equality.

#### IV. VINDICATING "PSEUDO-SECULARISM"

[W]hen Hinduism is no religion and is a way of life to say that a Hindu state is anti-secular is wholly incorrect . . . Hinduism is secularism par excellence.<sup>99</sup>

The failure of the Court to appreciate the meaning of Hindutva and, thus, the implications of its deployment in the political landscape has done an enormous disservice to the cause of secularism. But the extent of the damage does not end there. Rather, the damage has in our view been compounded by the Court's comments on the secular nature of some of the speeches of the BJP candidates. In this section, we begin by briefly reviewing these comments, and then attempt to illustrate their dangerous implications by situating these comments within the broader context of the highly contested meaning of secularism and the efforts of the Hindu Right to appropriate secularism for its own rather non-secular purposes. Finally, we challenge the Supreme Court's view that there is no inconsistency between its conclusions and the earlier decisions of the Constitutional Bench of the Supreme Court on secularism, particularly in *Bommai v. Union of India*.<sup>100</sup>

---

speech provisions, intended only to police the margins of intolerable speech, is undermined. For a more detailed discussion of this problem, see Kapur, *supra* note 17.

98. See BASU ET AL., *supra* note 9.

99. ORGANISER, Jan. 21, 1996, at 2.

100. *Bommai v. Union of India*, 3 S.C.C. 1 (1994). This case involved a challenge to the validity of the presidential declaration dismissing the BJP governments in four states following the destruction of the mosque at Ayodhya and the ensuing communal riots. The Constitutional Bench of the Supreme Court upheld the validity of the declaration, and in so doing passed considerable comment on the meaning of secularism in Indian constitutional life.

## A. Simply Secular?

In considering whether an appeal to *Hindutva* constituted a violation of the Representation of the People Act, 1951, the Court took into account the fact that many of the Hindu Right speeches at issue appealed to the principle of secularism, and to violations of the right to equality. In the Court's view:

It cannot be doubted that a speech with a secular stance alleging discrimination against any particular religion and promising removal of the imbalance cannot be treated as an appeal on the ground of religion as its thrust is for promoting secularism. Instances given in the speech of discrimination against any religion causing the imbalance in the professed goal of secularism, the allegation being against any individual or any political party, cannot be called an appeal on the ground of religion forbidden by sub-section (3). In other words, mention of religion as such in an election speech is not forbidden by sub-section (3) so long as it does not amount to an appeal to vote for a candidate on the ground of his religion or to refrain from voting for any other candidate on the ground of his religion.<sup>101</sup>

According to the Court, any election speech "made in conformity with the fundamental right to freedom of religion guaranteed under Articles 25 to 30 of the Constitution cannot be treated as anti-secular and prohibited by sub-section (3) of Section 123, unless it falls within the narrow net of the prohibition . . . ."<sup>102</sup> A speech that refers to "religion during an election campaign with a secular stance in conformity with the fundamental right to freedom of religion" is outside the purview of section 123(3) unless it includes an appeal to vote for or against a candidate on the basis of his religion.<sup>103</sup> Similarly, in *Ramakant Mayekar*, the Court stated: "There can be no doubt that mention made of any religion in the context of secularism of [sic] for criticizing the anti-secular stance of any political party or candidate cannot amount to a corrupt practice . . . ."<sup>104</sup> The subtext of these comments is quite clear: the fact that the candidates were criticizing the "pseudo-secularism" of the Congress Government and pointing out the discrimination against Hindus within this version of secularism meant that the speech was of a secular nature.

In our view, these small passages represent some of the most insidious dimensions of the inroads made by the Hindu Right. In this

---

101. *Prabhu*, 1995(7) S.C.A.L.E. 1, at 11-12.

102. *Id.* at 12.

103. *Id.*

104. *Meekar v. D'Silva*, 1995 (7) S.C.A.L.E. 72, 83.

passage, the Supreme Court has effectively legitimized the secular nature of the Hindu Right's version of secularism. The paradox of the Hindu Right's version of secularism has entered officially into legal discourse. Their long struggle to popularize and legitimize a version of secularism that effectively undermines all commonly prevailing notions of secularism has won yet another important ideological victory, in having just been awarded a judicial seal of approval. In order to illustrate the dangerous implications of these passages, we turn first to briefly review the dominant discourse of secularism within constitutional law, and the way in which the Hindu Right has appropriated this discourse for its own rather non-secular purposes.

### B. Contesting Secularisms

Although generally considered as a cornerstone of Indian democracy, secularism has long been a highly contested concept in India. From the days of the independence struggle, two very different understandings of secularism have competed for ideological dominance. Jawaharlal Nehru, the first Prime Minister of Independent India, had a vision of secularism—described as *dharmā nirapeksata*—which was based on a strong belief in the need to separate religion and politics.<sup>105</sup> By way of contrast, Mahatma Gandhi's vision—*saarva dharmā sambhava*—rejected the idea of the separation of religion and politics and was based instead on the principle of the equal respect of all religions. The contest between these two visions of secularism can be seen within the broader context of Western conceptualizations of secularism and debates regarding its appropriateness within the Indian context. The liberal democratic vision of secularism is generally seen as characterized by three principles: (1) liberty and freedom of religion, (2) citizenship and the right to equality and non-discrimination, and (3) neutrality and the separation of state and religion.<sup>106</sup> The first two principles have posed little controversy in the Indian context. The right to freedom of religion and the right to equality and non-discrimination are generally recognized as important constitutional values in their own right as well as a foundation of Indian secularism.<sup>107</sup> The problem arises, however, in relation to the third principle, the separation of religion and state.

---

105. This conceptualization of secularism was seen most clearly in the Karachi Resolution of the Congress on Fundamental Rights (1931), which provided: "the state shall observe neutrality in regard to all religions." As many commentators have observed, however, Nehru eventually compromised on his vision of secularism and adopted the equal respect of all religions. See Asgar Ali Engineer, *Secularism in India—Theory and Practice*, in *SECULARISM AND LIBERATION*, *supra* note 67, at 40.

106. See generally DONALD EUGENE SMITH, *INDIA AS A SECULAR STATE* (1964).

107. There has, however, been considerable criticism of the extent to which the Indian constitutional and political framework has upheld these values. See, e.g., *id.* at 133 (criticizing the

It is in regard to this third principle that some commentators have argued that India is not a secular state,<sup>108</sup> that others have argued that India has some but not all of the features of a secular state,<sup>109</sup> and that still others argue that if India is to be a secular state it must develop its own distinctive understanding of the requirements of secularism. It is in relation to this third principle that the Nehruvian and Gandhian models part company. Nehru was committed to a separation of religion and politics, whereas Gandhi was of the view that such a separation was neither possible nor desirable within the Indian context. Rather, a distinctively Indian conceptualization of secularism was required: a secularism that would be more in keeping with the culture and tradition of the Indian people. *Saarva dharma samabhava* was, in Gandhi's view, such a vision. It is this understanding of secularism as the equal respect of all religions that has come to dominate legal and political thought.<sup>110</sup>

Within the context of constitutional law and discourse, discussions of secularism typically focus on the right to freedom of religion and the right to equality, the first two of the general principles of liberal democratic vision of secularism. The literature typically highlights the various provisions of the Constitution that are considered relevant to the principle of the equal respect of all religions: articles 14–15 guaranteeing the right to equality and non-discrimination, and articles 25–26 guaranteeing the right to freedom of religion and the right of religious denominations to organize their own affairs. The right to equality and the right to freedom of religion are, within this vision, seen as fundamentally interconnected—that is, all citizens must have the *equal* right to freedom of religion, and the State must not *discriminate* on the basis of religion. Following from the dominant understanding of secularism as *saarva dharma samabhava*, the constitutional discourse does not insist on a wall of separation between religion and politics.<sup>111</sup> Rather, discussions tend to emphasize the principle of tol-

---

extent to which these principles were compromised by the Constitution, which allowed for state intervention in the affairs of religion).

108. See VED PRAKASH LUTHERA, *THE CONCEPT OF SECULAR STATE AND INDIA* (1964).

109. SMITH, *supra* note 106.

110. The argument that secularism in India does not mean a wall of separation between religion and politics, but rather, the equal respect of all religions is common throughout the legal literature. For a typical example, see Engineer, *supra* note 105, at 40, who argues that the western concept of secularism, which involves indifference to religion, has never taken root in India. "The concept of secularism in India emerged, in the context of religious pluralism as against religious authoritarianism in the west . . . . It was religious community, rather than religious authority, which mattered in the Indian context." At the same time, it is important to recognize that this dominant concept of secularism is a contested one, which many critics have questioned, challenged and rejected.

