

THE AFTERLIVES OF AURANGZEB: *JIZYA*, SOCIAL
DOMINATION AND THE MEANING OF
CONSTITUTIONAL SECULARISM

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ABSTRACT

This Article is the first to fully explore the historical context in which the relationship between taxation and religion has operated in India. It examines the history of Article 27 of the Constitution of India, illustrating how the men who designed it in the 1940s were influenced by the painful memory of faith-based levies imposed by bigoted Muslim sovereigns such as the 17th century Mughal ruler, Aurangzeb. It then proceeds to show how post-independence Supreme Court jurisdiction on the article has not only been scarce and intermittent, but has also been inconsistent with basic ideals of secularism and tolerance espoused by India’s founding generation. This Article suggests that by amending Article 27, and by re-examining the constitutionally mandated link between taxation and the state’s relationship between different (and competing) religious denominations, we can move toward a newer—and clearer—understanding of “Indian secularism.” At a broader level, it aims to convey the limitations of “constitutional borrowing” and the need to understand the cultural context in which these laws operate before changing them to conform with evolving standards of decency.

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Halikias for their assistance in writing and editing this paper.

INTRODUCTION

Article 27 of the Indian Constitution proclaims, “No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.”¹ At first glance, this provision would seem to be consistent with the Jeffersonian conception of religion, being “a matter which lies solely between Man & his God.”² India’s founding document apparently “build(s) a wall of separation between Church & State.” After all, American constitutional law—through the free exercise and non-establishment clause—reflects the belief that “once government finances a religious exercise, it inserts a divisive influence into our communities.”³ However, this Article will argue that Article 27 should be viewed within the Indian paradigm of the historical relationship between faith-based tariffs and the state’s quest for societal domination. The link between taxation and repression in the subcontinent—having impressed its dark hues upon the rich tapestry of Indian history and political thought—should complement comparative constitutional approaches in explaining Indian secularism.⁴

¹ CONST. OF INDIA 1949, art. 27.

² Letter from Thomas Jefferson to Nehemiah Dodge, Ephraim Robbins, & Stephen S. Nelson, Committee of the Danbury Baptist Association in the State of Connecticut (Jan. 1, 1802) (on file with the Library of Congress).

³ *Engel v. Vitale*, 370 U.S. 421, 442 (1962) (Douglas, J., concurring).

⁴ See *Naz Foundation v. Union of India*, 160 D.L.T. 277 (2009). Challenges to the applicability of comparative constitutional law are not just a theoretical abstraction. See also Surjit Choudhry, *How to Do Comparative Constitutional Law in India*, in *Comparative Constitutionalism in South Asia* (Sunil Khilnani, Vikram Raghavan, & Arun K. Thiruvengadam eds., 2012). As Sujit Choudhry explains in his book in its chapter: “How to Do Comparative Constitutional Law in India,” the Indian government argued against a comparative approach in the landmark *Naz Foundation v. Union of India* case, where the Delhi High Court overturned a Victorian-era statute criminalizing homosexual relations between consenting adults. *Id.* According to Choudhry, the government’s stance was that:

(a) the Constitution should be interpreted to be consistent with Indian cultural norms; (b) when interpreting the fundamental rights provisions of the Constitution, courts should prefer interpretations that are consistent with Indian cultural norms and reject interpretations that are inconsistent with them; (c) when determining whether violations of rights are justifiable, courts should defer when legislation reflects Indian cultural norms; and (d) comparative materials are an irrelevant and

This Article presents the story of faith-based taxation in India as a three-act tragedy. The first stage—definitively establishing the ability of a ruling Delhi elite to further its preferred religion via the power of its levy—is the Mughal Emperor Aurangzeb’s 1679 reimposition of the *jizya* tax on non-Muslims. Part I of this Article examines the historical evidence regarding Aurangzeb’s experimentation with *jizya* during his reign. The financial and symbolic depredations inflicted by Muslim rule on a predominantly “Hindu”⁵ population, compounded by the horrendous communal violence of “partition,” generated profound anxieties at the nation’s founding.⁶ Therefore, Part II explains how the legacy of *jizya* influenced the framers’ decision to prohibit the sustenance of any particular religion via taxation. Part II also argues that their inability to effectively divorce the state’s use of its tax revenue from its relationship with religion and adoption of a weak Article 27 instead, sets the stage for the Constitution to encode India’s historical trauma of *jizya*.

Part III deals with the last and continuing act of this tragedy: the post-independence Indian Supreme Court jurisprudence on Article 27. Not only are there “not many decisions which have given an indepth interpretation of Article 27,”⁷ but the Court’s rulings in these few cases also demonstrate inconsistencies, misrepresentations, and injustices. The primary defense offered for these curious judgments has been a peculiarly Indian understanding of “secularism,” unexplainable by Western—and therefore illegitimate—conceptions of the phrase. Part IV of this Article shall therefore attempt to draw on the lessons of the Indian historical experience of theocracy-by-taxation to advocate a shift away from an inconsistent—and deeply flawed—Indian “model” of secularism and toward a transnational idea of contextual

illegitimate aid to constitutional interpretation, since by definition they come from outside the Indian cultural context.

⁵ See Romila Thapar, *Imagined Religious Communities? Ancient History and the Modern Search for a Hindu Identity*, 23 MOD. ASIAN STUD. 209 (1989). A more appropriate term, perhaps, would be “non-Muslims.” The validity of a shared Hindu identity has been a matter of scholarly debate, with commentators focusing on the lack of uniformity in the “indigenous” religious practices of the Indian subcontinent, and calling conceptions of historical continuity in the Hindu faith “a modern search for an imagined Hindu identity from the past, a search which has drawn on the historiography of the last two centuries.” *Id.* (emphasis added).

⁶ See Mushirul Hasan, *Memories of a Fragmented Nation: Rewriting the Histories of India's Partition*, 33 ECON. & POL. WKLY. 2662 (1998).

⁷ *Prafull Goradia v. Union of India*, 2 S.C.C. 568 (2011).

secularism, based on the principle of the state maintaining a principled distance from all religions.

I. PURITANICAL OR PRUDENT?: INVESTIGATING THE HISTORICAL RECORD ON *JIZYA*

Writing to Aurangzeb, his nominal overlord and lifelong adversary, the Maratha chieftain Shivaji summoned all his ability to plead and berate, asking for the withdrawal of the *jizya* tax on non-Muslims—a request the Mughal Emperor did not honor:

If you believe in the true Divine Book and Word of God (i.e. the Quran) you will find there [that God is styled] Rabb-ul-amin, the Lord of all men, and not Rabb-ul-Musalmin, the Lord of the Muhammadans only . . . To show bigotry for any man's creed and practices is equivalent to altering the words of the Holy Book . . . In strict justice the jaziya is not at all lawful . . . Apart from its injustice, this imposition of the Jaziya is an innovation in India and inexpedient . . . I wonder at the strange fidelity of your officers that they neglect to tell you of the true state of things, but cover a blazing fire with straw!⁸

The tax, mentioned in the Quran as an exaction required of non-Muslims,⁹ had been discontinued in 1564 by Akbar, Aurangzeb's great-grandfather and a sovereign remembered for his accommodation and tolerance for non-Muslim Indian communities.¹⁰ Aurangzeb, however, reimposed the tax in 1679, fixing the rate at 12, 24 and 48 dirhams a year for three income-

⁸ Letter from Shivaji to Aurangzeb (Apr. 2, 1679). See also 3 JADUNATH SARKAR, HISTORY OF AURANGZIB: MAINLY BASED ON PERSIAN SOURCES Appendix VI (Orient Longman 1972).

⁹ A. J. ARBERRY, THE KORAN INTERPRETED (1955), <http://www.oxfordislamicstudies.com/article/book/islam-9780192835017/islam-9780192835017-miscMatter-6> (last visited Mar. 31, 2017). Verse 9:29 of the Quran says, "Fight those who believe not in God and the Last Day and do not forbid what God and His Messenger have forbidden—such men as practise not the religion of truth, being of those who have been given the Book—until they pay the tribute out of hand and have been humbled." *Id.*

¹⁰ Munis Faruqi, *The Forgotten Prince: Mirza Hakim and the Formation of the Mughal Empire in India*, 48 J. ECON. & SOC. HIST. ORIENT 487 (2005).

based classes of non-believers; the higher one's class, the higher the *jizya*.¹¹

There are two explanations for why Aurangzeb reintroduced *jizya*, both of which this section shall explain: one explains the tax as another manifestation of his puritan fanaticism and bigotry toward Hindus, while the other ascribes it to the financial exigencies facing the empire after Aurangzeb's ruinous military campaigns in the Deccan.¹² However, neither explanation establishes that the link between religion and taxation was one that was drawn for reasons of societal domination—either for the primacy of one faith over others, or the supremacy of a tottering old man over his fraying realm. As the dominance of the Muslim emperor was broken by Christian foreigners, who in turn seemed about to cede power to Hindu hegemony, the memory of *jizya* would come to affect the formulation of the constitution for the new Indian nation starting in 1947.

Writing to his trusted general, Zulfiqar Khan Bahadur Nasrat Jang, Aurangzeb asked: "Why should a fertile land be given to an ungrateful 'kafir-i-harabi'?"¹³ Why should we be negligent in carrying out works which make it impossible to accomplish without any evident objection? Have we not read about the rewards of the crusade (against the infidels) in the 'Sahihain?'"¹⁴ Among all the Great Mughals,¹⁵ Aurangzeb is almost indisputably the most polarizing figure; the "very name of Aurangzeb seems to act in the popular imagination as a signifier of politico-religious bigotry and repression, regardless of historical accuracy."¹⁶ Modern Hindu nationalists, in painting a picture of Hindu humiliation and subjugation during what they see as a millennium of "Muslim rule,"

¹¹ 4 THE CAMBRIDGE HISTORY OF INDIA 242 (Richard Burn ed., 1937).

¹² Satish Chandra, *Jizyah and the State in India during the 17th Century*, 12 J. ECON. & SOC. HIST. ORIENT 322 (1969).

¹³ See Michael Davis, *Laskar Jihad and the Political Position of Conservative Islam in Indonesia*, 24 CONTEMP. SE. ASIA 12 (2002). Kafir-i-harabi is a "belligerent" infidel, who does not pay the *jizya*. *Id.*

¹⁴ See 1 A. F. L. BEESTON, JULIA ASHTIANY, M. M. BADAWI, MARIÒA ROSA MENOCAL, RAYMOND P. SCHEINDLIN, & MICHAEL SELLS, THE CAMBRIDGE HISTORY OF ARABIC LITERATURE: ARABIC LITERATURE TO THE END OF THE Umayyad Period (1984). See also JAMSHEDJI HORMASJI BILIMORIYA, RUKA'AT-I-ĀLAMGIRI; OR, LETTERS OF AURUNGZEBE, WITH HISTORICAL AND EXPLANATORY NOTES 154–55 (Luzac 1908). A canonical book of Islam, written c. 1000 CE.

¹⁵ For a brief exploration of the popular memory of the first six Mughal emperors, and the image of royalty associated therewith, see Ruby Lal, *Rethinking Mughal India: Challenge of a Princess' Memoir*, 38 ECON. & POL. WKLY. 53 (2003).

¹⁶ Katherine B. Brown, *Did Aurangzeb Ban Music? Questions for the Historiography of His Reign*, 41 MOD. ASIAN STUD. 77 (2006).

find it handy to portray Aurangzeb as being representative of all Muslim monarchs.¹⁷

Writing in 1912, Sir Jadunath Sarkar recounted an episode that reflects mainstream Hindu views of Aurangzeb's reign. According to Sarkar, a Hindu crowd protesting the imposition of *jizya* had blocked Aurangzeb's path from his palace to the mosque where he wanted to offer Friday prayers.¹⁸ After waiting for an hour, he ordered elephants to be moved through the crowds, mowing down many Hindus and quelling their protest.¹⁹ Sarkar claimed that Aurangzeb did not just intend to humiliate *dhimmis*—he wished to convert them to Islam. Apart from the natural incentive of no longer having to pay *jizya*, there were financial rewards announced for newly converted Muslims—including monetary allowances for food, inclusion in triumphal processions on elephants through the city, and appointment to local administrative offices from which Hindus now found themselves disbarred.²⁰

However, contemporary academic historians have pushed back on the idea that Aurangzeb reintroduced *jizya* purely for religious or proselytizing reasons.²¹ Satish Chandra, for example, questions how Aurangzeb or his courtiers could expect *jizya* to suddenly induce millions of Hindus to embrace Islam, when its existence for the entirety of Muslim rule in India—except the period 1564 A.D. through 1679 A.D.—had failed to convince their forebears to give up their faith.²² The “real” reason for the rebirth of *jizya*, according to Chandra and others, was the massive drain on the Mughal royal treasury from 1676 because of Aurangzeb's relentless expansionary wars in the Deccan, as well as periodic conflagrations with Afghan, Rajput and Ahom adversaries.²³ Further, while the burden of *jizya* hit poor Hindus the hardest, they were also the beneficiaries of Aurangzeb's decision to rescind more than 80 customary taxes early in his rule, to alleviate suffering from war and drought. The pious emperor decided that these taxes did not conform to Islamic *sharia* law, and in abolishing levies on goods and services such as goats, or small-scale grain trading, he enriched peasants of all sects.²⁴ Aurangzeb even suspended the collection of

¹⁷ Amartya Sen, *The Threats to Secular India*, 21 SOC. SCIENTIST 5 (1993).

