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Freedom of Religion and Belief in India and Australia: An Introductory Comparative Assessment of Two Federal Constitutional Democracies

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Abstract

This article considers the freedom of religion and belief ("free exercise") in two secular federal constitutional democracies: India and Australia. Both constitutional systems emerged from the former British Empire and both continue in membership of the Commonwealth of Nations, which succeeded it. However, the similarities end there, for while both separate church and state, and protect free exercise, they do so in very different ways. On the one hand, the Indian Constitution contains express provisions which comprehensively deal with free exercise. On the other hand, while one finds what might appear a protection for free exercise in the Australian Constitution, that protection is far from comprehensive. Instead, unlike its Indian counterpart, the Australian federal democracy depends upon a piecemeal collection of Constitutional, legislative, and common law provisions which, when taken together, seem to achieve plenary protection for free exercise. Still, while India protects free exercise within a comprehensive constitutional framework, and while Australia does so in a disjointed and fragmentary way, both arrive at the same place: a constitutionalism characterized by secularism/separation of church and state combined with a corresponding comprehensive protection for free exercise.

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Introduction

Freedom of religion and belief ("free exercise") continues to attract international attention. In case after case in various jurisdictions,[1] appellate courts give shape and structure to this keystone right and its role in ensuring protection for the panoply of fundamental rights and freedoms.[2] Justice Kennedy, in his very last opinion, delivered in the U.S. Supreme Court decision in *Trump v. Hawaii*, provides this eloquent summary:

1. *See, e.g.*, Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018); Trump v. Hawaii, 138 S. Ct. 2392, 2392 (2018); *see also* Law Soc'y of B.C. v. Trinity W. Univ., [2018] S.C.R. 32 (Can. B.C. S.C.C.); Trinity W. Univ. v. Law Soc'y of Upper Can., [2018] S.C.R. 33 (Can. B.C. S.C.C.); Bundesarbeitsgericht [BAG] [Federal Labor Court] Apr. 17, 2018, ENTSCHEIDUNGEN DES BUNDESARBEITSGERICHTS [BAGE] 257 (Ger.), *translated in* http://curia.europa.eu/juris/document/document.jsf?text=&docid=201148&doclang=EN; *In re* N. Ir. Human Rights Comm'n for Judicial Review (2018) UKSC 27 (appeal taken from N. Ir.).

2. Keith Thompson, *Freedom of Religion and Freedom of Speech: The United States, Australia and Singapore Compared*, 6 GLOBAL SCI. & TECH. FORUM J.L. & SOC. SCI. 1, 2–4 (2017).

> The First Amendment prohibits the establishment of religion and promises the free exercise of religion. From these safeguards, and from the guarantee of freedom of speech, it follows there is freedom of belief and expression. It is an urgent necessity that officials adhere to these constitutional guarantees and mandates in all their actions . . .[3]

When combined with the protection for free exercise, the prohibition on the establishment of a state religion constitutes the foundational right upon which all other fundamental rights and freedoms depend.[4] Thus, "[f]or the seeker of religious truth…religious freedom creates the conditions, the 'constitutional space,' for investigation and the pursuit of truth."[5] Free exercise of religion itself "embraces two concepts,—freedom to believe and freedom to act;"[6] "[i]t is . . . because of the close linkage of expression [action] to the inner domain of 'thought, conscience and religion', and thereby to the core of human dignity, that freedom of expression is so important in the constellation of constitutional and human rights."[7] Free exercise of religion and the freedom to believe (the internal forum of conscience) and to act on one's beliefs (the external forum that occurs in the "public square") therefore sit at the very core of the matrix of fundamental human rights and freedoms recognized and protected in most western liberal systems.

It is unsurprising, then, that the right to free exercise finds protection both in international human rights instruments and

3. *Trump*, 138 S. Ct. at 2424.

4. *See generally* Brett G. Scharffs, *Why Religious Freedom? Why the Religiously Committed, the Religiously Indifferent, and Those Hostile to Religion Should Care*, 2017 B.Y.U. L. REV. 957 (2017).

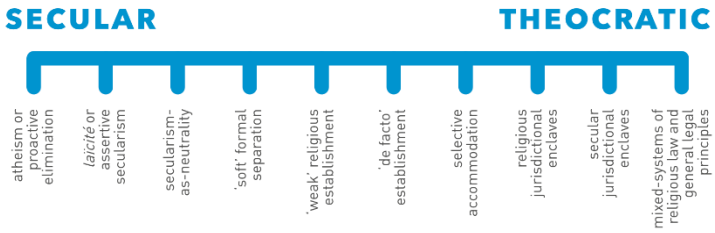
5. *Id.* at 958 n.2 (footnote omitted).

6. Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940).

7. W. COLE DURHAM, JR. & BRETT G. SCHARFFS, LAW AND RELIGION: NATIONAL, INTERNATIONAL, AND COMPARATIVE PERSPECTIVES 165 (Aspen Publishers 2010).

in national constitutions.[8] Figure 1 below illustrates the continuum of constitutional approaches to free exercise, along which the approaches of various nations could be plotted; at one end, secular states, and at the other, theocratic.

Figure 1: **Continuum of Constitutionalism**[9]



At one end of this continuum one finds those nations that take a secular approach to religion with some form of separation between church and state and a protection for free exercise of religion. At the other end lies theocracy where the church and state are fused or synthesized. At the secular end of the continuum, further specificity is possible amongst four possible variants of secularity, listed from most secular to most theocratic: (i) those nations which practice state atheism or active elimination of religion from the public square; (ii) laïcité, or assertive secularism, (iii) secularism as neutrality, and (iv) 'soft' formal separation. At the middle of the continuum one finds weak religious establishment and *de facto* establishment, and so on through an additional four gradations of theocracy or synthesizing of church and state.

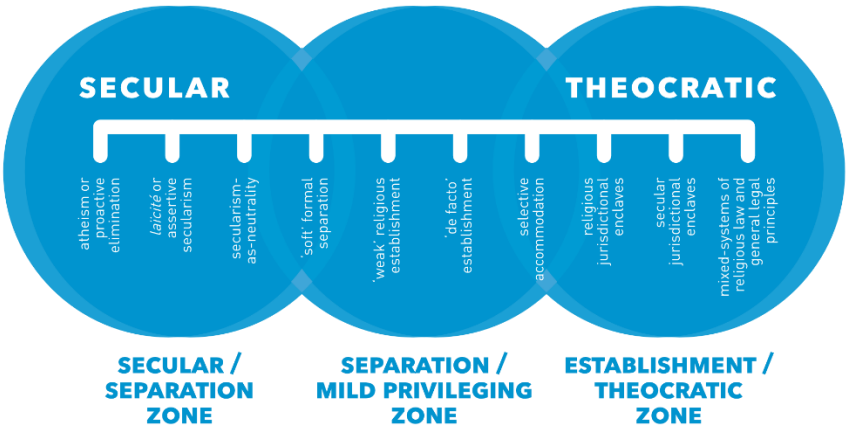
Yet, when attempting to define any one nation, it becomes clear that the constitutional approach to religion taken in most states oscillates around a number of points, or zones of the continuum. No precise description sufficiently captures how a

8. *See, e.g.*, U.S. CONST. amend. I; Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11, § 2(a)–(b) (U.K.); International Covenant on Civil and Political Rights, March 23, 1976, 999 U.N.T.S. 171; G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at 18 (Dec. 10, 1948).

9. *See* Paul Babie, *Religion and Constitutionalism: Oscillations Along a Continuum*, 39 J. RELIGIOUS HIST. 123, 130 (2015).

nation uses constitutionalism to mediate the relationship between religion and state.[10] Instead, what one finds are three zones: (i) Secular/Separation; (ii) Separation/Mild Privileging; and (iii) Establishment/Theocratic. These zones are further outlined in Figure 2 below.

Figure 2: **Oscillation and Zones Along the Continuum of Constitutionalism**[11]



The United States, for instance, while certainly at the Secular end of the continuum, probably sits much closer to its center than one might otherwise think. Indeed, the United States very likely ends up within the Separation/Mild Privileging Zone. In short, what one might assume about a nation's treatment of religion is not always the reality upon a full examination of constitutional and other legal texts and their interpretation by the courts.[12]

In this article, we consider two federal constitutional democracies, India and Australia, which best fit at the secular end of the continuum within the Secular/Separation Zone because they actively separate church and state and protect the free exercise of religion. Moreover, both constitutional systems

10. *See generally id.* at 130.
11. *Id.* at 135.
12. *Id.* at 124–37.

emerged from the former British Empire and both continue membership of the Commonwealth of Nations, which followed the end of the Empire.[13] However, the similarities end there, as they achieve Secular/Separation of church and state in very different ways.