111. See, e.g., P.B. Gajendragadkar, *Secularism: Its Implications for Law and Life in India*, in *SECULARISM: ITS IMPLICATIONS FOR LAW AND LIFE IN INDIA* 1, 4 (G.S. Sharma ed., 1966): "The

eration—that is, the equal toleration of all religions.<sup>112</sup> In this regard, article 51A prohibiting the establishment of a state religion is generally highlighted, as are the constitutional prohibitions on religious instruction in state schools, and on taxation in support of any particular religion. The constitutional guarantees on equality and freedom of religion that are seen to frame this principle of equal toleration are also again highlighted. The constitutional characterization of secularism can, then, be seen to be characterized by three principles: (1) freedom of religion, (2) equality and non-discrimination, and (3) toleration. Toleration thus comes to displace neutrality as the third principle of secularism.<sup>113</sup> It is this subtle but important shift from neutrality to toleration that captures the essence of the *saarva dharmā samābhava* vision of secularism, and its conceptualization of the appropriate relationship between religion and state. In stark contrast to the liberal democratic model, which insists that the relationship must be characterized by non-intervention, the equal respect of all religions model allows for state intervention in religion, provided that such intervention is in accordance with the requirements of equality and freedom of religion.<sup>114</sup>

State does not owe loyalty to any particular religion as such; it is not irreligious or anti-religion; it gives equal freedom for all religions and holds that the religion of the citizen has nothing to do in the matter of socio-economic problems;” and R.L. CHAUDHARI, *THE CONCEPT OF SECULARISM IN INDIAN CONSTITUTION* 169 (1987): “[T]he absence of complete separation between the State and the Religion is because of the character of Indian Society which is basically religious . . . . Separation of the State from the religion is not the basis of Indian Secularism, as it is in other countries. Indian Constitution does not reject religion. On the contrary, it respects all religions.” See also J.M. SHELAT, *SECULARISM: PRINCIPLES AND APPLICATIONS* 121–22 (1972).

112. See, e.g., P.K. Tripathi, *Secularism, Law and the Constitution of India*, in *SECULARISM IN INDIA* (1966). See also P.K. Tripathi, *Secularism: Constitutional Provision and Judicial Review*, in *SECULARISM: ITS IMPLICATIONS FOR LAW AND LIFE IN INDIA* 165 (G.S. Sharma ed., 1966).

See also Upendra Baxi, *The Struggle for the Redefinition of Secularism in India: Some Preliminary Reflections*, in *SECULARISM AND LIBERATION*, *supra* note 67, at 54, 61–62, who argues that these principles find recognition in the Indian constitution. See the cases *Kesavananda Bharati*, AIR 1973: S.C., 1461; and *Indira Nehru Gandhi v. Raj Narain*, AIR 1976: S.C., 1260. Another feature was added through a constitutional amendment that imposed a fundamental duty on all citizens to “preserve the rich heritage of our composite culture” (article 51-A(f)). Baxi places considerable reliance on the courts and judiciary in determining the meaning of secularism in India and argues that such a constitutional perspective has been absent from public debate. He argues that the judiciary can bring a sharper focus to the debate. While we agree that the judiciary has a role to play, the *Hindustan* decision highlights how the judiciary has failed to do so.

113. Although there are some echoes to the principle of neutrality within the constitutional discourse, these discussions tend to infuse the concept of neutrality with the spirit of *saarva dharmā samābhava*. Neutrality to all religions tends not to be associated with a wall of separation, as it is in the American context, but rather with the idea that the State must not discriminate against any religion.

114. SMITH, *supra* note 106, at 133. Smith has argued that the third principle of liberal democratic secularism regarding the separation of religion and state includes two distinct principles: “(1) the non-interference of the state and religious organizations in each other’s affairs; (2) the absence of a legal connection between the state and a particular religion. The Indian Constitution . . . does not subscribe to the first principle; it does, however, uphold the second.”



Within this constitutional framework there is, then, a general sense that state intervention in religion is not prohibited. There is also a general sense that equality is intricately connected to secularism: the equal respect of all religions requires that all individuals and religious communities have the equal right to freedom of religion (to practice, profess, and propagate their religion), and that the State does not discriminate among citizens on the basis of their religion. But the more specific question of the *kind* of state action mandated by this vision of secularism remains unanswered. Does the equal respect of all religions require that the Government treat all religions the same? Or does the equal respect of all religions require that the Government equally accommodate the different religions? There is nothing on the face of the concept itself that resolves this question of the kind of intervention contemplated by this vision of secularism.<sup>115</sup>

As we have argued elsewhere, the debate over the meaning of secularism is very much a debate over the meaning of equality and, as such, much of the confusion over the meaning of secularism derives from the confusion over the meaning of equality.<sup>116</sup> Any attempt to resolve the meaning of secularism requires a shift in attention to the meaning of equality—a concept that is no less contested within the contemporary Indian polity. The dominant understanding of equality in India, particularly within the context of constitutional law, has been one of formal equality—that is, formally equal treatment. But a second

---

115. Some have suggested that it requires that the State treat all religions in a *neutral* and impartial manner. But the requirement of neutrality does little to clarify the precise meaning of secularism. Does neutrality require that the State stay out of the affairs of the religious communities? Such an understanding begins to sound rather like the doctrine of separation of religion and politics that this model explicitly rejects. Alternatively, then, would neutrality require that the State treat religious communities the same? Or is the State acting neutrally when it treats religious communities in a way that ensures an equal result? This question has been an ongoing dilemma within the context of U.S. constitutional law and the anti-Establishment clause of the First Amendment. Martha Minow has argued that “neutral means might not produce neutral results, given historic practices and social arrangements that have not been neutral.” Martha Minow, *Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 22 (1987). See also MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW* 44 (1990). In this view, the anti-establishment clause in the U.S. Constitution, which is based on strict state non-intervention, only serves to reinforce the power relationships of the status quo and the dominant position of religious majorities. The facial neutrality of the clause ignores and risks reinforcing its non-neutral impact. Practices that may appear to be neutral as between different religions may in fact be premised on the norms and practices of the majority. In the face of divergent practices between majority groups and minority groups, state neutrality has served to reinforce the majority practices, and the power of the majority to define the norm. The majority’s practices become the unquestioned norm, against which any difference is measured, and in turn, defined. The emphasis on neutrality thus does little to clarify the precise meaning of the equal respect of all religions. Moreover, because of its connotation to a wall of separation approach, the criteria of neutrality may only further obscure the meaning of this vision of secularism.

116. See sources cited, *supra* note 2.

approach to equality is also discernible in Indian political and legal thought: one of substantive or compensatory equality. In this understanding, equality is concerned not with equal treatment, but with addressing disadvantage. Substantive equality, as we have elaborated in our work, is directed at eliminating the historic and systemic discrimination against disadvantaged groups that operates to undermine their full and equal participation in social, economic, political and cultural life.<sup>117</sup> These very different understandings of equality have correspondingly different implications for secularism. A formal understanding of equality would insist that the government treat all religions the same. A substantive understanding of equality, on the other hand, would require that the government accommodate religious differences, particularly those of minority religious groups that have suffered from historic and systemic disadvantage.

There has, however, been surprisingly little attention to this question of the meaning of equality within the dominant vision of secularism. This continuing silence on the underlying conception of equality is no longer a harmless oversight. As we illustrate in the next section, it has become a dangerous silence that the Hindu Right has been only too willing to exploit in its quest to claim the terrain of secularism as its own. The discursive strategies of the Hindu Right have been based on bringing a very particular understanding of equality to the popular understanding of secularism, with powerful results.

### C. In the Name of Secularism

The Hindu Right has staked its claim to secularism, casting itself as the only true upholder of Indian secularism. And increasingly, as its claim comes to have more and more popular appeal, those dedicated to the cause of secular democracy can no longer afford to ignore it. As we have argued elsewhere, a more detailed examination of their strategy reveals how skillfully the Hindu Right has deployed constitutional discourses of secularism and equality.<sup>118</sup> The Hindu Right has appropriated the concept of secularism and, through various ingenious discursive moves, made it very much their own. Secularism has now become the official banner under which the Hindu Right campaigns for a Hindu *Rashtra* and under which the rights of religious minorities are savagely attacked and delegitimized. And its claim to secularism is intricately connected to its understanding of equality.

---

117. For a detailed discussion of these competing visions of equality in the context of Indian constitutional law, see Ratna Kapur & Brenda Cossman, *On Women, Equality and the Constitution: Through the Looking Glass of Feminism*, 1 NAT'L L. SCH. J. (Special Ed. Feminism and Law 1993). See also, KAPUR & COSSMAN, *SUBVERSIVE SITES*, *supra* note 2.

118. See sources cited, *supra* note 2.

The Hindu Right explicitly argues in favor of *saarva dharma sambhava* and "positive secularism." The BJP has repeatedly stated its support for this version of secularism. For instance, the BJP Constitution provides "The Party shall be committed to . . . Positive Secularism, that is, *Sarva Dharma Samabhav*."<sup>119</sup> The BJP Manifesto similarly states: "The BJP believes in positive secularism which, according to our constitution makers, meant *Sarva Dharma Samabhava* and which does not connote an irreligious state."<sup>120</sup> This discourse is based on a particular vision of equal respect of all religions: that is, formally equal treatment. Within this view, the equality of all religions requires that all religious communities be treated the same in law. For example, L.K. Advani, a longtime leader of the BJP, states: "The BJP is committed unequivocally to secularism as conceived by our Constitution makers. All citizens are equal and there shall be no discrimination between one citizen and another, on grounds of his faith."<sup>121</sup> Any special or different treatment on the basis of religion is seen as a violation of secularism.<sup>122</sup>

The particular meaning that the Hindu Right gives to the equal respect of all religions is one based on formally equal treatment. Accordingly, any laws or policies that provide special treatment for minorities are opposed as "pseudo secularism," or the "appeasement of minorities." In the discursive strategy of the Hindu Right, this approach to secularism is made to sound quite reasonable. It is simply based on the *saarva dharma samabhava* approach to secularism, which is after all the quintessential understanding of secularism in India, and the formal approach to equality, which has been the dominant understanding of equality within Indian constitutional law. Beneath the surface, however, this discourse of secularism and equality is an unapologetic appeal to brute majoritarianism and an assault on the very

119. BJP Constitution and Rules, art. IV, as approved by the National Council, May 2, 1992.

120. See BJP Manifesto, quoted in L.K. Advani, Address at the Indian Parliament (Nov. 7, 1990). Interestingly, the 1996 BJP Election Manifesto does not mention secularism at all. But in his prime ministerial address to the nation, Atal Behari Vajpayee spoke of the BJP's secular vision and emphasized that under the BJP, India would never be a theocratic state.