¹⁸ Sarkar, *supra* note 8, at 309.

¹⁹ *Id.*

²⁰ *Id.* at 312–15.

²¹ Chandra, *supra* note 12.

²² *Id.*

²³ *Id.*

²⁴ M. Reza Pirbhai, *Reconsidering Islam in a South Asian Context* 103 (2009).

jizya in the Deccan when he was informed that poverty and the ravages of war had rendered Hindus in the area unable to pay their taxes.²⁵ *Jizya*, the bulk of modern historical research says, was not simply a product of Aurangzeb's lifelong desire to demonstrate his fidelity to doctrinaire Islam. It was an attempt to shore up the Mughals' permanently tenuous credibility with orthodox clergymen, and a product of the internal fractures in the Mughal elite produced by continuous wars of succession.

Scholars have emphasized how the Mughal dynasty, due to its Timurid/Mongol origins, was far more amenable to moderate influences from unorthodox Muslim factions and non-Muslim elites than the purist regimes of the Arabian Peninsula.²⁶ The first Mughal emperors were resented and opposed by non-Muslim and Muslim Indian elites for being a foreign invading power, and therefore sought to legitimize themselves using methods repugnant to orthodox *sharia*.²⁷ Humayun, for example, established the ceremony of "divine splendor," wherein he would dramatically raise the veil covering his face in public.²⁸ All Mughal emperors adopted grandiose titles whose provenance often lay in *dhimmi*, non-Arab traditions; Humayun's claim to being *Shahinshah-i Nasal-i Adam* (The Emperor of the (entire) Human Race) and Akbar's status as *Insan-i Kamil* (the Perfect Man) are two examples.²⁹

It is therefore not surprising that throughout the reigns of the first six emperors, the Mughal sovereigns sought to balance the politically expedient liberal policy of tolerating *dhimmis*, and co-opting Rajput princes as lieutenants and military commanders, with their legitimacy to the powerful Muslim *ulema* clergy. The theologians wanted constant *jihad* against non-believers, and the rigid implementation of a *sharia* conceptualized in eighth-century West Asia, which was a dramatically different time and place.³⁰ Akbar could hence be a follower of the bigoted cleric Shaikh 'Abd al-Nabi, who preached against both Shi'ites and non-Muslims, while abolishing *jizya* and pilgrimage taxes on Hindus and supporting their temples in Vrindavan with land grants.³¹ Similarly, Shah Jahan could suddenly assert that he was a defender of orthodox

²⁵ *Id.* at 104.

²⁶ Alam Khan Iqtidar, *State in the Mughal India: Re-Examining the Myths of a Counter-Vision*, 29 SOC. SCIENTIST 16 (2001).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ Chandra, *supra* note 12, at 329.

³¹ Iqtidar, *supra* note 26, at 22.

sharia and command the destruction of all new Hindu temples, while continuing to enforce, by stealth, a ban on cow slaughter that he had ostensibly revoked at the beginning of his reign.³² Mughal Emperors therefore maintained an uneasy equilibrium between a public persona of puritan Islamic kingship and subtle policy choices meant to appease the *dhimmi* populace.

This delicate balancing act could not last during Aurangzeb's reign, however, this has perhaps contributed to his nefarious reputation in the Indian popular imagination. The *ulema* disapproved of the continual progressive "drift" of the Empire, especially Akbar's policy of *sulh-i kul*; abolishing *jizya*, employing Rajput chieftains, allowing forcibly converted Hindus to apostatize from Islam without the *sharia*-mandated death penalty.³³ While Jehangir and Shah Jahan had tried to pull back from this excessively liberal direction, their efforts did not sufficiently impress the clergy. Further, the *ulema* had a vested interest in demanding the reimposition of the *jizya*—they formed a large part of the large population of people dependent for their sustenance on stipends from the Mughal state.³⁴ An increase in tax revenue from the *jizya* would conceivably increase the pool of money from which clerical grants were drawn—grants that Akbar had reduced and, to the *ulema*'s consternation, extended to non-Muslim holy men.³⁵

This Article does not seek to adjudicate which of the various historical explanations for Aurangzeb's reintroduction of *jizya* is most accurate. For our purposes, it would be sufficient to note that given *any* of these theories, the link between faith-based taxation and societal domination was clear in Mughal India of the 17th century—a link that this article claims helped shape the distinct Indian conception of secularism. If Aurangzeb was indeed merely fulfilling what he saw as his preordained role as the most Muslim of Mughal monarchs, the *jizya* was a naked attempt at asserting the dominance of Islam in a religiously heterogeneous empire through the state's power of taxation. On the other hand, if he was appeasing the *ulema*, he was using his discretionary powers to set tax rates to build a coalition of elites to stay in power—an exercise in *realpolitik* aimed at maintaining his hegemony as an "Oriental despot."³⁶ If a

³² SATISH CHANDRA, *MEDIEVAL INDIA: FROM SULTANAT TO THE MUGHALS* 254–57 (1997).

³³ JOHN F RICHARDS, *THE MUGHAL EMPIRE* 36–39 (1993).

³⁴ Chandra, *supra* note 12, at 328.

³⁵ Richards, *supra* note 33, at 37.

³⁶ See PERRY ANDERSON, *LINEAGES OF THE ABSOLUTIST STATE* (2013) for a discussion of the link between taxation and state absolutism, It must be noted that large parts

member of the Constituent Assembly drafting India's constitution were to sit at his desk³⁷ in 1948, and look at the Mughal Empire's experience with *jizya*, he could hence not help but see the link between taxation and state-sponsored religion.³⁸

II. "YOU WILL NOT KEEP OUT THE THING FROM THAT
CONSTITUTION": CONSTITUTIONAL BORROWING,
HISTORICAL MEMORY AND THE FORMULATION OF ARTICLE 27

India's Constituent Assembly was brimming with men who had good cause to remember Aurangzeb's reign as a cautionary tale against mixing religion with taxation. The President of the assembly—and later first President of the Indian republic, Dr. Rajendra Prasad—had been a student of Sir Jadunath Sarkar, whose magisterial work on Aurangzeb had established the Mughal's reputation as a tyrant taxing hapless Hindus.³⁹ As Rochana Bajpai has argued, Partition and the virtual disappearance of the Muslim League and the Sikh Panthic Party from the Constituent Assembly led to the hardening of opinion in Congress against religious sectional interests, with the now Hindu-dominated legislature eviscerating many of the safeguards for minorities that the first

of the Mughal court elite and royal family opposed Aurangzeb's reintroduction of the *jizya*. *Id.* In 1681, within two years of the tax being reinstated, Prince Mu'azzam was promising Rajput nobles that he would abolish *jizya* if they helped him come to the throne—again showing how the advent of Mughal wars of succession could heighten the politically expedient role taxation could play. *Id.* *Jizya* was formally abolished by Jahandar Shah in 1712—a mere five years after Aurangzeb's death. See Iqtidar, *supra* note 26, at 23.

³⁷ See Parliament of India, *First Day in the Constituent Assembly*, <http://parliamentofindia.nic.in/lis/debates/facts.htm>). It very likely was a "him"—the Lok Sabha's official estimate is that of the 207 members of the assembly present on the first day, December 9, 1946, just nine were women. *Id.*

³⁸ See JAWAHARLAL NEHRU, *THE DISCOVERY OF INDIA* 270 (1981). India's founding generation definitely thought about the Mughal Empire at length, aiming to draw lessons from the history of the previous non-European unitary state that had attempted to rule India from Delhi. See *id.*, where Nehru compares Akbar (whom he looks upon favorably) to Aurangzeb (who, in Nehru's words, was a "bigot"). See also S. Irfan Habib, *Why Maulana Azad's Century-old Defence of Free Thinking in Islam Speaks against Fundamentalism Even Today*, *CARAVAN* (Jun. 23, 2015), available at <http://www.caravanmagazine.in/vantage/maulana-azad-tells-us-why-lack-critical-engagement-islam-today-bane-religion> (last visited Apr. 10, 2016). Maulana Abul Kalam Azad, the Congress's most famous Muslim leader, wrote favorably of Dara Shikoh and his friend, an Armenian Jew named Sarmad Shaheed, for their free-thinking views on Islam. *Id.*

³⁹ Swapan Dasgupta, *A Loss of Character*, *OPEN* (Aug. 14, 2015) <http://www.openthemagazine.com/article/voices/a-loss-of-character> (last visited Apr. 10, 2016).

draft of the constitution had contained.⁴⁰ This section shall argue that Article 27 was an example of this Hindu-centric behavior of the Constituent Assembly, using two approaches to make its case. Firstly, it shall take a comparative constitutional approach in examining Article 49(6) of the Swiss Constitution of 1874, from which Article 27 was adapted almost word for word. The abolition of this article with the promulgation of Switzerland's new constitution in 1999 calls into question the acceptability of Article 27's continued existence in India. The section shall then look at the actual Constituent Assembly debates over Article 27, and highlight how the assembly's rejection of various proposed amendments allowed a flawed provision to enter the Constitution of India.

The Constitution of India can be viewed, in many ways, as a carpet woven with fibers of exotic provenances; several provisions and fundamental rights are drawn from the basic laws of the U.S., U.S.S.R., and sundry Western European countries.⁴¹ The Preamble to the Constitution of India opens with the words "We The People," a phrase sure to resonate with any American. It is, therefore, not surprising that Article 27 also originates in a Western constitutional provision—namely, the last paragraph of Article 49 of the Swiss Constitution of 1874.⁴² Here, it would be worthwhile to examine the specific country that India chose to emulate for its constitutional provision on faith-based taxation. This choice of country can be instructive in determining the founders' intent: the Preamble's borrowing of the American "We The People" phrase represents a faith in popular sovereignty, for example, while the Soviet-inspired Fundamental Rights and Directive Principles of state policy display the Congress' economically redistributive sympathies.⁴³ Switzerland's 1874 constitution was one written by the victors to impose their will on the vanquished; the Protestants who had won power in the *Sonderbund* war of 1847 used the document to dictate terms to the relatively conservative Catholics in the central part of the nation.⁴⁴ For Switzerland's reputation as a stable and equitable liberal democracy, restrictions on

⁴⁰ Rochana Bajpai, *Constituent Assembly Debates and Minority Rights*, 35 *ECON. & POL. WKLY.* 1837 (2000).

⁴¹ See Valentina Rita Scotti, *India: A 'Critical' Use of Foreign Precedents in Constitutional Adjudication*, *The Use of Foreign Precedents by Constitutional Judges* (Tania Groppi & Marie-Claire Ponthoreau eds., 2013).

⁴² B. SHIVA RAO ET AL., *THE FRAMING OF INDIA'S CONSTITUTION* 42 (1966).

⁴³ Shruti Rajagopalan, *Incompatible Institutions: Socialism versus Constitutionalism in India*, 26 *CONST. POL. ECON.* 328 (2015).

⁴⁴ Carol L. Schmid, *THE POLITICS OF LANGUAGE: CONFLICT, IDENTITY AND CULTURAL PLURALISM IN COMPARATIVE PERSPECTIVE* (2001) 127–28.

Catholicism continued for astonishingly long.⁴⁵ Jesuits were barred from churches and schools until 1973, and the creation of new bishoprics required federal approval till 2001.⁴⁶

The particular paragraph from the Constitution of 1874 that served as the inspiration for Article 27 deserves to be quoted in full here: “No one shall be bound to pay taxes the proceeds of which are specifically appropriated to cover the cost of worship within a religious community to which he does not belong. The detailed implementation of this principle shall be a matter for federal legislation.”⁴⁷ There are therefore striking similarities in the motivations of the internationalist Nehruvian Congress elite and the liberal Protestant canton representatives who drew up the Indian and Swiss constitutions. Neither opposed state funding of religion—they just did not want the Hindu to pay *jizya*, the Muslim a temple tax, or the German Protestant a tithe to the Catholic Church.⁴⁸ The humiliation and subjugation experienced by religious communities due to an identity-based tax seems to be the driving force behind these consanguineous constitutional provisions.

Swiss Constitution of 1874 Article 49 [Freedom of Religion and Belief] ⁴⁹	Swiss Constitution of 1999 Article 15 [Freedom of Faith and Conscience] ⁵⁰
(1) Freedom of creed and conscience is inviolable. (2) No one may be forced to participate in a religious association, to attend religious teaching, or to perform a religious act, nor be subjected to penalties of any sort because of his religious beliefs. (3) The holder of the paternal or tutelary authority shall determine the religious education of children in conformity with the foregoing principles until they have	(1) The freedom of faith and conscience is guaranteed. (2) Every person has the right to freely choose his or her religion or non-denominational belief and to profess them alone or in community with others. (3) Every person has the right to join or belong to a religious community and to receive religious education. (4) No person may be forced to join a religious community, to conduct a religious act or participate in religious

⁴⁵ WALTER HALLER, *THE SWISS CONSTITUTION* 172 (2009).

⁴⁶ *Id.*

⁴⁷ SWITZERLAND CONST. (1874), art. 27.

⁴⁸ *See, for e.g.*, Haller, *supra* note 45; Ayyangar, *infra* note 65.

⁴⁹ SWITZERLAND CONST. (1874), art. 49.

⁵⁰ SWITZERLAND CONST. (1999), art. 15.

