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Gary Jeffrey Jacobsohn: The Wheel of Law

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Chapter One

INTRODUCTION

Ashoka's Wheel

IN 1994 THE United States Supreme Court considered the case of Gregory Johnson, a young man whose fiery protest against the policies of the American government became an occasion for reflection on the symbolic significance of the American flag. The only thing that was certain about Johnson's defiant actions outside the 1984 Republican Convention, however, was that a cloth representation of some aspect of American identity was incinerated in front of a number of passersby, including several who were visibly outraged. Concerning the larger meaning of what was consumed in the flames that leapt from a Dallas, Texas, sidewalk, much was left in doubt.

For some, including Justices William Rehnquist and John Paul Stevens, dissenters in *Texas v Johnson*, the flag was emblematic of American nationhood and national unity; its desecration was therefore actionable regardless of any message Johnson may have intended to communicate through his act. Thus in the ashes that littered the space adjacent to the convening politicians were the collective memories of a people, of sons and daughters lost in war, and of the principles that gave meaning to their sacrifice. But for others, notably Justice William Brennan for the majority, these very principles—especially the “bedrock principle” of governmental tolerance for offensive ideas—could be consumed in flames only if offensiveness were compounded by error, by misconstruing the symbolism of the flag. Properly understood, the American flag represented the political aspirations of a free people, whose forbearance in the face of extreme and offensive provocation was the appropriate response to even the most flamboyant of demonstrations.¹

¹ In the parade of nations that traditionally opens the Olympic games, the United States alone does not permit its flag-bearing athlete to dip the flag when he or she passes the head of state of the host nation. This can easily be taken as a sign of disrespect; so it has become

This disagreement, and the intense emotions accompanying it, may obscure the deeper unity embodied in these alternative symbolic renderings. Both perspectives agree that the flag represents certain principles of American identity that, in turn, constitute the essence of what distinguishes membership in the national community. Indeed, the emotions stimulated by the sentiments of the first are linked to the intellectual content embedded in the second, and are in the end mutually supportive of one another. Thus locating the source of American nationhood in ideas and principles necessitates a substantial reliance on patriotic symbol and ritual; while the principles of republican government have the potential for generating widespread formal support, for most people they are abstractions that may require a more visceral evocation to strengthen political attachment. Where bonds of unity do not flow naturally from such primordial attachments as race, religion, or ethnicity, and are instead an inscribed extension of the human imagination, the national symbol can be interpreted—perhaps should be interpreted—in a way that joins memory and sacrifice to reason and deliberation.²

And so the burning of the flag produces two kinds of outrage: first, at the seeming disregard for a shared past that has shaped the lives of all Americans; and second, at a destructive act whose violence stands in apparent repudiation of the “Republic for which it [the flag] stands.” The flag’s shapes and colors reference national origins with its thirteen stripes, and signify the essential meaning of the nation in the (now) fifty stars. If, as has been often said, the United States was unique in its having been founded on a set of political principles, it is also distinctive in the mutability of the content of its flag. The addition of a new star to denote each alteration of the physical boundaries of the country suggests (in theory at least) that geography, rather than ascription, sets the salient parameters of national identity. In the more recent past, the heightened correlation of physical expansion, multicultural diversity, and inclusion underscores this symbolism. Who one is should matter less than where one lives and ultimately what one comes to affirm.

More important, there is nothing in the design of the flag that would render its desecration offensive to any member of a particular group

necessary for American officials to explain that the refusal to participate in the simple gesture is a matter of honoring the republican principles that are represented by the flag. How convincing this is to the head of state who is witness to the display of principle is another matter.

² As Michael Frisch has pointed out, “In America, national identity is more political than genetic, and thus the function of civil religion, which gives the country that identity, is extremely important.” *New York Times*, December 16, 2000, A17. And as Sheldon Nahmod has observed, “However American civil religion is defined, the American flag is surely one of its most powerful and dramatic national symbols.” Nahmod 1991, 537.

within the larger “American” community. Someone, for example, who chose to burn an American flag to express disdain for a religious group would have a very difficult time being understood, unlike Gregory Johnson, whose gesture of defiance was relatively unambiguous in its purpose of calling attention to policies he felt were immoral.³ In fact, Johnson might even have judged them to be so according to standards derived from the very ideals represented by the American flag, in which case the symbolic meaning of his act would have served a dual intent: the invocation of public philosophy to denounce public policy. On the other hand, if the source of his anger were traceable, say, to his Christian beliefs, then for his message to have been successfully conveyed, a further recourse to words or symbols would have been required.⁴

Of course, the burning of any nation’s flag usually means that the flag burner is opposed to something that the nation is doing. But there are other possibilities. The second most incinerated flag among the nations of the world is likely that of Israel; here, however, motive is clouded by the very different character of the national symbol. Is the flag burner protesting Israeli policy on the Palestinian question or expressing ugly sentiments toward the Jewish people? For the skinhead in Chicago or Berlin, the Star of David on the Israeli flag is the only stimulus necessary to precipitate an incendiary act of anti-Semitism. For the Arab demonstrator in Cairo, the scorched flag doubtless reveals an intense hostility for the Zionist entity to the east, which may also include some not very cordial feelings

³ Perhaps one notable exception: The burning of the American flag in some Muslim countries after the destruction of the World Trade Center in New York City can be seen as an expression of solidarity with those who view the United States as the embodiment of the contemporary Christian threat to Islam. Yet here too the act makes at least as much sense as a gesture of rejection directed at modernity and the West, particularly the subversive secular political ideas that these terms represent. As one observer, Scott Appleby, noted, “[The Islamic radicals] would respect the U.S. more if we did not separate God from governance—if we were in fact a Christian state.” *Newsweek*, September 24, 2001, 68.