Part I of this article focuses on India's Constitution, which contains express provisions that comprehensively protect free exercise. Part II demonstrates that while one finds what might appear a protection for free exercise in the Australian Constitution, such protection is far from comprehensive. Instead, as shown in this Article, unlike its Indian counterpart, the Australian federal democracy depends upon a piecemeal collection of Constitutional, legislative, and common-law provisions which, when taken together, seem to achieve plenary protection for free exercise. The introductory comparative assessment presented here demonstrates that while India protects free exercise in a comprehensive constitutional protection, and while Australia does so in a disjointed and fragmentary way, both arrive at the same place: a constitutional secular/separation in substance, ensuring a separation of church and state with a corresponding comprehensive protection for free exercise.

I. India

A. Secular Federation

As it was prior to independence, India today is home to multiple religious communities.[14] It was the unity of those religions that led the fight against discrimination and the establishment of basic rights relating to life and liberty, specifically free exercise.[15] However, that struggle for freedom

13. W. DAVID MCINTYRE, THE COMMONWEALTH OF NATIONS: ORIGINS AND IMPACT, 1869–1971 (U of Minn. Press, 1977).

14. Press Release, WIN-Gallup Int'l, Global Index of Religion and Atheism 14 (2012), https://sidmennt.is/wp-content/uploads/Gallup-International-um-trú-og-trúleysi-2012.pdf (explaining that India is the 18th most religious country in the world according to a 2012 survey, which found that at least 81 percent of Indians claim to have religious sentiments).

15. *Id.* at 14.

left behind two nations.[16] The first, India, afforded its citizens religious freedom.[17] The other, Pakistan, was left without it. As the Indian independence movement came closer to the realization of the Indian Constitution, a combination of the agitation for religious supremacy among certain groups, the separation of electorates, and the partition movement, made it more urgent to declare India a secular state.[18] It is well established that India's struggle against British rule was fought on the basis of equality for all faiths and their followers.[19] Characterized by religious diversity, the Indian independence movement led to the establishment of various religious protections in the Indian Constitution—some of which addressed specific religious traditions—giving birth to a concept of secularism that differs from the way in which the rest of the world understands it.[20]

India is primarily a secular country.[21] While it is true that the Indian Constitution established state secularism, nowhere does it define the concept of secularism. This does not mean that it is undefinable and ambiguous; the concept is based upon certain postulates,[22] such as an implied prohibition on an official religion and on the state recognition of a church or religion, among others. Free exercise as a right finds its place in Part 3 of the Indian Constitution, in the form of a guarantee against discrimination on the ground of religion.[23] Thus, the Indian

16. 1 DURGA D BASU, SHORTER CONSTITUTION OF INDIA 4–7 (14th ed., LexisNexis Butterworths Wadhwa Nagpur 2009); *see also* M.P. JAIN, INDIAN CONSTITUTIONAL LAW 14 (5th ed., Wadhwa Nagpur 2007).

17. BASU, *supra* note 16; JAIN, *supra* note 16, at 14.

18. BASU, *supra* note 16; JAIN, *supra* note 16, at 14.

19. Tahir Mahmood, *Professedly Secular vs. Conspicuously Communal*, HINDU (May 1, 2014, 12:50 AM), http://www.thehindu.com/opinion/op-ed/professedly-secular-vs-conspicuously-communal/article5963508.ece.

20. *Id.*

21. S R Bommai v. Union of India, (1994) 3 SCC 1 (India); *see also* P.M. BAKSHI, THE CONSTITUTION OF INDIA 4 (13th ed., Universal Law Publ'g 2015).

22. JAIN, *supra* note 16, at 14.

23. Part 3 of the Indian Constitution, which deals with 'Fundamental Rights', was discussed for as many as 38 days in the drafting process. SUBHASH C. KASHYAP, OUR CONSTITUTION: AN INTRODUCTION TO INDIA'S CONSTITUTION AND CONSTITUTIONAL LAW 94 (5th ed., Nat'l Book Trust 2011). B.R. Ambedkar, Minister of Law and Justice, described it as "the most criticized part." *Id.*

state is constitutionally bound to treat all religions equally.[24]

The secular character was debated greatly in the Constituent Assembly; Professor K. T. Shah advocated in favor of inclusion of the words *secular*, *federal*, and *socialist* in Article 1 of the Indian Constitution:

> As regards the Secular character of the State, we have been told time and again from every platform, that ours is a secular State. If that is true, if that holds good, I do not see why the term could not be added or inserted in the constitution itself, once again, to guard against any possibility of misunderstanding or misapprehension. The term 'secular', I agree, does not find place necessarily in constitutions on which ours seems to have been modelled. But every constitution is framed in the background of the people concerned. The mere fact, therefore, that such description is not formally or specifically adopted to distinguish one state from another, or to emphasis [sic] the character of ourstate [sic] is no reason, in my opinion, why we should not insert now at this hour, when we are making our constitution, this very clear and emphatic description of that State.[25]

The amendment was not accepted by B. R. Ambedkar, then Minister of Law and Justice.[26] After a long debate on the meaning of *secular*, the Indian Constitution was enacted and enforced on January 26, 1950 without explicit reference to it. It was not until 1976 that *secular* was inserted into the Preamble to the Indian Constitution. The object of the insertion of the word was to make explicit the principle of secularism. However, the secular nature of the Indian Constitution was already embodied in the enacting provisions under Articles 25–30. The

24. *Id.* at 94.

25. 7 CONSTITUENT ASSEMBLY DEBATES (PROCEEDINGS) 5 (Nov. 15, 1948), http://164.100.47.194/loksabha/writereaddata/cadebatefiles/C15111948.pdf.

26. *Id.* at 9.

debate on the secular character of the Indian Constitution has treated Indian secularism variously, from an implicit principle to an explicit term. However, the leading judgments of the Supreme Court of India lend this debate clarity. On the basis of the relevant cases, a conclusion can be drawn that secularism was the original constitutional principle. Secularism did not exist *in degree*; the implicit-versus-explicit debate could not, therefore, either lower or raise the constitutional sanctity afforded to this value. In 1973, the Supreme Court of India dealt with the word *secular* in *Bharati v. State of Kerala*, and held that *secularism* is part of the basic structure of the Indian Constitution, unamendable by the Parliament of India under its amending power: Article 368 of the Indian Constitution.[27] In 1975, the Supreme Court of India in *Gandhi v. Narain* explained the basic feature of secularism to mean that "[t]he State shall have no religion of its own and all persons shall be equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion."[28]

These interpretations of secularism by the Supreme Court in various cases leave no doubt as to the conclusion that the Indian Constitution provides for a fundamentally secular state. This state secularism is supported structurally from within, and beyond, the fundamental document of the state. Additionally, debates about the source of this secularism are obviated by the constitutional structure. In short, as governed by its Constitution, in accordance with the principle of the rule of law, India prohibits even a parliamentary majority to destroy the Indian guarantee of secularism.[29] This places India among other countries which forbid official religion: the United States,[30]

27. Bharati v. State of Kerala, (1973) 4 SCC 225, 307, 316, 518, 1480 (India).

28. Gandhi v. Narain, (1975) 2 SCC 159, 664 (India).

29. Bommai v. Union of India, (1994) 3 SCC 1 (explaining that secularism is part of the basic structure of the Indian Constitution, a theory propounded in *Bharati* by 13 judges); *see also Bharati*, 4 SCC 225.

30. *See, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947) ("The 'establishment of religion' clause of the First Amendment means at least this: Neither a State nor the Federal Government can set up a church . . .. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance.").

Australia,[31] and France, with its doctrine of *laïcité*.[32] To reverse Lord Burleigh's famous maxim, Indian secularism could never be ruined by a parliament.[33]

B. Indian Constitution

As has been shown, secularism is one of the basic structural components of the Indian Constitution. It is part of the original structure and not an extension of any part or component of that structure. Since 1973, secularism was interpreted and expounded, but not invented by the Supreme Court. The foundations of secularism are found primarily in the provisions of Articles 25–28 of the Indian Constitution. And in other provisions, secularism is given a strong role; for example, Articles 29 and 30 address the rights of cultural and educational rights of minorities, enshrine freedoms of conscience, profession, practice, and propagation.