<p>completed their 16th year.</p> <p>(4) The exercise of civil or political rights may not be restricted by any prescription or condition of an ecclesiastical or religious nature.</p> <p>(5) Religious beliefs do not exempt anyone from carrying out civic duties.</p> <p>(6) No one shall be bound to pay taxes the proceeds of which are specifically appropriated to cover the cost of worship within a religious community to which he does not belong. The detailed implementation of this principle shall be a matter for federal legislation.</p>	<p>education.</p>
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However, this commonality founded in historical fears does not justify a provision's place in modern constitutions. Switzerland revised its Constitution in 1999, primarily to help it reflect "principles and institutions which are the result of more than 150 years of constitutional development."⁵¹ One key aspect of this update of the constitution—along with incorporating evolving standards of decency such as universal suffrage and equality of men and women—was to reflect the commitments made by Switzerland as part of the European Convention on Human Rights (ECHR), which it ratified in 1974.⁵² As the above table shows, the constitutional provisions regarding religion did not survive unscathed from the process of constitutional reform in the late 1990s. The paragraph that served as precursor to Article 27 disappeared from the Swiss Constitution—evidently, it did not pursue the "maintenance and further realisation of Human Rights and Fundamental Freedoms" mandated by the ECHR.⁵³

Switzerland's abolition of a particular provision does not in itself constitute a compelling reason for India's derivative Article 27

⁵¹ Haller, *supra* note 45, at 14.

⁵² See HELEN KELLER & ALEC STONE SWEET, A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS 311–92 (2008).

⁵³ *Id.* See also Council of Europe, *The European Convention on Human Rights*, http://www.echr.coe.int/Documents/Convention_ENG.pdf (last visited Nov. 9, 2016).

to be done away with as well. Switzerland's broader attitude toward the relationship between state tax revenue and religious institutions must be observed closely in order to understand the kind of constitutional thinking that has inspired Article 27. Twenty-four of Switzerland's twenty-six cantons recognize official churches, and endow them with public law status—only in Geneva and Neuchatel is this not the case.⁵⁴ Officially recognized churches—the locally favored Roman Catholic, Protestant or, in some cases, Jewish establishments—can raise taxes from their adherents, concurrently with cantonal and communal levies.⁵⁵ In some cantons, even private companies must pay church taxes.⁵⁶ Adherents of “non-traditional” religions such as Islam are not eligible to receive money from the collected church tax.⁵⁷ In a referendum held on March 2, 1980, 79% of Swiss voters rejected a proposed complete separation between church and state.⁵⁸ The inability of Muslim communities to marshal enough resources at the cantonal level to be recognized as an “official church” and obtain state support, moreover, has further marginalized the community⁵⁹ at a time when Islamophobia and anti-immigrant sentiment is sweeping Switzerland.⁶⁰ Given the societal context of the provision that inspired Article 27, then, one should ask whether this is the constitutional company India wishes to keep.

Members of the Indian Constituent Assembly were not oblivious to the flaws in the proposed article.⁶¹ In fact, some of them raised prescient questions regarding its wording, and suggested several amendments—none of which, unfortunately, were adopted.⁶² The actual Constituent Assembly debate on Article 27 was rather short.⁶³ However, the brevity of the discussion, and its content, show how well understood the link between religion-based taxation and social strife was in 1948, and how the history of *jizya* mapped directly onto the fears and contentions of Constituent

⁵⁴ Haller, *supra* note 45, at 173.

⁵⁵ *Id.*

⁵⁶ U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, SWITZERLAND 2012 INTERNATIONAL RELIGIOUS FREEDOM REPORT, at 2 (2012).

⁵⁷ *Id.*

⁵⁸ Bruno Etienne, *Islamic Associations and Europe*, in POLITICS AND RELIGION 29, 39 (Sami Nair, ed., 2013).

⁵⁹ *Id.*

⁶⁰ J. E. Cheng, *Islamophobia, Muslimophobia or Racism? Parliamentary Discourses on Islam and Muslims in Debates on the Minaret Ban in Switzerland*, 26 DISCOURSE & SOC. 562 (2015).

⁶¹ See, generally, B. SHIVA RAO ET AL., *supra* note 42.

⁶² *Id.*

⁶³ *Id.*

Assembly members. The article—then numbered 21—was introduced for debate to the assembly on December 7, 1948.⁶⁴ M. Ananthasayanam Ayyangar, a Congressman from Madras who would go on to serve as the Lok Sabha's second speaker and retire as the Governor of Bihar, directly alluded to the misuse of taxation by sovereigns such as Aurangzeb to privilege their own faiths:

In the past we have had various Kings belonging to various denominations levying taxes in various shapes and forms. The Muhammadan Kings recovered a particular kind of tax for supporting Mosques. The Christians did not do so in this country. The ancient Hindu Kings collected a cess called the Tiruppani cess for supporting a particular temple or temples in my part of the country. In a secular State where the State is expected to view all denominations in the same light, and not give encouragement to any one particular denomination at the expense of others, this provision is absolutely necessary. This is part and parcel of the Charter of liberty and religious freedom to see that no particular denomination is given any advantage over another denomination.⁶⁵

Ayyangar's tortuous attempts at equating the practice of *jizya* with what he claims was the ancient practice of *tiruppani* are interesting, as well as the construction of his objection to faith-based taxation. As far as *tiruppani* goes, there is very little evidence that this cess—collected on a *voluntary* basis and used to restore temple buildings that had fallen into disrepair—was ever enforced on a large scale or caused unrest or mass dissatisfaction to a degree anything like *jizya*.⁶⁶ Having failed to find any examples of Christian rulers imposing taxes to support churches,⁶⁷ Ayyangar

⁶⁴ Constituent Assembly Debates, Constitution Hall, New Delhi (Dec. 7, 1948), *available at* <http://parliamentofindia.nic.in/ls/debates/vol7p21a.htm>.

⁶⁵ *See* M. Ananthasayanam Ayyangar, Speech during Constituent Assembly Debates, Constitution Hall, New Delhi (Dec. 7, 1948), *available at* <http://parliamentofindia.nic.in/ls/debates/vol7p21a.htm>.

⁶⁶ *See* Ramalingam Chettiar v. Ramasami Aiyar And Ors, 13 M.L.J. 379 (1903) (available in 13 THE MADRAS LAW JOURNAL REPORTS 379 (V. Krishnaswamy Aiyar, P.R. Sundara Aiyar, & P.S. Sivaswami Aiyar eds., 1903)).

⁶⁷ *See* DE LÍLIO DE MENDONÇA, CONVERSIONS AND CITIZENRY: GOA UNDER PORTUGAL, 1510-1610 267 (2002). While the Portuguese conducted the Goan Inquisition and persecuted, converted and expelled Hindus from their colony, they never imposed

had to cite an obscure minor temple cess to avoid singling out Islam. This was quite understandable for India's founding generation: in the aftermath of Partition, Indian statesmen wanted to avoid addressing the orthodoxies of a Muslim community largely remorseful for its role in the country's splintering.⁶⁸ However, Ayyangar's speech also hints at his acquiescence in the construction of a distinctly Indian notion of secularism, one that did not preclude the state's entanglement with religious affair. As one member of the assembly—a Christian reverend from Madras—had noted during the debate on Fundamental Rights to be enshrined in the Constitution:

I say, Sir, further that in the last analysis we have to make an appeal to a moral law and through the moral law to a Supreme Being, if the highest and the fullest authority is to be given and the most stable sanction to be secured for these fundamental rights. Sir, Mahatma Gandhi, in one of his unforgettable phrases, referring to the desire to have a secular Constitution and to avoid the name of the Supreme Being in it, cried out, "You may keep out the Name, but you will not keep out the Thing from that Constitution."⁶⁹

The true intent of Article 27 was an exemplar of this Gandhian vision of religion that permeates India's Constitution—a textual secularism coexisting with the real-world cohabitation of government and religion. For while Ayyangar and others did not wish to favor one religion over the other, they had no compunction in privileging religion over irreligion.⁷⁰ Therefore, while distinctions of caste stood legally abolished when the constitution

a *jizya*-like tax. *Id.* In fact, they attempted to extract tithes from local Catholics, leading many to question why anyone would take the trouble of paying *more* taxes by converting to Catholicism. *Id.*

⁶⁸ B. R. Nanda, *Nehru and Religion*, JAWAHARLAL NEHRU: REBEL AND STATESMAN (1998).

⁶⁹ Jerome D'Souza, Speech during Constituent Assembly Debates, Constitution Hall, New Delhi (Dec. 9, 1948), *available at* <http://164.100.47.132/LssNew/cadebatefiles/C09121948.html>.

⁷⁰ In other words, in using the state's power of the purse to fund temples, mosques, and churches as long as this did not disrupt the state's equidistance from India's major religions. For more on the conceptual background of Gandhian nationalism/secularism, see Neelam Srivastava, *SECULARISM IN THE POSTCOLONIAL INDIAN NOVEL* 30 (2008).

was adopted in 1950, the recognition and fostering of religion remained permissible.

Today's Article 27 is exactly the same as the one brought before the Constituent Assembly by Dr. B.R. Ambedkar almost seventy years ago—both the amendments moved by members in 1948 to alter the provision were defeated. However, the defeat of these amendments provides two further insights into how India's founding generation integrated the lessons of history into its understanding of how religion would play a role in modern Indian political life. The first of these amendments would have made all land owned by religious establishments and charitable trusts tax-free. However, this suggestion reminded at least one member of the manner in which religious freeloaders, hangers-on, and holy men had lived of the munificence of Indian states.⁷¹ The memory of the *ulema* who had been swayed by their financial interest in the reintroduction of *jizya* was probably fresh for Guptanath Singh from Bihar, who said:

[T]he property held in the name of religion and by religious institutions should certainly be taxed. I fear that if this article is not deleted from the Constitution, the majority of capitalists and Zamindars will try to donate their property for the advancement of religion and posing as the champions of religion would continue to perpetrate high handedness in the name of religion. Our state will become bankrupt as a consequence of the drying up of the source of taxation. I, therefore, pray that we should not make this constitution in such a way as to benefit only the Mullas, the Pandits and the Christian priests.⁷²

The collusion of landed zamindars and capitalists with the pandits, *ulema* and priests that Singh feared was no theoretical concern, of course: had the Mughals, religious Nawabs, East India Company *nabobs* and Raj officials not drained India of its wealth via a cohabitation with both financiers and the religious elite?⁷³ In

⁷¹ Guptanath Singh, Speech during Constituent Assembly Debates, Constitution Hall, New Delhi (Dec. 7, 1948), available at <http://164.100.47.132/LssNew/cadebatefiles/C07121948.html>.

⁷² *Id.*

⁷³ See TIMOTHY PARSONS, THE BRITISH IMPERIAL CENTURY, 1815-1914: A WORLD HISTORY PERSPECTIVE 45 (1999) for an account of how the religious elite as well as

defeating this amendment, the Constituent Assembly was in effect denying a class of stipend-holders—not dissimilar to the *ulema* of Aurangzeb’s time—the power to veto government tax policy.⁷⁴

The second amendment’s defeat was perhaps even more portentous for the future of Indian jurisprudence on religion and taxation. Syed Abdur Rouf, a Muslim member of the Constituent Assembly from Assam, moved the following amendment to the article, asking “that in [A]rticle 21, after the word ‘which’ the words ‘wholly or partly’ be inserted.”⁷⁵ Had this amendment been adopted, the framers of the Constitution of India would have made a momentous move toward a “modernity” of Western provenance: a Jeffersonian separation of church and state that implied the American principles of voluntarism, separatism and neutrality. This is because an article thus amended would not allow *any* government monies extracted from the people to be used for “the promotion or maintenance of any particular religion or religious denomination.”⁷⁶ However, this was not to be. Ayyangar spoke for the majority of the house when he stood and claimed that “Syed Abdur Rouf’s amendment desires that we should use the words ‘wholly or partly.’ I believe the whole includes the part, and therefore, that amendment is unnecessary.”⁷⁷

Ayyangar’s statement is curious, and to a reasonable person, it may seem manifestly untrue. The whole does *not* imply the part in this case—the article as it stands today may be read to mean that even if ninety-nine parts out of one hundred of the proceeds from a tax are used to support a religious establishment, it would mean the levy was not “specifically” for a religious purpose, and was therefore constitutional. What Rouf’s amendment would have done is disallow any such tax, even if only one percent of the resulting proceeds would be used to advance a religion. Rouf was not alone in advocating the disconnection of tax revenue from the support of religion—the final, and also doomed, proposed amendment to the Article, moved by B. Pattabhi Sitaramayya in 1949, proposed the following substitution for the extant wording:

westernized reformers in India attempted to “define” Indian traditions to influence British colonial rulers.

⁷⁴ Singh, *supra* note 71.

⁷⁵ Syed Abdur Rouf, Speech during Constituent Assembly Debates, Constitution Hall, New Delhi (Dec. 7, 1948), available at <http://parliamentofindia.nic.in/ls/debates/vol7p21a.htm>.

⁷⁶ CONST. OF INDIA 1949, art. 27.

⁷⁷ Ayyangar, *supra* note 65.

“No religion shall be recognized as a State religion nor shall any tax be levied for the promotion or the maintenance of any religion.”⁷⁸ While Ayyangar may have simply misunderstood the Rouf amendment, the rest of the members did not support it—or the later Sitaramayya rewording—either, and today’s Article 27 passed into the Indian Constitution—where it still stands—unchanged.