121. L.K. Advani, Press Conference (Jan. 18, 1993). Similar statements can be found in articles and commentaries throughout the *Organiser*. For example, Madhok writes "There are three universally accepted essential postulates of a secular state: 1. The state must not discriminate between its citizens on the basis of religion or form of worship. 2. There should be uniform laws for all citizens. 3. All citizens should be equal before the law." Balraj Madhok, *An Open Letter to the President, Prime Minister, Party Leaders and Editors*, ORGANISER, Republic Day 1993 Nationalism Special, at 52. Within this definition, secularism is rendered synonymous with the formally equal treatment of all citizens. Significantly, there is no mention of a non-denominational state within this definition of secularism.

122. The same emphasis on formally equal treatment can be seen in RSS political rhetoric: "The RSS . . . never demands any special rights to the Hindus. At the same time, it is against giving any concession to other religious minority groups and it opposes religious discrimination." K. JAYAPRASAD, RSS AND HINDU NATIONALISM: INROADS IN A LEFTIST STRONGHOLD 93 (1991). See also NANA DESHMUKH, RSS: VICTIM OF SLANDER 14-15 (1979).

legitimacy of minority rights.<sup>123</sup> The formal equality of the Hindu Right means that the dominant Hindu community becomes the norm against which all other communities are to be judged and the norm according to which these “other” communities are to be treated. In the hands of the Hindu Right, special protection for the rights of minorities is rejected as a violation of secularism. Moreover, their leaders defend this vision of secularism in unapologetically majoritarian terms. For example, Seshadri writes:

Democracy in normal parlance means the rule of the majority. In every single democratic country, it is the majority culture whose ideals and values of life are accepted as the national ethos by one and all . . . . The same applies to the laws of the land . . . . No religious group can claim any exclusive rights or privileges to itself.<sup>124</sup>

One of the very cornerstones of democracy—the protection of minorities from the rule of the majority—is simply discarded. Through this approach, the Hindu Right is attempting to establish majority norms as the ostensibly neutral norms against which all others are judged. Their norm is a Hindu norm. In their vision, the role of the state in religion is thus not one of neutrality at all, but of fostering the Hindu nation. We can see the paradox of this vision of secularism carried to its contradictory extreme. The practices of the Hindu majority come to be viewed as neutral, and the state in turn is seen to be acting neutrally only when it reinforces these practices. Thus, Hindus do not need “special rights” because of the extent to which all legal rights come to be based on Hindu cultural norms and practices. The discourse of secularism comes to reinforce the norms of the dominant Hindu community.

The reconstruction of secularism within the political rhetoric of the Hindu Right has also relied on the principle of toleration: a principle that in the hands of the Hindu Right is cast in wholly religious terms. Golwalkar, speaking on the question of secularism, stated:

It sometimes seems to mean a denial of all religion—and carries a connotation of being materialistic . . . . But if by secularism is meant that the State should not be tagged to any particular creed and that all faiths should be equally respected, then this again would be another name of Hindu tradition. In fact, Hindu tradi-

---

123. For a discussion of the dangers of majoritarianism that lie within this vision of secularism, see Prakash Chandra Upadhyaya, *The Politics of Indian Secularism*, 26, 4 MODERN ASIAN STUDIES 815, 830–37 (1992).

124. H.V. Seshadri, *Strange Political Diction*, ORGANISER, Feb. 4, 1990.

tion goes far beyond the western concept of "tolerance" which implies that the faith which "tolerates" is superior to the other. With us, all faiths are equally sacred . . . Hinduism is secularism in its noblest sense.<sup>125</sup>

Echoing the views of the ideological leaders of the Hindu Right before him, Deoras of the RSS similarly argues that only Hindus are capable of real secularism:

If secularism means treating all religions on an equal footing, proselytization and secularism can't go together. Those who believe in conversion do so because they feel that their religion is superior to all others. Their organizations therefore can not claim to be secular. Hinduism, on the other hand, does not believe in conversions and Hindus have never been proselytizers. As such, organizations of Hindus alone can be truly secular.<sup>126</sup>

Secularism is defined as the toleration of all religions. Hinduism is defined as the only religion with a true tolerance for all other religions. Therefore, according to these terms, only a country based on Hinduism can be truly secular. The norm of the dominant Hindu community, which remains unstated in the Hindu Right's political rhetoric around equality and non-discrimination is here stated quite explicitly: "Hinduism is secularism par excellence."<sup>127</sup> And paradoxically, it is precisely this argument that is used to deflect any allegation of fundamentalism or theocracy. Because Hinduism is tolerant—because it represents "secularism par excellence"—by definition, it cannot be fundamentalist or theocratic.

Revealingly, there is little emphasis on the second principle of Indian secularism—namely, freedom of religion within the Hindu Right. For example, neither the BJP Constitution nor Manifestos explicitly refer to freedom of religion as a basic commitment. There is a reference within its Constitution to "liberty of faith" as a basic objective, but the term is not synonymous with the constitutional guarantees of freedom of religion. Rather, when the idea of "liberty of faith" is raised, it tends to be subsumed within the more general rubric of toleration and is used to distinguish Hindu *Rashtra* from a theocratic state. For instance, in *Integral Humanism*, Deendayal Upadhyaya emphasized that Dharma Rajya<sup>128</sup> "does not mean a theocratic state . . . . Where a particular sect and its prophet or Guru rule supreme, that is

---

125. Madhav Sadashiv Golwalkar, From Red Fort Grounds, Speech Delivered at a Public Rally at the Red Fort Grounds (Nov. 14, 1965) (transcript available at the Nehru Memorial Museum and Library).

126. SRI BALASHEB DEORAS, ANSWERS QUESTIONS 54 (1984).

127. *M. Rama Josi SC Judgement on Hindutva Flawless*, ORGANISER, Jan. 21, 1996, at 2.

128. The term "Dharma Rajya" used by Upadhyaya and taken up by the Jana Party, and

a theocratic state. All the rights are enjoyed by the followers of this particular sect. Others either cannot live in that country or at best enjoin [sic] a slave[-]like, secondary citizen's status."<sup>129</sup> Upadhyaya insisted that such was not to be the case in Dharma Rajya, which would "accept(s) the importance of religion in the peace, happiness and progress of an individual. Therefore the state has the responsibility to maintain an atmosphere in which every individual can follow the religion of his choice and live in peace. *The freedom to follow one's own religion necessarily requires tolerance for other religions.*"<sup>130</sup> But the freedom of religion within this vision is a highly restricted one. First, the idea of "liberty of faith" or "freedom to worship" is cast in highly individualistic terms: it is the individual's right to pursue his or her own spiritual path, and not the collective rights of a religious community to any form of self-determination. Rather, these collective rights, such as the right to set up educational institutions as guaranteed by article 30 of the Indian Constitution, are cast as a violation of equality.<sup>131</sup> Second, it is a freedom of religion that is brought under the rubric of Hinduism—that is, Hinduism alone is seen to provide the toleration that is required for individuals to be able to pursue their own spiritual path. The idea of Hinduism as tolerant is again used to prop up the claim to secularism, while framing this claim within an entirely religious discourse. Third, it is a freedom that does *not* include the right to propagate one's religion. Rather, the propagation of religion is cast as a violation of toleration—as the inability of some religions to tolerate others.<sup>132</sup> More specifically, Islam and Christianity, the proselytizing religions, are seen to be premised upon the non-toleration of other religions and thus on the very denial of the right to freedom of religion of those who do not subscribe to their religions. The right to propagate one's religion is thereby transformed from an integral part of freedom of religion into a violation of freedom of religion.

---

subsequently, by the BJP, can be seen as a rough equivalent of Hindu *Rashtra*, a term that has since been explicitly adopted by the BJP.

129. DEENDAYAL UPADHYAYA, *INTEGRAL HUMANISM* 53, 54 (1965). This text is considered to be the ideological foundation of the BJP, and the term "integral humanism" has been included in the Party's constitution and policy statements since its inception.

130. *Id.* at 54 (emphasis added).

131. The 1996 BJP Election Manifesto includes a commitment to amending article 30, although it does not specify the nature of the amendment. The Manifesto states, at 64, that the BJP is committed to: "Ensure equality for all and discrimination against none on grounds of religion in matters of education by amending Article 30."

132. Conversions from Hinduism to either Islam or Christianity have long been a major theme within the Hindu Right. Savarkar and Golwalkar, as well as contemporary ideologues such as Seshadri and Deoras, have focused attacks on the proselytizing religions, the problem of conversions, and the goal of bringing those who have strayed from Hinduism back into its folds. Similarly, the ORGANISER publishes numerous articles detailing recent conversions of Hindus to other religions and condemning these proselytizing religions for their intolerance.