⁴ That is not to say that the desecration of the flag is without religious meaning. Indeed, to desecrate is to profane, to violate the sanctity of something (that had been *consecrated*) venerable. The dissenters in *Johnson* can reasonably be seen to have attempted to “sacralize the flag.” Underlying their opinions is “the belief that our secular political community requires patriotic symbols much as religious communities require religious symbols.” Nahmod 1991, 527. However, the effort to treat the American flag as sacred did not run afoul of the Establishment Clause of the First Amendment, because, as Nahmod has pointed out, it could not be associated with a preference for any particular religion. *Ibid.*, 532. See also, Goldstein 2000. Goldstein argues that, from the beginning, those involved in the flag protection movement “deliberately and systematically sought to create what amounted to a ‘cult of the flag’ by ideologically transforming it into a sacred object to be treated only in a highly reverential manner.” *Ibid.*, 13. In like manner, Michael Welch has noted that “It is precisely Old Glory’s venerated status that makes its destruction such a potent form of protest.” Welch 2000, 10.

for the Jewish people. And for the Arab in Nazareth, whose minimal contact with Israeli Jews has perhaps disabused him of at least some of the negative stereotypes that typically underlie anti-Semitism, the flames of anger are still directed at the Jewish majority, whose societal privileges are only too *flagrantly* revealed in the chosen symbol of Israeli nationhood.⁵

Unlike its American counterpart, the Israeli flag thus invites viewers to respond to its symbolism in ways that acknowledge the special place of a particular group. One's eye is immediately drawn to the center of the representational pattern, which suggests the centrality of the Jewish people to the meaning of Israeli nationhood. The Declaration of Independence refers to the "self-evident right of the Jewish people to be a nation," and the flag is an unambiguous testament to that commitment. However, a flag can reveal only so much; thus for Israel the prominence to be attached to the religious, rather than ethnic, content of the Jewish people is left open for interpretation. The profound political ramifications of this interpretive question have emerged when the Israeli flag has been burned by ultra-Orthodox Jews in Israel, who view the establishment of a Jewish State prior to the arrival of the Messiah as a grotesque theological travesty. They are so deeply offended by the blasphemous symbolism of the flag that they feel compelled to act in ways that are in turn grossly repulsive to most Israeli Jews, for whom the flag represents the triumphant culmination of the historic Zionist longing for a homeland for the Jewish people.

⁵ A 1997 law requires that all government-funded schools, including those of the Arab and ultra-Orthodox communities, must fly the Israeli flag. Until very recently the law was ignored, but the decision in 2001 by the education minister to have it enforced provoked an interesting debate about the use of symbols to encourage patriotism among all the citizens of Israel. In response to a member of the Knesset who questioned the wisdom of requiring Arabs and ultra-Orthodox Jews to fly the Israeli flag, another member said: "The flag of the country belongs to everyone, whatever they may think of the government. This value must be internalized by the minorities. . . . In the United States, they've understood this for a long time. There the requirement to fly the flag applies not only to the educational system. Everyone there identifies with the flag, rich and poor, black and white, even if they have ethnic and economic divisions. I would like to see a similar attitude in Israel." To which the first member said: "Of course, I believe that the Arab minority should identify with and show loyalty to the state. The question is one of sensitivity. Building bridges with a minority culture is the sign of a strong country, not a weak one." The second then replied: "We live in a society in which pluralistic differences are valued. This is good, but we must remember and remind others of our common denominator—Zionism. The flag symbolizes Zionism and democracy." *The Jerusalem Report*, July 2, 2001, 56. This dialogue reflects very well the basic tension or contradiction at the core of Israeli nationhood. Thus the Knesset member who defends enforcement of the law looks to the United States for guidance, but he fails to distinguish between the assimilative assumptions prevalent in American citizenship from the visionary ones that prevail in Israel. (This distinction will be developed in detail in subsequent chapters.) When he sees the flag, he thinks of Zionism and democracy without permitting himself to join in his colleague's more empathetic understanding in which the symbolism of the flag bears a message of exclusion as well as unity.