Jizya, with the image of Hindu subjugation and humiliation it still evokes, remains a potent symbol in modern India. Recently, the Indian National Congress held a press conference where it criticized a decision by the provincial government in Jammu and Kashmir—a coalition of parties headed by the Hindu nationalist Bharatiya Janata Party (B.J.P.)—to impose service tax on a chopper service used to ferry pilgrims to Vaishno Devi, a holy Hindu temple in the state.⁷⁹ Imposing the 12.5% additional service tax increased the cost of a helicopter ride to each pilgrim by about four dollars. The exact phrasing used by the opposition Congress, however, is interesting. “Is this Mr Modi’s⁸⁰ definition of *Jizya* tax on pilgrims to Vaishno Devi?” asked the Congress spokesman.⁸¹ “Is it B.J.P.-PDP’s⁸² version of *Jizya* tax to pilgrims of Vaishno Devi?”⁸³ A news article reporting on the conference nonchalantly stated, without any context or clarification: “*Jizya* tax was imposed on Hindus during the reign of Mughal emperor Aurangazeb [*sic*].”⁸⁴

This is why a discussion of the history of *jizya* and its place in popular memory is directly relevant to understanding the link

⁷⁸ B. SHIVA RAO, ET AL., *supra* at note 42, at 42.

⁷⁹ *Jammu and Kashmir Government Imposing 'Jizya Tax' on Vaishno Devi Pilgrims: Congress*, NDTV (SEP. 7, 2015), <http://www.ndtv.com/india-news/jammu-and-kashmir-government-imposing-jizya-tax-on-vaishno-devi-pilgrims-congress-1215089> (last visited Nov. 10, 2016).

⁸⁰ See Christophe Jaffrelot, *Communal Riots in Gujarat: The State at Risk?* (Heidelberg Papers in South Asian and Comparative Politics, Working Paper No. 17, 2003). This was a reference to Narendra Modi, the leader of the B.J.P. and current Prime Minister of India. *Id.* Mr. Modi is known for being a staunch supporter of *Hindutva*, and was, controversially, the Chief Minister of the state of Gujarat during a 2002 pogrom that left over 2,000 Muslims dead. *Id.*

⁸¹ *Jammu and Kashmir Government Imposing 'Jizya Tax' on Vaishno Devi Pilgrims: Congress*, *supra* note 79.

⁸² See *PDP-B.J.P. alliance a historic opportunity for Jammu and Kashmir: PM Modi*, FIRSTPOST POL. (Mar. 1, 2015), available at <http://www.firstpost.com/politics/pdp-B.J.P.-alliance-a-historic-opportunity-for-jammu-and-kashmir-pm-modi-2130053.html> (last visited Nov. 8, 2016). The PDP is the Jammu and Kashmir Peoples Democratic Party, a local party in Kashmir and the B.J.P.’s alliance partner in the state government. *Id.*

⁸³ *Jammu and Kashmir Government Imposing 'Jizya Tax' on Vaishno Devi Pilgrims: Congress*, *supra* note 79.

⁸⁴ *Id.*

between religion and taxation in contemporary India. The Mughal tax has become a catchphrase for any unjust tax purportedly burdening a religious community—even if the majority and governmental elite adhere to the allegedly affected faith. When the Congress spokesperson alleged that the Kashmir government’s policy was like *jizya*, he did not even need to clarify what he meant by the allegation: The underlying theme of religious subjugation and dominance attached to the tax spoke for itself. The incorrect⁸⁵ statement in the news article about the press conference—implying that *jizya* was somehow unique to the despised Aurangzeb—also speaks volumes about the popular association of religiously motivated taxation with the rule of a Muslim elite over a Hindu majority and a Hindu land.

The first generation of independent Indians therefore despised Aurangzeb’s legacy of taxation to support religion, yet passed up the opportunity to banish it to the dustbin of history while framing the nation’s constitution. The constitutional borrowing that permeated the functioning of the Constituent Assembly malfunctioned in the case of Article 27, with a flawed provision from the outdated—and, as we have discussed, religiously biased—Swiss Constitution serving as a model for the relationship between taxation and religion in independent India. Had the amendments proposed by Syed Abdur Rouf and other Constituent Assembly members been accepted, India may have improved upon this Swiss constitutional design and buried the ghost of Aurangzeb; however, this was not to be. This missed tryst with destiny, the next section argues, would prove to be the origins of confused Article 27 jurisprudence throughout independent India’s history. The next section will explore the intersection of this vivid popular memory of *jizya* (and faith-based taxation) with the unsatisfactory phrasing of the unamended Article 27. The Gandhian notion of secularism—with its assumption that when it came to religion, one could “not keep out the Thing from that Constitution”⁸⁶—that influenced the framing of the Constitution has also allowed courts arbitrarily to apply Article 27 to poke holes in the Jeffersonian wall between church and state.

⁸⁵ See Chandra, *supra* note 32. As we have discussed, *all* Muslim rulers in India imposed *jizya* at some time or the other before Akbar abolished the tax in his 1564 decree. Aurangzeb was merely reintroducing *jizya*, not inventing a levy mandated by Islam’s ancient Qur’anic precepts. *Id.*

⁸⁶ Jerome D’Souza, *supra* note 69.

III. "A STRICT CONSTRUCTION CANNOT BE GIVEN TO IT": JUDICIAL
ACTIVISM AND MISADVENTURES IN ARTICLE 27 JURISPRUDENCE
SINCE 1947

While much has been written about secularism and its broad application to Indian politics and statecraft,⁸⁷ Article 27 and religiously oriented taxation have not been at the center of this literature. Indeed, the Supreme Court of India acknowledged in 2011 that the article has been neglected in Indian jurisprudence as well, stating, "there are not many decisions which have given an in-depth interpretation of Article 27."⁸⁸ Unfortunately, the limited court decisions that do mention the provision—mostly in passing—have been inconsistent, sometimes with each other, and almost always with the framing intent of the Indian Constitution. This penultimate section of the article shall deal with five shortcomings and lacunae in Supreme Court rulings that have promulgated divergent readings of Article 27. These decisions have failed both in their attempts to conform to the jiggery-pokery of the Gandhian secularism described in the previous section, and in establishing a legitimate, reasonable separation between church and state.

The 1960-61 budget for Mysore State contained an apportionment of 150,000 rupees for "construction and repairs" of religious establishments and their facilities and equipment. Two years earlier, the state government had passed an order ceasing the earlier practice of allotting public funds for the constructions of new temples—concluding, quite sensibly, that this practice brought the state uncomfortably close to the church (or rather, it might be said, the temple). However, what about a grant such as that in the 1960-61 budget, which, again, allotted public funds for religious purposes but did not specify whether this was for Hindu, Muslim, Christian, or *any* denominational purposes?⁸⁹ This question is not simply an abstraction: Indian courts repeatedly found that Article 27 prohibits the privileging of any *particular* denomination over the others, not the promotion of religion to the detriment of irreligion.

For instance, in *Mahant Sri Jagannath Ramanuj Das And Another v. The State Of Orissa And Another*, the 1954 Supreme Court had to rule on the constitutionality of the Orissa Hindu Religious Endowments Act—legislation passed by Orissa's

⁸⁷ See, e.g., THE CRISIS OF SECULARISM IN INDIA (Anuradha Dingwaney Needham & Rajeswari Sunder Rajan eds., 2006).

⁸⁸ Goradia, *supra* note 7, at 2.

⁸⁹ Donald Eugene Smith, INDIA AS A SECULAR STATE 130-31 (1963).

provincial legislature.⁹⁰ Holding that the Act did not raise an Article 27 question, Justice Bijan Kumar Mukherjea, who later that year would become the fourth Chief Justice of India, wrote:

What is forbidden by article 27 is the specific appropriation of the proceeds of any tax in payment of expenses for the promotion or maintenance of any particular religion or religious denomination. The object of the contribution under section 49 [of the Act] is not the fostering or preservation of the Hindu religion or of any denomination within it; the purpose is to see that religious trusts and institutions wherever they exist are properly administered As there is no question of favouring any particular religion or religious denomination, article 27 could not possibly apply.⁹¹

Later that year, in eerily similar language and with five of the seven judges on the bench also having heard *Mahant Sri Jagannath*, Mukherjea would write another opinion holding that a similar legislation passed in Madras did not violate Article 27, since it did not privilege the Hindu faith over others:

[T]he object of the contribution under section 76 of the Madras Act is not the fostering or preservation of the Hindu religion or any denomination within it. The purpose is to see that religious trusts and institutions, wherever they exist, are properly administered . . . There is no question of favouring any particular religion or religious denomination in such cases. In our opinion, article 27 of the Constitution is not attracted to the facts of the present case.⁹²

⁹⁰ *Mahant Sri Jagannath Ramanuj Das and Another v. State Of Orissa And Another*, 1954 S.C.R. 1046 (1954),

available at <https://indiankanoon.org/doc/1778510/> (last visited Nov. 10, 2016).

⁹¹ *Id.*

⁹² *Commissioner, Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar*, 1 S.C.R. 1005 (1954),

available at <https://indiankanoon.org/doc/1430396/> (last visited Nov. 10, 2016).

The answer from these two cases in 1954 would hence seem to be clear: Gandhian secularism entailed that, as long as one religion was not being preferred over others, diversion of governmental tax revenue for religious purposes did not violate Article 27.

What, then, are we to make of the 2011 *Prafull Goradia* case? In his opinion, Justice Markandey Katju, while citing both the 1954 cases, wrote:

There can be two views about Article 27. One view can be that Article 27 is attracted only when the statute by which the tax is levied specifically states that the proceeds of the tax will be utilized for a particular religion. The other view can be that Article 27 will be attracted even when the statute is a general statute, like the Income Tax Act or the Central Excise Act or the State Sales Tax Acts (which do not specify for what purpose the proceeds will be utilized) provided that a substantial part of such proceeds are in fact utilized for a particular religion

In our opinion Article 27 will be attracted in both these eventualities. This is because Article 27 is a provision in the Constitution, and not an ordinary statute. Principles of interpreting the Constitution are to some extent different from those of interpreting an ordinary statute . . .

The object of Article 27 is to maintain secularism, and hence we must construe it from that angle.⁹³

Let us take the second of the two views outlined by Justice Katju. A general statute with an ultimate effect similar to that of the 1960–61 Mysore budgetary allocation could, say, result in “substantial” state expenditures for more than one religion. How then would a court adjudicate if a “particular” religion has been advantaged? We ignore the two “easy,” extreme cases—the clearly illegal case where the proceeds are overwhelmingly allocated to one faith, and the patently admissible scenario where each religion is given the same amount. What if, say, Islam and Christianity are given “substantial” proceeds and Hinduism—or a sect of Hinduism—is not? No “particular religion” would be favored, yet Hindus, or some part of their community, would clearly be discriminated against.

⁹³ Goradia, *supra* note 7, at 4.

Further, on what basis is the *ratio* of expenditures on different religions to be fixed? Should each religion claim entitlement to equal amounts of funding, with the 69,000 Indian Parsis receiving as much funding as 1.3 million Hindus? Or should the funding be in proportion to the percentage of the population in that state—or the Union—identifying with that faith? If this option were to be chosen, however, one would need exact data on the religious beliefs of the populace; data that is simply unavailable in India. One commentator had this to say about the religious data available in the decadal population census: “It is a scandal that we can compile data with such little regard for statistical rigour or method.”⁹⁴ And how one would even begin to differentiate and quantify the multitudes of castes, creeds, and orders that constitute Hinduism, one can only imagine.⁹⁵ The *Goradia* judgement diverges from the two 1954 cases in a crucial manner: While the acts at issue in the latter involved the religious establishments of basically one religion (Hinduism), *Goradia* sets up a more generalized test, which brings with it the various issues and problems we have discussed here.

A second critique of Article 27 jurisprudence can be found by looking at the two 1954 cases, which stress that the government was within its rights to regulate “secular” aspects of religious establishments.⁹⁶ For example, in the *Commissioner, Hindu Religious Endowments vs. Sri Lakshmindra Thirtha Swamiar* case, the court held that the case did not attract Article 27 since:

⁹⁴ R. Jagannathan, *Religious Census 2011 Sucks: Hindu Population May Even Now Be Overstated*, FIRSTPOST (Jan. 27, 2015), <http://www.firstpost.com/india/religious-census-2011-sucks-hindu-population-may-seriously-overstated-2066161.html>. See also Joanna Sugden and Shanoor Servai, *Where Are India’s 2011 Census Figures on Religion?*, WALL ST. J. (Jan. 9, 2015), available at <http://blogs.wsj.com/indiarealtime/2015/01/09/where-are-indias-census-figures-on-religion/>.

⁹⁵ See Thapar, *supra* note 5, and accompanying text. Romila Thapar provides an account of the diversity of the religious practices commonly classified as “Hindu.” *Id.*

⁹⁶ Article 25(2) of the Indian Constitution provides:

Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—
 (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;
 (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

INDIA CONST. (1950) art. 25(2).

