Modelling the Anchor and Range of State-Religion Relationships in Australia and Italy: Towards a New Understanding of State-Religion Typologies

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This article argues that states exhibit characteristics of multiple categories of state-religion relationships, which may be adjacent to one another on a continuum or other model, but that state-religion relationships should first be understood as existing within a range of potential relationships permitted by a jurisdiction's foundational documents. This paper therefore proposes a new methodology to interpret and apply the Durham and Scharffs loop model which first identifies anchors to the state-religion relationship before interpreting those anchors to determine the range of all potential state-religion interactions. In order to demonstrate how this methodology might be applied, it is used to compare the state-religion relationships in Australia and Italy, exploring why Durham and Scharffs classify both Australia and Italy as cooperationist states, despite very different underlying foundational documents.

1. INTRODUCTION

Typologies, also called models, of state-religion relationships can be useful tools in better understanding state-religion dynamics as well as comparing the interaction between the state and religion across jurisdictions. However, such models are inevitably an oversimplification and can obscure important similarities and differences between states. As a result, how you use typologies and the interpretation of results when applying them to a specific jurisdiction is important. While some typologies, such as that articulated by Fox[1] or by Temperman[2] assign jurisdictions to specific categories, others such as Durham and Scharffs[3] or Babie[4] argue that jurisdictions may exhibit characteristics of multiple categories of state-religion interactions. Babie, for example, describes this as '[oscillating] around a number of points along, or [in] a "zone" of the continuum.'[5] This article goes further, arguing not only that states do in fact exhibit characteristics of multiple categories of state-religion relationships, which may be adjacent to one another on a continuum or other model, but that state-religion relationships should first be understood as existing within a range of potential relationships permitted by a jurisdiction's foundational documents. This paper therefore proposes a new methodology to

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[1] Jonathan Fox, *Political Secularism, Religion, and the State: A Time Series Analysis of Worldwide Data* (Cambridge University Press, 2015).

[2] Jeroen Temperman, *State-Religion Relationships and Human Rights Law: Towards a Right to Religiously Neutral Governance* (Brill, 2010).

[3] W C Durham Jr and B G Scharffs, *Law and Religion: National, International, and Comparative Perspectives* (Wolters Kluwer, 2nd ed, 2019) 121.

[4] Paul Babie, 'Religion and Constitutionalism: Oscillations Along a Continuum' (2015) 39(1) *Journal of Religious History* 123 ('Religion and Constitutionalism').

[5] Ibid 125.

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interpret and apply the Durham and Scharffs loop model which first identifies anchors to the state-religion relationship before interpreting those anchors to determine the range of all potential state-religion interactions. In order to demonstrate how this methodology might be applied, it is used to compare the state-religion relationships in Australia and Italy, exploring why Durham and Scharffs classify both Australia and Italy as cooperationist States despite very different underlying foundational documents.[6]

As this paper will highlight, Australia and Italy are very different jurisdictions with notably different constitutional arrangements in relation to religion. Yet multiple models of state-religion relationships, including as we have already highlighted, Durham and Scharffs, place Italy and Australia in the same category. Similarly, yet by contrast at the same time, Temperman identifies both as embodying forms of separation between state and religion.[7] However, not all models place Australia and Italy in the same category. For example, Fox classifies Australia as accommodation, while Italy is classified as multi-tiered preferences — one religion.[8] The differing approaches and classifications need further examination and explanation. Indeed, the differing approaches to classification of jurisdictions by the various models of state-religion relationship need to be explained. The proliferation of models has also produced a proliferation of categorisations, with often inconsistent results.[9] This paper provides one explanation for this divergence in classification using Australia and Italy as comparative exemplars.

We argue that, as a result of the operation of the anchor and potential range of each state-religion relationship, the differences in approach of the various models such as Durham and Scharffs, Temperman, and Fox can be explained by emphasis on different aspects of the relationship. For example, while some models focus on the anchor of the state-religion relationship when classifying specific jurisdictions, others take a wider approach looking at other laws and public policies as well as their operation in practice. Further, we argue Australia and Italy are often classified in similar ways, despite their different constitutional anchors, due to overlap in the potential range of their respective state-religion relationships.