Article 25 provides that "all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate" their religion.[34] However, this right, like other rights, is not absolute. The State may put reasonable restrictions upon the exercise of such rights on the grounds of public order, morality, or health. Article 26 extends the protection to the freedom to manage religious affairs. As with Article 25, the freedom to manage religious affairs is not absolute. The State can curtail this freedom, too, on the same grounds. Read together, the provisions extend their protection to matters of faith, doctrines, or belief, as well as acts done in pursuance of religion, and, therefore, contain a guarantee for rituals, observances, ceremonies, and modes of worship, which

31. *Australian Constitution* s 116 (prohibiting the Federal Parliament from establishing an official religion and from prohibiting the free exercise of religion. This is discussed further in the Part II of this article).

32. 1958 CONST. 1 (Fr.) (explaining that Laïcité is a core concept of the French Constitution. Article 1 states that France is a secular republic: "La France est une République indivisible, laïque, démocratique et sociale.").

33. WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 161 (21st ed. 1857) ("England could never be ruined but by a parliament").

34. INDIA CONST., art. 25.

are an essential or an integral part of religion.[35]

Articles 24 and 25 ensure both an internal and an external freedom for practicing religion. This is an individual freedom that belongs to everyone, so the freedom of one cannot encroach upon a similar freedom belonging to another.[36] Because the State must maintain secularity, any such encroachment is a State concern. This freedom is given by the Indian Constitution, and it is the Constitutional duty of the State to ensure that the persons entitled to the freedom must enjoy it. The State cannot sit as a spectator in such situations of interreligious tension by saying that it is secular. That the State is secular means that it may have equal faith in all the religions, or that it may have no religion; it must, in other words, maintain neutrality. Unlike the State, an individual may have faith in a religion in accordance with his or her choice, or he or she may opt not to choose any religion. In both situations, the constitutional guarantee of faith extends to him or her. In the Indian framework, then, the individual enjoys two rights: religion and secularism. Both are available to the individual, but because it is bound to be secular, the State does not have a choice. Therefore, under the secular obligations of the Indian Constitution, the State must administer its duty in affairs of religion (faith and/or acts which are an essential part of the religion) concerning any individual or group of individuals.

To retain the secular character of the Indian Constitution, free exercise is ensured by giving internal and external freedom to individuals to practice the essential parts of one's religion. In addition to this, Article 27 establishes a general policy that any money paid from public funds for promoting or maintaining any particular religion not be taxed.[37] Further, Article 28 provides for a freedom to attend religious instruction or to worship in certain educational institutions. Again, by classifying the institutions of education, the secular character of the State has

35. Comm'r of Police v. Avadhuta, (2004) 12 SCC 770, 782–83 (India) (stating "to persons believing in religious faith, there are some forms of practicing the religion by outward actions which are as much part of religion is [sic] the faith itself").

36. Stanislaus v. State of Madhya Pradesh, (1977) 2 SCR 611 (India).

37. INDIA CONST. art. 27 (prohibiting the levying of a tax of which the proceeds are meant specifically for payment of expenses for the promotion or maintenance of any particular religion or religious denomination).

been maintained. Article 28(1) provides that "No religious instruction shall be provided in any educational institution wholly maintained out of State funds."[38] However, there is no prohibition on the "study of religious philosophy and culture, particularly for having value based social life in a society which is degenerating…."[39]

1. Nature of the Right

Indian free exercise, internal and external, is a fundamental right enshrined in Part Three of the Indian Constitution. By making it a fundamental freedom, the framers of the Indian Constitution have treated this freedom as an indispensable human right. In the case of violation, a remedy lies under Articles 226 and 32 of the Indian Constitution. Article 32 vests the Supreme Court with jurisdiction in cases of a violation of fundamental rights. The right to religious freedom is based in the principle of secularism, which warrants the equal treatment of persons of all religions and of those who have no religion. Article 14 guarantees, in a general sense, the equality of all persons before the law in India. Therefore, the constitutional right to religious freedom is a particularized right that strikes against the generality of Article 14. This means that the nature of the right which ensures religious freedom is directed against arbitrariness and, being a basic structure of the Indian Constitution,[40] cannot be amended. It is, then, one of the basic components of the Indian rule of law, consistent with the principles of a just constitutional order.[41]

Secularism, a basic structure of the Indian Constitution, therefore has the following components:

- **Article 14:** general principle of equality before the law;[42]
- **Articles 15 and 16:** prohibition against discrimination on

38. *Id.* art. 25.

39. Roy v. Union of India, (2002) 7 SCC 368.

40. Bommai v Union of India, (1994) 3 SCC 1, 184; *see also* Sripadagalvaru v. State of Kerala, (1973) 4 SCC 225 (India).

41. *See generally* A. V. DICEY, THE LAW OF THE CONSTITUTION (8th ed. J.W.F. Allison ed. 1915).

42. INDIA CONST. art. 14.

the ground of religion;[43]

- **Articles 19 and 21:** freedom of speech and expression;[44]
- **Articles 25 to 28:** freedom of religious practices;[45]
- **Articles 29 and 30:** freedom of operation of educational institutions by linguistic and religious minorities;[46]
- **Articles 17 and 25(2)(b):** grounds for the State to make reforms within institutions of the Hindu religion;[47]
- **Article 44:** an aspiration for the State to enact uniform civil laws treating all citizens as equal throughout India;[48]
- **Article 48:** sentiments of majority of people towards cows and against their slaughter;[49]
- **Article 325:** equal ballots.[50]

With respect to the relationship between protections for equal treatment of citizens, and the constitutional principle of secularism, the Court's interpretation of two expressions in Article 14 is enlightening.[51] The Supreme Court, in *Srinivasa*

43. *Id.* at art. 15–16.

44. *Id.* at art. 19–21.

45. *Id.* at art. 25–28.

46. *Id.* at art. 29–30.

47. *Id.* at art. 17, 25(2)(b).

48. *Id.* at art. 44.

49. *Id.* at art. 48. This demonstrates the secular content of Indian constitutional law. In its wider sense, it also incorporates the notion of allowing animals fair and just treatment as a part of their natural rights. *See, e.g.*, Hanuma v. State of Telangana, (2017) Crl.R.C. 517 (India) ("[a] cattle which has served human beings is entitled to compassion in its old age when it has ceased to be milch or draught and becomes so-called 'useless'. It will be an act of reprehensible ingratitude to condemn a cattle in its old age as useless and send it to a slaughter house taking away the little time from its natural life that it would have lived, forgetting its service for the major part of its life, for which it had remained milch or draught. We have to remember: the weak and meek need more of protection and compassion."); *see also* BASU, *supra* note 16, at 651.

50. INDIA CONST. art. 325. (stating "[n]o person to be ineligible for inclusion in, or claim to be included in a special, electoral roll on grounds of religion . . .").

51. *Id.* at art. 14 (stating "[t]he State shall not deny to any person *equality before the law* or *equal protection of laws* within the territory of India.") (emphasis added).

Theatre v. Gov't of Tamil Nadu,[52] explains that the operation of the constitutional principle of equality before the law expressed in Article 14 establishes equality as a dynamic concept, and one which has many facets. One such facet is an obligation upon the State to bring about, through the machinery of law, a more equal society, as envisaged by the Preamble and Part 4 of the Indian Constitution.[53] This creates a State obligation to bring about a more equal society in respect of the social, economic, and political status of its citizens. While discharging this duty, the State ought to treat secularism as one of the tools of the machinery of law that may bring about equality.

2. Interpretation and Limitations

The framers of the Indian Constitution thought that religion aided the creation of an ordered society. Nevertheless, they assessed that throughout the world, irrespective of territorial boundaries, "[t]here [was] no modern and efficient constitution in the world which [was] based on a particular religion."[54] The right to free exercise, therefore, sought to balance two aims: first, the freedom for communities to practice religion in such a way that protected the spiritual well-being of each religious community, and, second, the secular interest in a state which could make laws to provide for the public welfare. The Indian constitutional protection for free exercise ensures citizens'

52. Srinivasa Theatre v. Gov't of Tamil Nadu, (1992) 2 SCR 164 (India).

53. INDIA CONST. pmbl. ("WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a [SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC] and to secure to all its citizens . . . EQUALITY of status and of opportunity"); *Id.* art. 39 (stating several "directive principles of state policy" aimed at achieving economic equalities among Indian citizens).