The sphere of freedom of religion has been radically curtailed within the discourse of the Hindu Right. It is contained on one side by a formal understanding of equality that treats any special treatment of religious minorities as a violation of secularism. On the other side, freedom of religion is contained by a religious understanding of toleration, within which Hinduism becomes the only guarantor of an individual's ability to follow his or her own religion, therefore, the only guarantor of secularism. Thus framed, the Hindu Right can retain just enough of the discourse of freedom of religion (or liberty of worship) to maintain its claim to secularism and to distinguish itself from religious fundamentalism.

Through these various manipulations and redefinitions the Hindu Right is able to cast its arguments within the requirements of the constitutional discourse of secularism. It appeals to the constitutional guarantees of equality in articles 14 and 15, which it interprets to mean the equal treatment of all individuals and communities. It appeals to the principle of toleration, which in its hands means the supremacy of Hinduism. And it appeals to the constitutional guarantees of freedom of religion in article 25, interpreting this provision to mean only the individual's right to worship, which is then used to reinforce the importance of Hinduism's toleration. Each dimension is carefully deployed to reinforce the other and to immunize itself from the allegation of religious fundamentalism.

Despite its appearance, the Hindu Right's discourse of "secularism" fails to conform to any of the prevailing definitions of secularism. It does not, of course, follow the formal approach to secularism, insofar as there is no separation of religion and politics. It also does not follow the *saarva dharma sambhava* approach insofar as there is no real respect or accommodation for any other religion. The Hindu Right does *not* equally respect all religions: since not all religions are as tolerant as Hinduism, not all religions are worthy of equal respect. Rather, the objective of *Hindutva* is the assimilation of minorities into the broader and ostensibly more tolerant fabric of Hinduism. This version of secularism is capturing the hearts and minds of Hindu subjects and is increasingly passing as a reasonable alternative to the other failed versions.

In the *Manohar Joshi* decision even the Supreme Court recognized the Hindu Right's appropriation of the concept of secularism as a reasonable alternative. In the Court's view, speeches that allege discrimination against a religious community are simply part and parcel of the constitutional guarantees of equality and freedom of religion. There is a certain logic to this reasoning, following from the Constitutional discourse of secularism: the Hindu Right is appealing to the concept of secularism and criticizing the failure of the central govern-

ment to implement real secularism. It is casting its arguments in the language of formal equality, which translates into discrimination against Hindus. Appeals are expressly made to the guarantees of equality in articles 14 and 15 of the Indian Constitution. Since the BJP's arguments are cast in the discourse of Indian constitutionalism, these arguments are not considered an appeal to religion. It is precisely this appeal to the language of secularism and equality that has made the strategies of the Hindu Right so disturbingly successful. On its face, there is nothing in the constitutional discourse of secularism that seems to prevent the Hindu Right from doing so. It is able to take up the equal respect of all religions, and its underlying principles of equality and non-discrimination, freedom of religion, and toleration, to argue in favor of a Hindu State. The fact that this constitutional discourse has never insisted on the separation of religion and state leaves the Hindu Right free to argue for a Hindu *Rashtra*. Because the meaning of equality that ought to inform this vision of secularism has not been clearly articulated the Hindu Right is left free to argue for its vision of equality. The fact that the constitutional discourse has accepted the importance of toleration of other religions as the essence of Indian secularism means that the Hindu Right is free to argue that Hinduism alone provides the basis for a tolerant, secular state.

On one hand, the Supreme Court's decision can be interpreted simply as being guided by the basic dictates of constitutional secularism, and based upon way the BJP appealed to this constitutional discourse, it rightly concluded that there was no violation of secularism. On the other hand, if constitutional secularism is to be guarded and protected by the judiciary, we might reasonably expect the courts to take a harder look at the claims before it. It is reasonable to expect the courts to look beneath the surface of these claims and interrogate whether the claims of the Hindu Right are in fact consistent with the principles of constitutional secularism. Furthermore, we ought to reasonably expect the Court to do so *before* it condones the claims of the Hindu Right to secularism. In the *Manohar Joshi* case such reasonable expectations were not met. Rather, the Court was content to conclude that the speeches were secular simply by virtue of their appeal to the discourse of equality. The Court has, in effect, fallen into the complex trap set by the Hindu Right, wherein a fundamentally non-secular project is being packaged, sold and consumed as a secular one. The Court has, perhaps inadvertently, legitimized this version of secularism with a judicial seal of approval.

It is precisely in this legitimization of the Hindu Right's vision of secularism that the Supreme Court decision has such dangerous implications. The strategy of dressing up its attack on minority rights, and its effort to establish a denominational state in the language of secu-



larism, has become enough to legitimize the Hindu Right's political agenda as a secular one. Despite the Court's efforts to clarify that its decision does not in any way allow an appeal to religion to gain votes, the fact remains that the Hindu Right will be able to continue to pursue its strategy of attacking minorities by manipulating the discourse of secularism. It means that the Hindu Right can continue its efforts to promote enmity and hatred against Muslims under the guise of secularism. Although the Court was clear that blatantly hateful comments like those of Thackeray would constitute a violation of the *Representation of the People Act, 1951* and would not be tolerated, attacks on the very legitimacy of minority rights that are dressed up in the discourse of secularism will attach no such liability.<sup>133</sup>

Finally, in its rejection of the review petition, the Supreme Court concluded that there was nothing inconsistent between the *Bommai* decision and the *Hindutva* decision.<sup>134</sup> The Court's conclusions are true insofar as there is no clearly articulated principle of secularism that is undermined, no protection overruled, and no earlier decision reversed. Nevertheless, the result is more beneficial to the Hindu Right in the final analysis. First, the conclusion of the Court that nothing in the *Bommai* case was of assistance in interpreting sections 3 and 3(A) of the Representation of the People Act, 1951 is unsustainable—several of the opinions in the *Bommai* decision made specific mention of these sections and establish a framework of secularism within which these sections ought to be interpreted. Moreover, a careful reading of the *Hindutva* decisions reveals many inconsistencies with the spirit of secularism affirmed by the Supreme Court in the earlier decision. The conclusions on the meaning of *Hindutva*, and on the secular nature of the speeches of the Hindu Right, are fundamentally at odds with the conclusions of the full Constitutional Bench of the Supreme Court on both the meaning and importance of secularism, and the nonsecular nature of the strategies of the Hindu Right.

In *Bommai*, the declaration of Presidential rule in four states following the destruction of the Babri Masjid on December 6, 1992, by the mobs of the Hindu Right was challenged. The full constitutional bench of the Supreme Court upheld the validity of the declaration of Presidential rule, and in so doing established the importance and meaning of secularism in India.<sup>135</sup> The opinions of three Justices,

---

133. This seems to be the strategy adopted by the BJP in its 1996 election campaign. It has placed the face of moderation at the front of the party, displacing and even distancing itself from the more militant persons. At the same time, the BJP continues to campaign on its platform of secularism, which continues to include all of its usual characteristics: "One Nation—One People", Repeal Article 370, Uniform Civil Code, Human Rights Commission, Detection and Deportation (of Bangladeshi immigrants).

134. *Mohammed Aslam v. Union of India and ORS J.T.*, 1996 (5) S.C.C. 566.

135. *Bommai*, 3 SCC 1 (1994).

speaking on behalf of six members of the Supreme Court, unanimously affirmed the importance of secularism to the Indian constitution, while emphasizing the distinctively Indian concept of secularism as the equal respect of all religions.<sup>136</sup> For example, Justice Sawant echoed the common view that in India secularism does not involve a complete separation of religion and the state, but rather the notion of treating all religions equally.<sup>137</sup> In his words:

The ideal of a secular State in the sense of a State which treats all religions alike and displays benevolence towards them is in a way more suited to the Indian environment and climate than that of a truly secular State by which [is] meant a state which creates complete separation between religion and the State.<sup>138</sup>

According to Justice Sawant this concept of secularism as religious tolerance and equal treatment of all religious groups includes an assurance of the protection of life, property, and places of worship for all religious groups. He further states that any act of state government "calculated to subvert or sabotage secularism as enshrined in our Constitution, can lawfully be deemed to give rise to a situation in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution."<sup>139</sup>

136. The opinions in *Bommai*, 3 SCC 1 (1994) were delivered by Justice Sawant (on behalf of Kuldip Singh, J. with Pandian, J. concurring); Justice Jeevan Reddy, (on behalf of S.C. Agrawal, J., with Pandian, J. also concurring); and Justice Ramaswamy.

137. Quoting and reviewing at length with approval from a 1965 lecture by M.C. Setalvad, Justice Sawant noted that secularism in India does not imply a complete separation of religion and state as in the United States. "In our country, all religions are placed on the basis of equality . . ." *Id.* at 145.

138. *Id.* at 146. Justice Sawant further wrote:

Secularism under our Constitution is that whatever the attitude of the State towards the religions, religious sects and denominations, religion cannot be mixed with any secular activity of the State. In fact, the encroachment of religion into secular activities is strictly prohibited. This is evident from the provisions of the Constitution to which we have made reference above. The State's tolerance of religion or religions does not make it either a religious or a theocratic State. When the State allows citizens to practice and profess their religions, it does not either explicitly or implicitly allow them to introduce religion into non-religious and secular activities of the State. The freedom and tolerance of religion is only to the extent of permitting pursuit of spiritual life which is different from the secular life . . . This is also clear from sub-section (3) of Section 123 of the *Representation of the People Act, 1951* . . . [and] sub-section 3(A) of the same section . . .