The paper therefore begins by delineating the foundational components of the diverse Australian and Italian legal systems, establishing the basis for comparative analysis. It then scrutinises the Durham and Scharffs model of state and religion, outlining its unique characteristics, potentials, and applications before turning in Parts Four and Five to our proposed methodology for a deeper understanding of state-religion dynamics focusing on the anchor and potential range of that relationship. We argue that these foundational laws enable a spectrum, or "range", as we term it, of state-religion relationships. We have undertaken a comparative analysis, utilising our proposed methodology to highlight points of convergence and divergence between Italy and Australia. We conclude that the Durham and Scharffs model, and indeed all models of state-religion relationships, are better understood as signalling a predominant category of church-state relations, without excluding the coexistence of elements that also align with alternative categories. Indeed, when our methodology is applied, apparent inconsistencies in laws, public policies, and state practice, as well as within the literature, can be understood as manifestations and reflections of part of the overall potential range of state-religion relationships in a given jurisdiction.

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[6] Durham and Scharffs (n 3) 124, 126-127, 145-146.
[7] Temperman, (n 2) 70, 102-103, 118-119, 121-123, 135.
[8] Fox (n 1) 44-45.
[9] Renae Barker, 'Law and Religion in the Classroom: Teaching Church-State Relationships' (2022) 1 *Australian Journal of Law and Religion* 1, 12-14.

2. AUSTRALIA AND ITALY

The juxtaposition of Australian and Italian states provides interesting insights, not only despite but because of their structural, cultural, historical, and legal differences. As outlined in Table 1 below, Australia and Italy have notably different religious demographics. Both have dominant Christian populations. However, in Italy, Roman Catholics alone make up over 74% of the population. In contrast Australia's composite Christian population has dropped to just under 44%. While Roman Catholicism is the largest Christian denomination at 20%, the largest single 'religious' grouping is 'no religion' at nearly 39%.[10] Both have significant minority Muslim populations. Overall, however, Australia's religious demographics are more diverse than Italy's. These religious demographic differences hint at deeper structural, cultural, historical, and legal differences which are both the product and cause of the religious demographic differences.

	Australia	Italy
Population	26.01 million	58.94 million
Majority Religion (> 50%)	N/A	Roman Catholicism (74.5%)
Significant Minorites (>10%)	Christian (43.9%) No religion (38.9%)	Atheist and Agnostic (15.3%)
Other Minorities (>2%)	Muslim (3.2%) Hinduism (2.7%) Buddhism (2.4%) No answer (6.9%)	Other Christian (4.1%) Muslim (3.7%)

Table 1: Religious Demographics of Australia and Italy[11]

2.1 AUSTRALIA

Australia is a federation made up of six former British colonies, with the first European settlers arriving in 1788 bringing with them 'so much of English law as is applicable to their own situation and the condition of an infant colony'.[12] However they did not find a 'formless void'.[13] Instead, they found a land inhabited by First Nations people. As explained by Tanganekald, Meitangk, and Boandik academic Irene Watson:

> [W]e have been here forever and we have an ancient constitution through our ancient connections to law and country … our claims to our country have been confirmed forever and, indeed, acknowledged in non-Aboriginal discourses as extending for more than 65,000 years.[14]

[10] As at 2021. See Australian Bureau of Statistics, *Religious Affiliation in Australia: Exploration of the changes in reported religion in the 2021 Census* (online, 4 July 2022) <https://www.abs.gov.au/articles/religious-affiliation-australia> (accessed 25 June 2024).
[11] Data Commons, 'Australia', (Web Page, 2022) <https://datacommons.org/place/country/AUS?category=Demographics#Population> (accessed 25 June 2024); Data Commons, 'Italy', (Web Page, 2022) <https://datacommons.org/place/country/ITA?category=Demographics#Population> (accessed 25 June 2024); Australian Bureau of Statistics (n 10).
[12] See *Ex parte The Rev George King* (1861) 2 Legge 1307, 1313 (Dickinson J), 1323 (Wise J).
[13] Vicki Grieves, *Aboriginal Spirituality: Aboriginal philosophy, the Basis of Aboriginal Social and Emotional Wellbeing* (Cooperative Research Centre for Aboriginal Health, 2009).
[14] Irene Watson, 'Aboriginal Recognition: Treaties and Colonial Constructions, We Have been Here Forever …' (2018) 30(1) *Bond Law Review* 7, 12.