54. 2 CONSTITUENT ASSEMBLY DEBATES (PROCEEDINGS) 13 at ¶ 80 (Jan. 21, 1947), https://cadindia.clpr.org.in/constitution_assembly_debates/volume/2/1947-01-24; *see also* 3 CONSTITUENT ASSEMBLY DEBATES (PROCEEDINGS) 18 at ¶ 218 (Apr. 29, 1947), https://indiankanoon.org/doc/747690/ (distinguishing between 'religion' and 'creed,' Kamath states "I think the word religion is not comprehensive enough to include in its scope creed as well. For instance, a person may not accept any religion in the conventional or formal sense of the term, yet he may have a creed. A man may say that he has no religion, yet he may say that he is a rationalist or a free-thinker and that I suppose is a creed which anybody can profess and still he may say that he does not belong to the Hindu, Muslim or Sikh religion, or for the matter of that to any other religion.").

spiritual well-being by allowing them freely to profess, practice, and propagate their faith with free conscience.[55] On the other hand, due weight is given to public welfare by emphasizing the State secularism that the Indian Constitution seeks to realize. Therefore, free exercise is not an absolute, but qualified right. Accordingly, Articles 25 and 26 enumerate certain grounds upon which the State can restrict religious freedom, including: (a) public order, morality, health; (b) grounds in respect of other provisions of the Indian Constitution; (c) the regulation of non-religious activity associated with religious practice; (d) social welfare and reform; and (e) the openness of Hindu religious institutions of a public character to all classes of Hindus.[56]

One striking point in this system is that while the Indian Constitution guarantees religious freedom, the term *religion* is nowhere defined in the text. Religion is taken as a matter of faith and belief in a common meaning. Thus, the Supreme Court defines religion as:

> . . . a matter of faith with individuals or communities and it is not necessarily theistic. There are well known religions in India like Buddhism and Jainism which do not believe in God or in any Intelligent First Cause. A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but it would not be correct to say that religion is nothing else, but a . . . doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of *food and dress*.[57]

55. INDIA CONST. art. 25.

56. *Id.* at art. 25(2)(b) (allowing the state to make a law "providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.").

57. Comm'r of Hindu Religious Endowments v. Swamiar, (1954) SCR 1005 (India) (emphasis added).

The Court, while interpreting free exercise, observed that a "religion is not merely an opinion, doctrine or belief. It has its outward expression in acts as well."[58] Accordingly, the Indian Constitution not only protects religious *beliefs*, but also *acts* done in pursuance of those beliefs. However, if religious practices run counter to public order, morality, health, or a policy of social welfare upon which the state has embarked, such practices must give way.[59] The good of citizens as a whole prevails in any instance of conflict between the principles of the State and those of a particular religion.

3. Regulation of Religious Acts

Acts done in pursuance of religion for spiritual well-being are protected, but those done under the administration of a religious institution are not. Instead, they are covered by the secular functions of the State.[60] Therefore, no *mahant*,[61] *pujari*,[62] or trustee, in a religious place, can declare an area or particular practices to fall under the essential category of practices related to religion and, therefore, to be protected from interference. There is a clear line between religious practice and secular practice, each having different objectives. Therefore, activities like the (a) management of a temple, (b) maintenance of discipline, (c) order inside the temple, (d) control of activities of temple staff, or (e) payment of remuneration to them, are all secular concerns falling under state administration and can be regulated by the State's laws.[63] As regards offerings made in a temple, to share them is not a religious right, but a secular one,

58. Gandhi v. State of Bombay, (1954) SCR 1035 (India); *see also* Seth v. State of U.P., AIR 1957 All. 411 (India).

59. State of Bombay v. Mali, AIR 1952 BOM 84 (India).

60. Yatendrulu v. State of Andhra Pradesh, AIR 1996 SC 1414 (India); *see also* Visheshwara v. State of U. P. (1997) 2 SCR 1086 (India).

61. The *mahant* is a religious leader, commonly the leader of a temple or a monastery, in the Hindu and Sikh religions. JAIN, *supra* note 16, at 1262.

62. The *pujari* is a priest of the Hindu temple. *English translation of 'पुजारी'*, COLLINS, https://www.collinsdictionary.com/dictionary/hindi-english/पुजारी (last visited Feb. 7, 2019).

63. State of Orissa v. Khuntia, (1997) 8 SCC 422 (India).

held by *sevaks*,[64] by way of remuneration for their secular duties.[65]

The discussion above draws a distinction between fundamentally religious acts and another class of practices, which, though associated with religion, are not an integral and essential part of it. These practices find no protection under Articles 25–28 of the Indian Constitution. Such practices associated with religion are treated as a matter of public concern and may be the subject of state law under the secular Constitution. The Constitution expresses these limitations on the practice of religion as qualifications to the provisions which confer free exercise. Thus, a purportedly religious practice that goes beyond what might be considered integral to religion may be subject to State regulation pursuant to law as a matter of secular faith. For instance, in *Comm'r of Police v. Avadhuta*, the Supreme Court held that the *Tandava*, a divine dance performed in public places, is not to be considered an essential part of Ananda Marga, a religious philosophical movement with ties to Hinduism.[66] In *Faruqui v. Union of India*,[67] it was held that the mosque is not an essential part of the practice of Islam, and that *namaz*, Islamic prayer, can be offered anywhere, even in the open. Accordingly, in that case, it was held that the acquisition of land on which a mosque was built was not prohibited by the provisions of the Indian Constitution which establish free exercise.[68]

In *Quareshi v. State of Bihar*,[69] the Petitioner submitted that slaughter of cows on Eid al-Adha (the Islamic "Feast of Sacrifice") was an essential practice of his religion. It was contended that the sacrifice of cows on the feast day was enjoined by the Koran. Therefore, it was argued, the practice must be considered as an integral part of Islam. The Court, after reviewing the evidence, determined that the practice is not an

64. *Sevaks* are servants who provide services in the temple, and outside it, but under its management. *English translation of 'सेवक'*, COLLINS, https://www.collinsdictionary.com/dictionary/hindi-english (last visited Feb. 8, 2019).

65. *Khuntia*, 8 SCC 422.

66. Comm'r of Police v. Avadhuta, (2004) 12 SCC 770 (India).

67. Faruqui v. Union of India, (1994) 6 SCC 360 (India).

68. *Id*. at [96]–[97].

69. Quareshi v. State of Bihar, (1959) SCR 629 (India).

essential part of Islam. Therefore, the State could regulate the practice.

4. Protection of Individual Rights

As discussed above, free exercise is an individual right and belongs to every person. Therefore, the freedom of one person cannot encroach upon the same freedom of another.[70] To that end, the protection of the propagation of religion in Article 25(1) of the Indian Constitution does not grant a right "to convert another person to one's own religion but to transmit or spread one's religion by an exposition of its tenets."[71] In India, different religious communities follow different religious laws to deal with their particular affairs. Some religious laws and customs permit polygamy. In the case of Islam, men are permitted to have multiple wives, but Islamic law does not allow a woman to have multiple husbands. However, Section 494 of the Indian Penal Code 1860 makes it an offense for a person, having a living husband or wife, to marry another. A similar provision is also found in British law.[72] To avoid liability under Section 494 of the Indian Penal Code 1860, a person cannot claim protection because the religion he or she practices allows polygamy. Article 25 extends no such protection. In *Mudgal v. Union of India*,[73] the Supreme Court held that a Hindu man, being married to a Hindu wife, and who later converted to Islam, could not marry a second wife in Islamic law because that marriage would infringe the rights of the first Hindu wife. This shows that secular law prevails above religious law in important legislative areas.

It is clear, then, that the constitutional right to free exercise is not absolute. Rather, it is expressly qualified by limitations enumerated by the provisions from which the right itself is

70. Thomas v. Union of India, (2000) 6 SCC 224, 62 (India) (stating "[f]reedom guaranteed under Article 25 of the Constitution is such freedom which does not encroach upon a similar freedom of the other persons. Under the constitutional scheme every person has a fundamental right not merely to entertain the religious belief of his choice but also to exhibit his belief and ideas in a manner which does not infringe the religious right and personal freedom of others.").

71. Stanislaus v. State of Madhya Pradesh, (1977) 2 SCR 611, 616 (India).

72. Offences Against the Person Act 1861, 24 & 25 Vict. c. 100, § 57 (UK).

73. Mudgal v. Union of India, (1995) 3 SCC 635 (India).

sourced. And on a number of occasions, the Supreme Court of India has dealt with various conflicts between religious practices and interfering State laws, in which it has developed the limitations upon the right with reference not only to the religious aim of achieving spiritual well-being, but also to the policy of social welfare of the State. This was emphasized by the former Chief Justice of the Supreme Court, Ramesh Chandra Lahoti who, referring to the treatment of secular constitutions in religious thought, quoted a verse from the *Srimad Bhagavad Gita* ("Song of God"), one part of the great epic poem the *Mahabharata*, which is an important text in the Hindu faith:

> In *Shrimad Bhagvat Gita* Lord Krishna has said:
>
> > *Sarva dharmani parityajyam mamekam sharanam brajah:*[74]
> >
> > What is meant is – do practice and profess your religion, yet surrender to Me as I am Religion of all religions. Adapting this *shloka* to our Constitution, it can be said – our Constitution is Religion of all religions and unconditional surrender to the command of the Constitution, rising above the narrow dogmas can resolve our several issues.[75]

The emphasis that Lahoti places on Indian secularism shows that both individual religious freedom and the neutrality of the State towards religion remain fundamental principles of Indian constitutionalism. Thus, while the Indian federal democracy clearly resides at the Secular end of the Continuum of Constitutionalism in Figure 1 above, and the Secular/Separation Zone of Oscillation in Figure 2, it also provides for a robust, comprehensive protection for free exercise

74. A.C. BHAKTIVEDANTA SWAMI PRABHUPADA, BHAGAVAD-GITA: AS IT IS 749 (2d ed., Bhaktivendanta Book Trust-Mumbai 1989).

75. R. C. Lahoti, Chief Justice of India, Lecture on Constitutional Values Delivered in Celebration of Constitution Day at the Supreme Court (Nov. 26, 2017).

of religion. We turn next to consider the way in which Australia arrives at the same position on the continuum.