....

... [R]eligious tolerance and equal treatment of all religious groups and protection of their life and property and of the places of their worship are an essential part of secularism enshrined in our Constitution.

*Id.* at 146-48.

139. *Id.* at 149. Although each of the decisions echoed the general idea of Indian secularism as the equal respect of all religions, there were slightly different emphases in each of the decisions. For example, while Justice Sawant most strongly emphasized the equal respect of all religions, and its requirement of toleration, Justice Jeevan Reddy's decision placed some emphasis on the

In a similar vein, the opinions of Justice Jeevan Reddy and Justice Ramaswamy similarly condemned the strategies of the Hindu Right as non-secular. For example, Jeevan Reddy J. stated:

. . . it is clear that if any party or organization seeks to fight the elections on the basis of a plank which has the proximate effect of eroding the secular philosophy of the Constitution it would certainly be guilty of following an unconstitutional course of action . . . . Introducing religion into politics is to introduce an impermissible element into body politic and an imbalance in our constitutional system. If a political party espousing a particular religion comes to power, that religion tends to become, in practice, the official religion . . . . This would be plainly antithetical to Articles 14 to 16, 25 and the entire constitutional scheme adumbrated hereinabove. Under our Constitution, no party or organization can simultaneously be a political *and* a religious party.<sup>140</sup>

Justice Ramaswamy's decision also strongly condemned the rise of fundamentalism as a violation of the constitutional principle of secularism. For example, he writes: "[The] rise of fundamentalism and communalization of politics are anti-secularism. They encourage separatist and divisive forces and become breeding grounds for national disintegration and fail the Parliamentary democratic system and the Constitution."<sup>141</sup>

In stark contrast to the views expressed by the Court in the *Hindutva* case, the Court in *Bommai* recognized that the BJP's strategy was an attack on the religious freedom of minorities and thus undermined one of the very essentials of secularism. Perhaps because of the extremity of the circumstances surrounding *Bommai*—the destruction of the mosque, the outbreak of communal riots and the declaration of presidential rule—the Court was not blinded by the discourse of secularism used by the Hindu Right to advance its agenda. But, in the *Hindutva* cases, it was the *discourse* itself (the promotion of *Hindutva* and attacks on minorities through the language of secularism and equality as well as

---

idea of the separation of religion and politics. After a long discussion of the requirement of equal respect, Jeevan Reddy J. stated: "In short, in the affairs of the State . . . religion is irrelevant; it is strictly a personal affair. In this sense . . . our Constitution is broadly in agreement with the U.S. Constitution, the First Amendment whereof declares that 'Congress shall make no laws respecting an establishment of religion or prohibiting the free exercise thereof . . . .' Perhaps this is an echo of the doctrine of separation of Church and State; maybe it is the modern political thought which seeks to separate religion from the State—it matters very little." *Id.* at 235. By way of contrast again, Justice Ramaswamy's opinion, while also speaking of the equal respect of all religions, included several references to the concept of neutrality.

140. *Id.* at 236.

141. *Id.* at 175.

through hate speech) that was effectively on trial. Had the Supreme Court been willing to examine critically the meaning of *Hindutva* and its implications for minorities, as well as the way in which the political aspirations of *Hindutva* are now cloaked in the rhetoric of secularism, it would have been able to see the extent to which the Hindu Right was undermining the very essentials of secularism. This was the critical flaw in both the *Hindutva* decisions and in the subsequent dismissal of the review petition.

At the same time, it is important to recognize that the conclusions of the Supreme Court in the *Manohar Joshi* case were at least partially facilitated by the fact the Constitutional Bench in the *Bommai* decision did not articulate the precise meaning of the concept of equal respect of all religions. The pronouncements of the Supreme Court in *Bommai* were important affirmations of the principle of secularism and equally important denunciations of the communalism of the Hindu Right. The decision remains marred, however, by the elusive nature of the underlying conception of equality and the kind of state action mandated by this conception. It is partially because the meaning of equality remains unarticulated that the Hindu Right can continue to advance its position as a legitimate version of secularism and that the Supreme Court can condone its position as such. We do not mean to suggest that the courts alone are responsible for this increasing legitimacy of the claims of the Hindu Right to secularism, nor that the courts alone will be able to reverse the trend. We do believe, however, that the courts can help uphold the principle of secularism by more carefully and precisely articulating the content of the equal respect of all religions and, in so doing, may at least be able to close the doors on any further *constitutional* recognition of the Hindu Right's claim to secularism.

## V. SECULARISM IN CRISIS

The rise of the Hindu Right in and through the discourse of secularism has intensified the contemporary debates on the concept of secularism in India. Despite the widespread agreement within constitutional discourse of secularism as a cornerstone of Indian democracy as well as its distinctive Indian character as the equal respect of all religions, secularism remains a highly contested concept. Some critics reject the concept altogether, arguing that it is wholly derived from western modernity and ill-suited to the historical realities of Indian society. Ashis Nandy, who has led this intellectual charge, has argued that secularism is part of the same process of the formation of the modern state that has also promoted "religion as ideology," or communalism. Rather than relying on the secularism of the modernized elite, Nandy argues that Indians should "explore the philosophy, the sym-

bolism and the theology of tolerance in the various faiths of the citizens and hope that the state systems in South Asia may learn something about religious tolerance from everyday Hinduism, Islam, Buddhism, and/or Sikhism . . . ."<sup>142</sup>

Many other commentators, who have come to secularism's defense, nevertheless remain highly critical of the way in which secularism has evolved in the Indian context. Some question the appropriateness of the particular model of secularism, arguing that Indian democracy might be better served by a more complete separation of religion and politics.<sup>143</sup> Upadhyaya, for example, argues that the concept of *saarva dharma sambhava* has failed to transcend the categories of communalism and that this approach to secularism has been an underlying cause of the communalization of Indian politics. In his view, this understanding of secularism that envisions the state as "the representative body of all religious communities" becomes a majoritarian secularism. Upadhyaya argues that if all communities within this approach to secularism were to be equal "one would be more equal than others—namely, the majority hindu community." This approach, he argues, has given rise to majoritarian politics in which "representative politics based on adult franchise have become a contest in which communities are mobilized in a competition for votes, and in which the majority community must always win." The major lacunae in the conceptualization of secularism in India thus "lies in the definition of secularism . . . in that secularism has not been clearly defined in terms of the separation of religion from politics, either in its constitutional form or in the conventions of the political process."<sup>144</sup>

---

142. Ashis Nandy, *The Politics of Secularism and the Recovery of Religious Tolerance*, ALTERNATIVES XIII, Apr. 1988.

143. Upadhyaya argues that the equal respect for all religions has been responsible for Communalizing politics. Upadhyaya, *supra* note 123. See also Prakash Chandra Upadhyaya, *The Politics of Indian Secularism: Its Practitioners, Defenders and Critics*, 11 Occasional Papers on Perspectives in Indian Development (Nehru Memorial Museum and Library, New Delhi, India), Jan. 1990.

144. See Upadhyaya, *supra* 123, at 817–18. In his view, Indian secularism has been coopted "by communal parties and ideologies in this way because it has never meant the separation of religion from politics. Instead, it defines religion and community as legitimate platforms for political mobilization, and merely preaches political accommodation between all religious communities. This definition is open to interpretation and misrepresentation, and allows communists to masquerade as secularists." *Id.* at 852. Upadhyaya, however, also emphasizes the important differences between majoritarianism and communalism. Majoritarianism "represents accommodation and moderation as opposed to confrontation with minorities. It preaches not religious orthodoxy but religious heterodoxy. It maintains a semblance of tolerance as opposed to the outright intolerance of the communalist. It seeks to replace the language of religious antagonism with the vocabulary of non-antagonistic communalism." *Id.* But, despite these important differences, he concludes that "at moments of communal polarization, majoritarian secularism is always in danger of being swamped by Hindu communalism." *Id.* at 853.

Yet others argue for a total reconceptualization of secularism within the Indian polity. Partha Chatterjee, for example, has argued for a reconfiguration of the problem of secularism; that is, for a shift in the understanding of the nature of the challenge presented by the Hindu Right to one of minority rights and, accordingly, has argued that what is needed to meet this challenge is a reconceptualization of the concept of toleration.<sup>145</sup> He raises the same doubt as Nandy as to "whether secularism necessarily ensures toleration," but in contrast to Nandy who seeks toleration in the cultural traditions of pre-modern India, Chatterjee sets out to find a political conception of toleration.<sup>146</sup>

We are in substantial agreement with those commentators who argue that the current crisis of secularism must be seen within the broader context of majoritarianism and the increasing disregard of the rights of minorities. It is precisely this majoritarianism that needs to be challenged—a tall order for the concept of secularism. The majoritarianism that Upadhyaya and others have demonstrated in the dominant understanding of Indian secularism is also deeply rooted in a multiplicity of dominant ideologies.

