Law & Social Inquiry
Volume 45, Issue 4, 965–994, November 2020

Law& Social Inquiry

Just Hindus

Deepa Das Acevedo

What happens when courts reach "good" outcomes through "bad" reasoning? Are there limits to consequentialist jurisprudence? The Indian Supreme Court's recent decision in IYLA v. State of Kerala *offers important insights on both issues.* IYLA*, decided in September 2018, held that the Hindu temple at Sabarimala may not ban women aged ten to fifty from its premises even though devotees argue the exclusion is religiously mandated. Reactions to* IYLA *have been vehement and violent, and so far only two women in the prohibited age range have managed to visit the temple. Perhaps any outcome impinging on religious practice would have elicited such responses. Nevertheless, the Court's analysis, which disregarded devotee perspectives in its eagerness to acknowledge the previously overlooked perspectives of women, is problematic insofar as it superficially upholds the Court's reputation as a progressive institution while creating bad precedent by further damaging the "essential practices" doctrine. This article draws on case law and legal analysis to demonstrate how the Court's reasoning paid short shrift to its own doctrines and to conflicting imperatives in the Indian Constitution. The Court's (and ruling's) failures underscore the extent to which winning good outcomes through bad reasoning should be sobering rather than satisfying.*

It is often hard to not like the Indian Supreme Court.[1] India's apex judicial body is frequently poetic and progressive, self-consciously cosmopolitan, and has for over seventy years gamely risen to, if not always succeeded at, the challenge of interpreting the world's longest constitution for the world's largest democracy. It has undoubtedly had its bad moments, like when it confirmed the nationwide suspension of habeas corpus[2] or

Deepa Das Acevedo, JD, PhD, is a legal anthropologist and Assistant Professor at the University of Alabama School of Law, 101 Paul W. Bryant Drive, East, #319, Tuscaloosa, AL 35487, Email: ddasacevedo@law.ua.edu 205-348-1130. My thanks to Jaclyn Neo and Tim Lubin for inviting me to present this piece at conferences on "The Law and Politics of Freedom of Religion in Asia" and "Status and Justice in Law, Religion, and Society," held at the National University of Singapore and Washington and Lee University in 2018 and 2019, respectively; to Aparna Chandra and four excellent anonymous reviewers for their feedback; to Spencer Bowley for superb research assistance; and, as always, to John Felipe Acevedo. Errors are mine alone.

1. Many readers may—and have—objected to the positive characterization of the Indian Supreme Court in these first two sentences, with good reason. Beyond the failings described in the rest of this paragraph, the Court's jurisprudence in areas like preventative detention, national security (as well as nationalism writ large), and tribal rights is, to put it mildly, less than stellar. Its recent *Ayodhya* decision has been rightly criticized as privileging Hindus over other Indians. Nevertheless, it is *also* true that the Court has issued many remarkably progressive opinions that may be described as "likeable" and that is all I have claimed here. Moreover, in comparison with several other supreme courts (perhaps most relevantly that of the United States), the Indian Court is *still*—in many ways, and despite its considerable flaws—quite progressive.

2. One of the Supreme Court's most unpopular decisions, *ADM Jabalpur v. Shivkant Shukla*, (1976) 2 SCC 521 (hereinafter *ADM Jabalpur*), confirmed the Prime Minister's ability to suspend habeas corpus during periods of "emergency."

© 2020 American Bar Foundation.

https://doi.org/10.1017/lsi.2020.1 Published online by Cambridge University Press

when it recently seemed confused about an adult woman's right to marry whom she pleases.[3] Earlier on in its life, the Court had an exceptionally bad moment that lasted for twenty-one months (or forty-two years, depending on one's arithmetic), a moment for which it atoned via several decades of enthusiastically adventurous jurisprudence and a brand new cause of action.[4] But very often, in both its substance and its style, the Indian Supreme Court renders itself irresistible. The recent verdict on women's entry at Sabarimala is not one of those times.

Indian Young Lawyers Association v. State of Kerala (hereinafter *IYLA*) concluded, inasmuch as legal disputes ever attain finality in India,[5] that a public Hindu temple's exclusion of women between the ages of ten and fifty is an unconstitutional form of gender discrimination.[6] So far, so good. India's Constitution has substantial antidiscrimination and equality protections that could easily support such an outcome, and the Indian Supreme Court's recent jurisprudence involving those protections as well other constitutional provisions has a markedly expansive and progressive flavor.[7] The core finding in *IYLA*, that the Sabarimala temple must welcome women of all ages, is so decidedly within the realm of the plausible that for many court watchers it must have seemed very nearly inevitable. Whether one has nine justices or nearly thirty, some cases are easy to call.

So what's the rub? Briefly, this: that individuals who believe in the religious necessity of excluding some women from Sabarimala are as glaringly absent from the *IYLA* opinion as the women being excluded were palpably missing from an earlier lower court judgment on the same issue.[8] To the extent that individual believers actually figure in the plurality opinion, they are "just Hindus"[9]—people whose beliefs are insufficiently idiosyncratic to distinguish them from the breathtaking diversity of traditions

3. In the 2017–2018 "Hadiya case," the family of a twenty-four-year-old Hindu woman argued that she had been forced to convert to Islam and marry a Muslim man. The Kerala High Court annulled her marriage against her wishes. Although the Supreme Court eventually reversed the High Court, it took its time in lifting Hadiya's house arrest and reinstating her marriage. Shafin Jahan v. Asokan K.M., Crim. App. No. 366 of 2018 (Mar. 8, 2018).

4. The Indian Supreme Court is widely viewed as having acquiesced to many of Indira Gandhi's demands during the Emergency, a period between June 25, 1975, and March 21, 1977, when democratic norms and rights were suspended. Although the Emergency itself ended in 1977, *ADM Jabalpur* was not technically overruled until *Puttaswamy v. Union of India*, (2017) SCC OnLine SC 996. The Court's behavior during the Emergency is often viewed as the primary motivation behind its development of public interest litigation in the late 1970s and early 1980s (Desai and Muralidhar, 2000).

5. Finality is indeed becoming something of a scarce good. When this article entered the review process, the Supreme Court held in a 3–2 decision to refer the several dozen review petitions asking it to reconsider its opinion to a seven-judge bench. The timing of this response, which coincides with Chief Justice Ranjan Gogoi's retirement from the Court, is remarkably similar to the timing of the original *IYLA* verdict, which was issued in the last week of former Chief Justice Dipak Misra's retirement (Scroll.in 2019a; Indo-Asian News Service 2019).

6. Indian Young Lawyers Ass'n v. State of Kerala (IYLA), Writ Petition (Civ.) No. 373 of 2006 SC (Sept. 28, 2018) (Misra, C.J.).

7. *See* Part I, notes 30–33, *infra*. The reformist impulses of both the Constitution and the Supreme Court, especially as regards religion, have been the focus of a body of scholarship that is too immense to be cited here (*See* Fuller 1988; Galanter 1971; Jacobsohn 2010; Khaitan 2016; Sen 2010).

8. S. Mahendran v. The Secretary, Travancore Devaswom Board, AIR 1993 Ker 42 (hereinafter *Mahendran*).

9. *IYLA*, Writ Petition (Civ.) No. 373 of 2006 SC, para. 96 (Misra, CJ) ("Therefore, the devotees of Lord Ayyappa are just Hindus and do not constitute a separate religious denomination.").

https://doi.org/10.1017/lsi.2020.1 Published online by Cambridge University Press

expediently styled *Hindu* or, quite differently, people whose beliefs will, when properly understood, be found to exactly exemplify contemporary notions of fairness and equality. Neither of these analytic stances is peculiar to the *IYLA* judgment; in fact, they perpetuate established trends in the Supreme Court's jurisprudence on religious freedom. But the clarity with which they emerge in *IYLA* and the lopsidedness of the ensuing analysis demonstrates how important it is that the Court seriously grapple with conflicting constitutional impulses even—or *especially*—on the road to issuing landmark judgments.

The *IYLA* decision and its tumultuous reception make two things amply clear. To scholars of Indian constitutional law, *IYLA* demonstrates that problematic outcomes in Indian religious freedom cases do not necessarily derive from the "essential practices doctrine"—a longstanding jurisprudential fixture and a popular scholarly scapegoat (Sen 2010, 66–67).[10] Rather, *IYLA*'s analytic weakness arises, in large part, from the increasingly strained way in which the Court has applied the essential practices doctrine. To be sure, any kind of badly reasoned case would be problematic in any common law system, but in India and in cases involving the essential practices doctrine they are especially so: they eat away at a delicate and not always successful—but absolutely critical—dynamic equilibrium between two different visions of the state (Das Acevedo, 2016b).[11] This is because opinions like *IYLA*, which make no pretense of accounting for devotee perspectives even as they rule on devotee practices, destroy the balance between one theory of the state that respects bedrock democratic principles like the sovereignty and privacy of its citizens and a second, competing vision in which the state tries to reform its citizenry in the course of pursuing *other* democratic principles like the equality of all citizens.

To scholars (and indeed to lawyers and judges) elsewhere, *IYLA* provides an object lesson in how not to engage in cultural politics. Indian constitutional law and political circumstances combined to offer the Court a rare opportunity: multiple contrasting and yet equally plausible and feasible conclusions.[12] That the Court nonetheless produced a decision that elicited popular revolt (and that *should* elicit skepticism even from supporters of women's entry) is an unfortunate and unnecessary proof of the view that hard cases make bad law.[13] In *this* case, there was plenty of good law to be made. As a result, this second lesson is directed as much at upholders of the Court's progressive image, who are likely to value the substantive outcome of the decision, as it is to observers who are less invested in Indian law and politics. It tells these supporters they should not place *IYLA* in the "win" column (which they are

10. Sen quotes and agrees with Rajeev Dhavan, Fali S. Nariman, and Ashis Nandy that the "approach of the Supreme Court and its essential practices doctrine … not only has narrowed the institutional space for personal faith, but also marginalized popular religion by treating it … as parts of an enormous structure of irrationality and self-deceit, and as sure markers of an atavistic, regressive way of life" (internal citations omitted). *See also* Derrett 1968, 447, who critiques the essential practices doctrine on the grounds that "courts can discard as non-essentials anything which is not proved to their satisfaction … with the result that it would have no constitutional protection."

11. For further discussion, see Part IV.

12. I discuss some of these possible alternatives in Part IV.

13. Northern Securities Co. v. U.S., 193 U.S. 197 (1904) (Holmes, J., dissenting).

https://doi.org/10.1017/lsi.2020.1 Published online by Cambridge University Press

already starting to do) despite its expansion of women's religious freedom rights (*see* Bhatia 2019).[14]

Neither of these criticisms is exactly equivalent to the perspective, being articulated with growing frequency and justification, that the overall quality of the Supreme Court's argumentation has declined. For instance, I am not particularly concerned with the quality of the *IYLA* majority's prose even if, like many Indian Supreme Court opinions, the majority opinions do frequently violate reasonable expectations of clarity and concision (Pillai and Sekhar 2018).[15] More substantively, *IYLA* is not a poorly reasoned opinion because it exemplifies the problems of "small benches deciding 'big' cases … jurisprudentially inconsistent or awkward decisions … [or] a variety of interpretive techniques."[16] The bench size was appropriate, a variety of interpretive techniques is standard even among apex courts that hear cases *en banc*, and as the rest of this article suggests, the problem is that (notwithstanding significant differences among them) the three majority opinions were *too similar* to one another and to earlier precedent in their disregard of devotees—not that they were inconsistent.

Rather, the *IYLA* plurality opinion (and to a lesser extent, the other majority opinions) are poorly reasoned to the extent that they are "result oriented" and to the extent that their authors "surrendered [their] responsibility of engaging in a thorough rights reasoning of the issues" before them (Chandrachud 2016, 86). But the failures of reasoning set out here are neither part of a recent "third phase" of Indian jurisprudence (at least as far as the essential practices doctrine is concerned) nor should they be excused as merely turning on the coherence and appeal of "the larger democracy in which [the Court] is situated" (ibid; *see also* Mehta 2015, 260). On the contrary, *IYLA*'s flaws are part of a longstanding and lamentable trend in Supreme Court religious freedom jurisprudence that has created more bad precedent by further damaging the essential practices doctrine, and that upsets the careful balance between the two visions of democratic sovereignty described earlier. This time, however, the Court erred to rather spectacular effect.

Part I of this article draws on case law, social science research, and media analysis to describe earlier disputes over women's access to Sabarimala. Part II explores the Supreme Court's judgment, focusing mostly, but not exclusively, on justifications for overturning the ban as they are articulated in Chief Justice Misra's plurality opinion. (Readers should note that, going forward, I will refer to the Chief Justice's opinion

14. In a section of his book written before *IYLA* was handed down, Bhatia argued that a woman's genuinely held religious belief in the importance of visiting Sabarimala between ages ten to fifty should prevail over the denominational rights of Ayyappan devotees (2019, 167). In a postscript added after *IYLA*, he wrote that while the Chief Justice and Justice Nariman "decided the case along traditional lines," Justice Chandrachud's opinion was "fascinating" because it proposed that the essential practices doctrine "in its present form, was unsustainable" and because it conducted "a detailed Article 17 [prohibition of untouchability] analysis," both of which combine to make Chandrachud's opinion "a powerful articulation of a transformative interpretation of Articles 25 and 26") (2019, 168).