It is a secular administration of the religious legislature seeks to control and the in the Act, is to ensure that the institutions that the object, as enunciated endowments attached to the religious institutions are properly administered and their income is duly appropriated for the purposes for which they were founded or exist.⁹⁷

A criticism of this judgment may be formulated on the basis of the ambiguous boundaries between religion and “secular life.” The “purposes” for which religious institutions “were founded or exist” can be keenly contested: Calcutta Marwaris, for instance, have in the past been vehement defenders of *sati*, the practice of widow-burning.⁹⁸ Mathew John has argued that the logical extension of the “original purposes” wording of the 1954 case could allow for the legitimization of regressive practices of *sati*, in direct contravention of Article 25(2) of the Indian Constitution, which charges the government with reforming the Hindu faith.⁹⁹

Thirdly, there is the theoretical economic debate over the difference between taxes and fees, and whether Article 27’s ban on taxes wholly used to support religious denominations could possibly be extended to fees that have the same effect. Both the 1954 cases saw the tax–fee distinction come up, with diametrically opposite outcomes. The appeal against the *Orissa* act was dismissed because the court ruled the resulting levy had been a fine and not a tax, and the provincial legislature had the right to impose fees. The court further decided that the *spirit* of the provision did not violate Article 27—but did not clarify whether fees are under the purview of the provision.¹⁰⁰ The Madras appeal, on the other hand, was upheld because the court ruled that the resulting levy was indeed a tax, which the provincial legislature was beyond its rights in creating. However, the court went on to state briefly:

The first contention, which has been raised by Mr. Nambiar in reference to article 27 of the Constitution is that the word “taxes”, as used therein, is not confined to taxes proper but is inclusive of all other

⁹⁷ Commissioner, Hindu Religious Endowments, *supra* note 92.

⁹⁸ See Anne Hardgrove, *Sati Worship and Marwari Public Identity in India*, 58 J. ASIAN STUD. 723 (1999).

⁹⁹ Mathew John, *Decoding Secularism: Comparative Study of Legal Decisions in India and US*, 40 ECON. & POL. WKLY. 1901 (2005).

¹⁰⁰ Mahant Sri Jagannath Ramanuj Das, *supra* note 90.

impositions like cesses, fees, etc. We do not think it necessary to decide this point in the present case, for in our opinion on the facts of the present case, the imposition, although it is a tax, does not come within the purview of the latter part of the article at all.¹⁰¹

While the court went on to explain, as has already been noted, why the legislation did not violate Article 27 since it did not prefer Hinduism, it left open the question whether the word “taxes” in the provision included “all other impositions like cesses, fees, etc.”¹⁰² In general, taxes are imposed to generate revenue, are typically mandatory, and are marked by an absence of a quid pro quo arrangement. Fees are levied by a self-selecting group to seek specific government privileges—although in some cases, fees may be *de facto* compulsory.¹⁰³

However, it is widely acknowledged that this difference is ultimately superficial and open to question: Taxes and fees, especially if they have the same end-user impact, can be indistinguishable. The American experience shows that when voters in California made certain taxation measures harder to implement, governments started levying fees that imposed precisely the same financial burdens on consumers, but were legally easier to execute.¹⁰⁴ The false fee-tax dichotomy opens up a question about constitutional intent and judicial activism. As Justice Katju observed in *Goradia*, “a Constitution is not to be interpreted in a narrow or pedantic manner.”¹⁰⁵ The indisputable intent of the Constituent Assembly in passing Article 27 was to ensure that no religion was favored over others; its members arguably did not care if this favoritism occurred via taxes, levies, or cesses. It is entirely conceivable that a maleficent government, given this absence of court guidance, could impose fees penalizing followers of religions other than its favored faith, while claiming not to violate Article 27.¹⁰⁶ Unlike the case of California, where courts have now burdened the government with proving that a financial burden is a

¹⁰¹ Commissioner, Hindu Religious Endowments, *supra* note 92.

¹⁰² *Id.*

¹⁰³ Thomas H. Steele, Andres Vallejo, & Scott M. Reiber, *The Riddle of Fee Versus Tax Solved: California's Proposition 26*, ST. TAX NOTES (2011), available at <http://media.mofo.com/files/Uploads/Images/110314-The-Riddle-of-Fee-Versus-Tax-Solved-Californias-Proposition-26.pdf> (last visited Apr. 11, 2016).

¹⁰⁴ *Id.*

¹⁰⁵ *Goradia*, *supra* note 7, at 4.

¹⁰⁶ Which, it is to be noted, is the only constitutional provision explicitly dealing with the relationship between religion and taxation.

fee and not a tax,¹⁰⁷ a petitioner challenging a religiously biased “fee” in India would have to take on the Union in the court system to prove that the levy is actually a tax—surely, a daunting task only accessible to those with the fortitude, time, and resources.¹⁰⁸

A fourth problem with Article 27 cases in India stems from the courts’ historical reluctance to challenge the government, for fear of censure or adverse reactions from the entrenched political elite. In a 2009 book, Shyalshri Shankar explains how, while the Indian judiciary’s operational independence has increased after the Emergency era of the mid-1970s, political configurations and calculations still play a large role in the judges’ decision-making calculus.¹⁰⁹ In many cases, the likelihood of a judge ruling against the government depended on how large the ruling party’s majority in Parliament was, or how powerful the incumbent Prime Minister seemed.¹¹⁰ This reluctance to challenge the Union of India in court seems especially pronounced in cases involving economic decisions made by the government—including a tax policy that could potentially attract Article 27. Indeed, the court said as much in the case of *Government Of Andhra Pradesh & Ors v. Smt. P. Laxmi Devi*,¹¹¹ writing in its opinion, “while Judges should practice great restraint while dealing with economic statutes, they should be activist in defending the civil liberties and fundamental rights of the citizens.”¹¹²

The court had simply borrowed this rather curious dichotomy between economic issues and matters of free speech in defining the scope of judicial activism from a 1941 book *Free Speech in the United States*, written by Zechariah Chafee, a Harvard Law School professor.¹¹³ The error in this simplistic quotation is that the Court presents Chafee’s opinions as if they represented the mainstream of American, Western, or indeed democratic jurisprudence. In fact, Chafee’s exclusion of economic issues from

¹⁰⁷ See Steele, Vallejo, & Reiber *supra* note 103.

¹⁰⁸ See *Government Of Andhra Pradesh & Ors v. Smt. P. Laxmi Devi*, 2008 S.C. 1640, 8 (2008), available at <https://indiankanoon.org/doc/856631/>. An endeavor which is even more challenging if one considers that the Supreme Court has previously written that “while the Court has power to declare a statute to be unconstitutional, it should exercise great judicial restraint in this connection” [interestingly, Justice Katju authored that opinion too]. *Id.*

¹⁰⁹ See generally SHYLASHRI SHANKAR, *SCALING JUSTICE: INDIA'S SUPREME COURT, ANTI-TERROR LAWS, AND SOCIAL RIGHTS* (2009).

¹¹⁰ *Id.*

¹¹¹ *Government of Andhra Pradesh*, *supra* note 108, at 20.

¹¹² *Id.*

¹¹³ *Id.* The judgment of the court explicitly quotes Chafee, naming him twice.

the ambit of judicial activism has been called “a dramatic break from the tradition of American civic libertarianism.”¹¹⁴ His beliefs were certainly not settled law, or widely accepted even at the time *Free Speech in the United States* was written in America—the court applying them to India in 1980 would hence be akin to entering a broken down Yugo in a Formula One Grand Prix. The court’s deceptive presentation of Chafee’s views in a seminal case establishing a precedent that would restrict its future ability to challenge the constitutionality of vital economic statutes hence calls into question the Supreme Court’s ability to resist governmental pressure and fulfill its responsibility to uphold the constitution as a co-equal organ of responsible government.

The fifth, and gravest, problem with Indian jurisprudence on Article 27 is the theoretical hole in its understanding of the difference between taxes and subsidies when it comes to interpreting the ambit of the provision. Here, it would be instructive to compare and contrast cases decided by the American and Indian supreme courts, in 1970 and 2011 respectively. *Walz v. Tax Comm'n of the City of New York*¹¹⁵ involved an appellant’s challenge to the city’s practice of granting tax exemptions to religious establishments—such subsidies, he claimed, violated the First and Fourteenth Amendments.¹¹⁶ One of the central contentions between the majority opinion written by Chief Justice Burger, and the dissent penned by Justice Douglas, was whether a tax exemption represented excessive “entanglement” of the state with religion. Chief Justice Burger wrote:

The grant of a tax exemption is not sponsorship, since the government does not transfer part of its revenue to churches, but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees "on the public payroll." There is no genuine nexus between tax exemption and establishment of religion.¹¹⁷

¹¹⁴ MARK A. GRABER, *TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM* 152-64 (1991).

¹¹⁵ 397 U.S. 664 (1970).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 675.

However, Burger made it clear that he opposed a “direct money subsidy”—i.e., a transfer of government tax funds, which he called “a relationship pregnant with involvement.”¹¹⁸ Writing a vigorous dissenting opinion, Justice Douglas, decried by his critics as a neo-liberal advocate of “government by judges,”¹¹⁹ wrote that *both* tax exemptions and subsidies to churches violated the separation between church and state, preferencing religion over irreligion and discriminating against non-believers. Blasting what he saw as the false dichotomy between direct subsidies and tax exemptions, he wrote:

A tax exemption is a subsidy . . . Is my Brother *Brennan*¹²⁰ correct in saying that we would hold that state or federal grants to churches, say, to construct the edifice itself would be unconstitutional? What is the difference between that kind of subsidy and the present subsidy? . . . Sectarian causes are certainly not anti-public, and many would rate their own church, or perhaps all churches, as the highest form of welfare. The difficulty is that sectarian causes must remain in the private domain, not subject to public control or subsidy. That seems to me to be the requirement of the Establishment Clause.¹²¹

The American Supreme Court therefore had a public airing of the justices’ differences over which of two financial distortions—direct monetary subsidies and tax exemptions—they thought represented the state’s establishment of a religion. Unfortunately, no such cathartic moment has yet come to pass in India’s Article 27 case history. It could be argued that the scope of Article 27 is so much more limited than the First Amendment’s sweeping preclusion of any state “establishment of religion”: all that is prohibited is a tax whose proceeds support a particular religion more than others. However, one should ideally not have to grasp at the meaning of an article that is part of the nation’s basic law; the Supreme Court

¹¹⁸ *Id.*

¹¹⁹ Wallace Mendelson, *Mr. Justice Douglas and Government by the Judiciary*, 38 J. POL. 918 (1976).

¹²⁰ A reference to Justice William N. Brennan Jr., who wrote a concurring opinion in the case. *See* Walz, 397 U.S. at 680-94 (emphasis added).

¹²¹ *Id.* at 710.

should clarify whether subsidies and tax exemptions fall under the ambit of Article 27.

The Court had precisely such an opportunity in 2011 with the *Goradia* case, where Prafull Goradia, a former B.J.P. Member of Parliament,¹²² brought a suit challenging the constitutionality of the *haj* subsidy provided by the government to Indian Muslims.¹²³ The petition challenged the government's subsidy for the pilgrims' airfare, which was naturally drawn from the direct and indirect taxes paid by Indians of all faiths, but solely benefitted Muslim *hajis*.¹²⁴ A crucial question the court should have answered was whether a subsidy should be considered a tax in the context of Article 27. If the answer is yes, there is no question that the *haj* subsidy was favoring Islam over other faiths and should have been struck down. If subsidies were *not* to be considered taxes, however, the subsidy may not have been an Article 27 issue. Unfortunately, the court's opinion failed to even bring up—let alone address—this issue.

Writing the *Goradia* opinion, Justice Katju seemingly created his own novel theory regarding when the article was ever violated:

In our opinion Article 27 would be violated if a substantial part of the entire income tax collected in India, or a substantial part of the entire central excise or the customs duties or sales tax, or a substantial part of any other tax collected in India, were to be utilized for promotion or maintenance of any particular religion or religious denomination. In other words, suppose 25 per cent of the entire income tax collected in India was utilized for promoting or maintaining any particular religion or religious

¹²² See Prafull Goradia, *Faith, Fact and Fiction*, DLY. PIONEER (Oct. 22, 2010). Goradia has written many books about Hindutva, and authored newspaper articles with statements like these: “[H]indu temples have been vandalised time and again by Muslim rulers and invaders. Will Muslims consider returning all those *mandirs* to Hindus in exchange of the Babri Masjid?” *Id.* He quit the B.J.P. in 2004, incensed at the party's embrace of “development and nationalism” as its new planks, and claiming that the party had “betrayed Hindutva.” See also Neena Vyas, *Praful Goradia Quits B.J.P.*, HINDU (Sep. 4, 2004), <http://www.thehindu.com/2004/09/04/stories/2004090409301300.htm> (last visited Apr. 11, 2016).

¹²³ Goradia, *supra* note 7.

¹²⁴ *Id.*

denomination, that, in our opinion, would be violative of Article 27 of the Constitution...In our opinion, if only a relatively small part of any tax collected is utilized for providing some conveniences or facilities or concessions to any religious denomination, that would not be violative of Article 27 of the Constitution. It is only when a substantial part of the tax is utilized for any particular religion that Article 27 would be violated.¹²⁵

However, a close reading of the Constituent Assembly debates, the exact text of the Article, and the prior 1954 court rulings find little support for Justice Katju's 2011 decision. Katju would rule as permissible the collection of any tax in India, even the gargantuan proceeds of the federal income tax—and, crucially, even for the promotion of a particular sect, creed, or religious denomination—as long as the fraction of the tax collected were not “substantial.”¹²⁶ This approach is fundamentally flawed for at least two reasons.

First, it does not comport with the intent of the framers of the Indian constitution. Even if one were to set aside his/her aversion to any entanglement between state and church and embrace the Gandhian concept of secularism alluded to by members of the Constituent Assembly, any governmental act favoring one religion over others would be impermissible in a liberal democracy.¹²⁷ It would be very easy to tack on several provisions to an omnibus spending bill,¹²⁸ transferring large amounts of largesse to one faith, while not constituting a “substantial” part of the portion of the governmental budget being legislated.