However European settlers failed to recognise First Nations people, instead declaring Australia to be *terra nullius*, a legal fiction which was not overturned until 1992, in the landmark First Nations land rights case *Mabo v Queensland.*[15] As a result it is English law which predominantly shaped the Australian state-religion relationship.[16] The Australian colonies federated on 1 January 1901 following the passage of the *Commonwealth of Australia Constitution Act 1900* (Imp) by the British parliament bringing together the six former colonies.[17]

The *Constitution* established a unique system of representative democracy with limited, responsible parliamentary government. The system is an amalgam of the British parliamentary system and that of the United States of America, sometimes referred to as the 'Washminster' system.[18] Power is divided between three branches of government: Executive, Legislature, and Judiciary, as well as three levels of government: Commonwealth, State (and Territory), and local. Formally, legislative power is divided in the *Australian Constitution* between the Federal Commonwealth government and State governments, with the Federal government having exclusive power over matters listed in ss 52, 86, 90, and 122 of the *Constitution* and concurrent power over matters listed in s 51 (with any conflict between state and federal legislation resolved 'to the extent of the inconsistency' in the favour of the Commonwealth per s. 109).[19] Areas of legislative power not listed in the *Constitution*, known as residual powers, are within the exclusive competence of State legislatures. Referendums in 1974 and 1988 on constitutional recognition of local government bodies were unsuccessful.[20] Local governments therefore derive their power from State legislation,[21] with responsibility for areas such as town planning, animal control, and local roads. Religion is principally dealt with by section 116 of the *Constitution*:

> 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.

As will be discussed below, section 116 has been interpreted narrowly by the Australian High Court and its drafting history suggests its inclusion in the *Constitution* was as much about balancing the inclusion of a reference to 'Almighty God' in the Preamble of the *Constitution* and the power of the States to control and regulate religion in their own jurisdiction as it was about freedom of religion and the separation of church and state. Indeed, its inclusion in the part of the *Constitution* labelled 'the States' suggests such an interpretation.[22]

While legislation plays an increasing role within the Australian legal system, Australia inherited and retains a common law legal system applying the concept of *stare decisis*.

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[15] *Mabo v Queensland [No 2]* (1992) 175 CLR 1.
[16] Renae Barker, *State and Religion: The Australian Story* (Routledge, 2019) 43 ('*State and Religion*').
[17] Watson (n 14) 8.
[18] Elaine Thompson, 'The "Washminster" mutation' (1980) 15(2) *Politics* 32.
[19] *Australian Constitution* s 109. The Commonwealth also has power over matters not enumerated in the Constitution as a result of judgments of the High Court, treaty, or convention.
[20] George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010) 91.
[21] See for example *Local Government Act 1995* (WA).
[22] See Renae Barker, *State and Religion* (n 16) 73-86; see also Luke Beck, *Religious Freedom and the Australian Constitution* (Routledge, 2018).

Significant areas of law remain exclusively within case law, although these are increasingly being modified by legislation.

Australia does not have a National Bill or Charter of Rights.[23] However, this does not mean that there are no protections for human rights. Protection is instead provided via what has often been described as a 'patchwork' of federal and state legislation, including narrow rights contained in the *Australian Constitution*, anti-discrimination laws at both the National and State levels, and state-based statutory human rights charters.[24] This approach has also been referred to as an 'ethos' of rights.[25]

2.2 ITALY

Italy belongs to a complex and multi-layered legal space. It was one of the founding members of the European Union project. In 1951, the country signed the *Treaty of Paris*, establishing the European Coal and Steel Community ('ECSC') alongside France, Germany, Belgium, Luxembourg, and the Netherlands.[26] Moreover, in 1957, the country hosted the signing in Rome of two other treaties, establishing the European Atomic Energy Community ('EAEC Euratom')[27] and, most importantly, the European Economic Community ('EEC').[28] The three treaties together represent the initial concept of a shared, common, and unified market and legal space where the movement of capitals, goods, services, and people is unrestricted. They eventually evolved into the European Union ('EU') as it is known today, composed of 27 member states, governed by the *Treaty of Lisbon*[29] and subject to the mandatory rulings of the Court of Luxembourg.[30]

Italy is also a signatory party of the *European Convention on Human Rights* ('*ECHR*') that was ratified in 1955.[31] This international treaty reflects the commitment of the contracting parties to safeguard fundamental rights and freedoms both at the national level and in the space of the Council of Europe. This is an organisation of states, much wider than the EU: it is made up of 46 countries and subject to the jurisdiction of the Court of Strasbourg.

The Italian legal order belongs to the family of civil law countries. It is rooted in ancient Roman law and has been significantly influenced by the Napoleonic Code. According to its current Constitution, justice is administered in the name of the people and judges are subject only to the law. Unlike in common law jurisdictions, written statutes hold greater formal significance than case law, and judges primarily interpret and apply these codes to individual cases.