We enter into these debates with a focus on the constitutional discourses of secularism, or rather the legal and specifically constitutional discourses articulated by the courts. In so doing, we do not mean to suggest that legal discourse alone can turn the current majoritarian tides. Rather, our focus on this discourse is simply in recognition of the extent to which law itself has become an important site in the struggle over the meaning of secularism and the broader contest over the role and status of minorities in India. To the extent that law itself has become a site of this struggle, it will be important for the forces of democratic secularism to challenge the Hindu Right on this terrain as well. And as such, the courts can play a role in this broader dispute over the meaning of secularism and the place of minorities. At a minimum, the courts can guard against any further erosion of the principle of toleration and the rights of minorities. Beyond this basic minimum, the courts could also play a significant role in more precisely articulating the principles and content of democratic secularism in India.

It is with this limited, but important role of legal discourse in mind, that we turn to briefly reconsider the principles that ought to inform democratic secularism, principles designed with a view to constrain the

---

145. Partha Chatterjee, *Secularism and Toleration*, 29 *ECON. & POL. WKLY.* 1768 (1994). See also Akeel Bilgrami, *Two Concepts of Secularism: Reason, Modernity and Archimedean Ideal*, 29 *ECON. & POL. WKLY.* 1749 (1994). Bilgrami argues for a negotiated secularism that could emerge "by negotiation between the substantive commitments of particular religious communities." *Id.* at 1755.

146. Chatterjee, *supra* note 145.

majoritarianism of the Indian political scene. In what may appear to be in contrast with the insights of critics like Upadhyaya, we situate this argument within the dominant discourse of secularism, or more specifically the equal respect of all religions. Although a more complete segregation of religion and politics might ultimately be desirable, it hardly seems any more likely in the current political environment than it was in Nehru's day. In our view, any effort to argue for a wall of separation of religion and politics at the current juncture will invariably fall into the trap of "westernization." It will simply be written off as a misguided effort to impose a western model of secularism onto the highly distinctive character of Indian society. It is not only the opponents of secularism like Ashis Nandy who would dismiss such claims, but rather all those who defend the dominant discourse of secularism in India as the equal respect of all religions.

Therefore, rather than calling for a more complete separation of religion and politics, we turn to secularism as the equal respect of all religions. Our objective here is to look for legal support within constitutional discourse as it currently exists. Notwithstanding the limitations that critics like Upadhyaya have identified with this vision of secularism, it may be possible to revitalize the principles that have informed this vision to better meet the challenge of majoritarianism. In this concluding section we set out some tentative suggestions for working in and through the dominant discourse of secularism in an attempt to realign this concept with democratic principles.

### A. Equality

First and foremost, a democratic realignment of the principle of the equal respect of all religions requires a shift in the underlying model of equality. The discourse of secularism needs to be reframed within a model of substantive equality. As we have argued elsewhere, a substantive model of equality would allow minorities a claim to deferential treatment.<sup>147</sup> A substantive model of equality directs attention to both historic and systemic forms of discrimination. In order to compensate for past and continuing disadvantage, these minorities may be treated differently. Further, a substantive model of equality can take differences into account in a way that a formal model of equality cannot. Formal equality simply insists on equal treatment, which then allows difference to operate either in denying the very claim to equality of groups who are different (only those who are similarly situated need to be treated the same),<sup>148</sup> or in denying the relevance of the differences of

---

147. See sources cited *supra* note 2.

148. Martha Minow has explored the dilemmas of difference presented by the notion of equality as sameness. See sources cited *supra* note 115.

the group (equality demands that they be treated the same). In the context of Indian secularism, the formal equality of the Hindu Right has done the latter. It has insisted that religious minorities be treated the same. The question that goes unaddressed in this model of equality is, "The same as who?" A model of equality that insists on sameness invariably judges those who are different according to the unstated norms of the majority. Thus, in the context of the Hindu Right, the formal model of equality judges religious minorities according to the unstated (though sometimes explicitly stated in the more extreme rhetoric of the RSS and Shiv Sena) norms of the Hindu majority.

In stark contrast, a substantive approach to equality considers the way in which dominant social and legal practices may be pressured by the unstated assumptions of the majority. It recognizes that these unstated assumptions, against which those who are different are often judged, simply serve to reinforce dominant practices and endeavor to assimilate those who are different into these dominant practices. In so doing, it recognizes that the protection of cultural minorities may require these groups to be treated in a manner that is not set by these dominant norms. It allows for a recognition of the validity of cultural, religious, and/or other differences, and opens the possibility that these differences need to be recognized and respected in law. At the same time, a substantive model of equality does not provide a formula that insists that minorities must always be treated differently. There are some contexts in which it is quite inappropriate to treat minorities differently (as with the right to vote), whereas in other contexts it might be quite necessary to treat them differently (as with the right to worship on a particular holy day). It simply creates the *possibility* that difference might be relevant and directs attention to the *possibility* of systemic discrimination in dominant social and legal practices. In so doing, it challenges the pure majoritarianism of a formal approach to equality by creating a legally principled defense for the protection of the rights of cultural minorities.<sup>149</sup>

A revision of equality along these lines will allow for a re-examination of the meaning of equal respect for all religions to ensure that freedom of religion is equally guaranteed to all individuals and communities. Equal *respect* of all religions need not be taken to imply the equal *treatment* of all religions. Rather, a substantive model would direct attention to the unstated norms implicit in the demand for equal

---

149. The substantive approach to equality has made some inroads into Indian legal and political discourse, and more specifically into the discourse of Indian constitutional doctrine. On one hand, the equality guarantees in article 14 continue to be interpreted through the doctrine of reasonable classification, which includes the similarly situated test. But the case law related to article 15, which prohibits discrimination, and article 16, which promotes equality of opportunity within employment, has recognized the need for "preferential treatment" and "compensatory discrimination" for disadvantaged groups. INDIA CONST., art 16.



treatment—that minorities should be judged and treated in accordance with the norms of the majority. It would consider whether these norms are appropriate ones with which to judge cultural minorities or whether the protection of the rights of cultural minorities requires that their differences be taken into account. Equal respect for cultural minorities thus means respecting their differences; a substantive model would allow for these differences to be respected within the constitutional mandate of equality.

### B. Toleration

The principle of toleration must be democratized. The point of departure for such a process must be the disarticulation of toleration from its majoritarian and explicitly religious moorings. Dominant discourses of secularism have emphasized that the principle of toleration is derived from the cultural traditions of Indian society—cultural traditions that more often than not are equated with Hindu traditions and Hinduism. Although this majoritarian and religious basis of toleration has been made most explicit in the discourse of the Hindu Right, it is also apparent in the constitutional discourse of secularism. The very reason that Indian secularism is said to be different than the West lies in this concept of toleration and the claim that historically Indian society in general, and Hinduism in particular, has been tolerant of other religions. The advocates of Indian secularism as the equal respect of all religion have time and again emphasized this historical and cultural grounding. The Hindu Right has simply taken up this grounding and developed it in their own distinctive and aggressively nationalistic direction.

Toleration has been cast as the characteristic of the majority, hindu community. If the concept of toleration is to be democratized it must be unlinked from these majoritarian and religious foundations. To do so, however, would undermine the very foundation of the distinctive nature of Indian secularism. We thus encounter a troubling paradox—that the majoritarian and religious character of toleration is precisely the characteristic that gives Indian secularism its distinctive nature. This paradox gives credence to Upadhyaya's position that this concept of secularism is the one that has created the problems of majoritarianism. One way out is to abandon this concept of secularism in favor of one that returns to the principle of neutrality; however, it is the dominant discourse of secularism that offers the most political promise. The dilemma then becomes how to escape from this paradox without abandoning secularism as the equal respect of all religions?

It may be possible to approach toleration as a constitutional value in its own right by eliminating its majoritarian moorings. We need to

consider whether it is possible to reconfigure the principle of toleration in a fashion that is more conducive to the claims of cultural minorities. Toleration could be approached not from the point of view of the religious traditions of Indian society, but rather, from the perspective of the principled requirements of liberal democracy. It will be important, however, to articulate more specifically the requirements of such an approach to toleration. First, it is necessary to consider the meaning of toleration and the kind of state action that it mandates. Does the toleration of subgroups merely involve non-intervention in their affairs or does it require a more substantive accommodation of group differences? Martha Minow has explored this question along with many other dilemmas that toleration presents to the accommodation of subgroups and cultural minorities.<sup>150</sup> She argues that if toleration simply involves non-intervention with respect to the views and practices of a subgroup, it will fail to adequately respect the subgroup. According to Minow:

[M]ere noninterference [cannot convey] the ideas captured by tolerance, especially where noninterference occurs within a context in which the viewpoint or practice does not conform to the majority practices. The majority may stigmatize, deride, or chill the adoption of minority group viewpoints or practices. The majority may undermine the conditions subgroups need to preserve in order to flourish. Apparently equal policies that nonetheless fail to accommodate the differences of a minority culture edge toward intolerance if those policies make expression or maintenance of the minority culture's views or practices difficult or costly to members of that group.<sup>151</sup>

In her view, the protection of cultural minorities requires more than toleration; it requires a respect for cultural diversity, which she defines as "a more active demand than toleration, for it may call for accommodation of subgroup practices and, therefore, changes in dominant institutions."<sup>152</sup>

Minow's critique points out the ways in which the liberal value of toleration has been one extended by, and measured according to, dominant social groups and dominant social norms. The Hindu Right's unapologetically majoritarian approach to toleration can be seen within this framework. The Hindu Right has promoted a vision of toleration that is based explicitly on dominant social groups and norms. Its vision

---

150. Martha Minow, *Putting Up and Putting Down: Tolerance Reconsidered*, 28 OSGOODE HALL L.J. 409 (1990).

151. *Id.* at 422–23.