II. Australia[76]

A. Secular Federation

Like India, Australia, from its establishment as a constitutional federal democracy in 1901, has been a secular state. Unlike India, however, secularism is something that emerges largely from the conventions that led to the adoption of the text of the Australian Constitution itself as much as from judicial interpretation. We see this assurance emerge, then, from the interplay of competing visions for the Australian federation among the framers of the Constitution during the Constitutional Convention debates of the 1890s. Prior to that time, the colonies, which would ultimately federate to become the Australian States, were largely non-secular, adhering to one degree or another to the doctrines of the Anglican Church of England. It was during the debates that produced the Australian Constitution that some framers sought to make reference to God in the text of the draft constitution, while others sought to ensure a separation of church and state.[77] The secularity of the Australian federal system therefore begins with the Preamble to the Constitution, which reads: "WHEREAS the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established[.]"[78]

John Quick, one of the framers of the Australian

76. Parts of earlier versions of this section were previously published as Paul Babie, *Freedom of Religion in Australia: An Introductory Outline*, 13 AMITY L. REV. 1 (2017); Paul Babie, *The Concept of Freedom of Religion in the Australian Constitution: A Study in Legislative-Judicial Cooperative Innovation*, 1 QUADERNI DI DIRITTO E POLITICA ECCLESIASTICA 259 (2018).

77. *See generally* RICHARD ELY, UNTO GOD AND CAESAR: RELIGIOUS ISSUES IN THE EMERGING COMMONWEALTH 1891-1906 (Melbourne Univ. Press 1976).

78. *Australian Constitution* pmbl.

Constitution, and Robert Garran, the secretary of the framers drafting committee, in their annotated edition of the Australian Constitution, published contemporaneously with its promulgation in 1901,[79] wrote that "the Federal [Commonwealth] Parliament might, owing to the recital in the preamble, be held to possess power with respect to religion of which we have no conception. Consequently . . . the power to deal with religion in every shape and form should be clearly denied to the Federal Parliament."[80] Yet, if the State was to remain secular, how could this potential power be balanced as against the separation of church and state and the freedom of religious adherents to believe in and practice their faith? The framers sought to achieve this through the insertion of a clause within the substantive terms of the Constitution, which would check the power seemingly contained in the Preamble.

But would the protection against the Commonwealth power contained in the Preamble apply only to the Commonwealth (federal) government, or to the states as well? Answering this question involves a long and complex story running over the course of many years—ultimately, though, among the framers, it was Henry Higgins who "propos[ed] . . . a simple ban on religious legislation or religious tests by the Commonwealth, and was careful to emphasize that in this field existing State powers would be left intact . . . the States were left free [in the final form of the Constitution], if they wished, to legislate for religious intolerance."[81] Put simply, the framers ultimately concluded that, because the ostensible power to legislate with respect to religion contained in the Preamble was a Commonwealth power, the States need not be so limited. As such,

> If God were 'recognized,' a large number of good people would need to be reassured that 'their rights with respect to religion [would] not be interfered with' …. Higgins then alleged, 'the

79. JOHN QUICK & ROBERT RANDOLPH GARRAN, THE ANNOTATED CONSTITUTION OF THE AUSTRALIAN COMMONWEALTH 952 (Legal Books Sydney reprint 1976) (1901).

80. ELY, *supra* note 77.

81. *Id.*

> recognition of God was not proposed merely out of reverence; it was proposed for distinct political purposes under the influence of debates which have taken place in the United States of America.' In 1892 the United States Supreme Court had declared that country 'a Christian country', and this declaration had given rise to an intense political campaign to 'impose . . . a compulsory sabbath all through, in, and upon every state, and a lifting of the banner of those who opposed that movement' . . . . [E]xperience showed that the presence of a declaration of a religious character in the preamble might form the basis for attempts to pass legislation 'of a character which I do not think we intend to give the Federal Commonwealth power to pass…. I do not think that we ought to interfere with the right of the states to do anything they choose, if they think fit to do anything.'[82]

The framers ultimately accepted Higgins' position and included what is now Section 116 in the Australian Constitution.[83] The Australian Constitution, which came into effect on January 1, 1901, thus contains an assurance of state secularity. Yet, notwithstanding the protections found therein, comprehensive protection for free exercise in Australia involves the convergence of those protections with Commonwealth and state legislation. We now turn to consider the operation of the Australian Constitution as it concerns free exercise.

B. Australian Constitution

Two aspects of the Australian Constitution ensure the protection of free exercise: first, the provisions of Section 116, and, second, the parameters of the implied freedom of political communication. We consider each in turn.

82. *Id.* at 61–62.

83. Luke Beck, *Higgins' Argument for Section 116 of the Constitution*, 41 FED. L. REV. 393, 402 (2013).

1. Section 116

Section 116 provides that: "The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth."[84] At first blush, Section 116 seems a robust protection for free exercise, containing four separate guarantees: against the establishment of a state religion, prohibiting the imposition of religious observance, of free exercise, and of a religious test for holding an office of the Commonwealth government.

An application of Section 116 requires, first, that one determine what is meant by *religion*. While it dealt with the application of tax exemptions for religious organizations, the High Court in *Church of the New Faith v. Comm'r for Pay-Roll Tax*[85] established the legal definition of *religion* for the purposes of applying Section 116. That case contained three judgments offering three different definitions of religion. The first, typically taken as the controlling definition, is found in Mason A.C.J. and Brennan J's opinion, in which they established two criteria:

> First, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief, though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion.[86]

Justices Wilson and Deane set out five indicia: (i) "that the particular collection of ideas and/or practices involves belief in the supernatural," or being something that could not be perceived by the senses; (ii) "that the ideas relate to man's

84. *Australian Constitution* s 116.

85. *Church of the New Faith v. Comm'r of Pay-Roll Tax* (1983) 154 CLR 120 (Austl.).

86. *Id.* at 137.

nature and place in the universe and his relation to things supernatural;" (iii) "that the . . . adherents [accept certain ideas as] requiring or encouraging them to observe particular standards or codes of conduct or to participate in specific practices having supernatural significance;" (iv) "Adherents . . . constitute an identifiable group or identifiable groups;" and (v) The adherents themselves see the collection of ideas and/or, practices as constituting a religion.[87]

Justice Murphy provided the broadest definition:

> Religious freedom is a fundamental theme of our society. That freedom has been asserted by men and women throughout history by resisting the attempts of government, through its legislative, executive or judicial branches, to define or impose beliefs or practices of religion. Whenever the legislature prescribes what religion is, or permits or requires the executive or the judiciary to determine what religion is, this poses a threat to religious freedom. Religious discrimination by officials or by courts is unacceptable in a free society. The truth or falsity of religions is not the business of officials or the courts. If each purported religion had to show that its doctrines were true, then all might fail. Administrators and judges must resist the temptation to hold that groups or institutions are not religious because claimed religious beliefs or practices seem absurd, fraudulent, evil or novel; or because the group or institution is new, the number of adherents small, the leaders hypocrites, or because they seek to obtain the financial and other privileges which come with religious status. In the eyes of the law, religions are equal. There is no religious club with a monopoly of State privileges for its members. The policy of the law is "one in, all in".[88]

87. *Id.* at 164–77. For a summary, see Mark Darian-Smith, *Church of the New Faith v Comm'r for Pay-Roll Tax*, 14 MELB. U. L. REV. 539, 543 (1984).

88. *Church of the New Faith*, 154 CLR at 150.