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[23] Louise Chappell, John Chesterman, and Lisa Hill, *The Politics of Human Rights in Australia* (Cambridge University Press, 2009) 27–9.
[24] Renae Barker, *State and Religion* (n 16) 105–9.
[25] See Paul T Babie, 'The Ethos of Protection for Freedom of Religion or Belief in Australian Law' (2010) 47 *University of Western Australia Law Review* 64–91 ('The Ethos of Protection').
[26] *Treaty Establishing the European Coal and Steel Community*; ELI: <http://data.europa.eu/eli/treaty/ceca/sign>.
[27] *Treaty Establishing the European Atomic Energy Community*, opened for signature on 25 March 1957, 298 UNTS 167 (entered into force 1 January 1958) ('*EAEC Treaty*').
[28] *Treaty Establishing the European Community,* opened for signature on 25 March 1957, 298 UNTS 11 (entered into force 1 January 1958) ('*EEC Treaty*').
[29] *Treaty on European Union*, opened for signature 7 February 1992, [1992] OJ 191/1 (entered into force 1 November 1993) art 2, as amended by *Treaty of Lisbon amending the treaty on European Union and the treaty Establishing the European Community*, opened for signature 13 December 2007, [2007] OJ C 306/1 (entered into force 1 December 2009) art 1(4).
[30] See Robert Schütze, *An Introduction to European Law* (Oxford University Press, 2020).
[31] *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

The country is a parliamentary democratic republic featuring a decentralised regional system. Since its coming into force in 1948, the Italian Constitution[32] has undergone one of the most significant reforms in 2001, aimed to enhance and clarify the interactions among the State (central government), the regions, and local authorities (municipalities).[33] This decentralisation reflects the country's diverse economic landscape and regional needs, while harmonising the guarantee of essential levels of services throughout the whole territory.[34] The country is divided into twenty regions, with five of these having a special status, greater legislative powers, and financial independence.[35] Regional governments are vested with exclusive authority in some specific sectors, for example local economic development or vocational education.[36] Some other matters fall within a concurring competence, where the central government sets the general framework legislation, and each Region implements the details.[37] These include, for example, sports, disaster relief, and land-use planning. The State has *exclusive* legislative powers in listed matters, such as the relations between the Republic and religious denominations.[38]

3. TYPOLOGIES OF STATE-RELIGION RELATIONSHIPS

Typologies of the relationship between the state and religion (or church and state) are usually used to identify the specific state-religion relationship of a given jurisdiction at a particular point in time. However, state-religion relationships change over time. Australia, for example, has been described as having transitioned through four separate state-religion models in its brief history since colonisation.[39] During the early colonial period, colonial officials treated the Church of England as the established church — although historians and legal scholars continue to debate whether this establishment was de jure or de facto.[40] This was followed by a period of plural establishment from the 1830s through to the 1860s to 1890s characterised by the Church Acts in the various colonies which provided direct financial aid to the dominant Christian denominations.[41] With the repeal of the Church Acts in the late 19th century, Australia moved into a period of liberal separation. While the Australian state-religion relationship maintained certain aspects of its Christian heritage during this time, such as prayers in parliament, the level of interaction between the state and religion was generally lower than in previous and subsequent periods. Today, the Australian state-religion relationship is typically described as some variation of pluralism or separation.[42] Most recently, Barker has attempted to reconcile the disagreement within the literature by rearticulating the Australian state-religion

[32] *Costituzione della Repubblica Italiana di 22 december 1947* [The Constitution of the Italian Republic of 22 December 1947] ('*Costituzione*').
[33] *Legge Costituzionale 18 ottobre 2001*, n 3 [Italian Constitutional Law no 3 of 18 October 2001].
[34] For a general overview, see Erika Arban, Giuseppe Martinico, and Francesco Palermo, *Federalism and Constitutional Law: The Italian Contribution to Comparative Regionalism* (Routledge, 2021).
[35] Sicily, Sardinia, Trentino-Alto Adige/Südtirol, Aosta Valley, and Friuli-Venezia Giulia.
[36] *Contituzione* (n 32) art 117 para 4.
[37] Ibid art 117 para 3.
[38] Ibid art 117 para 2 (c).
[39] J Christopher Soper et al, *The Challenge of Pluralism: Church and State in Six Democracies* (Rowman & Littlefield, 2017) 121; Alex Deagon, *A Principled Framework for the Autonomy of Religious Communities*: *Reconciling Freedom and Discrimination* (Hart, 2023) 121.
[40] Barker, *State and Religion* (n 16) 49–67.
[41] See Renae Barker, 'Under most peculiar circumstances: The church acts in the Australian colonies as a study of plural establishment' (2016) 3(3) *Law & History* 28–52.
[42] Renae Barker, 'Pluralism versus Separation: Tension in the Australian Church-State Relationship' (2021) 16(1) *Religion and Human Rights* 1, 6–8 ('Pluralism versus Separation').