15. Note that Pillai and Shekhar reserve the vast majority of their criticism for non-Supreme Court prose. Moreover, while much of their objections have to do with writing style, several have to do with the importation of judicial bias into opinion writing, which issue is hardly unique to Indian courts.

16. These are some of the qualities that have led one commentator to label Supreme Court opinions from a recent (undefined) "third phase" of the Court's history as "*panchayati* eclecticism" (Chandrachud 2016, 92).

https://doi.org/10.1017/lsi.2020.1 Published online by Cambridge University Press

as the "plurality" and the opinions by Justices Nariman and Chandrachud as *other* "majority" opinions rather than as "concurrences."[17]) Parts III and IV are the heart of the article. They consider two analytic moves made by the plurality that are also partly reflected in the other majority opinions, and explain how each one serves to bypass hard constitutional analysis by absenting individual believers from the conversation. In the process, the opinion transforms believers into little more than the grounds of (a new and valuable) discourse on equality. The irony is acute: for at least twenty years, scholars of gender in South Asia have noted how *women* are often "neither subjects nor objects but, rather … the site on which tradition [is] debated and reformulated" even when the traditions in question are ostensibly all about women (Mani 1998, 79).[18] The Indian Supreme Court can do better than to simply flip the narrative.

I. WOMEN'S ENTRY

Sabarimala's exclusionary practices have been something of a sleeper scandal. For decades there has been low-level rumbling about the nature and appropriateness of the ban on women, but until quite recently there was very little to suggest either the legal register at which the debate would eventually be conducted or the violence with which its conclusion would be received.

The ban itself is just one among many unusual features of the temple.[19] Unlike many Hindu temples, Sabarimala is a pilgrimage site rather than a place of everyday worship. It is located far from any contemporary or historical settlement, in the hills of what is now the Periyar Tiger Reserve in Kerala, and it is not easily reached by modern transportation. The temple is also open only at select times: for a festival in April; for its annual pilgrimage season, which runs roughly between November and January; and for a few days at the beginning of each month. More strikingly, Sabarimala's presiding deity, Ayyappan, is a male deity born of two other male deities, Vishnu and Shiva, when one of them temporarily assumed female form. At Sabarimala, Ayyappan is also considered a bachelor (unlike most male Hindu gods) and his type of bachelorhood—*naishtika brahmacharya*—arises from a permanent vow of celibacy rather than a transitory stage of life.[20] Most commentators agree that at least in April and during the pilgrimage season, devotees visiting Sabarimala must complete

17. The structure of the Indian Supreme Court, which sits in panels (usually of two or three, less frequently of five or seven, and very rarely of nine or more) lends itself to a polyvocality that is difficult to imagine in the American context (Robinson 2013, 184–86). Majority outcomes (like the invalidation of Sabarimala's ban) without majority opinions (as in *IYLA*) are not uncommon. American scholars would probably refer to the opinions by Justices Nariman and Chandrachud as *concurrences*, but I have not found this to be a common usage among Indian lawyers and scholars and consequently do not follow it here.

18. My argument here is related to, but not quite the same as, that of another scholar who famously wrote about the invisibility of women's voices. In "Can the Subaltern Speak?," Gayatri Spivak uses the example of *sati*, or widow immolation, to make a larger point about the impossibility of subaltern speech; however, Spivak's point was that subaltern perspectives must be voiced through the language and logic of those in power and that this process of translation (whether it is done by subalterns themselves or by their elite interlocutors) effectively muddles speech (1988).

19. This brief background of the temple and its traditions draws on Das Acevedo (2016b).

20. See the discussion of Justice Malhotra's dissent in *IYLA*, *infra*, Part II, note 74.

https://doi.org/10.1017/lsi.2020.1 Published online by Cambridge University Press

a forty-one-day penance during which they abstain from coarse language, alcohol, sex, and nonvegetarian food, go unshaven, engage in various prayer and spiritual activities, and wear distinctive black clothing (*see generally* Osella and Osella 2003).[21] Finally, and unlike the vast majority of Hindu temples, Sabarimala seems to have always allowed (men of) all castes and all religions within its premises.

The only substantive legal treatment of the ban before *IYLA* is a relatively brief 1991 Kerala High Court decision, *S. Mahendran v. Secretary, Travancore Devaswom Board*.[22] *Mahendran* began as a public interest litigation (or PIL) suit filed by a male devotee who complained that young women in the prohibited age range were visiting the temple and that one woman in particular, S. Chandrika, had conducted her infant grandson's rice-feeding ceremony there. Various parties were impleaded: the State of Kerala and the Travancore Devaswom Board (TDB) (the statutory body responsible for managing Sabarimala) as respondents, and the Indian Federation of Women Lawyers and the Kerala Kshethra Samrakshana Samithi (a religious advocacy organization) as intervenors.[23] The *Mahendran* court considered both the parameters of the ban and possible justifications for it. Ultimately, and via an opinion less than twenty pages long, the court not only affirmed the ban's constitutionality, it also expanded the ban's applicability to all days that Sabarimala is open to the public.

Mahendran now matters less for the arguments it elicited or the principles it explicitly laid down—which have at any rate been canvassed elsewhere—than for what it implicitly communicates about that particular stage in the conversation on Sabarimala (*see* Uma and Das Acevedo n.d.; Das Acevedo 2018). Women are remarkably absent in this opinion about women. This is literally so, in that Chandrika herself is only named seven times in the entire opinion (five of those being on the first page) and is only indirectly referenced another two, perhaps three, times.[24] The only woman to appear in the opinion besides Chandrika is counsel for the Indian Federation of Women Lawyers, who surfaces just three times.[25] There are no female witnesses cited—against the ban or otherwise—although no fewer than seven witnesses were heard and many of them were explicitly referenced by the court.[26] Some of this is inevitable: Keralite *tantri*s are men (although some other priest-roles or priestly duties may be fulfilled by women) and so are the actual, if not titular, heads of most Keralite royal families who enjoy customary rights at temples that were formerly under their patronage. For instance, the erstwhile Raja of Pandalam, whose family has long had a connection with and

21. There is some dispute as to whether the forty-one-day penance is required *only* at these times or throughout the year. *See* Das Acevedo 2018, 561.

22. AIR 1993 Ker 42.

23. *Mahendran*, AIR 1993 Ker 42, paras. 3–4.

24. Named references occur at paras. 2, 3, 9, and 43. Indirect references ("2nd respondent" or "all respondents") occur at paras. 9, 11, and 43. *Mahendran*, AIR 1993 Ker 42.

25. Direct references by name or otherwise occur at paras. 13, and 26; an indirect reference ("the counsel appearing for the two intervenors") appears at para. 11. *Mahendran*, AIR 1993 Ker 42.

26. The High Court notes that of nine potential witnesses, one was "given up" and another, who was wrongly served, was also "given up." *Mahendran*, AIR 1993 Ker 42, para. 3. Of the remaining seven, only four are identifiable: the *tantri*, or chief priest, of Sabarimala; the *tantri* of another Keralite temple; the head of the erstwhile royal Pandalam family, which is closely connected to Sabarimala; and the head of a devotional association, the Ayyappa Seva Sangham.

https://doi.org/10.1017/lsi.2020.1 Published online by Cambridge University Press

privileges at Sabarimala, was one of the seven witnesses cited in *Mahendran* and has been a vocal source of resistance to the *IYLA* verdict.[27]

But beyond their merely cursory *literal* inclusion women are also absent from *Mahendran* at a conceptual level, and this is far more worrisome.[28] The Kerala High Court simply seems uninterested in women—in their rights, their opinions, or their concerns. Although it formally stipulates that one of the questions for consideration is whether "the denial of entry … amounts to discrimination and [is] violative of Articles 15, 25 and 26 of the Constitution," the court never actually analyzes the Article 25(1) (religious freedom) rights of *female* devotees.[29] It does, at one point, appear to edge closer toward taking up this issue—too close, in fact, because after briskly articulating the protections afforded to *all* individuals under Articles 15 and 25(1), the court immediately observes that religious denominations are granted the freedom to manage their own affairs under Article 26. As an example of jurisprudential dodgeball, it is superb.

Mahendran also spares no thought for privacy or dignity concerns that may inhere in being excluded from a public place of worship on the basis of a sex-specific bodily function. Of course, at the time the opinion was issued, the Indian Supreme Court's jurisprudence on these issues was far less developed than it is now. There was no *Suchita Srivastava* (reproductive rights),[30] no *NALSA* (third gender),[31] no *Puttaswamy* (privacy),[32] and no *Navtej Singh Johar* (same-sex intimacy)[33] to assert the fundamental nature of a right to privacy or to spell out how that right might relate to corporeal dignity and autonomy. Moreover, Sabarimala's ban is in some superficial sense orthogonal to the link between menstruation and privacy, insofar as the ban is expressed in terms of age ("no women between the ages of 10 and 50") rather than the thing, menstruation, that it is ostensibly concerned with. This does not obviate concerns about the link between menstruation and exclusion—discriminatory goals that are difficult to achieve or that are imperfectly achieved are still discriminatory.

27. *IYLA*, Brief of Respondent No. 19 (Raja of Pandalam), WP (Civil) No. 373 of 2006 SC (July 26, 2017).

28. Contrast, for instance, the rewritten *Mahendran* opinion authored by Saumya Uma and Deepa Das Acevedo for the Indian Feminist Judgments Project. Uma and Das Acevedo use precedent and information that was available to the Kerala High Court to demonstrate that women's interests, rights, and perspectives could have played a greater and perhaps course-correcting role in the High Court's analysis.

29. *Mahendran*, AIR 1993 Ker 42, para. 12. These articles guarantee rights pertaining to non-discrimination (Article 15), religious freedom for individual persons (Article 25), and the rights of religious denominations (Article 26) (India Const. Part III: Fundamental Rights, Arts. 15, 25, 26). With regards to Article 26, readers should note that "denomination" carries particular and complicated significance. Whereas Presbyterians and Catholics may both be considered Christian denominations by virtue of a shared (if nonidentical) orientation toward Christ, the pantheon of Hindu deities necessarily means that denominations can be distinguished from one another on a variety of metrics.

30. Suchita Srivastava v. Chandigarh Admin., (2009) 9 SCC 1 ("a woman's right to make reproductive choices is also a dimension of 'personal liberty'" under Article 21 of the Constitution and that "a woman's right to privacy, dignity and bodily integrity should be respected").

31. Nat'l Legal Servs. Auth. v. Union of India, Writ Petition (Civ.) No. 604 of 2013 SC (Apr. 15, 2014) (recognizing the existence of a third gender).

32. *Puttaswamy*, (2017) SCC OnLine SC 996 (determining that privacy is a fundamental right protected by the Indian Constitution in the course of upholding the national government's scheme for a unique biometric identity card).

33. Navtej Singh Johar v. Union of India, (2018) SCC OnLine SC 1350 (reading down § 377 of the Indian Penal Code insofar as it criminalized consensual homosexual sex acts).

https://doi.org/10.1017/lsi.2020.1 Published online by Cambridge University Press

Perhaps, then, the answer (notwithstanding Justice Chandrachud's *IYLA* opinion[34]) is that there simply *is* no privacy violation in using the force of law to forbid women from participating in devotional activities on the basis of their menstrual status. But the *Mahendran* court did not even ask the question.

The erasure of women is a profound shortcoming, as well as one that is all the more striking given the eventual contrast with *IYLA*, but it is worth remembering that *Mahendran* hardly constitutes the entire prehistory of the dispute over women's entry at Sabarimala. We can make out some elements of that prehistory from the Kerala High Court's own opinion, as well as from insights gleaned from conversations,[35] and from archival evidence,[36] and they all suggest that two things are virtually indisputable based on the information currently available to us.[37] First, it seems clear that *some* form of exclusion has always been practiced at Sabarimala with respect to women. And second, it seems equally clear that the parameters and validity of these exclusionary practices have always elicited some confusion or resistance.

One of the more recent examples of confusion over the ban is the unlikely series of events that gave rise to the *IYLA* petition itself.[38] In 2006, an astrological rite produced a surprise confession from Jaimala, a minor Kannadiga actress, who faxed an apology to temple authorities for having desecrated the deity by visiting Sabarimala when she was in her twenties. Not only did she claim that she was unaware of Sabarimala's ban at the time of her visit, she also said that she was pushed by the throng of visitors into the sanctum itself.