152. *Id.* at 414.

that only Hindus can be truly tolerant is but an extreme example of the liberal dilemma of toleration, which positions toleration within dominant communities and extends toleration to others only to the extent that those communities accept and practice a similar vision of it. One of the paradoxes of toleration, then, is that its location within dominant social groups and norms always runs the risk of undermining the very practices of subgroups that it purports to tolerate. Mere nonintervention may be inadequate to the task of accommodating the subgroup; indeed mere nonintervention perpetuates the very oppressive conditions that subgroups struggle against for their very survival. Yet, nonintervention may be all that stands in the way of the goal of assimilation. From the point of view of the cultural minorities that are under attack from the Hindu Right, even weak toleration as mere nonintervention may seem to be an increasingly attractive and elusive norm.

While the critique of toleration is an important one that helps complicate our inquiry, we are of the view that it remains politically and legally efficacious to retain it in the struggle for India's secular democracy. In a political environment characterized by escalating intolerance, the principle of toleration is one well worth fighting for. It seems incontrovertible that toleration has been measured against dominant social norms and, in this respect, is a principle that seems to be inherently majoritarian. But this critique of the majoritarian nature of toleration is a long way from the kind of majoritarianism we have identified in the Hindu Right's approach. In the context of contemporary India, even the kind of weak toleration that Minow and others have commented on is rarely evident. Given the explicitly majoritarian and communalist approach of the Hindu Right that only Hindus are tolerant, a liberal notion of toleration would be a considerable advancement from the point of view of cultural minorities.

At the same time, it is important to continue to wrestle toleration away from its majoritarian settings—from the extreme majoritarianism of the Hindu Right to the more subtle majoritarianism of liberal toleration. In our view, a democratized vision of toleration that accompanies a substantive vision of equality is one that must include the kind of respect for cultural diversity that Minow advocates. It is a vision that requires more than a passive acceptance of different points of view; it requires an active accommodation of subgroup practices and, at times, changes in dominant institutions. It is a vision of toleration that, alongside a substantive approach to equality, requires an explicit recognition of group differences and challenges dominant norms as those that are appropriate to judge cultural minorities against.

A second recurring question that plagues the principle of toleration is whether or not the principle should extend to groups that are

themselves intolerant of other groups' differences. In other words, the question involves a decision as to when toleration should be extended to subgroups. The problem is one that again highlights the extent to which toleration is measured against the norms of the dominant community. It is the dominant community that holds the principle of toleration as supreme, and it is this dominant community that has the power to decide if and when the practices of the subgroup are to be tolerated.<sup>153</sup>

Partha Chatterjee has explored this dilemma of toleration specifically within the context of India and the assault on minority rights by the Hindu Right.<sup>154</sup> Beginning with a concern about liberal democratic theory's inability to accommodate the claim of collective rights of cultural groups,<sup>155</sup> Chatterjee refuses to give up on toleration, but instead tries to find a defensible argument for minority cultural rights in the current legal-political situation that prevails in India. His analysis attempts to reveal the extent to which the Indian state has failed to live up to the three basic principles of liberal democratic secularism—freedom of religion, equality, and separation of state and religion. Chatterjee suggests that the problem of the rise of the Hindu Right with its accompanying assault on minorities should be conceptualized not as a problem of secularism but as a problem of toleration.<sup>156</sup> In so doing, he has initiated a process of rethinking the principle of toleration, arguing that the principle of respect for human beings provides

153. As Minow has argued, liberal notions of tolerance may thus appear to be disrespectful from the point of view of cultural minorities, who do not accept the liberal value of tolerance itself. See Minow, *supra* note 150.

154. See Chatterjee, *supra* note 145.

155. See *id.* Chatterjee argues that there is no viable way out of this problem within the given contours of liberal democratic theory which must define the relations between the relatively autonomous domains of state and civil society in terms always of individual rights. As has been noticed for many other species of emerging forms of non-western modernity, this is one more instance where the supposedly universal forms of the modern state turn out to be inadequate for the postcolonial world.

*Id.* at 1773.

156. We do not agree with Chatterjee that attention to the problems of majoritarianism and toleration necessarily require a shift *away* from secularism. Chatterjee seems to accept the liberal democratic version of secularism and its requirements of neutrality as the definition against which Indian secularism is to be judged. Using this definition, Indian secularism is ultimately found lacking since it cannot meet the requirements of neutrality. In shifting the focus to the principle of toleration, he glosses over the fact that this principle of toleration has become the third defining feature of Indian secularism, particularly within the context of constitutional discourse. The choice need not be cast as one between secularism and toleration, since the specific variety of Indian secularism has long been said to be informed by the principle of toleration. By the same token, we *do* agree that any principled defense of Indian secularism must include a refocusing on toleration. Toleration does need to be wrestled away from its current majoritarianism moorings and needs to be revitalized with a sense of democratic protection for cultural minorities, and cultural pluralism. In our view, Chatterjee's suggestions for a rethinking of the principle of toleration may nevertheless be useful *within* the context of a democratic revitalization of the concept of secularism itself.

a moral basis for defending this principle, with respect to the rights of cultural groups.

Chatterjee examines the specific requirements of toleration and subgroups, including the dilemma of extending toleration to those groups that are "intolerant towards [their] own members and show inadequate respect for persons."<sup>157</sup> In approaching this dilemma, he attempts to move beyond the typical liberal insistence on an individual right to exist. By attempting to reconfigure the content of toleration, Chatterjee reframes the kind of treatment that the dominant community will have to extend to subgroups. He argues that toleration will have to involve more than the mere right to be different: Equally important is the other half of the assertion:

"We have our own reasons for doing things the way we do." This implies the existence of a field of reasons, of processes through which reasons can be exchanged and validated, even if such processes are open only to those who share the viewpoint of the group. The existence of this autonomous discursive field may only be implied and not activated, but the implication is a necessary part of the assertion of cultural autonomy as a matter of right.<sup>158</sup>

Chatterjee argues that the principle of toleration requires accepting "that there will be political contexts where a group could insist on its right not to give reasons for doing things differently provided it explains itself adequately in its own chosen forum."<sup>159</sup> Cultural minorities will need to ensure that procedures and processes exist through which they can "publicly seek and obtain from its members consent for its practices insofar as those practices have regulative power over the members."<sup>160</sup> It is, in effect, a call for an internal accountability that becomes the prerequisite for extending the principle of toleration and for accommodating a cultural minority's right to do things differently.<sup>161</sup>

157. Chatterjee, *supra* note 145, at 1775.

158. *Id.*

159. *Id.*

160. *Id.* Chatterjee elaborates:

It is not necessary that there be a single uniform pattern of seeking consent that each group will be required to follow. But it is necessary, if toleration is to be demanded, that the processes satisfy the same condition of representativeness that is invoked when a legislative body elected under universal franchise is found unsuitable to act on matters concerning the religion of minority groups. In other words, even if a religious group declares that the validity of its practices can only be discussed and judged in its own forums, those institutions must have the same degree of publicity and representativeness that is demanded of all public institutions having regulatory functions.

*Id.*

161. In some ways, Chatterjee can be seen to have simply shifted the nature of the problem—

In our view, both Minow's and Chatterjee's efforts at refashioning the scope and content of toleration may be insightful in the effort to ground secularism within a more democratic setting. In particular, their insistence on the importance of a cultural minority's rights to some degree of self-governance and self-determination is an important contribution to redemocratizing the principles that constitute Indian secularism. A revision of toleration along the lines of equal toleration of all religions will allow for an approach to secularism that does not preclude the recognition of group differences, but rather begins with an affirmation of the importance of accommodating these differences. Equal *toleration* of all religions need not be taken to imply equal treatment; nor need it imply that the practices and views of religious minorities be brought in line with those of the dominant community in order to qualify for toleration. Rather, equal toleration would recognize the validity of different ways of being and of believing, and attempt to create the social space required to accommodate those differences.

### C. Freedom of Religion

Finally, freedom of religion, secularism's third principle, must also be recuperated. Interestingly, it is in relation to freedom of religion that the Hindu Right's claim to secularism is the weakest. In its discourse, freedom of religion is rarely articulated specifically as a political norm. Rather, it speaks only of an individualized right to worship. Yet, even this right is limited by the Hindu Right's vision of equality and toleration. As the weak link in the Hindu Right's rhetorical chain, freedom of religion may represent an easy target in the effort to chip away at their claim to secularism. Freedom of religion must mean more than an *individual* right to *worship*. A substantive notion of freedom of religion must recognize that religious identity is necessarily constituted in and through a broader community. It must recognize that for religious minorities, there is more at stake than an individual right to worship. There is the matter of the group's collective survival: their right to practice their religion collectively, their

---

from one of toleration to one of accountability and democracy. In his refashioned vision of toleration, it is the existence of some structures of accountability and democratic representation that operate as the prerequisite for the dominant community's willingness to extend toleration to the subgroup. To the extent that the subgroup does not accept these principles, it may again be experienced as intolerance of their ways of being different. In this way, it is not possible to completely break out of the imposition of some normative framework on cultural minorities. But, by the same token, we are of the view that the prerequisite of some form of representation—which, as Chatterjee suggests, may take very different social and political contexts into account—does seem to be the appropriate one within the context of a political project expressly committed to a democratic vision.

right to educate their children according to their own beliefs, their right to attend public places of worship, and their right to conduct their own religious institutions free from intervention. Thus, it is important to reemphasize that freedom of religion is not simply an individual right, but also a collective right incorporating the rights of individuals and their religious organizations to collectively pursue their religious beliefs.<sup>162</sup>

To insist on such a vision of freedom of religion is to do little more than insist on the rights that are already recognized and articulated within the Indian constitution. Article 25 of the constitution guarantees to all persons "freedom of conscience and the right to freely profess, practice and propagate" their religion. Article 26 further guarantees "to every religious denomination or any section thereof" certain collective rights of religion, including establishing and maintaining institutions for religious and charitable purposes, managing its own affairs in matters of religion, owning, acquiring and administering property.<sup>163</sup> These constitutional guarantees clearly contemplate both individual and collective rights to freedom of religion that extend well beyond the limited right to worship.