A second contention to be raised against the Katju approach is the ambiguity inherent in the use of the word “substantial.” In the ruling itself, the figure of twenty-five percent is apparently pulled out of thin air. Are judges throughout the land now to conduct a fact-intensive inquiry in each case to determine whether the proportion of a tax being devoted to a particular religion is “substantial?” Is that threshold to be a percentage or an absolute

¹²⁵ Goradia, *supra* note 7 at 6.

¹²⁶ *Id.*

¹²⁷ Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. Chi. L. Rev. 195-223 (1992).

¹²⁸ For an exploration of why and how politicians attach their own favored legislation to larger spending bills, see Glen S. Krutz, *Tactical Maneuvering on Omnibus Bills in Congress*, 45 AM. J. POL. SCI. 210 (2001).

rupee amount? Would the threshold vary, fluctuating from one to five to twenty-five to ninety percent, depending on the tax, religion, and region of India? The sheer range of confounding circumstances and political pressures to be encountered by this test of “substantiality” renders it unsuitable to use in determining the applicability of a constitutional provision.¹²⁹ Further, it opens up the possibility of activist judges interpreting what is substantial and what is not as per their own whims and preferences—a clearly suboptimal and undemocratic method of constitutional decision-making by unelected politicians-in-robos.¹³⁰ As Justice Katju said, “while a statute must ordinarily be construed as on the day it was enacted, a Constitution cannot be construed in that manner, for it is intended to endure for ages to come . . . [h]ence a strict construction cannot be given to it.”¹³¹ However, one could certainly assert that to ensure Article 27 and the Constitution of India do endure forever, this flexibility does not imply that the Constitution—with its legitimacy emanating from “we the people”¹³²—means whatever Katju and his brethren deem it to.

IV. THE POWER TO DESTROY: MOVING TOWARD A CONTEXTUAL INDIAN SECULARISM

“The power of tax,” declared Chief Justice John Marshall in his famous 1819 *McCulloch v. Maryland*¹³³ opinion, “involves the power to destroy.”¹³⁴ However, the part of Marshall’s opinion that is less-often quoted is his focus on the role of “confidence” in the functioning of responsible representative government: “[t]o carry . . . [taxation] to the excess of destruction would be an abuse,” the opinion stated, “to presume which would banish that confidence which is essential to all Government.”¹³⁵ In pronouncing the Court’s

¹²⁹ See Edwin J. Butterfoss, *Bright Line Seizures: The Need for Clarity in Determining When Fourth Amendment Activity Begins*, 79 J. CRIM. L. & CRIMINOLOGY 437 (1988). Many scholars have argued against ambiguity in constitutional interpretation, advocating “bright line” tests to help set clear legal precedents. *Id.*

¹³⁰ For a discussion of the meaning and dimensions of “judicial activism,” see Keenan D. Kmiec, *The Origin and Current Meanings of ‘Judicial Activism’*, 92 CAL. L. REV. 1441 (2004).

¹³¹ *Goradia*, *supra* note 7 at 4.

¹³² For a discussion of the various concepts of constitutional legitimacy – and their implications for the legitimacy of the various organs of government, see Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005).

¹³³ 17 U.S. 316 (1819).

¹³⁴ *Id.* at 431.

¹³⁵ *Id.*

epochal opinion, Marshall opined that by enacting the Constitution, the people had reposed their trust in the “Legislature of the Union alone.”¹³⁶ *McCulloch* therefore established not just Congress’s right to establish a bank, or the Union’s position at the apex of a federal structure, but also the relationship between the taxation and state power that has been a constant feature of history.¹³⁷ The state, to exist, must combine its monopoly on the “legitimate use of physical force within a given territory”¹³⁸ with a stranglehold on the right to extract a share of the productive capacity of that territory, such as the right of taxation. It is not surprising, therefore, that the U.S. Constitution mandates that Congress— the legislative branch of government— “shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.”¹³⁹

Given this inextricable link between taxation and state power, it is not surprising that in order to understand the separation of church and state, we must investigate religion’s access to tax revenue. This section aims to move beyond the details of Article 27’s legal history and jurisprudence attached to Article 27, and examine how the distinctive relationship between religion and taxation in India has informed the quest for an “Indian” conception of secularism. A comparison with American constitutional experience, the latter grounded in First and Fourteenth amendment case law, shows how the Constitution of India, rather than privatizing religion, publicizes it.¹⁴⁰ The Indian historical relationship between religion and taxation should lead one to argue for a more transnational conception of secularism in India. As the flawed Article 27 jurisprudence described in the previous section has shown us, searching for a uniquely Indian model of secularism can lead to the unjust and majoritarian application of constitutional law, judicial activism and legislation from the bench, and a popular historical memory dominated by Hindu resentment. However, this

¹³⁶ *Id.*

¹³⁷ See Timothy Besley and Torsten Persson, *The Origins of State Capacity: Property Rights, Taxation, and Politics*, 99 AM. ECON. REV. 1218 (2009). Economic literature suggests that property rights, taxation systems and external political events such as wars determine state capacity. Further, rich countries also tend to be high-tax countries with good enforcement of contracts and property rights. *Id.*

¹³⁸ Max Weber, “Politics as a Vocation,” (lecture delivered at Munich University, 1918), *available at* <http://polisci2.ucsd.edu/foundation/documents/03Weber1918.pdf>.

¹³⁹ U.S. Const. art. I, § 8, cl.1.

¹⁴⁰ See, e.g., Rajeev Bhargava, *Indian Secularism: An Alternative, Trans-cultural Ideal*, in THE PROMISES OF INDIA’S SECULAR DEMOCRACY, 104 (2010).

section shall argue that the solution is not to chain India to a purely Western model of the separation of church and state; a more transnational ideal of spiritual humanism may be needed—a humanism that would also mandate the revision of Article 27.

American constitutional theory envisages the state's relationship with religious practice as being based on the precepts of voluntarism and separatism.¹⁴¹ The former stipulates that a religion may only advance itself through the voluntary efforts of its followers, and not by means of the political support of the state. The latter principle focuses on the government's "nonentanglement," with neither state nor church deriving its authority from the other.¹⁴² Implicitly, this has entailed that ". . . 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity."¹⁴³ Historically, the roots of this aversion to state support of religion via taxation can be traced to the colonial period, when settlers were obliged to tithe to the Congregationalist Church. While dissenters could be allowed to pay taxes to their own church, not all denominations enjoyed this exemption, leading to a system of discriminatory tax rebates to the state's favored churches.¹⁴⁴ American independence brought almost immediate challenges to this state favoritism in its wake. Thomas Jefferson, in his 1777 *Act Establishing Religious Freedom*, declared "that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."¹⁴⁵ In the years before the ratification of the Constitution, various state laws and constitutional conventions succeeded in ending legal penalties for religious dissent, compulsory attendance in established churches, prohibitions on public worship, attempts to establish Protestantism as the state religion, and, crucially, legal obligations to support the state church.¹⁴⁶

It must be stated, however, that the First Amendment has not been interpreted to completely insulate the government from religious matters. On the contrary, since independence, tax exemptions have been granted to religious institutions; public lottery funds have been used to fund parochial schools; churches

¹⁴¹ LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, 1154–66 (1988).

¹⁴² *Id.*

¹⁴³ *Walz*, 397 U.S. at 668.

¹⁴⁴ CHESTER JAMES ANTIEAU, ARTHUR T. DOWNEY, & EDWARD C. ROBERTS, *FREEDOM FROM FEDERAL ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES*, 31–32 (1964).

¹⁴⁵ *Id.* at 33.

¹⁴⁶ *Id.* at 61.

have been regularly incorporated; public buildings have been used for religious purposes; and days of thanksgiving and prayer have been declared at all levels of government.¹⁴⁷ In 1792, for instance, the Connecticut legislature apportioned 40,000 dollars to Yale College, an institution controlled by the Congregationalist Church; this would be equivalent to between one and three million U.S. dollars in 2015.¹⁴⁸ The Framers of the U.S. Constitution “clearly envisioned religion as something special.”¹⁴⁹ Therefore, the Supreme Court has not rejected any and all usage of religious classifications in governmental actions, and instead mandated the use of an additional doctrine of “neutrality,”¹⁵⁰ along with those of neutrality and voluntarism discussed before.

Legal scholar, Lawrence Tribe, has identified four distinct kinds of “neutrality” in Supreme Court jurisprudence; here, we focus on two of these: denominational and free exercise neutrality.¹⁵¹ Denominational neutrality implies that legislatures may not provide accommodations to *specific* religious sects and groups, and must write statutes in denominationally neutral language.¹⁵² Free exercise neutrality mandates a state to create religious classifications so that its regulations do not place burdens on specific communities.¹⁵³ For example, in *Wisconsin v. Yoder*,¹⁵⁴ the Court excused the Amish from a state law mandating school attendance, since the absence of an exemption for that community would have imperiled the core tenets of its faith.¹⁵⁵ To summarize, the American constitutional tradition prohibits state interference with religion and preferential treatment toward any sect or community, as defined under the norms of “neutrality,” while

¹⁴⁷ *Id.* at 206.

¹⁴⁸ *See id.* at 171. *See also* Samuel H. Williamson, *Measuring Worth - Relative Value of the US Dollar*, <https://www.measuringworth.com/uscompare/index.php> (last visited Apr. 6, 2016).

¹⁴⁹ TRIBE, *supra* note 141, at 1189.

¹⁵⁰ *See* *Wallace v. Jaffree*, 472 U.S. 38, 49 (1985). The Court has referenced “the established principle that the Government must pursue a course of complete neutrality toward religion.” *Id.*

¹⁵¹ TRIBE, *supra* note 141, at 1188. The other kinds of neutrality identified by Tribe were strict neutrality and political neutrality. *Id.*

¹⁵² Anjali Sakaria, *Worshipping Substantive Equality over Formal Neutrality: Applying the Endorsement Test to Sect-Specific Accommodations*, 37 HARV. C.R.-C.L. L. REV. 483 (2002).

¹⁵³ Tribe, *supra* note 141.

¹⁵⁴ *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

¹⁵⁵ *Id.* *See also* ROBERT H. BREMNER, *CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY, 1908-11* (1970).

not mandating the total alienation of the government from matters of faith.¹⁵⁶

How would this nuanced separation of church and state work in a nation-state whose founding ideologue once wrote, “those who say that religion has nothing to do with politics do not know what religion means?”¹⁵⁷ While India is a young state, with a constitution just sixty-five years old, its civilization and historical traditions stretch back millennia. Across this time period, scholars have contended, the various Indian religious traditions now classified as “Hindu” displayed an emphasis not just on *moksha*, or spiritual freedom, but also on *artha*, i.e. material satisfaction.¹⁵⁸ Religious and economic life in India has always been interrelated: the ossification of the caste system, for example, is said to have constrained labor mobility and therefore resulted in the economic stagnation of pre-Islamic India.¹⁵⁹

Indeed, in order to understand the provenance of the Indian Constitution’s provisions with respect to religion, it is important to appreciate the historical legacy of the Hindu caste system.¹⁶⁰ Alexis de Tocqueville, having read the conservative *Laws of Manu*, bitterly criticized Hinduism as a pseudo-aristocratic religion that had failed Indian civilization and made it vulnerable to foreign conquest. “[R]eligion is mixed up in everything and . . . everything is a religious act for Hindus,” he wrote.¹⁶¹ Tocqueville’s critique of Hinduism was twofold. Firstly, he faulted the faith for keeping a majority of its adherents, born into the lower castes, in a state of permanent servitude.¹⁶² Calling Hinduism a “religion of privileges,”

¹⁵⁶ ANTIEAU, DOWNEY, & ROBERTS, *supra* note 144, at 206.

¹⁵⁷ MOHANDAS K. GANDHI, AN AUTOBIOGRAPHY: THE STORY OF MY EXPERIMENTS WITH TRUTH (Mahadev H. Desai trans., 2011).

¹⁵⁸ Rajeev H. Dehejia & Vivek H. Dehejia, *Religion and Economic Activity in India: An Historical Perspective*, 52 AM. J. ECON. & SOC. 145 (1993).

¹⁵⁹ *Id.*

¹⁶⁰ *See, e.g.*, Charles Lindholm, Paradigms of Society: a Critique of Theories of Caste among Indian Muslims, 26 EUR. J. SOC. 131 (1985). *See also* Joseph Tharamangalam, *Whose Swadeshi? Contending Nationalisms among Indian Christians*, 32 ASIAN J. SOC. SCI. 232 (2004). Caste is not a malady specific to just Indian *Hindus*: families and communities that converted to Islam or Christianity even generations ago show caste consciousness and differentiation among and between themselves. *See* Siegfried Lienhard, *The Monastery and the Secular World Sangha-Buddhism and Caste-Buddhism*, J. AM. ORIENTAL SOC’Y 593 (1989). Lienhard argues that lay-Buddhists in India accepted caste differentiations and lived in segregated, caste-based communities. *Id.*

¹⁶¹ ALAN S. KAHAN, TOCQUEVILLE, DEMOCRACY, AND RELIGION: CHECKS AND BALANCES FOR DEMOCRATIC SOULS, 189–94 (2015).