Much of contemporary Israeli politics and constitutional disputation is driven by the uncertainties surrounding the question of Jewish identity. Whereas the absence of any religious symbolism on the American flag comports with the view that questions of faith and piety are to be resolved more properly in private places, the featured presence of the Star of David on the Israeli flag points to the unavoidably public nature of the religious question in Israel.⁶ Erecting a “wall of separation” between Church and State will not, one might logically infer, be a very viable option in responding to the inevitable conflict flowing from temporal and spiritual commitments. On the other hand, it does not necessarily follow from this that when such conflicts arise, the spiritual interest will always, or even usually, prevail over the temporal interest. What implications follow from the State’s official cognizance of religion, indeed its special recognition of a particular religion, cannot be known in the absence of much more information. That the Kuwaiti flag, like the Israeli, extends pride of place to one religion (in the former case, Islam) suggests only that in both countries, the adherents of the favored religion will in some ways be regarded differently from those who are otherwise affiliated. It provides no information about the substance of the rights and privileges attaching to the differently situated groups.

Another country where religion figures prominently in heated debates over the content of national identity is India. Here the controversy is not over the meaning and implications of the officially designated, preferred status of one of the nation’s religious groups, but whether, and if so in what form, such a preference should be instituted. Frequently, this argument leads to soul-searching reflection over the contemporary “crisis of secularism,” which turns out not to be a contemporary phenomenon at all but a staple of Indian politics since independence. Nevertheless, with a government in power dominated by a party famous for its critique of mainstream secularism, and with an ominous increase in the recent past of incidents involving appalling acts of communal violence, good reason exists to view the religious problem with a heightened sense of urgency. Perhaps, then, it behooves us to take a close look at the Indian flag.

It is divided horizontally into three broad strands of color, with a wheel in the center of the central white section. Most non-Indians would identify the band of color running across the top of the flag as orange, but to the

⁶ There had been a debate over the design for the Israeli flag, which ultimately was won by those who favored the adoption of the World Zionist Organization flag as the national flag. The losers in this argument were those who wanted to make a clear distinction between the new State and the pre-State period. This group also wanted a design that would more clearly mark the difference between Jews living inside and outside the State. The blue and white flag matches the colors of the Jewish prayer shawl, and in general the flag is a reflection of the “civil religion in Israel.” Liebman and Don-Yehiya 1983, 107.

locals it is saffron. The bottom color is green. In a political climate of communal conflict and consciousness, these colors of the national flag suggest the unfinished business of national integration. Thus the familiar green hue of Islam is separated from the saffron shading that has become emblematic of Hindu revivalism by an expanse of white that can be understood to express the aspiration for peaceful coexistence, if not genuine harmony.

It may be a testament to the power of the obvious identifications evoked by these colors that responsible leaders will seek to disabuse their followers of reflexive investment in readily accessible, but potentially dangerous, symbolism. Jawaharlal Nehru, as he inaugurated the project of constitutionalism in independent India, told the Constituent Assembly: "Some people, having misunderstood its significance, have thought of it [the flag] in communal terms and believe that part of it represents this community or that. But I may say that when this Flag was devised there was no communal significance attached to it."⁷ Given Nehru's political proclivities, his preference was that the colors be understood to represent agriculture, revolution, industry, and commerce; but he was enough of a realist to appreciate that in the pliability of symbolic meanings, one could discover a mirror for the transvaluation of national identity. Therefore, the struggle to define the principles of a nation should not be permitted to terminate with the achievement of independence. After all, the fact that the flag had already been freighted with communal significance was a vivid reminder of the fragility of political ascendancy.

Nehru believed that the Constitution had codified the governing principles of the new State, and faithful adherence to them would ensure their secure entrenchment. His voice was one of several at the Constituent Assembly to call attention to the wheel in the center of the flag to explain the substance of the framers' commitment. Whatever significance others might attach to the colors on the flag, the Indian experiment in secular democracy would endure if those responsible for its safekeeping understood and embraced the teaching represented by that wheel. First, however, it would be necessary to distinguish the wheel on the new flag from the one that had appeared on the flag of the preindependence Indian National Congress. The earlier emblem had incorporated an image of Mahatma Gandhi's spinning wheel, or *chakra*, but Nehru indicates in his speech to the Assembly that the latter-day designers had their sights fixed on a more distant model. "[W]hat type of wheel should we have? Our minds went back to many wheels but notably our famous wheel, which had appeared in many places and which all of us have seen, the one at the top of the Ashoka column and in many other places. That wheel is a

⁷ Rao 1966, vol. 1, 500.

symbol of India's ancient culture, it is a symbol of the many things that India had stood for through the ages."⁸

It remained for others to elaborate on what exactly the reproduction of the wheel on the capitol of Emperor Ashoka's Sarnath pillar stood for. The most detailed account came from S. Radhakrishnan, the distinguished philosopher and future president of India.