relationship as 'non-establishment pluralism'[43] while Deagon has proposed that Australia moved from 'pragmatic pluralism' to, what he terms, 'mild establishment'.[44]

Similarly, Italy's journey of legal and societal transformation in church-state relations can be divided into different phases.[45] The first phase occurred in the 19th century, as liberal states were emerging across Europe. In Italy, a form of liberal separation between secular and religious realms developed, treating religion as a private matter and prohibiting religious discrimination.[46] The second phase began after Italy's unification in 1861, characterised by a conflictual separation and laws weakening the Catholic Church's power, which included confiscating its properties.[47] After Rome's capture in 1870, Pope Pius IX declared himself a prisoner of the Italian State, expressing dissatisfaction with the unilateral guarantees granted to him by the newly formed Italian State.[48] The third phase commenced with the rise of fascism, which made the country a confessional state, using the Catholic Church to garner political support. This phase peaked with the 1929 Lateran Pacts, when the Concordat signed between the Kingdom of Italy and the Holy See recognised Catholicism as the only State religion.[49] The fourth phase commenced after World War II, with Italy becoming a republic and adopting a new constitution in 1948. Articles 7 and 8 of the Constitution govern the relationship and the possible agreements between the Catholic Church and other religious groups. This marks a shift from merely tolerating non-Catholic religions, as was the case under the monarchy's Constitution of 1848, to recognising their equal freedom under the law as proclaimed by the republican Constitution of 1948. The fifth phase, initiated with the revision of the Concordat in 1984, promoted greater separation between the State and the Catholic Church and fostered religious pluralism. Agreements with non-Catholic religious groups were signed, facilitated by the presence of new minoritarian religions due to increased immigration.[50]

State-religion relationships are complex. The above summaries and categories obscure many complexities and apparent inconsistencies. As we have already explained above, and as Babie has observed, many state-religion relationships cannot be easily assigned to a single category. Instead, they 'approximate several, perhaps many points along [a] continuum'.[51] Babie described this phenomenon as 'oscillation', noting that states exist in zones along a continuum of possible state state-religion relationships rather than a single point.[52] However, once this oscillation has been recognised, it is still necessary to define the zone in which the state-religion relationship operates and the outer boundaries of that oscillation. To do so it is necessary to define the breadth of possible state-religion relationships. Numerous models for doing so have

[43] Ibid.
[44] Deagon (n 39) 153–182.
[45] Simone Martino, 'L'Italia: un modello concordatario nell'epoca del pluralismo' [2014] (66) *Quaderni di Sociologia* 27.
[46] See, for example, Legge 19 giugno 1848, n. 735, prohibiting discrimination on grounds of religion in the enjoyment of civil and political rights.
[47] Regio decreto 7 luglio 1866, n. 3036.
[48] *Ubi Nos*, encyclical letter on Pontifical States, Pope BI. Pius IX-1871. Legge 13 marzo 1871, n. 214 ("delle guarentigie"), which granted the Pope - whose person was declared sacred and inviolable - full freedom in the exercise of his spiritual magisterium and sovereignty over the Vatican palaces.
[49] As explained in greater details below, the Lateran Pacts of 1929 contained three legal documents: the Treaty, the Concordat, and the financial convention. See the English version of the Lateran Pacts of 1929 at <https://www.uniset.ca/nold/lateran.htm>.
[50] For a general overview see Marco Ventura, *Religion and Law in Italy* (Kluwer Law International, 2013).
[51] Babie, 'Religion and Constitutionalism' (n 4) 123, 131.
[52] Ibid 131–132.

been proposed with different categorisations and levels of generalisation or granularity.[53] The models outlined by Durham and Scharffs, Temperman, and Fox referred to above are just three such models.