There was universal agreement that neither of these assertions were plausible given her obvious youth and beauty at the time of the supposed visit; even Jaimala's husband understood her claims as the product of an overly active devotion.[39] A consensus quickly emerged that she had fabricated her confession, perhaps as a publicity stunt. The "Jaimala scandal" soon shifted into being a debate over the mechanics of Section 295 of the Indian Penal Code, which prohibits actions intended to hurt religious sentiments (the sentiments in question being those of Ayyappan devotees who oppose women's entry) rather than over constitutional concerns connected to the ban itself. The episode's greatest legal significance lies in the national media coverage it provoked and the public interest suit, which was the original *IYLA* writ petition, that this coverage inspired.

In retrospect, the twenty-four to thirty-six months preceding the *IYLA* verdict provided unambiguous hints as to the possible scale and intensity of post-verdict

34. *IYLA*, Writ Petition (Civ.) No. 373 of 2006 SC, para. 234 (Chandrachud, J.).

35. Professor Varma (now deceased) developed an informal history of the ban based on his private communications with the erstwhile royal family of Travancore. According to him, the ban dated to 1969 (this is otherwise uncorroborated) and the sister and niece of the last ruler of Travancore, Chithira Thirunal, regularly visited Sabarimala along with nonroyal women.

36. For instance, records show that Sreemathi Pottayil Ammukutty Amma, the daughter of the Maharaja of Cochin, visited Sabarimala around early August 1947. General Department, Bundle 430: File 1165 (1946–49) and Bundle 425: File 688 (1946–49) Kerala State Archives (India).

37. Interview with the late Ambalapuzha Rama Varma (a professor of classical art), in Kottayam, Kerala, July 19, 2011.

38. This brief history of recent social movements around Sabarimala is drawn from Das Acevedo (2018, 567–71).

39. Telephone interview with H.M. Ramachandra (Jaimala's husband), June 30, 2011.

https://doi.org/10.1017/lsi.2020.1 Published online by Cambridge University Press

protests. In late 2015, two separate yet virtually simultaneous social movements drew unprecedented national attention to the Sabarimala ban. On the one hand, a student named Nikita Azad wrote an open letter to Prayar Gopalakrishnan, then president of the Travancore Devaswom Board (TDB), critiquing his views on menstruation, cleanliness, and sin (Azad 2015a). Gopalakrishnan had recently implied that the TDB would be open to allowing women within Sabarimala only once it was possible to mechanically scan women's bodies to determine whether they were menstruating (Times News Network 2015). Azad's letter went viral and soon she had herself impleaded as an intervenor in the *IYLA* suit that had been filed back in 2006.[40] Her letter even inspired a hashtag campaign, #HappyToBleed, that also went viral as confirmed by the fact that it was soon met by a counter campaign, #ReadyToWait.[41]

Around the same time that Nikita Azad was posting her online letter, a community organizer named Trupti Desai was reading about purification rituals at the Shani Shignapur temple in her home state of Maharashtra (*see* Das Acevedo 2018, 568–71). The rituals were meant to atone for the intrusion of a group of women into the temple's traditionally all-male space. Desai promptly attempted to enter the temple along with members of her women's community group, and over the next year or so she would lead or participate in similar agitations at three Hindu temples and one Muslim shrine.[42] All of these religious institutions would eventually grant access to women—except for Sabarimala.[43]

In the aftermath of the *IYLA* verdict, Desai reiterated her intention to visit Sabarimala and was greeted with the kind of frothing rage that is as unsurprising today as it would have been peculiar at the time of the Jaimala incident. Prayar Gopalakrishnan, for his part, managed to simultaneously deploy conflicting tropes of women as temptresses and as victims over the course of a single news conference. He declared that allowing women to enter Sabarimala would turn it into "Thailand," while also warning women interested in visiting the temple that they would be leaving themselves open to "get[ting] caught by a tiger or a man" (The News Minute 2018). A Keralite actor and member of the Hindu nationalist (and nationally governing) Bharatiya Janata Party announced that "[w]omen [who visit Sabarimala] should be ripped apart; one half should be sent to Delhi and another to the Kerala Chief Minister" (ibid). Protests erupted in over 200 locations across Kerala, and the Kerala unit of another Hindu nationalist organization, the Shiv Sena, threatened mass suicides if the verdict was not overturned

40. *In re* IYLA v. State of Kerala and *In re* Nikita Azad (Arora), Intervention Appl. No. 10 of 2016 in Writ Petition (Civ.) No. 373 of 2006 SC.

41. It is not entirely clear who launched #HappyToBleed—it may have been Azad herself, or it may have been readers of her initial post on *Youth Ki Awaaz*. The language of a subsequent post by Azad regarding the Twitter campaign is ambiguous: "Friends, #HappyToBleed, as a campaign was launched on November 21, 2015 as a counter attack against the sexist statement given by Devaswom chief . . . . The open letter written by Nikita Azad has been widely shared, appreciated, and criticised at the same time . . . we urge women to participate in the campaign . . . ." (Azad 2015b).

42. It is worth noting that among these other women's entry campaigns, the women petitioners in the Haji Ali dargah case won in the Bombay High Court. Furthermore, although it initially appealed the High Court ruling to the Supreme Court, the dargah then voluntarily chose to modify its entry rules. Niaz v. State of Maharashtra, PIL No. 106 of 2014 HC Bom (Aug. 26, 2016); *see also* Vishwanath 2016.

43. When Desai first announced her intention to visit Sabarimala during the 2016–2017 pilgrimage season, her declaration briefly united supporters of the ban (who objected on principle) and the Government of Kerala (which was then led by the anti-ban Communist Party of India (Marxist), and was concerned about "law and order" problems). *See* Das Acevedo (2018, 570–71).

https://doi.org/10.1017/lsi.2020.1 Published online by Cambridge University Press

(Jacob 2018; Times Now Digital 2018). Women journalists attempting to visit Sabarimala during its first days open after the verdict were pelted with stones notwithstanding the presence of a police escort (Times News Network 2018, discussing the experiences of the *New York Times* reporter Suhasini Raj). As of this writing, only two women in the prohibited age range appear to have successfully visited Sabarimala; one of them was briefly thrown out of her marital home and separated from her child, and both have received death threats (Times Now Digital 2019, Scroll.in 2019b).

None of this is due to the *reasoning* in *IYLA*. Supreme Court decisions, even in India, do not carry that kind of punch. The ominous warnings and protests and abuse would have almost certainly unfolded just as they did regardless of the particular reasons why the plurality authors—and a majority of the judges hearing the case—arrived at their ultimate conclusion. Quite possibly, an opinion that upheld Sabarimala's ban would have also elicited massive (although, one hopes, peaceful) demonstrations; certainly, the social movements that pre dated *IYLA* and the women's counter protests that have occurred after the decision suggest that this was possible (Jacob 2018; British Broadcasting Corporation 2019).

But precisely because *IYLA* involved the kind of issues that could be expected to generate ominous warnings and protests and abuse, and because a good deal of this popular appeal was already on display in the months preceding the verdict, any opinion the Court produced needed to be constructed with self-conscious care. At the very least, the opinion needed to be written in a way that reflected the balancing potential of the Constitution and the balancing purpose of the essential practices doctrine. *Ideally*, it would have been written so that it could lead both sides to see themselves in its reasoning, if not in its outcome. For the reasons outlined below, that opinion has not been forthcoming.

II. *IYLA v. STATE OF KERALA*

The four opinions issued in *IYLA v. State of Kerala* are by no means the Supreme Court's lengthiest pronouncements—*Kesavananda Bharati* was over seven hundred pages long, while even recent judgments like *Puttaswamy* and *Navtej Singh Johar* clock in at 637 and 311 pages, respectively—but they are still too long to comprehensively survey here.[44] The *IYLA* opinions are also characteristically eclectic in their choice of legal and cultural inspiration: Chief Justice Misra quotes Susan B. Anthony and Henry Ward Beecher within the first three pages of the plurality opinion, while Justice Malhotra looks to the Supreme Court of Alaska at one point and Justice Nariman quotes religious sources ranging from the Gospel of Mark to the Guru Granth Sahib to the Bundahishn.[45] It is impossible to capture all of this color in the

44. Kesavananda Bharati Sripadagalvaru v. State of Kerala, (1973) 4 SCC 225; *Puttaswamy* (2017) SCC OnLine SC 996; *Navtej Singh Johar* (2018) SCC OnLine SC 1350. In contrast, the consolidated opinions in *IYLA*—which relied purely on writ petitions, affidavits, and *Mahendran* itself—totaled some 169 pages. These page estimates are based on the SCC OnLine versions of the opinions.

45. *IYLA*, Writ Petition (Civ.) No. 373 of 2006 SC, paras. 1, 3 (Misra, C.J.); *IYLA*, Writ Petition (Civ.) No. 373 of 2006 SC, para. 309.5 (Malhotra, J.); *IYLA*, Writ Petition (Civ.) No. 373 of 2006 SC, para. 169 (Nariman, J.).

https://doi.org/10.1017/lsi.2020.1 Published online by Cambridge University Press

space of a few sentences. What follows is merely a series of thumbnail sketches for readers who have not been able to read through part or all of the Court's nearly two-hundred-page opus.[46]

After summarizing the arguments of the various petitioners, respondents, intervenors, and *amici*—no small feat, in a case where there are well over half a dozen[47]—Chief Justice Misra, writing for himself and Justice Khanwilkar, begins by stating that Ayyappan devotees do not constitute a religious denomination separate from Hinduism. (If they did, they would be entitled to manage their own religious affairs under Article 26 of the Constitution.) He then asks whether Sabarimala's ban can be understood as an "essential practice" of Hinduism, such that Ayyappan devotees who favor the ban would be able to claim protection for it under Article 25(1), and he answers this in the negative.[48] Part III of this article explains the essential practices doctrine and its treatment in *IYLA* in greater detail.

Finally, the Chief Justice examines specific provisions of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965, as well as the statutory Rules meant to give effect to the Act. Section 3 of the Act provides that places of public worship that are "open to Hindus generally or to *any* section or class thereof, shall be open to *all* sections and classes of Hindus."[49] Section 4 stipulates that although trustees of public places of worship may make regulations to maintain "order and decorum and the due performance of rites and ceremonies," these regulations may not discriminate against any Hindu on the grounds he belongs to a particular section or class.[50]

However, Rule 3(b), formulated under the power granted by Section 4, states that temple authorities may exclude "[w]omen at such time during which they are not by custom and usage allowed to enter a place of public worship."[51] In most contexts, Rule 3(b) is understood to permit the exclusion of women during the few days they are literally menstruating but the *IYLA* respondents maintain that as regards Sabarimala, Rule 3(b) permits the exclusion of women aged ten to fifty because they

46. SCC Online's version of the case seems to lack internal page numbering for *IYLA* (which can be cited under this system as 2018 SCC OnLine SC 1690). The PDF document is 169 pages long (159 up to the endnotes) but this does not correspond to the usual internal page numbering system used by SCC, which is likely to be higher. Throughout this article, I have used only paragraph citations when referencing the *IYLA* opinions.

47. Actually, the *Supreme Court Observer* counts over one dozen respondents alone; however, not all respondents' (or all parties') submissions were reviewed in the various *IYLA* opinions (Supreme Court Observer 2019).

48. In between these two areas of analysis, the Chief Justice also briefly considers whether the right to religious freedom protected by Article 25(1) can be enforced as against the TDB.

49. Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965 (emphasis added), discussed in *Mahendran*, AIR 1993 Ker 42, para. 26.

50. Ibid.

51. Ibid. Flat exclusions like the one implemented by Sabarimala with respect to women aged ten to fifty seem relatively rare, but something more than self-imposed absence during the actual days one is menstruating does exist elsewhere. The Maharashtrian temples that Trupti Desai targeted—the Shani temple in Shignapur, Mahalakshmi temple in Kolhapur, and Trimbakeshwar temple in Nashik—all fall into this intermediate category, usually because they exclude women from the inner sanctum (Das Acevedo 2018, 569 n. 106). Supporters of Sabarimala's ban are also usually quick to point out that the Attukal Bhagavathi temple in Kerala has an important all-female festival (called "Pongala") that has not elicited similar objections. Easwar (2016) (calling Attukal Pongala "the female version of the Sabarimala pilgrimage" and stating that, during Pongala, "women are given a privilege that is given to no male").

https://doi.org/10.1017/lsi.2020.1 Published online by Cambridge University Press

are likely to be in between menarche and menopause. The plurality opinion concludes that Rule 3(b) violates Sections 3–4 of the Act, as well as the religious freedom rights of female Ayyappan devotees under Article 25(1) of the Constitution.[52]

The first twenty paragraphs, or roughly fifty pages, of Justice Nariman's concurrence extensively reviews existing jurisprudence on religious freedom and, in particular, on the "essential practices" doctrine.[53] His discussion of the Sabarimala dispute begins with an analysis of the interplay between Article 25(1) (protecting freedom of religious belief and practice) and Article 25(2) (which allows the state to regulate the secular aspects of religion notwithstanding the protections afforded by 25(1)), as well as with a review of the contrast between Articles 25(1) and 26.[54]

Justice Nariman then moves on to a brief synopsis of *Mahendran* and the religious rationales for Sabarimala's ban—in particular, the idea that fertile women simply cannot complete the forty-one-day penance because of the ritual impurity associated (not only at Sabarimala) with menstruation.[55] He canvasses several religious texts in order to conclude that "[a]ll the older religions" view menstruation as ritually polluting, while "the more recent religions" take "a more pragmatic view."[56] (The "older religions" Justice Nariman cites are Hinduism, Judaism, Islam, Christianity, and Zoroastrianism; the "new religions" are Sikhism and the Baha'í faith.)[57]

Next, like the plurality, he considers the denominational rights of Ayyappan devotees under Article 26 as well as the validity of Rule 3(b) regarding the exclusion of women "at such time during which they are not by custom and usage allowed to enter a place of public worship." He too finds that Ayyappan devotees do not qualify for Article 26 protection and that Rule 3(b) violates Section 3 of the Authorisation of Entry Act as well as the Constitution.[58]

Before he concludes, Justice Nariman briskly disposes of two of the respondents' objections: first, that the Indian Young Lawyers Association is not an appropriate petitioner, and second, that the Supreme Court should have engaged in fresh fact-finding when it heard *IYLA*.[59] To the objection that the IYLA's representatives suffered no personal harm as a result of the ban because they are not devotees of Ayyappan, Justice Nariman responds that the dispute presented "far-reaching" constitutional matters and so "this technical plea cannot stand in the way of a constitutional court

52. *IYLA*, Writ Petition (Civ.) No. 373 of 2006 SC, para. 144.iii, x–xii (Misra, C.J.).