The Ashoka's wheel represents to us the wheel of the Law, the wheel of the *Dharma*. Truth can be gained only by the pursuit of the path of *Dharma*, by the practise of virtue. . . . It also tells us that *Dharma* is something which is perpetually moving. . . . There are ever so many institutions, which are marked into our social fabric like caste and untouchability. Unless these things are scrapped, we cannot say that we either seek truth or practise virtue. This wheel, which is a rotating thing, indicates to us that there is death in stagnation. There is life in movement. Our *Dharma* is *Sanatana*, eternal, not in the sense that it is a fixed deposit but in the sense that it is perpetually changing. Its interrupted continuity is the *Sanatana* character. So even with regard to our social conditions it is essential to move forward.⁹

This rendering comports with other views expressed at the Constituent Assembly; for example, that Ashoka's dharma-chakra represented the "balance-wheel of religion that sustains society."¹⁰ Or as one Muslim delegate put it after praising "that great Buddhist Emperor Ashoka," the wheel was "a religious emblem and we cannot dissociate our social life from our religious environments."¹¹

From this we can begin to appreciate how the symbolism of the Indian flag conveys a message about the conceptualization of secular democracy that is significantly different from the approaches intimated by the American and Israeli flags. Where religion is emblematically absent in the United States, it is prominently featured on the Indian flag, albeit in a form that is not readily identifiable with narrow sectarian interests. The term *dharma* does not translate very well into English; at the most general level, it refers to beliefs and postulates that, if scrupulously followed, will allow one to lead a moral life.¹² For Hindus, it has had a historic connection to

⁸ Ibid., 501. Nehru went on to underscore the significance of Ashoka to the national challenge at hand. "For my part, I am exceedingly happy that we have associated with our flag not only this emblem but in a sense the name of Ashoka, one of the most magnificent names in India's history and the world. It is well that at this moment of strife, conflict, and intolerance, our minds should go back towards what India stood for in the ancient days and what, I hope and believe, it has essentially stood for throughout the ages."

⁹ Ibid., 504.

¹⁰ Ibid., 495. From the delegate, S. D. Kalkar.

¹¹ Ibid., 509. From the delegate, Mohammed Saadulla.

¹² The term itself is used in several widely different senses, and is one of the most comprehensive terms in Sanskrit literature. The most frequently employed sense refers to the sum

the caste system, with each caste having its own dharma, that is to say, its own moral code in accordance with which caste members are expected to conduct their lives. As the delegates to the Constituent Assembly knew, the Ashokan conception of dharma separated the phenomenon from its caste and sectarian moorings, retaining much of its spiritual significance, but providing it with an ethical content intended for societal as well as personal transformation. As Romila Thapur has persuasively argued, Ashoka's understanding of dharma makes very clear that it was a concept intended for a secular teaching.¹³ That teaching was directed toward the amelioration of social injustices embedded in a status quo of religiously based hierarchy.

It is this Ashokan understanding that I explore in this study, or more specifically, I study its meaning in the context of postindependence Indian constitutional politics. The great challenge in pursuing the elusive goal of Indian secularism is bound up in what is distinctive about the Indian case, namely that critical elements of the social structure are inextricably entwined with religion in a way that renders the possibilities for any meaningful social reform unimaginable without the direct intervention of the State in the spiritual domain. My exploration cannot pretend to be a comprehensive account of secularism in India; as important as the constitutional experience has been, it only provides a limited perspective on the incredibly complex and multifarious problems of spiritual-temporal relations in contemporary India. But within this constitutional focus, I attempt to broaden the perspective by placing the Indian example in a comparative framework. The distinctiveness of the Indian case, represented on the flag by Ashoka's wheel as its symbolic centerpiece, can obviously benefit from comparative reflection on the alternative experiences of other constitutional systems. The American and Israeli flags suggest why these nations—the United States with its tradition of Church/State separation, and Israel with its unambiguous embrace of a particular religious tradition—provide especially rich possibilities for clarifying secular meanings in India.

By placing the Indian case within a comparative constitutional context, I hope also to contribute to some lively contemporary debates within the field of political theory that address the constitutional essentials of a lib-

of all the duties that bear upon individuals according to their status (*varna*) and stage of life (*asrama*). It is a concept particularly celebrated in the *Bhagavad Gita*, wherein it is emphatically asserted that “[E]very man has the unique capability of determining all actions by means of the Law of Dharma.”

¹³ Thapur 1997, 163. Thapur writes of the institution of the *dhamma-mahamattas*, a special cadre of officials installed by Ashoka in the fourteenth year of his reign. They were the people charged with negotiating the practical working of dharma. It was “an attempt made by As’oka to provide some system of social welfare for the lower castes and the less fortunate members of the community.” *Ibid.*, 157.

eral democratic polity. American constitutional theorists have increasingly seen the value of comparative reflection to their subject matter. In this they are not alone, for indeed constitutionalism in faraway places seems finally to have come of age among all kinds of scholars of public law. It is entirely possible, of course, that the recent surge of interest in other people's constitutional affairs may turn out to be nothing more than a momentary post-Cold War diversion, in which case comparative constitutional scholarship (especially in the United States) can be expected to return to the relative obscurity that has for many years been its profile within the broader field of public law studies. But even if the interest in constitutional arrangements other than one's own carries beyond the stimulus of current events, the characteristically insular approach toward the examination of American constitutional issues will require persistent attention and resistance lest it reemerge with renewed vigor.¹⁴ To appropriate the famous metaphor from the First Amendment arena that is the concern of this book, it is as if a "wall of separation" has shielded both scholarly and judicial analysis of constitutional issues from the experience of other polities. As a result, too often constitutional debate has been denied the illumination and insights of comparative research.