More challenging, however, is the broader political context within which the Hindu Right gives meaning to freedom of religion, namely, its redefinition of the meaning of equality and toleration. The inroads of the Hindu Right have been in relation to *these* concepts. It is these concepts that are increasingly limiting the common sense conception of the appropriate scope and content of freedom of religion. Within the Hindu Right's understanding of formal equality any recognition of

162. Smith has observed both the individual and collective dimension to freedom of religion. SMITH, *supra* note 106. On the individual dimension, he writes,

Freedom of religion means that the individual is free to consider and to discuss with others the relative claims of differing religions, and to come to his decision without any interference from the state. He is free to reject them all. If he decides to embrace one religion, he has freedom to follow its teachings, participate in its worship and other activities, propagate its doctrines, and hold office in its organizations.

*Id.* at 4. On the collective dimension he writes, "The collective aspect of this right is the freedom of two or more individuals to associate for religious purposes and to form permanent organizations to carry out these purposes." *Id.* at 5.

163. INDIA CONST. art. 26. The cases dealing with article 25 and 26 have focused largely around delineating the legitimate sphere of state intervention in religion. Article 25 guarantees are subject to public order, health, and morality. Article 25(2) provides that the state is entitled to regulate and restrict "any economic, financial, political or other secular activity which may be associated with religious practice," (INDIA CONST. art. 25, s. 2, cl. a) and entitled to make laws for "social welfare and reform." INDIA CONST. art. 25, s. 2, cl. b. Article 26 guarantees are similarly subject to public order, morality, and health. The case law has attempted to further articulate the grounds on which the state intervention contemplated by these articles is justified. The courts have held that the state is permitted to intervene to regulate the secular activities of religious endowments. However, decisions have tended to treat article 26 as independent from article 25, thus increasing the scope of religion and the activities that are considered integral to a religion.

religious differences—differences that require recognition in accordance with the Constitutional requirement of freedom of religion—becomes a violation of the Constitutional guarantee of equality. Similarly, it is through its understanding of Hinduism as the only tolerant religion that the right of religious minorities to profess and propagate their “intolerant” religions is cast as a violation of freedom of religion. The site of contestation, then, seems to be less one over freedom of religion and more one over equality and toleration. The Hindu Right’s concept of freedom of religion seems to be almost entirely derivative of its conceptions of equality and toleration. This does not suggest that the struggle over freedom of religion in the effort to revitalize and redemocratize secularism will be easy or can afford to be ignored. It merely sets forth the idea that freedom of religion does not itself seem to be a central and independent component of the Hindu Right’s discourse.

Strategically, it will be important to reveal the Hindu Right’s real position on freedom of religion, namely, that it does not agree with the constitutional guarantees of the individual and collective right to freely practice, profess, and propagate religion. It will also be important to guard against any judicial limitations on these constitutional guarantees. But the problem is not one of legal discourse alone. It is, rather, a broader political problem in which the Hindu Right is increasingly capturing the popular imagination. After all, it is in the name of freedom of religion and the protection of religious minorities that the Hindu Right has been demanding constitutional amendments.<sup>164</sup> It is not enough simply to assert the discourse of Indian constitutionalism when the Hindu Right is challenging the very legitimacy of that discourse.

Ironically, although freedom of religion may be the weak link in the Hindu Right’s claim to secularism as traditionally defined, the strength of its approach is beginning to displace this traditional definition. Defending secularism against these encroachments; including the dissolution of freedom of religion, involves no less than reversing the growing domination of formal equality and religious toleration. A democratic revision of freedom of religion will thus need to break its association with formal equality and religious toleration, both of which disavow any recognition of religious/group difference. Formal equality

---

164. For example, the BJP has long demanded reform to article 30 of the constitution. Article 30(1) provides that “All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.” And article 30(2) prohibits the state from discriminating against any education institution in granting aid to education institutions “on the ground that it is under the management of a minority, whether based on religion or language.” According to the BJP, article 30 is part of a general policy of appeasement of the minorities.



will need to be displaced in favor of a more substantive conception of equality that can accommodate the need for religious groups to be treated differently. Simultaneously, it will be important to disarticulate freedom of religion from its religious foundation within the discourse of the Hindu Right. The Hindu conception of toleration, that only Hindus are really tolerant of other religions, must be displaced in favor of a more substantive and democratic vision of toleration that accommodates religious difference.

The need for state recognition and accommodation of religious difference is perhaps easier in the Indian context than the American, since there is no equivalent of the anti-Establishment clause in the Indian constitutional protection of freedom of religion. Indian case law has explicitly recognized the fact that in certain specified contexts the state may intervene in the operations of a religion.<sup>165</sup> Thus, the accommodation of religious difference would not run into the same problems of violating the prohibition on any state recognition of religion. Although Indian constitutional law continues to be plagued by dilemma's as to when state intervention in religion is justifiable, the constitutional framework is nevertheless one that allows for a substantive recognition of group differences.

### CONCLUSION

There are certainly no easy answers in the on-going struggle for secularism in Indian democracy. The continuing ascendance of the Hindu Right, with its own distinctive claim to secularism, has only increased the stakes. We do not believe that the struggle for secularism will be exclusively a legal contest. But we do believe that law and legal discourse will be one important site of this struggle, and that the courts will have a role in defending secularism from the corrosive influence of the Hindu Right.

The Supreme Court is not fully performing its role with respect to these matters. Despite the Court's efforts in earlier decisions to defend a strong constitutional secularism, the *Hindutva* cases mark a decisive shift. The Court's decision has effectively legitimated the Hindu Right's understanding of secularism and paradoxically opened the door for the Hindu Right's very non-secular agenda. At the same time, it is important to acknowledge that the Supreme Court remains critical of the

---

165. State intervention in religion is specifically contemplated by the very articles that guarantee freedom of religion, and a major focus of the case law relating to articles 25 and 26 has been delineating the legitimate scope of state intervention. Indeed, it is important to recall that it is this Constitutional legitimacy of state intervention in religion that distinguishes Indian secularism from American concepts of secularism. See Chatterjee, *supra* note 145. See also SMITH, *supra* note 106.

Hindu Right. Although we have argued that the *Hindutva* case represents an important victory for the Hindu Right, the victory is not an unequivocal one. Despite its vindication of the Hindu Right's vision of *Hindutva* and its vision of secularism, the Court did in fact condemn, in no uncertain terms, the practices of several members of the Hindu Right, most notably Bal Thackeray. Further, in dismissing the application for a review petition, the Court was emphatic that the decision did not allow for an appeal to votes on the basis of religion. The decision is therefore a contradictory one in which the Hindu Right was both condemned and condoned. It is the contradictory nature of the inroads made by the Hindu Right that continue to make the law an important site of contestation in the struggle for Indian secularism. Despite the mounting pressure and influence of the Hindu Right, the Court has retained an important critical distance and thus can continue to be an important tool in the struggle against the enemies of democratic secularism.

At the heart of the Hindu Right's approach to secularism is a policy of assimilation. It is a policy that aims at denying and ultimately obliterating cultural and religious minorities. It is a policy that is most specifically directed at the Muslim minority, but that also includes other religious minorities that pose any threat to, or are in any way different from, the dominant Hindu norm. The effort to defend secularism from the onslaught of the Hindu Right will thus require a direct confrontation over the issue of minority rights and, as we have argued earlier, a democratic revitalization of the principle of secularism. Our suggestions regarding each of the three principles of secularism (equality, toleration, and freedom of religion) share common features—the emphasis on group rights being chief among them. Within this vision of secularism, cultural minorities must be free to pursue their own beliefs, and the state must be willing to accommodate their group differences. The substantive approach to equality, toleration, and freedom of religion each emphasize this accommodation of difference. In stark contrast to the approach of the Hindu Right and other right wing discourses that emphasize equal treatment and assimilation of difference, the approach that we are outlining is one that insists on the democratic validity and necessity of accommodating difference. These three principles need to be taken up by the judiciary in a manner that goes beyond the general articulation of the principle of the equal respect of all religions. This general principle of secularism needs to be given more concrete content and to have its underlying philosophical basis fully explored. It is only in doing so that we can begin to unmask the deeply nonsecular and undemocratic nature of the claims of the Hindu Right. It is only in doing so that we can more clearly demarcate the kinds of state action that are mandated by the protection

of secularism. And it is only in so doing that we can hope to promote a truly democratic secularism in India.