It is not the purpose of this paper to propose a new model for understanding state-religion relationships. Instead, this paper proposes a new methodology for *using* these models and as a consequence, a new way to understand state-religion relationships. We have therefore chosen an existing model outlined by Durham and Scharffs in *Law and Religion: National, International and Comparative Perspectives*.[54] While a number of different typologies would be suitable for this analysis, we have chosen the one outlined by Durham and Scharffs for five reasons: (1) it is not context specific; (2) it is comprehensive; (3) it is detailed; (4) it has been modelled graphically; and, (5) it offers insights into the interaction between the state-religion relationship and freedom of religion and belief ('FoRB').

First, the model was developed in abstraction rather than in the context of considering a specific state-religion relationship.[55] While typologies focusing on the range of current, historical, or potential relationships within a particular jurisdiction are useful, they are bespoke and therefore inevitably need to be adjusted to suit other jurisdictions. The Durham and Scharffs typology was not developed with a particular state in mind and is therefore more readily applicable to different jurisdictional contexts.

Second, it is comprehensive. A typology which is to be used to understand the full range of state-religion relationships within a particular jurisdiction must include a full range of possible relationships. The Durham and Scharffs model includes a full range of state-religion models

[53] See for example Shimon Shetreet, 'The Model of State and Church Relations and Its Impact on the Protection of Freedom of Conscience and Religion: A Comparative Analysis and a Case Study of Israel' in Winfried Brugger and Michael Karayanni (eds), *Religion in the Public Sphere: A Comparative Analysis of German, Israeli, American and International Law* (Springer, 2007) 87, 87–93; Winfried Brugger, 'On the Relationship Between Structural Norms and Constitutional Rights in Church–State Relations' in Winfried Brugger and Michael Karayanni (eds) *Religion in the Public Sphere: A Comparative Analysis of German, Israeli, American and International Law* (Springer, 2007) 21, 31–48; Viet Bader, 'Religions and States A New Typology and a Plea for Non-Constitutional Pluralism' (2003) 6(1) *Ethical Theory and Moral Practice* 55, 65–72; Carl Esbeck, 'A Typology of Church-State Relations in Current American Thought' (1998) 15(1) *Religion & Public Education* 43; Temperman (n 2) 118–119; W Cole Durham, 'Perspectives on Religious Liberty: A Comparative Framework' in John Witte Jr and Johan D van der Vyver (eds), *Religious Human Rights in Global Perspective* (Martinus Nijhoff Publishers, 1996) bk 2, 1, 20–23; Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press, 2nd edition) 88–124; Michel Rosenfeld, 'Introduction: Can Constitutionalism, Secularism and Religion be Reconciled in an Era of Globalisation and Religion Review' (2009) 30(6) *Cardozo Law Review* 2349–2351; Cécile Laborde, 'Political Liberalism and Religion: On Separation and Establishment' (2013) 21(1) *Journal of Political Philosophy* 67, 68; Richard Albert, 'The Separation of Higher Powers' (2012) 65(1) *Southern Methodist University Law Review* 3, 3–69; Barker, *State and Religion* (n 16) 21–29; Darryn Jensen, 'Classifying Church-State Arrangements: Beyond Religious Versus Secular' in Nadirsyah Hosen and Richard Mohr (eds), *Law and Religion in Public Life: The Contemporary Debate* (Routledge, 2011) 15; Julian Rivers, 'Irretrievable Breakdown? Disestablishment and the Church of England' (1994) 3 *Cambridge Papers* 2–4; Adrian Hastings, *The Faces of God: Reflections on Church and Society* (Orbis Books, 1976) 47–67; Renae Barker, 'Pluralism versus Separation' (n 42); Deagon (n 39); Soper *et al* (n 39); R Hirschl, *Constitutional Theocracy* (Harvard University Press, 2012) 26–40; Babie, 'Religion and Constitutionalism' (n 4); Ahmet Alibašić, 'Models of State-Church Relations in Europe and the USA and Their Consequences' (2008) 2(1) *Archers Quarterly* 42.

[54] Durham and Scharffs (n 3) 124–129; an earlier version of this typology can be found in Durham (n 53). The Durham and Scharffs model is based on one proposed by Ryskamp. See George R Ryskamp, 'The Spanish Experience in Church–State Relations: A Comparative Study of the Interrelationship between Church–State Identification and Religious Liberty' [1980] *Brigham Young University Law Review* 616.