In chapter 2 I present a conceptual and analytical framework for understanding constitutional arrangements for Church/State relations in liberal democratic polities. Inasmuch as the frame of reference for discussion of constitutional questions pertaining to religion and politics is invariably the American experience, much of the available analysis relies upon conceptual categories (such as accommodation and separation) that portray the array of options confronting constitutional regimes in the form of an unduly narrow spectrum of possibilities.¹⁵ My approach to the conceptual question is based on two critical dimensions: the extent to which religion exists as a constitutive factor in shaping the contours of social life and institutions, and the extent to which the State is identified with any particular religious group. The second of these will be familiar to anyone conversant with contemporary constitutional discourse concerning religion and politics, although a version of it may also be found in an Ashokan edict that reads simply: "You should strive to practice impartiality."¹⁶ Lat-

¹⁴ For examples of comparative work that represent excellent exceptions to this characteristic insularity, see Glendon 1987 on abortion and family policy, and Post 1986, 691–742, on the law of defamation.

¹⁵ Thus I believe that even the best theorizing about the role of religion in public life (as, for example, in the work of Michael McConnell and Leonard Levy) can benefit from the refractory insights emerging from the prism of comparative scrutiny.

¹⁶ Ashoka's edicts are inscribed on rocks and pillars that are located in various parts of the Indian subcontinent. They are usually to be found in the proximity of places of religious significance and are a primary source of our knowledge of Ashoka's philosophy and political rule.

ter-day Indian constitutional jurisprudence is emphatic in its endorsement of this principle of equal treatment of religions (*sarva dharma sambhava*); the spokes on a wheel must, after all, be of equal length.

But as an American-Indian contrast quickly reveals, a commitment to impartiality in the relationship between the State and the various religions active within its jurisdiction does not in itself indicate what role public institutions should play in the domain of the spiritual life. Whether desirable or not, in the United States it is at least possible to envision a clear separation of Church and State, in which religion and politics are maintained as distinct areas of human striving, and where the neutrality of equal treatment is broadened to require a hands-off policy for governing the relations between secular and religious institutions. Thus to the extent that religion is either helped or hindered through official action, it must be done inadvertently, the State being obliged to take no cognizance of religion in the course of its activities. As we shall see, such an arrangement is inconceivable in India, where, upon initial analysis, religious and secular life are so pervasively entangled that a posture of official indifference cannot be justified either politically or constitutionally.

That is the case of course in Israel as well, although there the inseparability of the two domains is less the reflection of a thickly constituted religious presence in the social life of the nation than it is a corollary of the politics of ethnoreligious identification. While such identification logically threatens the secular foundation of the State, in practice it has been prevented from destroying it by embracing a religious identity that is relatively restrained in its theological and social ambitions. In sorting these various distinctions out, this chapter highlights three models of secular constitutional development—*assimilative*, *visionary*, and *ameliorative*—that correspond respectively with the American, Israeli, and Indian cases. They are analytical constructs that allow us to better understand the various constitutional options available to nations as they confront the challenges to liberal democratic institutions posed by religion.

These models are given more detailed consideration in chapters 3 and 4, where I examine the assumptions underlying the three approaches. In so doing, it quickly becomes apparent that some of the ideas associated with secular constitutionalism—most notably equality—are featured prominently in each of the separate locales. Readers will not be surprised to learn that such ideas can mean different things in different places, and that their constitutional implementation may produce contrary results. These disparate results are then readily comprehensible in light of the differences in political culture that are evident in a careful consideration of the three cases. But words matter, and, significantly, comparable actors within contrasting systems feel obligated to appeal to the same concept

(or at least vocabulary) to justify their arrangements for achieving a goal as important as religious liberty. A secular State may assume a variety of forms, with corresponding sets of constitutional norms and expectations for governing the relationship between public and religious institutions. There are, however, necessary limits to what should be considered acceptable in the way of this governance, so that any blatant, systematic disregard for the fundamental religious liberties of a population or subpopulation, even if executed in the name of equality, should place the nation in question outside the family of secular constitutional regimes. Indeed, categorical exclusion should be predicated precisely on the basis of a failure to comport in fact (rather than rhetoric) with a philosophically coherent and plausible understanding of equality.

India, Israel, and the United States can all legitimately lay claims to recognition as secular constitutional polities. While varying in the degree to which this status is threatened by local circumstances and wavering commitments, they nevertheless display patterns of regard for the practice of religious freedom and for the secular conduct of public business that are for the most part genuine, if imperfectly realized. These patterns reflect the regime-defining attributes of nationhood that are distinctive to each of the cases. In these chapters I consider the ubiquitous problem of polygamy, where the contrasting solutions that have evolved in the three constitutional settings are, if not inevitable, clearly reflective of the dominant strand—assimilative, visionary, or ameliorative—present in the differently configured secular contexts of the respective polities. They can be plausibly defended as reasonable accommodations to the demands of these contexts; so, for example, the differential treatment of religious groups that may be justified in India or Israel will be more difficult to situate comfortably within the assimilative context of constitutional secularism in the United States.