¹⁶² *Id.*

Tocqueville decried how one “belongs to it by birth: there is no means of entering it if one is not born in its bosom.”¹⁶³ The second fatal flaw in Hinduism, according to Tocqueville, was its obliteration of any sense of common purpose or nationhood among the different castes it wove together: “the national spirit of the Hindus is confined to the caste,” he said, and “in a country of castes, the idea of the fatherland, of the nationality, disappears in some sense.”¹⁶⁴

It is therefore instructive that the Constitution of India goes out of its way to condemn and outlaw the practice of untouchability. “Untouchability’ is abolished and its practice in any form is forbidden,” Article 17 states “[t]he enforcement of any disability arising out of ‘Untouchability’ shall be an offense punishable in accordance with law.”¹⁶⁵ As Sujit Choudhry has noted, Article 17 goes further than most of Part III of the constitution, which outlines the fundamental rights of citizens that the government is supposed to respect, in providing for criminal sanctions against public *and private* entities that breach this crucial provision banning untouchability.¹⁶⁶ The ban on untouchability, along with the constitutional regimen of affirmative action for Scheduled Castes, has been called India’s “ameliorative” approach to secularism.¹⁶⁷ India’s constitutional project can be seen as a struggle against the ancient “sacral,” or *vertical* divisions of caste in Hinduism, protecting the long oppressed, underrepresented and dehumanized *Dalits* and untouchables from an upper caste elite reluctant to relinquish its stranglehold on pecuniary, ritualistic and civic power.¹⁶⁸

When it comes to the horizontal matter of adjudicating matters between religions, however, the Constitution is far less forceful in its articulation of secularism, and does not offer an American-style argument for neutrality. Indeed, Article 25(2)(a) and (b) of the Constitution allows the state to regulate economic, financial, political, or other secular activity associated with religious practice.¹⁶⁹ Continuing the interventionist tendency in the Constitution toward the vertical divisions in Hinduism, the article allows the government to forcibly throw open that faith’s

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ CONST. OF INDIA 1950, art. 17.

¹⁶⁶ Sujit Choudhry, *Living Originalism in India: Our Law and Comparative Constitutional Law*, 25 YALE JOURNAL OF LAW & THE HUMANITIES 10 (2013).

¹⁶⁷ Gary J. Jacobsohn, *The Wheel of Law: India's Secularism in Comparative Constitutional Context*, 91–121 (Princeton, NJ: Princeton University Press, 2003).

¹⁶⁸ *Id.* at 119–121.

¹⁶⁹ See John, *supra* note 99, at 1903–04.

establishments to Hindus of all classes.¹⁷⁰ From this article, we can already see three key distinguishing factors that make Indian secularism diverge from the voluntarism-separatism-neutrality trifecta of American constitutional tradition.

First, there is a direct tradeoff between liberty and equality involved in the Indian conception of state secularism. The state may intervene in the affairs of Hindu establishments for the betterment of the lower castes traditionally denied basic human dignity. However, in doing so, the Indian state impinges upon the “liberty” of private religious sects and entities so zealously guarded in Western constitutions such as the United States Constitution.¹⁷¹ Second, there is a distinct Hindu foregrounding to Indian secularism—it is worth noting that Article 25 specifically names Hinduism.¹⁷² Furthermore, in the now infamous *Hindutva* cases, the Supreme Court ruled that the electoral platform of *Hindutva* used by several right-wing parties—which the court decided to treat as being synonymous with Hinduism—was nothing but a “way of life” which had historically been customary for the peoples of India.¹⁷³

Third, and most importantly for the purpose of this article, this conception of secularism allows, and even mandates, state interventionism in matters of religion. The Supreme Court has chosen to install itself as a body of not just jurists, but pseudo-theologians as well. As Mathew John has summarized in an article, the court has interpreted, reinterpreted, and misinterpreted religious dogma and text in various cases. It has, for example, deprived the Khadims of the Ajmer Durgah some of their traditional rights to gifts offered at the durgah; forcibly declared certain *satsangis* to be Hindus and thrown open their places of worship to all other Hindus; declared that the *tandava* dance is not a significant part of Hindu religion; excluded cow sacrifice from being an essential part of Islam; and said that praying in a mosque is not crucial to Islam—as Muslims can pray anywhere!¹⁷⁴

For a Court so disposed to making case-by-case decisions on the validity and “truth” of religious doctrine, it is not surprising that issues of religion and taxation too hinge on judicial decisions on what constitutes faith. An income tax tribunal in the city of Nagpur, for example, declared as constitutional a tax exemption to a temple

¹⁷⁰ CONST. OF INDIA 1949, art. 17.

¹⁷¹ See John, *supra* note 99, at 1903.

¹⁷² CONST. OF INDIA 1949, art. 25.

¹⁷³ JACOBSON, *supra* at note 167, at 164–165.

¹⁷⁴ See John, *supra* note 99, at 1904.

trust, ruling that the worship of Hindu deities Shiva and Durga did not constitute a religion.¹⁷⁵ A tax exemption to a religion in itself may or may not present a challenge to Article 27 of the Constitution¹⁷⁶—as we saw in our discussion of *Engel v. Vitale*.¹⁷⁷ However, the tribunal also declared that "technically, Hinduism is neither a religion nor a community," whereas Islam and Christianity were.¹⁷⁸ While the tribunal's ruling did not invoke or deal with Article 27 issues, what this would have meant under the provision is that taxes *can* be collected for the purposes of supporting Hinduism, but not to aid Christianity or Islam. This would fly in the face of any reasonable definition of secularism, equality, or fairness. In the United States, any court would throw out this ruling on the grounds that it would violate state neutrality, and be equivalent to the establishment of a state religion.¹⁷⁹

However, as this article has established, Indian secularism with its peccadilloes cannot be understood in a purely comparative context. The common theme from the two epochs in Indian history studied in the first two sections—the reign of Aurangzeb, and the turbulent era of independence and Partition—is that legal norms regarding the appropriate relationship between religion and taxation have evolved as a function of changing relative powers of Hindu and Muslim communities in India. Historical memory, of *jizya* and of Partition, played a crucial role in the formulation of Article 27, and its subsequent interpretation by Indian courts.¹⁸⁰ The Article 27 saga is representative of the larger debate over Indian secularism. Shabnum Tejani, in her pioneering intellectual history of Indian secularism, identified four major schools of

¹⁷⁵ C Unnikrishnan, *Shiva Worship Not a Religious Act, Income Tax Tribunal Says*, THE TIMES OF INDIA, Mar. 16, 2013.

¹⁷⁶ See, for e.g., *Engel*, 370 U.S. at 422.

¹⁷⁷ *Engel*, 370 U.S.

¹⁷⁸ Unnikrishnan, *supra* note 175.

¹⁷⁹ See TRIBE, *supra* note 141, at 1179–88, for a discussion of how American courts have defined religious practice, and inquired into the validity of religious doctrine, while expanding their concept of "religion" beyond the narrowly theistic notion prevalent at American independence. See also *Jones v. Wolf*, 443 U.S. 595 (1979). Courts, for example, have been allowed to probe the sincerity of alleged religious beliefs, but not their accuracy or truthfulness. See *Wisconsin v. Yoder*, 406 U.S. 205, 246 (1972) (Douglas, J., dissenting). In a more entertaining perspective, especially when contrasted with the imperious attitude taken by some Indian judges in adjudicating which religious traditions are most in sync with "Indian traditions," Justice Douglas once observed that "a religion is a religion irrespective of what the misdemeanor or felony records of its members might be." *Id.*

¹⁸⁰ See, generally, Section II.

thought in the debate on Indian secularism.¹⁸¹ The first is the “liberal left” position, which advocates the complete separation of church and state—dominated by the English-speaking Indian elite, it looks to Western constitutional arrangements *a la* Lawrence Tribe, and decries the rise of Hindu nationalism.¹⁸² Some of these ideologues subscribe to the idea of *sarva dharma sambhava*—all religions are true—and ascribe Indian secularism to the country’s innate tolerance for all creeds and faiths.¹⁸³

A second school of thought, pioneered by T.N. Madan and Ashis Nandy, sees this Western-influenced secularism as an attempt at imposing a foreign model on India.¹⁸⁴ These thinkers characterize Indian religions such as Hinduism and Islam as being unreformed, and unaccepting of any artificial division between the “spiritual” and “secular” categories of one’s life. Instead, they stress an Indian tradition of tolerance stemming from the Hindu faith, and encourage Indians to extract messages of tolerance from the precepts of their own faiths.¹⁸⁵ The third, and increasingly resurgent, conception of Indian secularism belongs to the Hindu right. They dismiss modern Indian secularism as pandering to Muslims and other minorities, and conceive of India as a fundamentally Hindu polity that has been degraded by repeated foreign invasions over millennia.¹⁸⁶ Non-Hindu Indians and converts to other religions—especially Islam—are still “culturally” Hindu, in their opinion.¹⁸⁷

A fourth school of thought, however, may go furthest in furthering universal ideals of justice and fairness, while accommodating the realities of Indian political and religious life. Rajeev Bhargava, in an essay explaining the distinctive nature of Indian secularism, uses some of the examples already listed in this article to demonstrate how, unlike the West, a strict separation of church and state is not the intent of the Indian constitutional firmament. Instead, he advocates a *contextual* Indian secularism, based on the state’s *principled distance* from all religions.¹⁸⁸ This argument deserves unpacking, for it could allow us to propose both

¹⁸¹ SHABNUM TEJANI, *INDIAN SECULARISM: A SOCIAL AND INTELLECTUAL HISTORY, 1890–1950*, 8–10 (2008).

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ TEJANI, *INDIAN SECULARISM: A SOCIAL AND INTELLECTUAL HISTORY, 1890–1950*, 8–10.

¹⁸⁸ See Bhargava, *supra* note 140, at 63–105.

a broader framework for understanding church-state relations in India, and a way to resolve the Article 27 conundrum. Principled distance, as defined by Bhargava, is premised on the notion that a state with secular ends and structures must engage with religion and religious communities as a matter of public policy.¹⁸⁹

Drawing on Richard Dworkin,¹⁹⁰ Bhargava equates principled distance with the state adopting a “*treatment as equals*” approach to religions. This is distinct from an “equal treatment” premise that is attached to Western notions of strict neutrality toward religion, whereas equal treatment implies equal concern and respect for different individuals and groups, which could imply unequal treatment.¹⁹¹ For example, if Hinduism has particular evils associated with it, such as a caste system of unusual rigidity, Bhargava’s proposed approach would allow the government to specifically intervene in the affairs of Hindu temples, thereby legitimating Article 25(2) of the Indian Constitution.¹⁹² This is an important advantage of the principled distance method, as compared to strict neutrality. Under the latter system, which would require a complete divorce of the state machinery from matters of religion, several articles of the Indian Constitution mandating interference with Hindu institutions—but clearly “just,” in the sense that they combat caste-based vertical discrimination within Hinduism—would be illegitimate.¹⁹³

Contextual secularism, when premised on its bedrock of principled distance, would therefore promote universal ideals of fairness and equality—who could disagree with equal respect and concern for all religions, after all—while keeping in mind the historic tensions particular to India. Bhargava, for example, cites clashes between individual rights and group rights, equality and liberty, and claims of liberty and the satisfaction of basic needs as problems that contextual secularism would deal with on a case-by-case basis.¹⁹⁴ Ironically, this might perhaps have been the vision of Indian secularism that Justice Katju was hinting at, when he issued his maxim about a “strict construction” not being given to constitutional provisions.

However, what he and his judicial brethren have forgotten, and what this article has tried to explain, is the Indian historical context

¹⁸⁹ *Id.*

¹⁹⁰ RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

¹⁹¹ *See* Bhargava, *supra* note 140, at 63–105.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 95–97.

of the social dominance of one religious sect translating into its subjugation of other faiths through the state tax machinery. A principled distance from major faiths would recognize that given this history, Muslims, Sikhs, Christians, and others would have legitimate fears about Hindu interests capturing state tax resources. Therefore, a ruling like *Goradia*, safeguarding the *haj* subsidy, may be appropriate in its result. However, the inconsistencies in Article 27 jurisprudence pose a more troubling theoretical problem: given a contextual secularism approach, the continued existence of constitutional provisions exposing religious minorities to possibly discriminatory taxation is inexcusable. Article 27 therefore needs to be significantly amended, not as a surrender to a foreign “imperialism of categories,”¹⁹⁵ but as an acknowledgement of the need to preserve a distinctively Indian secularism.

CONCLUSION

I carry with me the fruits of my sins and imperfections . . . I came here alone, and alone I depart . . . I have committed numerous crimes, and know not with what punishments I may be seized . . . When I was alive, no care was taken; and now I am gone, the consequence may be guessed.¹⁹⁶

Writing this lamentation to his son Kaum Buksh in 1707, Aurangzeb was on his deathbed.¹⁹⁷ Keenly aware of the fault lines that had opened in his dominion through his constant warfaring and unpopular attempts at imposing a puritan Islamic state more beloved by the *ulema* than the commoner, he would nevertheless have been surprised that the empire founded by his ancestors two

¹⁹⁵ See Susanne Hoeber Rudolph, *The Imperialism of Categories: Situating Knowledge in a Globalizing World*, 3 PERSP. ON POL. 1, 5 (2005). The “imperialism of categories” refers to the wholesale importation of classifications from the imperial metropole, without accounting for the local context of the colonized periphery. *Id.*

¹⁹⁶ A TRANSLATION OF THE MEMOIRS OF ERADUT KHAN, A NOBLEMAN OF HINDOSTAN, CONTAINING INTERESTING ANECDOTES OF THE EMPEROR ALZMGEER AURUNGZEBE AND OF HIS SUCCESSORS SHAW AULUM AND JEHAUNDAR SHAW; IN WHICH ARE DISPLAYED THE CAUSES OF THE VERY PRECIPITATE DECLINE OF THE MOGUL EMPIRE IN INDIA 8–9 (Jonathan Scott trans., 1786), available at http://www.columbia.edu/itc/mealac/pritchett/00litlinks/txt_aurangzeb_lastletters.html (last visited Nov. 11, 2016).