[55] For a jurisdiction-specific typology, see Esbeck (n 53).

from a complete fusing of the state and religion at one extreme[56] through to the elimination (or at least complete suppression) of religion by the state in both the public and private sphere.[57]

Third, it is detailed. In order to fully appreciate subtle as well as dramatic shifts in the state-religion relationships that may be possible within a given jurisdiction it is necessary to have a model which makes relatively fine distinctions between different models of state-religion relationships. The Durham and Scharffs typology includes ten state-religion models: theocratic states, established religions, religious status systems, endorsed religions, preferred set of religions, cooperation, accommodation, separation, laicite, secular control regimes, and abolitionist states. However, it does not include all possible categories of state-religion relationship. Like all models, it is inevitably a simplification of the real world. Other similarly comprehensive models include different sets of state-religion relationship. In some cases, these differences are a matter of nomenclature. For example, pluralism, as described by Ahdar and Leigh[58] could arguably be equated with Durham and Scharffs' cooperation category. In other cases, the different categories result from different emphasis in where to draw distinctions. Ahdar and Leigh, for example, include pragmatic pluralism, principled pluralism, formal neutrality, substantive neutrality, and the competitive market,[59] where Durham and Scarffs have just two categories: cooperation and accommodation.[60] Similarly, Temperman identifies both non-establishment and separation of state and religion as separate categories,[61] both of which would arguably fall within Durham and Scharffs' separation category. Temperman also includes non-identification as a separate category of state-religion relationship, which does not have an obvious equivalent in the Durham and Scharffs model, fitting in between accommodation and separation.[62]

Fourth, the Durham and Scharffs model has already been represented graphically. The method for understanding state-religion relationships proposed in this paper is best understood when represented in a graphical form. The fact that the Durham and Scharffs model has already been drawn removed the need to recreate this step.

Finally, the Durham and Scharffs model offers insights into the relationship between the state-religion relationship and FoRB. While traditional state-religion models present relationships between state and religion as a continuum, they do not offer any explanation of the interaction between the state-religion relationship and other related concepts such as FoRB, security, equality, or social harmony.[63] While the Durham and Scharffs model does not provide insight into all of these public goods, it does articulate the relationship between state-religion categories and FoRB providing additional insights not available in other models.

4. IDENTIFYING THE ANCHOR

The first step in our methodology is to identify the anchor of a state's state-religion relationship. In many jurisdictions there will be a fundamental law or structural element which is at the heart

[56] Usually referred to as theocracies and erastianism or caesaropapism.
[57] Usually referred to as an abolitionist and secular control regimes.
[58] Ahdar and Leigh (n 53) 109–112.
[59] Ibid 109–122.
[60] Durham and Scharffs (n 3) 126–127.
[61] Temperman (n 2) 115–124.
[62] Ibid 103–109.
[63] Renae Barker and Georgina Clarke, 'Understanding Models of State-religion Relationships' in Renae Barker, Camilla Baasch Andersen, and Mohammad Rasmi Alumari (eds), *Comparative Approaches to Law and Religion* (Routledge, 2025) 42.

of the state-religion relationship. It is this that forms the foundation or anchor for that relationship. Other laws, state practices, and policies build upon the anchor, giving the state-religion relationship form and detail. In many jurisdictions this anchor, or core, will be a constitutional provision. In some cases, such provisions enshrine FoRB, prohibit the establishment of a state church, or mandate a secular state. In others, it recognises a particular religion, establishes a state church, or provides that the laws of the state must conform with the doctrine of a particular faith.

For example, the First Amendment of the *United States Constitution* states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

While in the Iranian Constitution, art 1 establishes the country as an Islamic Republic and art 2 states:

> The Islamic Republic is a system based on belief in:
>
> 1 The One God (as stated in the phrase 'There is no God except Allah'), His exclusive sovereignty and the right to legislate, and the necessity of submission to His commands;
> 2. Divine revelation and its fundamental role in setting forth the laws;
> 3. The return of God in the Hereafter, and the constructive role of this belief in the course of man's ascent towards God;
> 4. The justice of God in creation and legislation;
> 5. The continuous leadership (*imamah*) and perpetual guidance, and its fundamental role in ensuring the uninterrupted process of the revolution of Islam;
> 6. The exulted dignity and value of man, and his freedom coupled with responsibility before God
>
> In which equity, justice, political, economic, social and cultural independence, and national solidarity are secured by recourse to:
>
> a. Continuous *Jtihad* of the *fuqaha'* possessing necessary qualifications, exercised on the basis of the *Qur'an* and the *Sunnah* of the *Ma'sumun*, upon all of whom be peace;
> b. Sciences and arts are the most advanced result of human experience, together with the efforts to advance them further;
> c. Negation of all forms of oppression, both the infliction of and the submission to it, and of dominance, both its imposition and its acceptance.