Differential treatment requires special attention in light of its apparent contradiction of the principle of equality. However, in pursuing the ameliorative aspiration of Indian secularism, we will begin to appreciate the complexity of this question. Thus we are introduced in chapter 4 to the challenge posed to secular institutions in India by the revival of Hindu nationalism. To achieve political ascendancy, this movement has appropriated liberal constitutional discourse, which, as applied to problems such as the practice of polygamy, demands that all individuals receive equal treatment under the law (specifically, that India adopt a uniform civil code, which incorporates the very principle of formal equality that would appear to be under assault from the regime of personal laws that provides Hindus and Muslims with disparate legal entitlements). Debate over the desirability of enacting a code has much to contribute to an un-

derstanding of the ameliorative character of Indian secularism. But as we see in this chapter, the insistence by the Hindu right on immediate codification has had a significant effect on the shape of the ensuing debate, often in ways that have produced less than thoughtful responses from opponents. Nevertheless, the demand, as a featured plank in the political agenda of those for whom the ameliorative aspiration is of little salience, and for whom the religious commitments of minorities are of minimal priority, alerts us to the difficulty in making any easy equation between secularism and liberal notions of equality.

This lesson is reinforced in chapter 5, in which I examine some of the constitutional issues flowing from the most devastating political/religious conflagration on the Indian subcontinent since Partition. The violent dismantling in December 1992 of the Islamic Babri Masjid mosque in the northern Indian city of Ayodhya precipitated a wave of carnage and destruction that has fundamentally altered the political landscape of the country. In the immediate aftermath of that event, the Central Government dismissed the elected governments of three states, many of whose members had supported the activities of the Hindu nationalist perpetrators of the deed. These dismissals were subsequently appealed to the Indian Supreme Court, which, in a landmark decision, upheld the actions of the Center while also discoursing at length on the subject of secularism and the Constitution. In so doing, the Court rejected the contention of the counsel for the three dismissed governments that the only legitimate grounds for invoking Presidential Rule (the Article 356 dismissal power) was because of a serious interruption of the democratic *process*. Thus the justices affirmed that the failure to act in accordance with the substantive provisions of the Constitution, in this case the commitment to secular rule, was sufficient to trigger the emergency powers of the Union Government. There was, in other words, no obligation to remain neutral with regard to critical matters of political orientation and belief. Once again liberal arguments were placed in the service of illiberal ends; their rejection by the Court served to clarify the essence of the Indian constitutional commitment to secularism.

As we shall see, the rejection of the process-based logic behind the challenge to the dismissals has implications that extend much further than the particulars of the case at hand. That the power to remove a duly elected state government was based loosely on the Guaranty Clause (Article IV, Section 4) of the American Constitution turns out to be of more than casual interest, particularly with respect to matters of great interest to constitutional theorists. For example, the American national government's obligation to guarantee republican governance in the states has never led to actions analogous to what happened in India. Abolitionists

who had argued that the existence of slavery demanded the invocation of the guarantee provision to reverse the antirepublican policies of the slaveholding states were defeated on the basis of the same sort of claims made by supporters of the dismissed officials in India to counter the secularism-inspired moves of the Indian government. Various explanations can be advanced to account for these differences, including the presence of contrasting experiences with federalism. But it is in the very different ways in which a constitution is conceptualized, highlighted by the viability in India of the idea of an unconstitutional constitutional amendment, that we find the most compelling explanation for why, in the face of substantive challenges to their legitimacy, elected governments in the United States are accorded substantially more deference than elected governments receive in India.

The argument I develop in the constitutional context of the Ayodhya aftermath is that secularism, as a “basic feature” of the Constitution (and therefore unamendable), must be understood within the broader framework of the document’s commitment to social reconstruction. What some justices referred to in the dismissals case as “positive secularism” helps us to see that the destruction of the mosque by an organized mob of religious zealots involved more than a threat to communal peace and stability; it also threatened to sabotage the Constitution’s long-term vision of a truly secular, or socially just, society. Applying a more formalistic American model—which we might call “negative secularism”—fails to capture what is special about the Indian case. Only comparative analysis clarifies this distinctiveness and assesses the clever strategy of religious nationalists in employing familiar categories of liberal constitutionalism to advance a quite illiberal agenda.

Chapters 6 and 7 focus our attention on one of the most vexing and controversial issues of contemporary political theory and constitutional disputation: religious speech in the public forum. Long before John Rawls and other democratic theorists began to reflect on the subject, Emperor Ashoka had this to say in his Rock Edict Number 12:

[T]he growth of the essentials of Dharma is possible in many ways. But its root lies in restraint in regard to speech, which means that there should be no extolment of one’s own sect or disparagement of other sects on inappropriate occasions and that it should be moderate in every case even on appropriate occasions. On the contrary, other sects should be duly honoured in every way on all occasions. . . . If a person acts in this way, he not only promotes his own sect but also benefits other sects. But, if a person acts otherwise, he not only injures his own sect but also harms other sects. Truly, if a person extols his own sect and disparages other sects with a view to glorifying his sect owing

merely to his attachment to it, he injures his own sect very severely by acting in that way. Therefore restraint in regard to speech is commendable, because people should learn and respect the fundamentals of one another's Dharma.¹⁷