¹⁹⁷ *Id.*

centuries ago would devolve into irrelevance within a generation.¹⁹⁸ This historical experience serves as both an influence and a warning for the contemporary Indian constitutional project of secularism.¹⁹⁹ The *influence* of the practice of *jizya*—in the same vein as that of the earlier ossified Hindu caste system and the later Gandhian concept of a nationalist polity infused with religion—can be seen a way which the relationship between state and church in India fails to be bounded by the American concepts of voluntarism, separatism, and neutrality.²⁰⁰ Just as the prescription in England of the *Book of Common Prayer* drove the Puritans to America and proved to be a philosophical precursor to the Jeffersonian “wall” between church and state,²⁰¹ Aurangzeb’s use of religion as a criterion for classifying subjects finds resonance in modern Indian courts’ invasions into the ideologies and practices of religions.²⁰²

However, the contextual definition of Indian secularism, and the historical experiences forging it through Mughal and British rule and the Constituent Assembly’s deliberations, do not excuse the world’s largest democracy from its legal obligation to provide for the social, economic, and moral sustenance of its minorities. India is a signatory to the 1966 UN International Covenant on Civil and Political Rights, which states:²⁰³ “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”²⁰⁴ A discriminatory tax levied on all Indians, Muslims, Hindus, and Sikhs, but benefitting only Hindus—while not meeting Justice Katju’s definition of having a “substantial” portion of its proceeds devoted to Hinduism—is not consistent with this convention, just as the *jizya* tax vitiating medieval Hindus’ ability to take their place as equal members of society. As we have discussed in this article, faith-based taxation has always fundamentally been a matter of societal domination in India. Since 1947, with the separation of the new

¹⁹⁸ RICHARDS, *supra* note 33, at 253-81.

¹⁹⁹ *See, generally*, Section II.

²⁰⁰ *See* Bhargava, *supra* note 140, at 63-105.

²⁰¹ Arthur E. Sutherland, *Establishment According to Engel*, 76 HARV. L. REV. 25, 45 (1962).

²⁰² *See, generally*, Section III.

²⁰³ *See* International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171, art. 27. Interestingly enough, in an Article 27 of its own. *Id.*

²⁰⁴ *Id.*

Islamic Republic of Pakistan, the Indian societal elite, political class, and civil services have been overwhelmingly Hindu.²⁰⁵

The various jurisprudential and philosophical problems with Article 27 cases in Indian courts extend well beyond the five lacunae outlined in this article. A simple fact about Article 27 is that nobody seems particularly bothered about it: as the Supreme Court itself noted in *Goradia*, few cases have taken up the provision, and this author could find no extended scholarship on the subject. However, this lack of attention does not obviate the problematic constitutional design and anti-secular effects of current Supreme Court practices: the obscurity of a statute or constitutional provision does not mean it cannot cause great harm in the future. For example, in *National Federation of Independent Business v. Sebelius*,²⁰⁶ President Obama's signature Affordable Care Act ("ACA") risked failure because a drafting mistake replaced the word "tax" with "penalty."²⁰⁷

For the specific case of Article 27, at least four arguments can be made in favor of amending the provision. First, on a theoretical plane, even for a culture and state that do not wish to completely dissociate themselves from the institution of religion, the Article threatens to grant excessive power to extra-constitutional organizations. The Mughal Empire suffered for having large masses of stipend-holders, such as the *ulema*, dependent on state largesse. In contemporary India, politicians and parties lean on religious leaders, communal organizations, and grassroots workers to get out the vote, often explicitly on religious lines.²⁰⁸ It is entirely conceivable that the same *maths*, *madrassas*, *gurudwaras* and churches—not to mention communal groups and local strongmen—who mobilize sectarian votes shall receive state patronage through tax proceeds that the current form of Article 27 fails to invalidate: politics in India, after all, has often been

²⁰⁵ See generally, Prime Minister's High Level Committee, *Social, Economic and Educational Status of the Muslim Community of India* 165 (2006). The government's Sachar Committee Report of 2006 showed how Muslims were systematically locked out of educational and vocational opportunities, had worse socio-economic indices, and were severely underrepresented in the Indian elite class. For example, merely three percent of the members of premier civil service—the Indian Administrative Services (IAS)—were Muslim. *Id.*

²⁰⁶ 132 S. Ct. 2566 (2012).

²⁰⁷ *Id.* at 2573–74.

²⁰⁸ Pradeep Chibber and Jasjeet S. Sekhon, *The Asymmetric Role of Religious Appeals in India* 2 (2015), http://sekhon.berkeley.edu/papers/ChhibberSekhon_identities.pdf.

characterized by such *quid pro quo* arrangements.²⁰⁹ A country languishing in the UN Human Development Index (“HDI”) rankings at 130th (out of a total of 188 countries)²¹⁰ can ill afford the diversion of government funding to such a special interest group.

Second, as a matter of public policy, one would expect that India has moved beyond the days when state tax policy was set by the whims and fancies of an Akbar or Aurangzeb. Of what use is Article 27 if its intent is frustrated through the levying of taxes disguised as fees, or by the imposition of discriminatory levies up to a non-“substantial” level, as in the *Prafull Goradia* case? Parity between Indian citizens of different religious persuasions is not simply a matter of officially recognizing them as being formally or morally equal; after all, “domination and a fortiori inequality often arises out of an inability to appreciate and nurture differences—not out of a failure to see everyone as the same.”²¹¹ If the original *intent* of the constitution’s framers²¹² is being frustrated, there is no reason for the successors of the Constituent Assembly in the Lok Sabha and Rajya Sabha—who also, presumably, believe in secularism being a guiding principle of Indian polity, to not suitably amend the constitution.²¹³

A third reason to amend the article has little to do with the textual or originalist arguments advocated above. The law does not exist in isolation from the society and people it seeks to regulate: its salutary effects and penumbral manifestations can reboot or retrench social norms. Cass Sunstein, writing in 1996, explained the “expressive function of law”: legislation allowing flag-burning, banning hate speech or desegregating schools often seeks to mold society as much as execute constitutional intent. According to Sunstein, “some people do what they do mostly because of the statement the act makes; the same is true for those who seek changes in law. Many debates over the appropriate content of law

²⁰⁹ Devesh Kapur and Milan Vaishnav, *Quid pro quo: Builders, politicians, and election finance in India 4* (Center for Global Development, Working Paper, 2011).

²¹⁰ United Nations Development Program Human Development Reports, *Human Development Index and Its Components*, <http://hdr.undp.org/en/composite/HDI>.

²¹¹ Stefan Gosepath, *Equality*, STAN. ENCYCLOPEDIA PHIL. (Mar. 27, 2011), <http://plato.stanford.edu/entries/equality/#MorEqu>.

²¹² This “original intent” is, of course, not always clear, unanimous or even desirable. See, e.g., Samuel Freeman, *Original Meaning, Democratic Interpretation, and the Constitution*, 21 PHIL. & PUB. AFF. 1 (1992).

²¹³ See, for e.g., Salil Tripathi, *Why secularism and socialism are integral to the Indian Constitution*, LIVE MINT (Feb. 2, 2015), available at <http://www.livemint.com/Opinion/XKcwMBM2WpKX7TM20yPBBP/Why-secularism-and-socialism-are-integral-to-the-Indian-cons.html> (last visited May 9, 2017).

are really debates over the statement that law makes, independent of its (direct) consequences.”²¹⁴ What kind of a statement does Article 27 make, then, when its ambiguities leave open the possibility of religiously discriminatory taxation? What is an Indian Christian to feel when a tax tribunal rules that Hinduism is not a religion—and presumably, therefore, can be supported through tax proceeds? How is an Indian Muslim supposed to live with dignity and confidence when the Indian National Congress—the supposedly secular pole of contemporary Indian polity²¹⁵—makes a point of associating unpopular pilgrimage taxes with the *jizya*? Dissociating state taxation from religion would go a long way in signaling to all Indians—Hindu or not—that they have an equal claim on Indian citizenship and identity.

Lastly, a judicial reinterpretation of Article 27 may be necessary in the years ahead if the political dispensation in power in Delhi seems unwilling to accommodate minority interests or—to put it mildly—not fully committed to the ideal of secularism. If, as the New York Times editorial board wrote in November, 2015, “the plain truth is that India is being riven by hatred and held hostage to the intolerant demands of some Hindu hard-liners,”²¹⁶ and the state has turned away from the Nehruvian mold, the judiciary may be the final refuge of Indian secularism. The Indian judiciary has acted to safeguard the core principles of the constitution before: the 1973 *Kesavananda Bharati* case saw the Supreme Court famously voted seven to six that Parliament could not amend the Constitution in a way that would eviscerate its “basic structure,” or disable the fundamental rights it promised citizens.²¹⁷ In recent years, the court has sometimes shown a reluctance to promote evolving standards of decency through decisions that could be criticized as displaying judicial activism.²¹⁸ However, the Supreme Court has proved, on

²¹⁴ Cass R Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2051 (1996).

²¹⁵ See Ramesh Thakur, *Ayodhya and the Politics of India's Secularism: A Double-Standards Discourse*, 33 ASIAN SURV. 645, 650 (1993).

²¹⁶ *The Costs of Hindu Extremism*, N.Y. TIMES, Nov. 3, 2015, http://www.nytimes.com/2015/11/04/opinion/the-costs-of-hindu-extremism.html?_r=0

²¹⁷ *His Holiness Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr.*, 2 S.C.C. 225 (1973).

²¹⁸ See Suresh Kumar Koushal & Anr vs Naz Foundation & Ors., 1 S.C.C. 1, 9-10 (2013). For example, the court reversed the Delhi High Court's decision to repeal Section 377 of the Indian Penal Code, which criminalized even consensual homosexual relationships. *Id.* The Supreme Court ruled that it was for Parliament, not the court system, to repeal the statute: “the said section does not suffer from any constitutional infirmity. Notwithstanding this verdict, the competent

occasions such as the *Kesavananda Bharati* case, that it can take a courageous stance as the guardian of the constitution, even (and sometimes especially) when the other two branches of Indian government have failed to do so.²¹⁹

In light of these moral and prudential factors, the lapses and inconsistencies in contemporary Article 27 jurisprudence would be best addressed via a constitutional amendment to the provision. This author favors adopting, at long last, the change proposed by Syed Abdur Rouf in the Constituent Assembly be adopted; namely, that the amended article 27 read: “No person shall be compelled to pay any taxes, the proceeds of which—wholly or partly—are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.” In severing the link between state taxation and religious institutions, this amendment would be a step back from the sort of Gandhian secularism insisted on by many members of the Constituent Assembly, and toward the American trinity of voluntarism, separatism and state neutrality.

However, a process as significant as a constitutional amendment must pass through the traditional mechanisms of democratic decision-making, which could yield a different solution to the problems with Article 27. In doing so, one could rely on an inherent strength of Indian constitutionalism: its flexibility. Since its enactment in 1950, Parliament has passed one hundred amendments to the constitution—compared to twenty-seven amendments to the American constitution since 1789.²²⁰ If Switzerland could decide, in 1999, to discard the paragraph of its older constitution that inspired Article 27, there is no reason for India not to take a similar step in 2016. As Nehru said in 1948:

While we want this Constitution to be as solid and as permanent a structure as we can make it, nevertheless there is no permanence in Constitutions. There should be a certain flexibility. If you make anything rigid and permanent, you stop a nation's

legislature shall be free to consider the desirability and propriety of deleting Section 377 IPC from the statute book or amend the same.” *Id.*

²¹⁹ See S. K. VERMA & K. KUSUM, FIFTY YEARS OF THE SUPREME COURT OF INDIA: ITS GRASP AND REACH, 16 (2000) for several instances of the Supreme Court expanding the ambit of constitutionally guaranteed fundamental rights, and checking parliamentary and executive overreach.

²²⁰ Ministry of Law and Justice (India), *The Constitution (Amendment) Acts*, <http://indiacode.nic.in/coiweb/coifiles/amendment.htm>.

growth, the growth of a living, vital, organic people.
Therefore, it has to be flexible . . .²²¹

The only proper way to honor the memory of Nehru and India's founding generation would be to ensure that the state and constitutional settlement they fought to secure continues to provide equal opportunity, conscience and advancement to all its people, without regard to creed or caste. This emphasis on secularism must, of course acknowledge the tensions manifest in the story of Indian societal progress: between Western influences and local practices, majoritarian democracy and the protection of minorities, collective rights and individual liberties, and so on. These contestations reinforce the need for a continual renewal in the intellectual enterprise of secularism, such as a transition to a contextual approach suited to the needs of Indian political life. If India were to completely turn back from its commitment to secularism, however, the noxious mixture of religion, taxation and social domination would bubble over. In that case, as Aurangzeb's last letter to his son indicated, the consequence may be guessed.

²²¹ ZACHARY ELKINS, TOM GINSBURG, & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 81 (2009).