53. The essential practices doctrine is a judge-made rule to the effect that courts must identify aspects of a religion that are beyond the purview of the state to reform or curtail, and that they must do so "with reference to the doctrines of that religion itself." *The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Shirur Mutt*, AIR 1954 SC 282, para. 20 (hereinafter *Shirur Mutt*).

54. *IYLA*, Writ Petition (Civ.) No. 373 of 2006 SC, para.166.8–.14 (Nariman, J.).

55. *IYLA*, Writ Petition (Civ.) No. 373 of 2006 SC, paras. 167–68 (Nariman, J.).

56. *IYLA*, Writ Petition (Civ.) No. 373 of 2006 SC, paras. 169–70 (Nariman, J.).

57. Ibid. Readers may differ from Justice Nariman in his interpretation of these religious texts; see his discussion of menstruation and Christianity drawing on the Gospel of Mark. Ibid, para. 168.

58. *IYLA*, Writ Petition (Civ.) No. 373 of 2006 SC, paras. 171–74 (Nariman, J.).

59. Ibid, para. 176. Justice Nariman also appears to address the appropriateness of public interest litigation as a mechanism for vindicating the rights of women devotees, although he does so indirectly. Ibid, para. 175. (dismissing the Respondents' argument that "the present writ petition, which is in the nature of a PIL, is not maintainable inasmuch as no woman worshipper has come forward with a plea that she has been discriminated against"). One of the hallmark characteristics of PIL suits, after all, is the relaxation of *locus standi* requirements.

https://doi.org/10.1017/lsi.2020.1 Published online by Cambridge University Press

applying constitutional principles to the case at hand."[60] Nor, he says, was the Supreme Court obliged to look beyond materials carried over from *Mahendran* and new affidavits filed by the parties, since "[t]he facts, as they emerge … are sufficient."[61]

Justice Chandrachud's concurrence runs for over sixty pages divided into fourteen parts or 119 paragraphs; it is a book as much as it is a judicial opinion. Several parts of this concurrence engage with issues that were also considered by the plurality and by Justice Nariman: the origins and development of essential practices jurisprudence (Parts F and G); whether or not Ayyappan devotees constitute a religious denomination (Part H); and the statutory and constitutional validity of Rule 3(b) (Part J). To be sure, Justice Chandrachud's analysis of these issues is not identical to that of his colleagues. As Part III of this article demonstrates, he makes an astute and (within the bounds of the *IYLA* verdict) unique observation about shifts in essential practices jurisprudence, although he does not seem to heed the lesson of his own teaching.[62]

Beyond some areas of common interest, Justice Chandrachud also ventures into topics that are clearly part of the documentary record but that were, for whatever reason, overlooked by the other justices in the majority. He considers whether exclusion based on ritual pollution constitutes a form of untouchability and is thus prohibited by Article 17 of the Constitution (Part I); whether the ban was an uncodified "custom or usage" that existed before independence and as such enjoys some immunity from the Constitution (Part K); the extent to which the ban is premised on a sexual stereotype of women as too weak-willed to complete the forty-one-day penance or too physically weak climb to Sabarimala's mountaintop location (Part G); and, finally, whether a deity can be said to have constitutional rights (Part L).[63] Although Justice Chandrachud's perspectives on these issues do not create precedent, they acknowledge—and identify for review petitions—gaps in the plurality opinion.[64]

After summarizing the parties' submissions, Justice Malhotra's dissent begins by questioning, on various grounds, the appropriateness of the lead petitioner as well as the use of public interest litigation (PIL) in this context.[65] Ideally, she argues, a petitioner who directly approaches the Supreme Court regarding a violation of fundamental rights should have personally suffered that violation.[66] Where a fundamental rights violation is articulated via a public interest suit (and consequently where the petitioner

60. *IYLA*, Writ Petition (Civ.) No. 373 of 2006 SC, para. 175 (Nariman, J.).

61. *IYLA*, Writ Petition (Civ.) No. 373 of 2006 SC, paras. 176–77 (Nariman, J.).

62. *See especially IYLA*, Writ Petition (Civ.) No. 373 of 2006, paras. 193, 209, 224 (Chandrachud, J.). Dhavan and Nariman make a similar point: "Created as a principle of inclusion to make some practices more sacral than others, it was interpreted in later cases as a threshold principle of exclusion to deprive supposedly non-essential practices of constitutional protection altogether" (Dhavan and Nariman 2000, 259).

63. If temple deities *do* have constitutional rights in addition to some of the common law rights they enjoy in matters of agency and property law, then presumably Ayyappan himself could sue, via his human representative, to enforce the ban as part of his religious freedom rights. This issue flared briefly during the hearings as one of the Intervenors in the case, an organization named People for Dharma, argued that Ayyappan did in fact have constitutional rights. *IYLA v. State of Kerala*, Brief of Intervenor-Applicant No. 30 of 2016 (People for Dharma), Writ Petition (Civ.) No. 373 of 2006 SC, 31–38 (on file with author).

64. As of August 16, 2019, sixty-four review petitions were filed in the Supreme Court (Indo-Asian News Service 2019).

65. Das Acevedo (2017, 5–6) discusses PIL in the Indian context and contrasts it with the idea of "public interest litigation" in the United States.

66. *IYLA*, Writ Petition (Civ.) No. 373 of 2006, para. 303.2 (Malhotra, J.).

https://doi.org/10.1017/lsi.2020.1 Published online by Cambridge University Press

need not plead personal harm) the petitioner should at the very least be a member of the community whose practice is being questioned.[67] Overall, however, Justice Malhotra seems skeptical of using PIL suits to vindicate Article 25(1) claims at all.[68]

Justice Malhotra's views on fundamental rights vindication via PIL suits constitute an unusual perspective as well as a foundational parting of ways with her colleagues, but she also diverges from the majority on the narrower questions of the case. On the denominational status of Ayyappan devotees, the validity of Rule 3(b), and whether the ban relates to an essential religious practice, she simply disagrees with her colleagues.[69] She also draws on the Constituent Assembly debates concerning the drafting of the Indian Constitution to argue that Article 15 (nondiscrimination on the basis of, among other things, sex) and Article 17 (prohibition of untouchability) were never meant to apply in situations like Sabarimala's ban on women.[70]

Finally, among her more striking arguments are two observations about religion: that courts should not weigh religious practices against constitutional understandings of rational behavior, and that "[t]he form of the [Hindu] deity in any temple is of paramount importance."[71] The former point, which would have been impressively banal coming from an American justice, is a shockingly self-limiting statement for a member of the Indian Supreme Court. Since when exactly, one imagines generations of scholars and lawyers asking incredulously, is "delineat[ing] the rationality of ... religious beliefs or practices ... outside the ken of the Courts"?[72]

Justice Malhotra's second point about Hindu deities is an important one and a response to an argument contained in both the plurality opinion and some of the petitioners' filings that Sabarimala's ban was not essential to Ayyappan worship because other Ayyappan temples did not have a similar ban.[73] She notes that Ayyappan-at-Sabarimala has a different personality and preferences than Ayyappan-elsewhere, and suggests that since "[w]orship has two elements—the worshipper and the worshipped" the right to worship Ayyappan-at-Sabarimala "cannot be claimed in the absence of the deity in the particular form in which he has manifested himself."[74]

67. Ibid, para. 303.4.

68. Ibid, para. 303.7. It should be noted that all but one of the cases cited in this subsection were decided before public interest litigation was developed by the Supreme Court, so it is hardly surprising that they were not articulated as PIL suits.

69. *IYLA*, Writ Petition (Civ.) No. 373 of 2006, para. 308.9 (denominational status); para. 309.13 (essential practices); para. 311.6 (Rule 3(b)) (Malhotra, J.).

70. *IYLA*, Writ Petition (Civ.) No. 373 of 2006, para. 305 (Art. 15); para. 310 (Art. 17) (Malhotra, J.).

71. *IYLA*, Writ Petition (Civ.) No. 373 of 2006, para. 304 (discussing religion and rationality); para. 309.9 (discussing Hindu deities) (Malhotra, J.).

72. Ibid, para. 304.2. For instance, Justice Malhotra's assertion seems to fly in the face of the well-known line from *Durgah Committee* that "even practices though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself." *Durgah Committee*, AIR 1961 SC 1402, 1415.

73. *IYLA*, Writ Petition (Civ.) No. 373 of 2006, para. 95 (Misra, C.J.); IYLA v. State of Kerala, Writ Petition by Indian Young Lawyers Association, Writ Petition (Civ.) No. 373 of 2006 SC, 52–54 ("Grounds—G"); IYLA v. State of Kerala, Brief of Intervenor-Applicant No. 30 of 2016 (People for Dharma), Writ Petition (Civ.) No. 373 of 2006 SC, 15–16; IYLA v. State of Kerala, Brief of Respondent No. 6 (Nair Service Society) in Writ Petition (Civ.) No. 373 of 2006 SC, 2–3.

74. *IYLA*, Writ Petition (Civ.) No. 373 of 2006, para. 309.9 (Malhotra, J.).

https://doi.org/10.1017/lsi.2020.1 Published online by Cambridge University Press

Of course, what Justice Malhotra's observation overlooks is the potential for disagreement *between devotees* as to the restrictions imposed by a deity's "particular form." Still, her point about the differing personalities of Hindu temple deities is significant and strikingly overlooked by the other justices, especially given the religious *and* legal salience of deity personas. Temple ethnographies and other studies too numerous to properly reference here attest to the unique habits and preferences of deity X as manifested at temple Y.[75] Likewise, generations of scholars and judges have studied the construction of temple deities as juristic persons having interests, preferences, and property.[76] Despite considerable variation in disciplinary focus and interpretation, all of this prior engagement—which found no place in the plurality's analysis—offers support for Justice Malhotra's view that, when it comes to Hindu temple deities, it simply does not make sense to employ generalizations along the lines of "what *Ayyappan* wants."

This overview cannot fully capture the justices' analysis, which is at once more detailed and more comprehensive than I have suggested here. Nor does it adequately convey the palpable absence of individual believers in three of the four opinions. The next section takes up two analytic moves variously employed by the majority opinions, especially the plurality written by Chief Justice Misra, in order to show how they efface believers from a dispute about belief. It also explains the history and contours of the essential practices doctrine in order to show how the plurality opinion reflects a common, problematic, and avoidable application of the doctrine.

III. HINDUS, JUST HINDUS

As Part II noted, the Chief Justice opens his analysis by declaring that Sabarimala is not a denominational temple because Ayyappan devotees are "just Hindus." Whether or not one is merely Hindu or something more specific matters a great deal for the purposes of the Indian Constitution, just as it matters whether or not one is merely Muslim or Christian or something more.[77] As it turns out, though, it is very hard to not be Hindu in the eyes of the Court.[78]

The "essential practices" doctrine was established via a landmark 1954 Supreme Court case called *Shirur Mutt* and was meant to provide judicial guidance for the task of determining the scope of individual and group religious freedom under Article 25. But *Shirur Mutt* also gave rise to a second, less widely discussed test that is used to decide the applicability of group (and *only* group) religious freedom rights under Article 26.[79]

75. On the individuality of Hindu temple deities, see Appadurai and Breckenridge (1976, 190), who write: "Still further evidence of the presence of the deity as a person is his or her eligibility for marriage … capacity of having sexual relations, desire to take holidays, and willingness to engage in conquest, quarrels or other playful acts."

76. For a sampling of the scholarship on Hindu temple deities as juristic persons, see Das Acevedo (2016a, nn. 46–55).

77. *Durgah Committee, Ajmer v. Syed Hussain Ali*, AIR 1961 SC 1402 (agreeing that the Chishti order of Sufis constitute a separate denomination within Islam but finding against the order on other grounds).