This Ashokan sentiment has been incorporated into modern Indian law in the form of the Representation of the People Act, the foundational 1951 enactment that governs the conduct of Indian elections.¹⁸ Among its many provisions is one that details a number of "corrupt practices," including the inappropriate use of religious speech to advance one's electoral prospects. Much like the Ashokan teaching, it emphasizes moderation and restraint. Candidates for public office must not seek votes on the basis of appeals to their own religion or through the disparagement of others' religions. The impetus behind the law is surely traceable to the gruesome ethnoreligious violence that accompanied the establishment of independent India. But the motivation to minimize religious conflict was also accompanied by a realization that religion was a pervasive and entrenched presence in the social fabric of the nation, so that any law requiring a muting of religious rhetoric in the context of democratic deliberation would doubtless prove to be controversial and litigious.

Just how controversial this law has become is evident from a series of decisions handed down by the Indian Supreme Court in the mid-1990s, known collectively as the *Hindutva Cases*. In deciding these cases, all of which involved questionable campaign activities of prominent politicians on the Hindu right, the Court was being asked to address both the constitutionality of the "corrupt practices" provision of the elections law and the reach of its statutory application. In the end, they upheld the constitutionality of the section while vindicating most of those charged with its violation through a narrow construction of its meaning. In so doing, the justices also addressed core issues of national and religious identity, as well as theoretical questions that are central to debates over the constitutional essentials of political liberalism. Indeed, the philosophical edifice upon which the Court's argument to sustain the law was built is taken essentially from the pages of John Rawls.

In chapter 6 I find the use of Rawlsian public reason-based arguments to sustain the constitutionality of restrictions on religious speech to be notably misplaced in the context of the Indian sociopolitical environment. Without making a judgment on the cogency of such arguments in the assimilative secular setting of the United States, I argue that the effort to

¹⁷ Sircar 1957, 50.

¹⁸ There was no direct invocation of the Ashokan edict in the drafting of the legislation, but it is noteworthy that the law's chief architect, Law Minister Ambedkar (also the driving force behind the Constitution), was the Indian figure most closely identified with the ancient emperor. Both were converts to Buddhism, who were committed social reformers.

place religious rhetoric beyond the arena of public disputation requires a rationale more attuned to the ameliorative commitments of the Indian Constitution. Thus to the extent that restrictions are justified, the threat posed by religion to the achievement of substantive aspirations for equality, rather than concerns over the process of democratic deliberation, offers the most compelling justification for limiting appeals to religion in the arena of electoral competition. To be sure, restrictions defended on the basis of content-neutral principles that conform to contemporary depictions of the liberal State may have a strong appeal in elite legal circles in both India and the United States; but the nonneutrality of the Indian State as delineated in the nation's Constitution renders problematic the easy transference of abstract moral reasoning from one constitutional locale to another.

But the story of the *Hindutva Cases*, including their significance to comparative constitutional theory, is not limited to the application of liberal reasoning in the adjudication of the legal issues. In fact, at this point in the progress of the book, the reader may begin to suspect the ulterior motives of anyone who relies heavily on liberal argumentation. Perhaps nowhere are these suspicions better founded than in the case of the author of the *Hindutva Cases*, Supreme Court Justice J. S. Verma. In chapter 7 I pursue the enigma of his central role in the controversial resolution of the "corrupt practices" cases, and in the process seek to illuminate the question of the judiciary's involvement in the campaign to reconstitute the essentials of Indian secularism. The mystery surrounding the Court's judgment has to do with the fact that while the Court upheld the restrictions on religious speech, it did so in a manner that essentially legitimated the core beliefs of the Hindu right on the most fundamental of all questions, the nature of Indian national identity. That Justice Verma's reasoning could find favor with both the liberal legal theorist Ronald Dworkin and the leading theoreticians of Hindu revivalism is vivid testimony to the puzzling quality of the Court's judgment. Through interviews with most of the major players in the complex and multidimensional drama of these cases, I present three alternative narratives of their meaning: first, that the outcome represented a significant victory for liberal principles of equality; second, that it was a triumph of religious and cultural nationalism; and finally, that the animating force behind the decisions was a commitment to precepts of sociological jurisprudence. In the end, however, a fourth story may be necessary to understand the meaning of what happened in these cases, and ultimately what is happening to Indian secularism, namely, a more nuanced and conflicted account that reflects a notably unsuccessful political system in providing the leadership required to clarify the question of Indian national identity. And as we shall see, the failure of judges in this regard is in turn a reflection of this larger political reality.