Establishing that one's beliefs constitute a religion triggers the operation of Section 116, the application of which is then a matter of judicial interpretation. Early in the history of Australian federation, the Judicial Committee of the Privy Council ("J.C.P.C."), while still the final appellate court for Australia, suggested that Section 116 contained a guarantee of individual rights:[89]

> It is true that a Constitution must not be construed in any narrow and pedantic sense. The words used are necessarily general, and their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of the words changed, but the changing circumstances illustrate and illuminate the full import of that meaning. It has been said that "in interpreting a constituent or organic statute…, that construction most beneficial to the widest possible amplitude of its powers must be adopted". But that principle may not be helpful when the section is, as s 92 may seem to be, a constitutional guarantee of rights, *analogous to the guarantee of religious freedom in s 116*, or of equal right of all residents in all States in s 117. The true test must, as always, be the actual language used.[90]

Once the break with the J.C.P.C. had been effected between

89. *James v. Commonwealth* (1936) 55 CLR 1 (PC) (Austl.); *see also* Anthony Dillon, *A Turtle by Any Other Name: The Legal Basis of the Australian Constitution*, 29 FED. L. REV. 241 (2001) (describing the role of the United Kingdom Parliament and the JCPC. in the interpretation and amendment of the Australian Constitution prior to 1986).

90. *See James*, 55 CLR at 43–44 (emphasis added) (internal citations omitted).

1968 and 1986,[91] the High Court rejected this approach in *Black v. Commonwealth*.[92] There, the High Court affirmed that Section 116 "is not, in form, a constitutional guarantee of the rights of individuals…. Section 116 . . . instead takes the form of express restriction upon the exercise of Commonwealth legislative power."[93] This merely served to confirm how the High Court had interpreted Section 116. Applying a restrictive interpretation of the four guarantees greatly reduces the potential for it to provide a strong protection for free exercise.

Aside from finding that this is a limitation on power and not a guarantee of individual rights, there is also the textual limitation of Section 116, that it is directed only at Commonwealth, and not State action. Moreover, it must be noted that very little judicial attention has been given Section 116 over the course of Australian federation; indeed, the second guarantee, prohibiting the imposition of religious observance, has never been judicially considered. Of the remaining three guarantees, two, prohibiting establishment and a religious test for a Commonwealth office, have been considered in one case each. In *Black*, the High Court found that Commonwealth financial support for state religiously affiliated schools did not establish a state religion, finding that:

> [E]stablishing a religion involves the entrenchment of a religion as a feature of and identified with the body politic, in this instance, the Commonwealth. It involves the identification of the religion with the civil authority so as to involve the citizen in a duty to maintain it and the obligation of, in this case, the Commonwealth to patronize, protect and promote the established religion. In other words, establishing a religion involves its adoption as an institution of the

91. In 1986, the Australian Parliament legislated, with reciprocal legislation enacted by the British Parliament, to sever the Australian courts from the United Kingdom: *see Australia Act 1986* (Cth) (Austl.), and the *Australia Act 1986* c. 2 (UK), abolished appeals from the High Court of Australia to the Judicial Committee of the Privy Council in the U.K.

92. *Black v. Commonwealth*, (1981) 146 CLR 559, 605 (Austl.).

93. *Id.* at 605, 653.

> Commonwealth, part of the Commonwealth "establishment."[94]

And, while asked to address the issue in *Williams v. Commonwealth*,[95] the High Court refused to consider whether Commonwealth funding of school chaplains in state schools constituted the imposition of a religious test for a Commonwealth office.

The greatest judicial attention has been given to the free exercise guarantee. In three decisions—*Krygger v. Williams*,[96] *Adelaide Co. of Jehovah's Witnesses Inc. v. Commonwealth*,[97] and *Kruger v. Commonwealth*[98]—the High Court has effectively narrowed the scope of free exercise to a very small number of cases. In *Krygger* (later affirmed by *Jehovah's Witnesses* and *Kruger*), Griffith C.J. wrote that Section 116 protects against:

> Prohibiting the practice of religion—the doing of acts which are done in the practice of religion. To require a man to do a thing which has nothing at all to do with religion is not prohibiting him from a free exercise of religion. It may be that a law requiring a man to do an act which his religion forbids would be objectionable on moral grounds, but it does not come within the prohibition of sec 116.[99]

In other words, a legislative or executive act must have as its express purpose the infringement of free exercise so as to run afoul of Section 116. The *effect* of such an act is not enough to violate the free exercise guarantee. As such, the courts have rejected free exercise claims where: (i) compulsory peacetime military training offends the religious convictions of persons who

94. *Id.* at 582, 604, 612, 653.

95. *Williams v. Commonwealth* (2012) 248 CLR 156 (Austl.).

96. *Krygger v. Williams* (1912) 15 CLR 366 (Austl.).

97. *Adelaide Co. of Jehovah's Witnesses, Inc. v. Commonwealth* (1943) 67 CLR 116 (Austl.).

98. *Kruger v. Commonwealth* (1997) 190 CLR 1 (Austl.).

99. *Krygger*, 15 CLR at 369.

believe that military service is opposed to the will of God;[100] and (ii) the use of legislation for compulsory removal of Aboriginal children from their families prohibited them from access to and free exercise of their tribal religion.[101]

In practice, then, Section 116, as judicially interpreted, while providing protection against the sorts of infringements covered by the four guarantees, fails to provide a comprehensive and robust protection for free exercise of religion. Another guarantee, however, one judicially implied in the terms of the Australian Constitution, supplements the limited protections of Section 116. Moreover, these interpretations, when read in conjunction with the Preamble's words "humbly relying on the blessing of Almighty God,"[102] support the view that the text of the Australian Constitution, interpreted by the High Court, establishes a secular federation, albeit one closer to the center of the Continuum of Constitutionalism in Figure 1, and to the Secular/Separation Zone of Oscillation in Figure 2. Commentators describe the outcome of this process of express and implied constitutional provision as establishing fruitful interaction and cooperation,[103] more a "semi-permeable membrane"[104] or "imaginary wall"[105] than impenetrable barrier between church and state.

2. Freedom of Political Communication

Unlike the First Amendment to the United States Constitution, which provides that "Congress shall make no law. . .abridging the freedom of speech, or of the press,"[106] the Australian Constitution contains no such express protection. In

100. *Id.*

101. *Kruger*, 190 CLR at 1.

102. *Australian Constitution* pmbl.

103. TOM FRAME, CHURCH AND STATE: AUSTRALIA'S IMAGINARY WALL 7–9 (Univ. of New S. Wales Press Ltd., Carla Taines ed. 2006).

104. PETER MACFARLANE & SIMON FISHER, CHURCHES, CLERGY AND THE LAW 32 (Fed'n Press 1996) ("metaphorically, the flow of Commonwealth largesse to religious institutions is permitted; what is blocked is the reverse passage of religious entanglement with Commonwealth affairs") (citing Lemon v. Kurtzman, 403 U.S. 602, 613 (1971)).

105. *See generally* FRAME, *supra* note 103.

106. U.S. CONST. amend. I.

1977, however, Justice Lionel Murphy began foreshadowing the possible existence of a number of implied rights, such as political communication as captured in the First Amendment:

> Elections of federal Parliament provided for in the Constitution require freedom of movement, speech and other communication, not only between the States, but in and between every part of the Commonwealth. The proper operation of the system of representative government requires the same freedoms between elections. These are also necessary for the proper operation of the Constitutions of the States (which now derive their authority from Ch. V of the Constitution. From these provisions and from the concept of the Commonwealth arises an implication of a constitutional guarantee of such freedoms, freedoms so elementary that it was not necessary to mention them in the Constitution…). The freedoms are not absolute, but nearly so. They are subject to necessary regulation (for example, freedom of movement is subject to regulation for purposes of quarantine and criminal justice; freedom of electronic media is subject to regulation to the extent made necessary by physical limits upon the number of stations which can operate simultaneously). The freedoms may not be restricted by the Parliament or State Parliaments except for such compelling reasons.[107]

Here we see the High Court working with the text of the Constitution as part of the structure established by the framers. Consider that:

> In his "Message to the Australian People" on the day of the Commonwealth's Inauguration,

107. *Ansett Transp. Indus. (Operations) Pty. Ltd. v. Commonwealth* (1977) 139 CLR 54, 88 (Aust.) (citations omitted).

> Edmund Barton, the freshly anointed first Prime Minister, described what he considered to be "the main principle of the Commonwealth" expressed in its Constitution: "Its representation in one House bespeaks justice to the individual; its representation in the other bespeaks equal justice to each State. It will, and must be, the aim of the Government of the Commonwealth to give complete effect to both of these principles."[108]

Certainly, in referring to those "freedoms so elementary that it was not necessary to mention them in the Constitution,"[109] Murphy J sought to give effect to this main principle, as enunciated by one of the framers and the first Prime Minister under the new Constitution. Sadly, Murphy J would never live to see this vision of the Constitution and its elementary freedoms realized.