78. Noting that "given the all-encompassing definition of Hinduism in Yagnapurushdasji, it is unlikely any sect within Hinduism is ever going to get the court's approval as a separate religion" (Sen 2010, 58).

79. *Shirur Mutt*, AIR 1954 SC 282, para. 15.

https://doi.org/10.1017/lsi.2020.1 Published online by Cambridge University Press

This "denominational" test is used to decide whether a community qualifies as a "religious denomination or section thereof," such that it should be allowed to enjoy various property rights, to establish and maintain religious and charitable organizations, and especially to "manage its own affairs in matters of religion."[80] In the *Shirur Mutt* formula that has gained widespread acceptance, a denomination is marked by the possession of a name, a faith, and an organization in common.[81]

By contrast, the essential practices doctrine helps sort aspects of religious life into those that are protected against state intrusion per Article 25(1), and those that the state may regulate under Article 25(2)(a) because they constitute "secular activit[ies] which may be associated with religious practice."[82] Because immunity from Article 25(2)(a) only applies to "the essential part[s] of a religion," and those parts are "primarily to be ascertained with reference to the doctrines of that religion itself," the essential practices test requires courts to explicitly articulate which religious doctrines are properly ascribed to an identifiable community. In other words, denominational analysis under Article 26 inheres in essential practices analysis under Article 25. In cases where one party claims that individual religious freedom rights are being violated by a religious community or institution, the former dictates (and may short-change) the latter.[83]

The *IYLA* plurality reasoning makes this clear. It begins by arguing that Ayyappan devotees do not have group rights under Article 26 because they do not qualify as a religious denomination. Although individual pilgrims to Sabarimala are called "Ayyappans" for the duration of the pilgrimage, the plurality notes that devotees at large are not called Ayyappans (the way, for instance, followers of the Sikh faith are called Sikhs).[84] Nor do Ayyappan devotees have a shared faith, whether this means a "new methodology" or "any common religious tenets peculiar to themselves."[85] They certainly do not have a common organization if that is understood to be an exclusive religious community with an authoritative ecclesiastical hierarchy—say, like the Catholic Church—although there are many devotional associations dedicated to Ayyappan. Put together, the plurality concludes, Ayyappan devotees are not a distinct denomination and consequently the Court's task in adjudicating the Article 25(1) rights of individual devotees who favor the ban is to determine whether excluding

80. India Const. Part III: Fundamental Rights, Art. 26(c) and 26(d) (property rights), 26(a) (religious and charitable organizations), 26(b) (internal affairs).

81. *Shirur Mutt*, AIR 1954 SC 282, para. 15; S.P. Mittal v. Union of India, (1983) 1 SCR 729 (citing *Shirur Mutt*).

82. India Const. Part III: Fundamental Rights, Art. 25(2)(a).

83. Courts often miss this, and only see the reverse relationship—namely, the way that essential practices analysis (Art. 25) impacts denominational rights (Art. 26). *See Shirur Mutt*, AIR 1954 SC 282, para. 20 ("If the tenets of any religious sect of the Hindus prescribe [listing various possible required activities] … all these would be regarded as parts of religion … and should be regarded as matters of religion within the meaning of article 26(b)."). In *Sri Venkataramana Devaru v. State of Mysore*, AIR 1958 SC 255 (1957), the Court articulated the doctrine of "harmonious construction" as a way to resolve the relative claims of Articles 25 and 26(b), which it did in favor of Article 25 (Sen 2010, 53). However, courts are likely to be less rigid in their application of Article 26's denominational test in cases that do not follow *IYLA*'s structure—namely, an individual versus a religious community where the individual is not a nonmember of the community, even if she is not an active participant in the community. See, for instance, the relatively less stringent application of denominational analysis in the Ananda Margi cases (see below, nn. 88, 90).

84. *IYLA*, Writ Petition (Civ.) No. 373 of 2006, para. 95 (Misra, C.J.).

85. Ibid, para. 96.

https://doi.org/10.1017/lsi.2020.1 Published online by Cambridge University Press

women between the ages of ten and fifty from temples is an essential practice of *Hinduism*. At the end of a series of passages that is almost as suspenseful as the alphabet song, the plurality concludes in the negative.[86]

The concurrences by Justice Nariman and Justice Chandrachud flesh out the connection between Articles 26 and 25(1). Justice Nariman states that since *non*-Hindus may worship at Sabarimala without ceasing to be practitioners of their own faith, *Hindus* who worship at Sabarimala also do not cease being Hindu.[87] Moreover, there are (according to the Respondents) over a thousand Ayyappan temples across India and it is to be assumed that Hindus worshipping at those temples would be surprised to learn that, by doing so, they have been practicing a distinct religion.[88] Justice Chandrachud takes an unusual approach to the relationship between Articles 25 and 26. He argues that since the *Mahendran* record demonstrates that Sabarimala's ban has not enjoyed perfect observance, and since the need for the ban forms "[t]he basis of the claim that there exists a religious denomination of Ayyappans," it follows that where there is no uniformity there is no denomination.

All of this coheres with the majority's view, held with "mathematical certainty" by the plurality, that Ayyappan devotees are insufficiently idiosyncratic to be something other than Hindus.[89] The allusion to mathematics is apt. The *IYLA* majority judges, like many others before them, seemingly calculate denominational status for the purposes of essential practices analysis using a kind of cultural arithmetic. Starting from an ascribed base affiliation—Christianity, Islam, or in most cases, Hinduism—judges have tended to "subtract" points of difference. Do the followers of the spiritual leader Ananda Murti refer to themselves as Ananda Margis?—then they no longer share the name "Hindu."[90] Does a temple's deed of endowment or any of its other foundational legal documents demonstrate that it was established for the benefit of a specific community?—then that community *may* no longer share the same organizational infrastructure as Hindus.[91] If enough points are subtracted, then the community may gain recognition as a denomination. If not, as Chief Justice Misra observed, its members are "just Hindus."[92]

Binary thinking is no less popular in law than it is in computer science and the *IYLA* majority's approach to denominational and essential practices analysis produces plenty of binaries. Individuals either *are or are not* Hindu; beliefs and practices either *are or are not* essential; communities either *are or are not* exclusive denominations. Inasmuch as its goal is to sort Ayyappan worship into any of these buckets, the plurality's

86. Ibid, paras. 122–23.

87. *IYLA*, Writ Petition (Civ.) No. 373 of 2006, para. 171 (Nariman, J.).

88. Ibid, para. 172.

89. *IYLA*, Writ Petition (Civ.) No. 373 of 2006, para. 112 (Misra, C.J.).

90. Acharya Jagdishwaranand Avadhuta v. Comm'r of Police, Calcutta, AIR 1984 SC 51, para. 4 (1983). For more information on Ananda Murti and the sect he founded, see Crovetto (2005).

91. Sri Venkataramana Devaru v. State of Mysore, AIR 1958 SC 255 (1957).

92. The Court's understanding of Hinduism, both in *IYLA* and over time, is addressed in Part IV. It is worth noting, however, that winning the denominational status argument does not ensure one will win the essential practices argument as well. The petitioners in decades-running Ananda Margi cases, *supra* note 88, did succeed in being recognized as a denomination or section of Hinduism. However, they lost (repeatedly) on the question of whether the *tandava* dance, performed in public procession while carrying a skull, live snake, and trident (among other things) was an essential part of the faith.

https://doi.org/10.1017/lsi.2020.1 Published online by Cambridge University Press

conclusions are not unreasonable. It is undeniably true that not all Ayyappan temples exclude fertile women (in fact, it is quite likely that *no* other Ayyappan temple does this). It is equally true that being a devotee of Ayyappan places few proscriptions or prescriptions on one's everyday existence; the forty-one-day penance is a special observance rather than a way of life. And it is also the case that worshipping Ayyappan—whether at home, at Sabarimala, or at one of the other "thousand" Ayyappan temples scattered throughout India—does not preclude worshipping other deities or even belonging to other faiths.

But this kind of *either/or* analysis produces conclusions that are problematic and beside the point—or, more accurately, that are problematic *because* they are beside the point. In some ways the denominational test is a poor fit for any religion. Naming conventions reflect external viewpoints as much as or in addition to self-identification—the Court's own frequent allusions to the "foreign" (meaning, Persian) origins of the term *Hindu* excellently illustrate this point.[93] Likewise, religious identity is frequently characterized by loyalty to multiple, overlapping communities rather than by a singular and exclusive affiliation: one is both a Christian *and* a Baptist, a Muslim *and* a Shi'a, a Hindu *and* a devotee of Ayyappan.[94] The one is not less true or less salient than the other. Part of the trouble in applying the denominational test is the trouble inherent in any governmental actor defining any religion and, as such, it can be mitigated but not avoided.[95]

In other ways, however, the denominational test seems especially unsuited to Hinduism—or, at the very least, it should be understood as actively squeezing Hindu beliefs and practices into uncomfortably narrow categories and thereby transforming them. (Of course, other aspects of the Court's religious freedom jurisprudence reflect constitutional impulses *favoring* Hinduism above other faiths [Schonthal et al. 2016, 971 –74].) "To the question 'Is Hinduism monotheistic or polytheistic?' the best answer is, 'Yes' (which is actually the answer to most either/or questions about Hinduism)" (Doniger 2014, 10). More specifically, to the question "Are you an Ayyappan or a Saivite [follower of Shiva] or a Vaishnavite [follower of Vishnu]?" the best answer, once again, may often be "Yes." This feature of Hinduism, namely, the potential for worshipping "a number of gods, one at a time, regarding each as the supreme, or even the only, god while you are talking to him" has been variously called henotheism or kathenotheism or, more simply, serial monotheism (ibid, 11–12; citing Max Müller). Whatever its name, as an approach to religious identity and exclusivity of belief, it does not find space within the denominational test.

93. Shastri Yagnapurushdasji v. Muldas Bhudardas Vaishya, AIR 1966 SC 1119, 11 (quoting Monier Williams for the proposition that "The Persians pronounced this word [Sindhu] Hindu and name[d] their Aryan brethren Hindus"). The Constituent Assembly Debates also contain extensive discussion of the name "Hindu" and its foreign—Persian or Greek—origins (1949).

94. Noting that "the fact that the people whom we call Hindus have defined themselves in many different ways—and that these definitions do not always delineate the same sets of people—does not invalidate the category of Hinduism" (Doniger 2014, 9).

95. *See generally* Sullivan (2005). In the end, Sullivan argues that in religious freedom cases "what is sought by the plaintiffs is not the right of 'religion' … but the right of the individual, every individual, to life outside the state … [s]uch a right may not be best realized through laws guaranteeing religious freedom but by laws guaranteeing equality." Ibid, 159.

https://doi.org/10.1017/lsi.2020.1 Published online by Cambridge University Press

Other aspects of Hindu belief and practice that cannot be easily sorted into binaries are similarly discounted. For instance, the plurality's approach to denominational analysis requires that Ayyappan devotees think of themselves as "Ayyappans" throughout the year instead of only when they are on pilgrimage—and since they do not, it ignores the fact that they *do* think of and refer to themselves as Ayyappans while on pilgrimage.[96] The plurality's approach also requires that Ayyappan devotees have unique "methodologies" or "tenets" but ignores their view that Ayyappan-at-Sabarimala has different traditions and preferences than Ayyappan-elsewhere (this was the point made by Justice Malhotra in her dissent).[97] Instead, the plurality requires believers and their temples to have *uniformly unique* tenets and practices. Over and over again, the plurality demands consistency and exclusivity and, where it encounters none, it discounts whatever points of distinction it does encounter.

None of this is mandated by the Constitution or even by the essential practices doctrine, which—as Justice Chandrachud notes—long ago shifted from protecting *essentially* religious (as opposed to secular) practices to protecting the much smaller and more difficult-to-determine circle of practices that could be considered *essential to* religion.[98] Later on, Justice Chandrachud makes a stronger (and perhaps even more critical) observation: "Beginning with the Shirur Mutt formulation that what is essential to religion would be determined by the adherents to the faith, the Court moved toward a doctrine that what is essential 'will always have to be decided by the Court.'"[99] However, he ultimately seems to just go along with the reformulated, Court-centric version of the essential practices test that he has painstakingly exposed as incidental rather than conceptually required.[100] As the followers of Ananda Murti discovered over the course of a multidecade lawsuit to protect their sacred *tandava* dance, *essential* religious practices are frozen in time: they must have existed and been important "since time immemorial" or since the religion's founding, whichever is earlier.[101] Perhaps Ananda Margis would not have won under the Court's original

96. *IYLA*, Writ Petition (Civ.) No. 373 of 2006, para. 95 (Misra, C.J.). Justices Nariman and Chandrachud find different aspects of the naming convention to be problematic. *IYLA*, Writ Petition (Civ.) No. 373 of 2006, para. 168 (Nariman, J.); *IYLA*, Writ Petition (Civ.) No. 373 of 2006, para. 242 (Chandrachud, J.).