The challenge to the original secular ideal of a composite culture is not, as illustrated in the *Hindutva Cases*, confined to the fringes of the Indian political system. Nehru's invocation of Ashoka at the Constituent Assembly, to the effect that Indian nationhood consisted of more than the Hindu affiliation of most Indians, resonates less authoritatively than it once did.¹⁹ It therefore comes as no surprise that some of the proponents of Hindu nationalism have found in Israel a political model that merits consideration, if not slavish emulation. A State that serves as an official homeland for the people of a particular religion represents an appealing example for those who see the destiny of their nation entwined in the culture and tradition of the country's dominant religious group. In chapter 8 I look closely at some recent constitutional developments in Israel for the lessons that they hold for Indians who might look to the Israeli example for their own development. I suggest that an enhanced Israeli-like profile for an ascriptive dimension in Church/State relations would very likely undermine the role of the Indian judiciary as an agent of social reform, and with it the larger purposes of Indian secular constitutionalism.

The specific setting for this analysis is the *constitutional revolution* in Israel, the term used to denote the emergence in that country of judicially enforceable rights against the legislative branch of government. It is a development that can be understood as part of a more ambitious effort to reconcile the contradictions in the revolutionary legacy of the Israeli polity. Thus for the jurists who are the driving force behind the effort, judicial review embodies the hope that the universalistic and particularistic strands in Israeli politics and constitutionalism can be rendered harmonious and whole. However, the premature expansion of the judiciary's formal powers before progress in establishing a popular consensus on fundamental issues of nationhood threatens to undermine the Supreme Court as an institution within the broader political system. In applying the lessons of the Israeli experience to India, I speculate on what could happen to the Indian Court's effectiveness as an instrument of ameliorative transformation if it were to become identified with a constitutional revolution in the secular priorities of the State. In the process, it also becomes clear that a Hindu State in India would look very different from a Jewish State in Israel.

But the fundamental differences between polities in how they are constituted with respect to their secular potentials need not obscure the possibilities within these potentials for achieving a degree of convergence in the secular constitutional development of contrasting societies. One of the

¹⁹ Ashoka's Rock Edict Number 15 reads: "All men are my children. Just as, in regard to my own children, I desire that they may be provided with all kinds of welfare and happiness in the world and in the next, the same I desire also in regard to all men." Sircar 1957, 56.

hopes for comparative constitutional analysis is that critical engagement across political and cultural boundaries will lead judges, legislators, and others involved in the processes of constitutional change to benefit from the lessons of foreign experience. This hope must always be tempered by a sense of realism concerning the obstacles to constitutional borrowing and transplantation that are embedded in local political and legal cultures. But the benefits of cross-national importation can be experienced in small increments, so that one need not despair in the face of only modest expectations regarding the adaptation of external practice to indigenous circumstances.

In the concluding chapter, I reflect on the adaptive possibilities of two of the constitutionally based models of secularism described in this study—the *ameliorative* and the *assimilative*—by reconsidering what is perhaps the most controversial religion decision (certainly in the free exercise arena) ever handed down by the American Supreme Court. In *Employment Division v Smith*, known widely as the peyote case, the Court created a political firestorm by curtailing the First Amendment’s usefulness as a basis for claiming exemptions to laws of general applicability that substantially burden particular religious practices. In my analysis, the subordination of conscience to civic obligation, which is at the heart of the assimilationist reasoning in Justice Scalia’s opinion for the Court, flows naturally from the Constitution’s secular aspirations. But the uncompromising application of Scalia’s logic to the two religiously motivated, peyote-ingesting followers of the Native American Church proves that in law as elsewhere, there can be too much of a good thing. Thus I argue that to challenge the strong presumption in favor of religiously based exemptions is a reasonable thing to do; prioritizing spiritual and temporal affairs in this way furthers the Constitution’s role in reinforcing a common American political identity. However, the line between political and social assimilation—the first desirable, the second problematic—is a fine one, which the Court transgressed when it failed to introduce any ameliorative considerations into the mix of its judicially administered prescription for resolving the case. As a result, the decision culminates in a surfeit of liberal formalism that found the justices relying too heavily on the resources of one secular model to maintain the appropriate balance in the constitutional equilibrium between religion and politics.

While I argue in this concluding chapter that a familiarity with the more ameliorative approach of Indian jurisprudence would be useful to decision makers in the United States, the idea behind the analysis of *Smith* is not that comparative constitutional analysis is essential for successful adjudication of these sorts of cases. Rather, it is that the various analytical constructs that assist us in distinguishing alternative contexts for secular constitutional development also reveal complementary approaches to a

more normatively driven model of Church/State relations in liberal democratic polities. The distinctiveness of constitutional regimes will doubtless persist in the face of the harmonizing effects of liberal globalization and international law, but increasingly apparent in the rising prominence of these phenomena are certain common attributes of constitutional organization that transcend national boundaries. Indeed, the “revolutionary” efforts in Israel to reconcile the visionary aspects of Church/State configuration with a fundamental shift toward more universalistic standards of constitutional practice present powerful testimony of this trend. As we shall see, the ameliorative emphasis in Indian secularism highlights for Americans the importance of substantive equality to the achievement of religious tolerance, much as the assimilative bent of American secularism conveys to Indians the salience of liberal democratic ideas in mitigating the communal obstacles to religious freedom. Each, that is, must be a contributing factor in the realization of the other’s constitutional aspirations. To the extent that this happens, we may come to know how ideal democratic arrangements for religion and politics might be constituted.

PART ONE

Three Models of Secular
Constitutional Design