In 1992, with Murphy having died in 1986, the High Court recognized the existence of an implied freedom of political communication in *Nationwide News Pty. Ltd. v. Wills*[110] and *Austl. Cap. Television v. Commonwealth*,[111] which was later modified in *Lange v. Austl. Broad. Corp.*[112] and *Coleman v. Power*,[113] and finally supplemented in 2013 by *McCloy v. New S. Wales*[114] and *Brown v. Tasmania*.[115] Together, these cases stand for the proposition "that there is to be discerned in the doctrine of representative government which the Constitution incorporates an implication of freedom of communication of

108. HELEN IRVING, TO CONSTITUTE A NATION: A CULTURAL HISTORY OF AUSTRALIA'S CONSTITUTION 169, 162–63 (Cambridge Univ. Press 1997) (citations omitted); *see also* W. HARRISON MOORE, THE CONSTITUTION OF THE COMMONWEALTH OF AUSTRALIA 329 (1902).

109. *Ansett Transp. Indus. (Operations) Pty. Ltd. v. Commonwealth* (1977) 139 CLR 54, 88 (Aust.) (citations omitted).

110. *Nationwide News Pty. Ltd. v. Wills* (1992) 177 CLR 1 (Austl.).

111. *Austl. Cap. Television Pty. Ltd. v. Commonwealth* (1992) 177 CLR 106 (Austl.).

112. *Lange v. Austl. Broad. Corp.* (1997) 189 CLR 520, 559–62 (Austl.) (explaining more in the Section entitled *Freedom of Communication*) (citations omitted).

113. *Coleman v. Power* (2004) 220 CLR 1 (Austl.).

114. *McCloy v. New S. Wales* (2015) HCA 34 (Austl.).

115. *Brown v. Tasmania* (2017) HCA 43 (Austl.).

information and opinions about matters relating to the government of the Commonwealth."[116] In expounding this implied freedom, unlike the limited application of Section 116 to Commonwealth legislative power alone, the High Court has held that it is logically indivisible in the sense that it applies to matters of both Commonwealth and State concern.[117]

Two decisions of the High Court, both delivered in 2013, provide further clarification of the implied freedom, especially as it relates to religious freedom. First, in *McCloy v. New S. Wales*,[118] the majority wrote that:

> The freedom under the Australian Constitution is a qualified limitation on legislative power implied in order to ensure that the people of the Commonwealth may 'exercise a free and informed choice as electors.' It is not an absolute freedom. It may be subject to legislative restrictions serving a legitimate purpose compatible with the system of representative government for which the Constitution provides, where the extent of the burden can be justified as suitable, necessary and adequate, having regard to the purpose of those restrictions.[119]

And in *Att'y-Gen. (SA) v. Corp. of Adelaide*, two members of the Court added that:

> Some 'religious' speech may also be characterised as 'political' communication for the purposes of the freedom. . . . Plainly enough, preaching, canvassing, haranguing and the distribution of literature are all activities which may be undertaken in order to communicate to members of the public matters which may be directly or

116. *Nationwide News Pty. Ltd. v. Wills* (1992) 177 CLR 1 (Austl.).

117. *Austl. Capital Television Pty. Ltd. v. Commonwealth* (1992) 177 CLR 106 (Austl.).

118. *McCloy*, HCA 34, at [2]; see also *Monis v. The Queen* (2013) 249 CLR 92 (Austl.).

119. *McCloy*, HCA 34, at [2].

> indirectly relevant to politics or government at the Commonwealth level. The class of communication protected by the implied freedom in practical terms is wide.[120]

The ambit of the implied freedom of political communication appears, then, to expand so as to cover religious communication, whether the infringement is Commonwealth or State. The High Court will provide further instruction as to the religious scope of this protection when it delivers its judgment in the twin appeals in *Preston v. Avery*[121] and *Clubb v. Edwards*;[122] both involve claims brought for infringement of political speech by peaceful religious activists who encroached upon abortion clinic safe access zones.

No right, though, is absolute. In *Cantwell v. Connecticut*, Roberts J of the United States Supreme Court wrote that "in the nature of things . . . [free exercise of religion] cannot be [absolute]."[123] In the Australian context, Latham argued that it must be "possible to reconcile religious freedom with ordered government."[124] And in *McCloy v. New S. Wales*,[125] the High Court determined that, in assessing infringements of the implied freedom of political communication, a two-stage test applies:

> [Political communication] is not an absolute freedom. It may be subject to legislative restrictions serving a legitimate purpose compatible with the system of representative government for which the Constitution provides, where the extent of the burden can be justified as

120. *Att'y-Gen. (SA) v. Corp. of Adelaide* (2013) 249 CLR 1, 43–44, 73–74 (Austl.).

121. *Preston v. Avery*, *appeal docketed*, No. H2/2018 (HCA 2018) (Austl.).

122. *Clubb v. Edwards*, *appeal docketed,* No. M46/2018 (HCA 2018) (Austl.).

123. *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940).

124. GEORGE WILLIAMS, SEAN BRENNAN & ANDREW LYNCH, AUSTL. CONSTITUTIONAL LAW & THEORY: COMMENTARY & MATERIALS 1175 (Fed'n Press 6th ed. 2014) (citing *Adelaide Co of Jehovah's Witnesses Inc. v. Commonwealth* (1943) 67 CLR. 116, 132 (Austl.)).

125. *McCloy*, HCA 34, at [2].

> suitable, necessary and adequate, having regard to the purpose of those restrictions.[126]

In assessing the justifiability of limitations, the High Court in *McCloy* enunciated a three-question standard:

> The question whether a law exceeds the implied limitation depends upon the answers to the following questions. . .:
>
> 1. Does the law effectively burden the freedom in its terms, operation or effect? If "no", then the law does not exceed the implied limitation and the enquiry as to validity ends.
>
> 2. If "yes" to question 1, are the purpose of the law and the means adopted to achieve that purpose legitimate, in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative government? This question reflects what is referred to in these reasons as "compatibility testing."
>
> The answer to that question will be in the affirmative if the purpose of the law and the means adopted are identified and are compatible with the constitutionally prescribed system in the sense that they do not adversely impinge upon the functioning of the system of representative government.
>
> If the answer to question 2 is "no", then the law exceeds the implied limitation and the enquiry as to validity ends.
>
> 3. If "yes" to question 2, is the law reasonably appropriate and adapted to advance that legitimate object? This question involves what is referred to in these reasons as "proportionality testing" to determine whether the restriction which the provision imposes on the freedom is justified.[127]

126. *Id.* (footnotes and citations omitted).
127. *Id.*

The proportionality test involves consideration of the extent of the burden effected by the impugned provision on the freedom. There are three stages to the test. These are the enquiries as to whether the law is justified as suitable, necessary, and adequate in its balance in the following senses:

> *suitable* — as having a rational connection to the purpose of the provision;
> *necessary* — in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom;
> *adequate in its balance* — a criterion requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.
> If the measure does not meet these criteria of proportionality testing, then the answer to question 3 will be "no" and the measure will exceed the implied limitation on legislative power.[128]

In sum, then, the Australian Constitution provides protection for the free exercise of individuals through the convergence of Section 116, albeit limited by restrictive interpretation of the High Court, and the implied freedom of political communication, notwithstanding that limitations may be placed upon that right. Comprehensive protection, however, requires the addition of legislative protections, both Commonwealth and State. We turn next to those additions.

C. Legislative Protections

Two types of legislation supplement the protections found in

128. *Id.* (affirmed in *Brown v. Tasmania* (2017) HCA 43, at [123]–[131], and [236] (Austl.)).

the Australian Constitution: (1) bills of rights enacted by States or Territories, and (2) Commonwealth and State or Territory anti-discrimination legislation. We consider each in turn.

1. Bills of Rights

Two Australian jurisdictions, the Australian Capital Territory and the State of Victoria, have enacted human rights legislation. Some have referred to these enactments as legislative *bills of rights*: in the case of the former, the Human Rights Act 2004 (ACT), and in that of the latter, the Charter of Human Rights and Responsibilities Act 2006 (Vic). Both statutes protect free exercise; the Victorian provision is representative:

> 14 Freedom of thought, conscience, religion and belief
>
> (1) Every person has the right to freedom of thought, conscience, religion and belief, including—
>
> (a) the freedom to have or to adopt a religion or belief of his or her choice; and
>
> (b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.
>
> (2) A person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.[129]

Yet, while both statutes provide for the protection of individual rights, neither has received anything more than

129. *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 14 (Austl).

passing judicial attention.[130] Significant protection, however, is found in State and Territory anti-discrimination legislation.