97. *IYLA*, Writ Petition (Civ.) No. 373 of 2006, para. 309.9–.15 (Malhotra, J., dissenting). Unlike the plurality, Justice Nariman asks whether "the Sabarimala temple" (rather than "Ayyappan devotees") constitutes a religious denomination, but he also answers in the negative. *IYLA*, Writ Petition (Civ.) No. 373 of 2006, para. 171 (Nariman, J.).

98. *IYLA*, Writ Petition (Civ.) No. 373 of 2006, para. 209 (Chandrachud, J.). *Venkataramana Devaru* is frequently identified as the first time the Court shifted its focus from what is "essentially religious" to what is "essential to religion" (Ibid; Dhavan and Nariman 2000, 259 n. 19).

99. *IYLA*, Writ Petition (Civ.) No. 373 of 2006, para. 216.

100. Ibid, paras. 225, 227–29.

101. In *Comm'r of Police, Calcutta v. Acharya Jagdishwaranand Avadhuta*, Civ. App. No. 6230 of 1990 SC (Mar. 11, 2004), the Supreme Court chided the Calcutta High Court for thinking that "an essential part of religion could be altered at any subsequent point of time." Para. 9. After the Supreme Court's initial decision holding that the *tandava* dance was not an essential practice of the Ananda Murti faith, the community's leader revised its seminal text, the *Carya Carya*, to describe the dance as such. This won no favors with the Supreme Court, which said, first, "Ananda Margi order was founded in 1955. Admittedly, Tandava dance was introduced as a practice in 1966. Even without the practice of Tandava dance (between 1955 to 1966) Ananda Margi order was in existence. Therefore, Tandava dance is not the 'core' upon which Ananda Margi order is founded." Ibid, para. 10. Second, the Supreme Court added that "If subsequent alterations in doctrine could be allowed to create new essentials, the judicial process will then be reduced into a

https://doi.org/10.1017/lsi.2020.1 Published online by Cambridge University Press

and more expansive understanding of the test, either, but there was no chance of their winning under its later, narrower interpretation. And, contrary to many of its critics, the essential practices doctrine need not have developed into the virtually unwinnable proposition it is now.

The plurality's demand for consistency and uniformity is not, strictly speaking, an adjudicative failing: the denominational test has never explicitly emphasized internal categories after the manner of the essential practices test. But given their shared origins in *Shirur Mutt*, it seems awkward to think of the two tests as proposing radically different approaches to categorizing religion. What is more, in light of the way denominational analysis necessarily impacts essential practices analysis, it stretches credulity to suggest that an objective standard for one does not compromise the subjective standard advocated by the other.

Perhaps the best defense of the plurality's approach is that denominational analysis—like its essential practices counterpart—depends on the availability of parties who can speak to the relevant factors. Even in those rare cases (like Sabarimala) where there exists an authoritative religious authority (the temple's *tantri*) there is often still no readily identifiable community whose opinion can be canvassed. Hindus are by and large not congregational and pilgrimage venues like Sabarimala are not congregational by definition. Well over forty individuals or organizations submitted review petitions asking the Supreme Court to reconsider its *IYLA* ruling, each of them claiming to speak for some or all Ayyappan devotees.[102] Even if an identifiable community miraculously agreed on a designated spokesperson, we would have to pause at the spectacle of the apex court of independent, democratic India turning to a courtroom religious expert in order to pronounce upon true faith: the shades of the East India Company are not *so* very far behind us.[103] But if the Court has no one to ask, should we still fault it for failing to raise its hand?

Perhaps. There may be value to believers—there is definitely value to the Court—in a judicial process that takes careful account of their perspectives, even if the outcome of that process is not in their favor. This is all the more true in circumstances, like the essential practices doctrine, where the judiciary itself proclaims that *litigants'* beliefs and perspectives establish the appropriate parameters for analysis. There is a considerable literature examining why people perceive institutions and rules to be legitimate, much of which boils down to the following proposition: "authorities and institutions are viewed as more legitimate and, therefore, their decisions and rules are more willingly accepted when they exercise their authority through procedures that people experience as being fair" (Tyler 2006, 380; internal citations omitted). Jurisprudential interpretive strategies are not, strictly speaking, procedures, but they are certainly analogous.

useless formality and futile exercise. Once there is a finding of fact by the competent Court, then all other bodies are estopped from revisiting that conclusion." Ibid, para. 11. Apparently, the *IYLA* Court did not feel similarly with regards to the Kerala High Court's opinion in *Mahendran*.

102. *See* note 62, *supra*.

103. *See* Cohn (2004, 619), stating that "each district court as well as each appeal court had a Hindu law officer attached to it … [who] were to advise the English judges, who rarely knew Sanskrit" but noting that "[t]here was ambivalence among some of the British jurists … about the usefulness of pandits as law finders for the judges"; Mani (1998, ch. 1), discussing the role of court pundits in translating concepts and scriptures for British officials responding to widow immolation.

https://doi.org/10.1017/lsi.2020.1 Published online by Cambridge University Press

Moreover, the process of legitimation is explicitly cumulative, such that the question is not whether a more thorough and evenhanded approach in *IYLA* itself might have made the decision more palatable, but whether such an approach *before and during* *IYLA* might have made the decision more palatable (ibid, 381). In the following Part, I will show that the *IYLA* Court disregarded the perspectives of Ayyappan devotees, this time not en route to designating them "just Hindus" but in the course of determining what *kind* of people Hindus are.

IV. INHERENTLY JUST HINDUS

> "Truth is one; sages speak of it variously."[104]

For decades now, this single line of poorly translated Sanskrit, derived from the *Rg Veda* and popularized by Swami Vivekananda, has had a considerable hand in shaping Hindu perceptions of self (Doniger 2014, 18). Its satisfying blend of monotheism, perspectivism, and enlightenment allows Hindus, regardless of their backgrounds and political priors, to see their faith as a same-but-better version of the other great (but sadly less open-minded) world religions.[105] It operates in the background of much political, cultural, and legal discourse on Hinduism today, whether in India or abroad, and informs debate even where it does not formally appear (although, as we will see shortly, it makes frequent cameo appearances). Always, the line invites Hindus to assume that they speak from a position of inherent cosmopolitanism. The *IYLA* plurality—like so many justices before them—accepts the invitation.

Early on, Chief Justice Misra articulates the plurality's view that real religion is progressive and pleasingly aligned with constitutional principles:

> Any relationship with the Creator is a transcendental one crossing all socially created artificial barriers and not a negotiated relationship bound by terms and conditions . . . which do not meet the constitutionally prescribed tests.[106]

Shortly thereafter:

> It is a universal truth that faith and religion do not countenance discrimination . . . .[107]

104. This is Vivekananda's translation of *Rig Veda* 1, 164.46, which reads "The wise speak of what is one in many ways" (Doniger 2014, 12). Material immediately before and after this segment make clear that, in context and carefully translated, it reflects both polytheism and a kind of monism but *not* conventional monotheism:

> "They call him Indra, Mitra, Varuna, Agni / and he is heavenly nobly-winged Garutman.
> To what is One, sages give many a title / they call it Agni, Yama, Matarisvan" (Griffith 1896).

105. Indeed, Vivekananda himself, from Volume III of *The Complete Works of Swami Vavekananda* (1971–73), felt Hinduism was a superior religion—one "of which Buddhism with all its greatness is as rebel child, and of which Christianity is a very patchy imitation" (quoted as *The Collected* [sic] *Works* . . . in Sen 2010, 8).

106. *IYLA*, Writ Petition (Civ.) No. 373 of 2006, para. 3 (Misra, C.J.)

107. Ibid, para. 4.

https://doi.org/10.1017/lsi.2020.1 Published online by Cambridge University Press

And, familiarly:

> All religions are simply different paths to reach the Universal One.[108]

Although the themes of oneness, universality, and inherent broadmindedness do not explicitly figure very much beyond these initial passages, they do unspoken work throughout the opinion. At paragraph 117, the plurality cites an early Supreme Court case on religious freedom, *Durgah Committee*,[109] for the proposition that "some practices, though religious, may have sprung from merely superstitious beliefs."[110] At paragraph 122, it notes that the exclusion of women from temples cannot be viewed as an essential practice of Hinduism "and on the contrary, it is an essential part of the Hindu religion to allow Hindu women to enter into a temple."

Indian justices have been defining away clashes between progressive constitutional principles and less-than-progressive religious practices ever since the essential practices doctrine was developed. In 1958, just four years after the doctrine emerged, the Court held that Sanskrit texts called the *Agama*s, when correctly understood, did not mandate the exclusion of Dalits from a Brahmin temple.[111] In 1966, the Court declared that a group called the *Satsangi*s were merely Hindu reformers, and that their desire to exclude Dalits from Satsangi temples was based on "superstition, ignorance and [a] complete misunderstanding of the true teachings [of the] Gita … of Hindu religion and of the real significance of the tenets and philosophy taught by [their leader] Swaminarayan himself."[112] This long history of resolute optimism means that the *IYLA* plurality opinion is not remarkable in any substantive sense. It is *not* unusual because it reflects the curious idea that something as internally variegated as Hinduism could have "an" orientation toward every kind of discrimination. It is not even unusual because it concludes that *proper* Hinduism is nondiscriminatory. The Supreme Court has long advanced the idea that Hinduism is, even if individual Hindus are not, inherently rational and just.

What does make the *IYLA* plurality stand apart is the ease with which it operationalizes these assumptions. Instead of stepping carefully through multiple sources and pausing to consider the cultural or religious histories of Ayyappan worship that are very much a part of the current dispute (something which Justice Chandrachud, to his credit, does attempt to do) the plurality teleports itself to its conclusion. On a profoundly generous reading, it spends some fifteen to twenty sentences scattered throughout a thirty-two page opinion exploring the tenets and practices of Ayyappan worship. In the *Satsang* case, by contrast, in which Chief Justice Gajendragadkar was no less willing to inform the plaintiffs that they were (unwilling) Hindus and that Hinduism was progressive in ways they were not, the Court easily spent half a dozen *pages* (of a twenty-page opinion) exploring Hinduism, Satsang beliefs, and the relationship between the two.

---

108. Ibid.

109. Ibid, para. 117 (citing *Durgah Committee* AIR 1961 SC 1402, para. 34).

110. In this instance, the Court was suggesting that even true Sufi Islam is inherently broadminded rather than composed of "superstitious" practices.

111. *Sri Venkatramana Devaru*, AIR 1958 SC 255 (1957).

112. *Shastri Yagnapurushdasji v. Muldas Bhudardas Vaishya*, AIR 1966 SC 1119, para. 55.

https://doi.org/10.1017/lsi.2020.1 Published online by Cambridge University Press

Once again, things need not have been this way. Neither Justice Nariman, who canvasses various religions for their views on menstruation, nor Justice Chandrachud, who goes to considerable effort to define the contours of Ayyappan worship, assume that religion (whether Hinduism in general or Ayyappan worship in particular) is inherently nondiscriminatory. Justice Nariman is quite willing to grant that Sabarimala's ban may be a genuine and even an important aspect of Ayyappan worship and to nonetheless call it discriminatory and therefore unconstitutional.[113] Justice Chandrachud makes an even finer distinction: he does not believe the ban is an essential aspect of religious life at Sabarimala but he implies that even if it *were* essential it would still fall afoul of constitutional values like dignity, liberty, and equality, and thus be impermissible.[114] Disagreement of this sort, unlike universalizing claims of transcendental oneness, rests on an acceptance of litigants' self-perceptions as well as an acknowledgement of the raw power being exercised whenever a court outlaws some aspect of those perceived selves.

Acknowledgements of power matter in all polities but especially in constitutional democracies where judicial authority depends on the buy-in of other branches of government, to say nothing of citizens themselves. This is not, *pace* one bedeviled Congress politician, a way of saying that "abstract notions of constitutional principle also have to pass the test of societal acceptance" (Tharoor 2018). A court is a court and not a legislature. It is also not to say that a plurality opinion less concerned with telling Ayyappan devotees that they have misunderstood the true nature of Hinduism (or of religion itself) would have generated any fewer protests. Reform, whether for better or for worse, hurts.

But while the Indian Constitution's commitments to social reform may be beyond question, so too is its understanding that citizens are more than putty in the hands of a benevolently paternalistic state. They are, on the contrary, also the real locus of political sovereignty (Das Acevedo 2016b, 580–81). As such, they have rather conventionally liberal rights like the freedom of conscience, of speech, and of association—and proof that the Court respects those rights even as it acknowledges the state's role in reforming religion is in its own essential practices pudding.

Admittedly, India's Supreme Court has often been more willing to countenance state authority over religion than many of the High Courts. The Kerala High Court's *Mahendran* ruling approving Sabarimala's ban was effectively negated by *IYLA*; a Calcutta High Court ruling in favor of the Ananda Margis's *tandava* dance was struck down—twice—by the Supreme Court; a Rajasthan High Court ruling that Sufi leaders had Articles 25 and 26 rights regarding the management of their *dargah* was overturned on appeal, and so on.[115] But a Court that has no interest in protecting the rights of

113. *IYLA*, Writ Petition (Civ.) No. 373 of 2006, para. 170 (Nariman, J.) ("For the purpose of this case, we have proceeded on the footing that the reasons given for barring the entry of menstruating women to the Sabarimala temple are considered by worshippers and Thanthris alike, to be an essential facet of their belief.").