2. Anti-Discrimination Legislation

The final recourse for the protection of free exercise is found in Commonwealth and State and Territory anti-discrimination legislation. An example of the former is found in the Racial Discrimination Act 1975 (Cth)[131] and of the latter in the Equal Opportunity Act 2010 (Vic).[132] State and Territory anti-discrimination legislation provides for prohibited grounds of discrimination; the Victorian legislation, for instance, provides in Section 6 that:

> The following are the attributes on the basis of which discrimination is prohibited in the areas of activity set out in Part 4—
> (a) age;
> (b) breastfeeding;
> (c) employment activity;
> (d) gender identity
> (e) disability;
> (f) industrial activity;
> (g) lawful sexual activity;
> (h) marital status;
> (i) parental status or status as a carer;

130. *See* NICHOLAS ARONEY, JOEL HARRISON & PAUL BABIE, *Religious Freedom Under the Victorian Charter of Rights*, *in* AUSTRALIAN CHARTERS OF RIGHTS A DECADE ON 120 (Matthew Groves & Colin Campbell eds., Fed'n Press 2017).

131. *Racial Discrimination Act 1975* (Cth) (Austl.). In addition to this, the Commonwealth has enacted the *Age Discrimination Act 2004* (Cth) (Austl.), the *Australian Human Rights Commission Act 1986* (Cth), the *Disability Discrimination Act 1992* (Cth) (Austl.), and the *Sex Discrimination Act 1984* (Cth) (Austl.).

132. *Equal Opportunity Act 2010* (Vic.) (Austl.). Every state and territory has enacted similar legislation. *See Discrimination Act 1991* (ACT) (Austl.); *Anti-Discrimination Act 1977* (NSW) (Austl.); *Anti-Discrimination Act 1996* (NT) (Austl.); *Anti-Discrimination Act 1991* (Qld) (Austl.); *Equal Opportunity Act 1984* (SA) (Austl.); *Anti-Discrimination Act 1998* (Tas) (Austl.); *Equal Opportunity Act 1984* (WA) (Austl.).

(j) physical features;
(k) political belief or activity;
(l) pregnancy;
(m) race;
(n) religious belief or activity;
(o) sex;
(p) sexual orientation;
(pa) an expunged homosexual conviction;
(q) personal association (whether as a relative or otherwise) with a person who is identified by reference to any of the above attributes.[133]

Such legislation, however, also sets out exceptions to or exemptions from the prohibited grounds of discrimination for religious organizations. Thus, the Victorian legislation provides, in Sections 82–84, that:

82. (1) Nothing in Part 4 applies to—
(a) the ordination or appointment of priests, ministers of religion or members of a religious order; or
(b) the training or education of people seeking ordination or appointment as priests, ministers of religion or members of a religious order; or
(c) the selection or appointment of people to perform functions in relation to, or otherwise participate in, any religious observance or practice.

(2) Nothing in Part 4 applies to anything done on the basis of a person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity by a religious body that—
(a) conforms with the doctrines, beliefs or principles of the religion; or
(b) is reasonably necessary to avoid

133. *Equal Opportunity Act 2010* (Vic) s 6 (Austl.).

> injury to the religious sensitivities of adherents of the religion.
>
> 83. (1) This section applies to a person or body, including a religious body, that establishes, directs, controls, administers or is an educational institution that is, or is to be, conducted in accordance with religious doctrines, beliefs or principles.
>
> 84. Nothing in Part 4 applies to discrimination by a person against another person on the basis of that person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity if the discrimination is reasonably necessary for the first person to comply with the doctrines, beliefs or principles of their religion.[134]

While they afford some protection to individuals, these exemptions apply, though, largely to religious organizations or bodies. The Victorian legislation, in Section 81, offers this definition of a religious body: "(a) a body established for a religious purpose; or (b) an entity that establishes, or directs, controls or administers, an educational or other charitable entity that is intended to be, and is, conducted in accordance with religious doctrines, beliefs or principles."[135]

While judicial consideration has produced variable results in terms of the meaning and application of the exemptions contained in anti-discrimination legislation,[136] what emerges is a "centrality of non-discrimination or equality legislation and, further, equality principles, in determining law and religion claims.'[137] It is clear that these exemptions, when taken together with the guarantees afforded by the Australian Constitution and the legislative bills of rights, achieve a comprehensive protection for free exercise in Australia.

134. *Equal Opportunity Act 2010* (Vic) ss 82–84 (Austl.).

135. *Equal Opportunity Act 2010* (Vic) s 81 (Austl.).

136. *See, e.g.*, *Christian Youth Camps Ltd. v. Cobaw Cmty. Health Servs. Ltd.* (2014) VSCA 75 (Austl.); *OV v. Members of Wesley Mission Council* (2010) 79 NSWLR 606 (Austl.).

137. ARONEY, HARRISON, & BABIE, *supra* note 130, at 127.

Conclusion: Comparative Reflections

India and Australia, both secular constitutional federal democracies which have emerged from the former British Empire as members of the Commonwealth of Nations, fall within the Secular/Separation zone on the Continuum of Constitutionalism identified in Figures 1 and 2. And both achieve a comprehensiveness in their protection of religious free exercise or liberty. Where, precisely, they fall at that end of the continuum, however, is not clear; nor need it be. As explained in the Introduction, most, if not all, nations will not be amenable to such precision in placing. Rather, they will move between, or oscillate, within zones of the continuum. This is certainly true of India and Australia. In both cases, one finds varying degrees of active elimination of religion from the public square, assertive secularism, secularism as neutrality, and soft formal separation. Both, then, demonstrate the ways in which a nation may oscillate around zones rather than find a fixed placement along the continuum. As former British colonies, they both pursued this movement towards secularism as a consequence of that former colonial status. Still, and perhaps more importantly, both nations demonstrate that it is possible to achieve a broadly similar outcome—Secularism/Separation—in very different ways.

Indian Secularism/Separation seems to emerge as a necessity for the guarantee of peace in a multi-faith and multi-ethnic nation. India pursued this course through appeal to the British constitutional system as one which would guarantee the rule of law as the inspiration for the constitutional primacy of state secularism. India achieves comprehensive protection for free exercise entirely within the constitutional framework found in articles 25–28 of its Constitution. And while judicial interpretation of those provisions establishes the ambit of the right protected, and the limitations which might be placed upon it in practice, the result is clear: religious free exercise, although operating within a milieu of secularism, is provided ample protection. This limitation and protection of the rights to religion is not static. Rather, it is continuously being tested with reference to the touchstone of equality working in conjunction with other rights and principles enshrined in the Indian

Constitution. To ensure against discrimination, any religious practice seeking protection may be subject to limitations so as to protect the competing right. Thus, secularism as a principle and secularity as a constitutional value are intended to work together to achieve justice, liberty, equality, and fraternity as set out in the preamble to the Indian Constitution.

Paradoxically, notwithstanding the common historical, legal, and constitutional roots, Australian Secularism/Separation was both an idealistic choice on the basis of the prevailing constitutional philosophies at the time of federation and perhaps a necessity to protect the rights of minority groups who might have been harmed by an official state church of Australia. Unlike India, though, rather than following the British constitutional model, Australia looked to the United States as the precedent for achieving separation and the protection of religious freedom. Thus, while clearly a secular state, Australia achieves a comprehensive protection for free exercise through a combination of constitutional and legislative provisions. The protection begins with the four guarantees found in Section 116 which, while restrictively interpreted by the High Court, nonetheless achieve some protection in the form of preventing the establishment of a state religion, thereby preserving a fragile separation of church and state, and protection at least against Commonwealth action which, in its express purpose, requires any religious observance, or limitations upon any such observance, or religious tests for Commonwealth office. When read in conjunction with the implied protection for political communication, it is possible to conclude that the Australian Constitution provides for moderately robust protection for free exercise. And to this must be added the legislative protections found in Commonwealth, State and Territory legislation either to protect free exercise—as found in legislative bills of rights—or the exemptions for individuals or organizations for religious reasons from the equality provisions of anti-discrimination legislation.

In short, while India provides protection for free exercise in a comprehensive constitutional framework, and Australia achieves that result through a piecemeal and ad hoc collection of constitutional and legislative provisions, both achieve the same result: comprehensive protection for religious free exercise.

Thus, both nations can be plotted somewhere in the secular/separation zone of the Continuum of Constitutionalism. And both demonstrate different methods of protecting free exercise of religion as the keystone right that, in its cumulative effect, establishes the constitutional space for the protection of the full matrix of human rights protection.