114. *IYLA*, Writ Petition (Civ.) No. 373 of 2006, para. 227 (Chandrachud, J.) ("The texts and tenets on which the Respondents placed reliance do not indicate that the practice of excluding women is an essential part of religion . . . .") and at para. 231 ("These constitutional values stand above everything else as a principle which brooks no exceptions, even when confronted with a claim of religious belief.").

115. *Durgah Committee*, AIR 1961 SC 1402.

https://doi.org/10.1017/lsi.2020.1 Published online by Cambridge University Press

individuals and communities to practice their religion as they understand it has no need to develop something like the essential practices doctrine, much less to apply it repeatedly. That it does so reflects constitutional commitments to two different visions of citizen-state relations: one in which citizens are sovereign and can designate religious life to be beyond the government's purview, and a second in which citizens and the state share in sovereignty and the government can legitimately participate in reforming religious life (ibid). In other words, despite the general aura of progressiveness that hangs about the Court and even despite recent decisions supporting expansive gender and privacy rights, it was not foreordained that supporters of Sabarimala's ban would lose.

When the Indian Supreme Court frequently reinterprets religious precepts so that they align with constitutional values, it does the important work of attempting to reconcile these two conflicting impulses. Its approach may even occasionally succeed in showing that "Hinduism, as a system of values, is not inevitably incompatible with either modern rationality … or the ideals of equality and individual freedom" (Fuller 1988, 247). However, neither of these worthy objectives is served by *IYLA*'s cloying baseline assumptions about religion that—like model minority myths or tropes of women as domestic goddesses—deny the object of analysis the respect of being seen.[116]

More prosaically, the poor reasoning of the *IYLA* plurality matters in the way that all precedential opinions matter in a common law system—*but more*. The additional cost of a decision like *IYLA* is that specific jurisprudential mechanisms like the essential practices doctrine, which are far from perfect but are nonetheless legitimate attempts at maintaining India's delicate balance between citizen sovereignty and the state's authority to enact social reform, become eroded and easily denigrated. To be sure, *IYLA* is not solely or wholly responsible for undermining the essential practices doctrine; that was achieved long ago with the shift from safeguarding practices that are "essentially religious" to protecting only that are "essential religious" practices.[117] The plurality opinion is, however, responsible for further damaging the doctrine and for doing so in the context of a predictably high-profile case, thereby providing reasonable grounds for the review petitions that were sure to follow (and did). Even if nothing comes of the dozens of review petitions filed before the Court, the inconclusiveness of the dispute and the sense of being disrespected it has quite justifiably engendered among Ayyappan devotees is cost enough to the integrity of the Court and of the Constitution it works to uphold.

What would have been better than the plurality's approach? Any number of things. The plurality might have revisited the shift from "essentially religious" to "essential religious" practices that Justice Chandrachud notes but does not himself

116. Astoundingly, the plurality explicitly criticizes this kind of idealization of women: "The dualism that persists in religion by glorifying and venerating women as goddesses on one hand and by imposing rigorous sanctions on the other hand in matters of devotion … results in indignity to women and degradation of their status." *IYLA*, Writ Petition (Civ.) No. 373 of 2006, para. 2 (Misra, C.J.)

117. *See* note 96, *supra*, and accompanying text. As this discussion should make clear, I am not suggesting that the essential practices doctrine be abandoned wholesale. There are no perfect interpretive tools, but there are imperfect tools that can be applied in better or worse ways. Relatedly, I am not suggesting that—because of the "impossibility of religious freedom"—we should abandon the attempt to use imperfect tools as best we can. The impossible nature of religious freedom is, to my mind, occasion for humility not resignation. *See* Doniger (2014, 11–12; citing Max Müller).

https://doi.org/10.1017/lsi.2020.1 Published online by Cambridge University Press

challenge.[118] Even if the justices did not fully return to the earlier, broader standard, something in between the two extremes would have allowed for a fuller consideration of devotee beliefs and the extent to which they bump up against constitutional values like equality and nondiscrimination. Or, and even without returning to a broader essential practices analysis, the plurality might have followed the leads of *both* Justice Chandrachud and Justice Nariman by engaging more thoroughly—and more honestly—with the beliefs and practices of Ayyappan devotees. This would have mitigated, if not wholly avoided, the triple indignity of telling devotees they had *no* unique identity, they misunderstood the (Hindu) identity they *did* have, and that a practice they believed to be crucial to their faith would henceforth be prohibited. It would also have signaled to future benches that the essential practices doctrine means what it says: "what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself."

Beyond these options inspired by the other *IYLA* majority opinions, the plurality might have conducted some fresh fact-finding in order to build on the writ petitions and affidavits filed by the *IYLA* parties and the paltry record assembled by the Kerala High Court in *Mahendran*. To be sure, Justice Nariman is correct when he states that "a writ petition filed under either Article 32 or Article 226 is itself not merely a pleading, but also evidence in the form of affidavits that are sworn."[119] It is less clear that "[t]he facts, as they emerge from the writ petition and the aforesaid affidavits, are sufficient to dispose of this writ petition on the points raised before" the Court, if disposition requires a fair consideration of *all* parties' perspectives.[120] Justice Nariman, for his part, seems to think that materials submitted by "the Petitioners[,] … the Board, and by the Thanthri's affidavit" are more than adequate.[121]

Finally, the plurality might have roused itself sufficiently to devise some sort of compromise approach to the problem of women's entry along the lines of the Court approach in the 1958 case, *Venkataramana Devaru*, in which the justices reinterpreted textual principles in order to allow Dalit devotees limited access to a Hindu temple.[122] This is not because *Devaru* is an ideal approach, much less one that is more likely to have pleased the religious actors in question than *IYLA* pleased Ayyappan devotees. It is because *Devaru* exemplified a Court truly grappling with the conflicting demands imposed on it by the Constitution to both respect religious life as a private

118. Note 96, *supra*.

119. *IYLA*, Writ Petition (Civ.) No. 373 of 2006, para. 176 (Nariman, J.).

120. Ibid, para. 177.

121. Ibid, para. 176.

122. Note 81, *supra*. Fuller's description of the opinion is apt: "'exclusion' was subtly redefined as 'insignificant participation,' and the temple-entry legislation was then said to effect the elimination of the 'anomaly' whereby Harijans could benefit from the worship, but could not take an equal part in it. At the same time, however, the judgment declared that temple-entry legislation did not affect the restrictions which applied to all members of the public, such as their equal debarment from the innermost shrines." Fuller is entirely aware of the rather creative exegesis this reading involves: "[a]t first sight, the outcome might look absurd, because no one could seriously claim that the Agamas really sanction the equal right of entry." His response, which I do not entirely disagree with, is that such exegesis to "recover" original truths is no different from the kind of exegesis done by non-judicial Hindu reformers. What is more relevant for our current purposes is the *Devaru* Court's effort to devise some kind of solution, however imperfect it may be, that acknowledges the legitimate constitutional claims of *both* sides to the dispute (Fuller 1988, 234).

https://doi.org/10.1017/lsi.2020.1 Published online by Cambridge University Press

(or semiprivate) concern of sovereign citizens and to reform religious life where it impinged on other constitutional values. India's complicated approach to religion-state relations requires a Court that is willing to do the hard and sometimes risky work of being creative, but the *IYLA* majority, to say nothing of the plurality, did not live up to that requirement.

Moreover, this last option would have been even more feasible in the circumstances surrounding *IYLA* than it was in *Devaru*: as the *Mahendran* record indicates, there has been considerable dispute over just how and when the ban on women's entry applies.[123] At least as recently as the 1990s it does not appear that Sabarimala's *tantri* and some other supporters of the ban affirmatively believed it was applicable year-round; indeed, the *Mahendran* Court actually extended the ban, from April and November–January to the entire year. Relatedly, there appears to have been some discussion during the *Mahendran* hearings as to whether women in the prohibited age range were permitted to enter the temple via a secondary entrance, alongside other pilgrims who did not carry the sacred *irumudikettu* bundle on their heads. All of this could have been taken into consideration by the Court if the Court had bothered to engage in fresh fact-finding.

CONCLUSION

The narrative above ought to be especially familiar to scholars of US constitutional law because it bears broad similarities to the afterlife of a famous decision by the American Supreme Court: *Brown v. Board of Education*.[124] *Brown* was long-sought and much-celebrated, and it continues to occupy a hallowed space in American jurisprudence.[125] Its outcome, in particular, is now politically unassailable. However, and starting soon after it was announced, commentators across the ideological spectrum took issue with the Court's reasoning, arguing variously that it was "weak," that it did not "really turn … upon the facts," and that—at the very least—it "may be headed for … irrelevance" (Bork 1990, 75; Wechsler 1959, 33; Bickel 1978, 151). India is not the United States and *IYLA* is not *Brown*, but the Indian case has all the makings of teaching *Brown*'s lesson, namely, that winning good outcomes through bad reasoning should be sobering rather than satisfying. If anything, *IYLA* offers the stronger warning, written as it was by a generally progressive *institution* (rather than a peculiarly progressive iteration of a generally conservative institution) and under the aegis of very different legal charter.

When it comes to religious freedom, the Indian Court is left to uphold a constitutional vision of faith as neither formally established in the public life of the nation nor as relegated to the strictly private lives of citizens. It is a hard balance to strike, and like most median positions it is one that will very often please no one. Still, a Court that pleases no one is better than a Court that consistently sees and hears some to the

123. *Mahendran*, AIR 1993 Ker 42, para. 43.

124. Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

125. Various prominent legal scholars attesting to *Brown*'s "most-favored opinion status," include Jack Balkin, Sanford Levinson, Michael McConnell, Richard Posner, Michael Klarman, and Louis Michael Seidman, among others (Snyder 2000, 384–85 nn. 4–5).

https://doi.org/10.1017/lsi.2020.1 Published online by Cambridge University Press

exclusion of others. In its dismissal of any unique features of Ayyappan worship and its assumption that true religion coheres with constitutional values, the *IYLA* Court chose to see Ayyappan devotees not as they presented themselves (and to disagree with them anyway) but to rely on its own interpretations (while claiming to do otherwise).

The ensuing erasure is at least as great as the one effected by the prohibition of Sabarimala's ban. It ignores the fact that the Court speaks for, and to, those citizens whose lives it changes as much as it does those who sought the change. It facilitates criticisms of India's unusual approach to religious freedom that, though hardly unwarranted, may inspire simplifications or adoptions that are no more suited to the country's unique circumstances and history than existing approaches like the essential practices doctrine. And, because of both India's common law heritage and the greater authority within that common law context of constitutional benches like the one that decided *IYLA*, the erasure of devotee perspectives compounds this problem for future jurists and litigants.

In the end, Ayyappan devotees were effaced from a judgment about belief because of the Supreme Court's desire to acknowledge the rights and voices of women who were rendered similarly invisible in an earlier judgment about women. The Kerala High Court's verdict in *Mahendran*, though it produced no protests or threats of suicide, was no more successful at hearing competing claimants speak. But there are corrections, and then there are overcorrections. A Court that decides between opposing claims in spite of, rather than in the absence of, the strongest versions of those claims will be able to pursue its reformist agenda without needing to call any of the parties who appear before it "just Hindus."

REFERENCES

Appadurai, Arjun, and Carol Appadurai Breckenridge. "The South Indian Temple: Authority, Honour and Redistribution." *Contributions to Indian Sociology* 10, no. 2 (1976): 187–211.

Azad, Nikita. "'A Young Bleeding Woman' Pens an Open Letter to the 'Keepers' of Sabrimala Temple." *Youth Ki Awaaz*, Nov. 20, 2015a. https://www.youthkiawaaz.com/2015/11/open-letter-to-devaswom-chief-sabrimala.

——. "#HappyToBleed: An Initiative Against Sexism." *Countercurrents*, Nov. 23, 2015b. https://www.countercurrents.org/azad231115.htm.

Bhatia, Gautam. *The Transformative Constitution: A Radical Biography in Nine Acts*. Noida, Uttar Pradesh, India: HarperCollins India, 2019.

Bickel, Alexander M. *The Supreme Court and the Idea of Progress*. New Haven, CT: Yale University Press, 1978.

Bork, Robert H. *The Tempting of America: The Political Seduction of the Law*. New York: Touchstone, 1990.

British Broadcasting Corporation. "Sabarimala Temple: Indian Women Form '620km Human Chain' for Equality." *BBC*, January 1, 2019. https://www.bbc.com/news/world-asia-india-46728521.

Chandrachud, Chintan. "Constitutional Interpretation." In *The Oxford Handbook of the Indian Constitution*. Edited by Sujij Choudhry, Madhav Khosla, and Prahap Bhanu Mehta, 73–93. Oxford, UK: Oxford University Press, 2016.

Cohn, Bernard S. "Anthropological Notes on Law and Disputes in North India." In *The Bernard Cohn Omnibus*, 575–631. New Delhi: Oxford University Press, 2004.

Constituent Assembly Debates, Vol. IX. Sept. 18, 1949.

Crovetto, Helen. "Ananda Marga's Tantric Neo-Humanism." In *The Encyclopedia of Religion and Nature*. Edited by Bron Taylor and Jeffrey Kaplan, 47–49. London: Thoemmes Continuum, 2005.

https://doi.org/10.1017/lsi.2020.1 Published online by Cambridge University Press

Das Acevedo, Deepa. "Divine Sovereignty, Indian Property Law, and the Dispute over the Padmanabhaswamy Temple." *Modern Asian Studies* 50, no. 3 (2016a): 841–65

——. "Temples, Courts, and Dynamic Equilibrium in the Indian Constitution." *The American Journal of Comparative Law* 64, no. 3 (2016b): 555–82.

——. "Sovereignty and Social Change in the Wake of India's Recent Sodomy Cases." *Boston College International & Comparative Law Review* 40, no. 1 (2017): 1–26.

——. "Gods' Homes, Men's Courts, Women's Rights." *International Journal of Constitutional Law* 16, no. 2 (2018): 552–73.

J. Duncan M. Derrett. *Religion, Law, and the State in India*. New York: Free Press, 1968.

Desai, Ashok H., and S. Muralidhar, "Public Interest Litigation: Potential and Problems." In *Supreme But Not Infallible — Essays in Honour of the Supreme Court of India*. Edited by B.N. Kirpal, Ashok H. Desai, Gopal Subramaniam, Raju Ramachandran, and Rajeev Dhavan, 159–92. New Delhi: Oxford University Press, 2000.

Dhavan, Rajeev, and Fali S. Nariman. "The Supreme Court and Group Life: Religious Freedom, Minority Groups and Disadvantaged Communities." In *Supreme But Not Infallible — Essays in Honour of the Supreme Court of India*. Edited by B.N. Kirpal, Ashok H. Desai, Gopal Subramaniam, Raju Ramachandran, and Rajeev Dhavan, 159–92. New Delhi: Oxford University Press, 2000.

Doniger, Wendy. *On Hinduism*. New York: Oxford University Press, 2014.

Easwar, Rahul. "Why Sabarimala Has Restrictions on Women." *TheNewsMinute*, January 14, 2016. https://www.thenewsminute.com/article/why-sabarimala-has-restrictions-women-rahul-easwar-explains-37674.

Fuller, C.J. "Hinduism and Scriptural Authority in Modern Indian Law." *Comparative Studies in Society and History* 30, no. 2 (1988): 225–48.

Galanter, Marc. "Hinduism, Secularism, and the Indian Judiciary." *Philosophy East and West* 21, no. 4 (1971): 467–87.

General Department, Bundle 430: File 1165 (1946–49) and Bundle 425: File 688 (1946–49) Kerala State Archives, Kerala, India.

Indo-Asian News Service. "Verdict on Review in Sabarimala Case Pending." *Outlook India*, August 16, 2019. https://www.outlookindia.com/newsscroll/verdict-on-review-in-sabarimala-case-pending/1597749.

Jacob, Jeemon. "Sabarimala Protests Put Kerala on Hold, 200 Locations Blocked." *India Today*, October 10, 2018. https://www.indiatoday.in/india/story/sabarimala-protests-put-kerala-on-hold-200-locations-blocked-1360237-2018-10-10.

Jacobsohn, Gary Jeffrey. *Constitutional Identity*. Cambridge, MA: Harvard University Press, 2010.

Khaitan, Tarunabh "Equality: Legislative Review under Article 14." In *The Oxford Handbook of the Indian Constitution*. Edited by Sujij Choudhry, Madhav Khosla, and Prahap Bhanu Mehta, 699–719. Oxford, UK: Oxford University Press, 2016.

Mani, Lata. *Contentious Traditions: The Debate on Sati in Colonial India*. Berkeley, CA: University of California Press, 1998.

Mehta, Pratap Bhanu. "The Indian Supreme Court and the Art of Democratic Positioning." In *Unstable Constitutionalism: Law and Politics in South Asia*. Edited by Mark Tushnet and Madhav Khosla, 233–60. Cambridge, UK: Cambridge University Press, 2015.

Osella, Flippo, and Caroline Osella. "'Ayyappan Saranam': Masculinity and the Sabarimala Pilgrimage in Kerala." *Journal of the Royal Anthropological Institute* 9, no. 4 (2003): 729–54.

Pillai, Amrita, and Reshma Sekhar, "The Art of Writing a Judgement." *The Hindu*, July 24, 2018. https://www.thehindu.com/opinion/op-ed/the-art-of-writing-a-judgment/article24497762.ece.

Rig Veda. Translated by Ralph T. H. Griffith (1896). https://www.sacred-texts.com/hin/rigveda/rv01164.htm.

Robinson, Nick. "Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts." *The American Journal of Comparative Law* 61, no.1. (2013): 173–208.

Schonthal, Benjamin, Tamir Moustafa, Matthew Nelson, and Shylashri Shankar. "Is the Rule of Law an Antidote for Religious Tension? The Promise and Peril of Judicializing Religious Freedom." *American Behavioral Scientist* 60, no. 8 (2016): 966–86.

https://doi.org/10.1017/lsi.2020.1 Published online by Cambridge University Press

Scroll.in. "Sabarimala: Temple Priest, BJP and Congress Hail SC Decision to Refer Review Pleas to Larger Bench." *Scroll.in*, November 14, 2019a. https://scroll.in/latest/943676/sabarimala-temple-priest-bjp-and-congress-hail-sc-decision-to-refer-review-pleas-to-larger-bench.

——. "Sabarimala: Women Who Entered Shrine Have Received Death Threats, Say Police," *Scroll.in*, Feb. 4, 2019b. https://scroll.in/latest/911949/sabarimala-women-who-entered-shrine-have-received-death-threats-say-police.

Sen, Ronojoy. *Articles of Faith: Religion, Secularism, and the Indian Supreme Court*. New Delhi: Oxford University Press, 2010.

Snyder, Brad. "How the Conservatives Canonized *Brown v. Board of Education*." *Rutgers Law Review* 52, no. 2 (2000): 383–494.

Spivak, Gayatri. "Can the Subaltern Speak?" In *Marxism and the Interpretation of Culture*. Edited by Cary Nelson and Lawrence Grossberg, 271–313. Urbana, IL: University of Illinois Press, 1988.

Sullivan, Winnifred Fallers. *The Impossibility of Religious Freedom*. Princeton, NJ: Princeton University Press, 2005.

Supreme Court Observer. "Parties Involved: Sabarimala Temple Entry." *Supreme Court Observer*, December 24, 2019. https://www.scobserver.in/court-case/sabrimala-temple-entry-case.

Tharoor, Shashi. "Why Sabarimala Leaves Instinctive Liberals Like Me Torn." *ThePrint*, November 28, 2018. https://theprint.in/opinion/why-sabarimala-issue-leaves-instinctive-liberals-like-me-torn-shashi-tharoor/147759.

The News Minute. "Don't Complain If You Are Molested: Ex-TDB President on Women's Entry into Sabarimala." *TheNewsMinute*, October 13, 2018. https://www.thenewsminute.com/article/don-t-complain-if-you-are-molested-ex-tdb-president-women-s-entry-sabarimala-89907.

Times News Network. "Outrage on Facebook After Sabarimala Board Wants Machine That Scans Menstruating Women." *Times of India*, November 23, 2015. https://timesofindia.indiatimes.com/india/Outrage-on-Facebook-after-Sabarimala-board-wants-machine-that-scans-menstruating-women/articleshow/49888621.cms.

——. "Second Day Running, Sabarimala Is a No-Woman's Land." *Times of India*, October 19, 2018. https://timesofindia.indiatimes.com/india/second-day-running-sabarimala-is-a-no-womans-land/articleshow/66278647.cms.

Times Now Digital. "Sabarimala Verdict: Ayyappa Devotees Protest on Kerala Streets." *TimesNowNews*, October 14, 2018. https://www.timesnownews.com/india/article/sabarimala-verdict-ayyappa-devotees-protest-on-kerala-streets/299283.

——. "Sabarimala Row: For the First Time in a Month, Kanakadurga Meets Her Children." *TheNewsMinute*, February 17, 2019. https://www.thenewsminute.com/article/sabarimala-row-first-time-month-kanakadurga-meets-her-children-96856.

Tyler, Tom R. "Psychological Perspectives on Legitimacy and Legitimation." *Annual Review of Psychology* 57, no. 1 (2006): 375–400.

Uma, Saumya, and Deepa Das Acevedo "*S. Mahendran v. Secretary, Travancore Devaswom Board*." In *The Indian Feminist Judgments Project*. Edited by Aparna Chandra and Jhuma Sen. In author's possession, n.d.

Vishwanath, Apurva. "Trust Agrees to Let Women into Haji Ali Shrine's Inner Sanctum." *LiveMint*, October 24, 2016. https://www.livemint.com/Politics/4zfPdHpsBS5KoK63olNZvI/Haji-Ali-Dargah-to-Supreme-Court-Will-grant-access-to-women.html.

Wechsler, Herbert. "Toward Neutral Principles of Constitutional Law." *Harvard Law Review* 73, no. 1 (1959): 1–35.

CASES AND COURT DOCUMENTS CITED

US CASES AND DOCUMENTS

Brown v. Board of Educ. of Topeka, 347 U.S. 483 (1954).

Northern Securities Co. v. U.S., 193 U.S. 197 (1904).

https://doi.org/10.1017/lsi.2020.1 Published online by Cambridge University Press

INDIAN CASES AND DOCUMENTS
Acharya Jagdishwaranand Avadhuta v. Comm'r of Police, Calcutta, AIR 1984 SC 51 (1983).
ADM Jabalpur v. Shivkant Shukla, (1976) 2 SCC 521.
Comm'r of Police, Calcutta v. Acharya Jagdishwaranand Avadhuta, Civ. App. No. 6230 of 1990 SC (Mar. 11, 2004).
Durgah Comm., Ajmer v. Syed Hussain Ali, AIR 1961 SC 1402.
Indian Young Lawyers Ass'n v. State of Kerala, Brief of Respondent No. 19 (Raja of Pandalam), WP (Civil) No. 373 of 2006 SC (July 26, 2017).
Indian Young Lawyers Ass'n v. State of Kerala, Brief of Intervenor-Applicant No. 30 of 2016 (People for Dharma), Writ Petition (Civ.) No. 373 of 2006 SC (on file with author).
Indian Young Lawyers Ass'n v. State of Kerala, Writ Petition by Indian Young Lawyers Association, Writ Petition (Civ.) No. 373 of 2006 SC.
Indian Young Lawyers Ass'n v. State of Kerala, Brief of Intervenor-Applicant No. 30 of 2016 (People for Dharma) in Writ Petition (Civ.) No. 373 of 2006 SC.
Indian Young Lawyers Ass'n v. State of Kerala, Brief of Respondent No. 6 (Nair Service Society) in Writ Petition (Civ.) No. 373 of 2006 SC.
Indian Young Lawyers Ass'n v. State of Kerala, Writ Petition (Civ.) No. 373 of 2006 SC (Sept. 28, 2018).
In re Indian Young Lawyers Ass'n v. State of Kerala and *In re* Nikita Azad (Arora), Intervention Appl. No. 10 of 2016 in Writ Petition (Civ.) No. 373 of 2006 SC.
Kesavananda Bharati Sripadagalvaru v. State of Kerala, (1973) 4 SCC 225.
Nat'l Legal Servs. Auth. v. Union of India, Writ Petition (Civ.) No. 604 of 2013 SC (Apr. 15, 2014).
Navtej Singh Johar v. Union of India, (2018) SCC OnLine SC 1350.
Niaz v. State of Maharashtra, PIL No. 106 of 2014 HC Bom (Aug. 26, 2016).
Puttaswamy v. Union of India, (2017) SCC OnLine SC 996.
S. Mahendran v. The Secretary, Travancore Devaswom Board, AIR 1993 Ker 42.
Shafin Jahan v. Asokan K.M., Crim. App. No. 366 of 2018 (Mar. 8, 2018).
Shastri Yagnapurushdasji v. Muldas Bhudardas Vaishya, AIR 1966 SC 1119.
S.P. Mittal v. Union of India, (1983) 1 SCR 729.
Sri Venkataramana Devaru v. State of Mysore, AIR 1958 SC 255 (1957).
Suchita Srivastava v. Chandigarh Admin., (2009) 9 SCC 1.
The Comm'r, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Shirur Mutt, AIR 1954 SC 282.

STATUTES CITED

India Const. Part III: Fundamental Rights, Arts. 15, 25, 26.

https://doi.org/10.1017/lsi.2020.1 Published online by Cambridge University Press