While the anchor to the state-religion relationship will often be found in a constitution, it may also be found in other fundamental documents and in convention or practice. For example, the guarantee of FoRB in art 9 of the *ECHR* forms part of the anchor for all state parties to that convention. The anchor may also be found in more than one legal text and may be a combination of laws, state conventions, and practice. For example, in England a foundation point is the establishment of the Church of England (manifested in the monarch as the head of the Church of England, the involvement of the state in church procedures, and the involvement

of the church in state processes).[64] These incidents of establishment, taken together with art 9 of the *ECHR*, form the anchor to the English state-religion relationship.[65] Similarly, New Zealand lacks a single written constitution, with its constitutional provisions found in a number of sources including legislation, the Treaty of Waitangi, other legal documents, and common law. As a result, the anchor of the state-religion relationship must, like the United Kingdom, be found across multiple laws including the *Bill of Rights Act 1990* (NZ).[66] The exact location of the anchoring law/s is not as important as the role it plays and its stability.

In order for a law to form the anchor of a state-religion relationship it must be stable. The law must hold fast and not be easily changed in response to political forces. This does not mean that it cannot or has never changed. However, changing these particular features of the relationship must take such monumental effort legally, culturally, or politically that the change is effectively revolutionary. This is an extremely high bar and it may be that in some jurisdictions there may be no law which is enshrined sufficiently to form a true anchor to the state-religion relationship.

4.1 AUSTRALIA'S ANCHOR

As a western democratic nation with a written constitution, the obvious place to look for the anchor to Australia's state-religion relationship is the *Australian Constitution*. As outlined above, the principal provision of the *Australian Constitution* concerned with religion, and the only operative provision to explicitly mention religion, is section 116.

Amendments to the *Australian Constitution* are both technically and historically difficult to secure.[67] They are governed by s 128 which requires, inter alia, that the proposed amendment must be approved by a double majority at a referendum. This has been notoriously difficult to obtain. Of the 45 proposed amendments put to the people in referendums since federation in 1901, just eight have been successful.[68] The last successful amendment of the *Australian Constitution* was in 1977.[69] There have been two referendums which included proposals to amend section 116. In 1944 and 1988, the people were asked to vote on proposals to extend the operation of section 116 to the States. On both occasions, the referendum failed.[70] As a result, the text of section 116 has remained unchanged since its enactment on 1 January 1901, thereby meeting the stability requirement for an anchor to the Australian state-religion relationship.

In addition to section 116, the Preamble to the *Australian Constitution* begins with the words 'Whereas the people …. Humbly relying on the blessing of Almighty God …'. Like section 116, these words have remained unchanged since their enactment in 1901. However, the Preamble has not been used in any meaningful way to interpret the *Constitution*. While it is occasionally referred to in debates about the Australian state-religion relationship, such

[64] Ahdar and Leigh (n 53) 101.
[65] The *European Convention on Human Rights* ('*ECHR*') is incorporated into United Kingdom domestic law via the *Human Rights Act 1998* (UK).
[66] For a discussion of the New Zealand state-religion relationship, see Rex J Ahdar, 'Reflecting on the Path of Religion-State Relations in New Zealand' (2006) 3 *Brigham Young Law Review* 619–660.
[67] See Williams and Hume (n 20).
[68] Ibid 88; Australia's 45th referendum, on the creation of an Indigenous Voice to Parliament, was unsuccessful in 2023.
[69] Williams and Hume (n 20) 154–67.
[70] Andrew Byrnes, Hillary Charlesworth, and McKinnon Gabrielle, *Bills of Rights in Australia: History, Politics and Law* (University of New South Wales Press, 2007) 26–27, 32–33; Beck (n 22) 137–142, 152–155.

reference is usually a matter of principle or history rather than a binding element of the relationship. As such, its ability to anchor the state-religion relationship is minimal.

There are few other sources of law or state practice or custom in Australia which would satisfy the stability element necessary for the law, practice, or custom to anchor the state-religion relationship. As outlined above, Australia does not have either a legislative or constitutionally enshrined federal Bill of Rights. The practices of saying prayers at the beginning of each session of federal parliament is governed by the Parliamentary standing orders, which could be readily changed if the necessary political will was present.[71] Section 116 is therefore the primary, if not only, anchor to the federal state-religion relationship in Australia.

Section 116, however, has some limitations relevant to its status as an anchor. As alluded to above, section 116 does not apply to the States. Further, Australia does not have an equivalent of the United States' Fourteenth Amendment, the so-called 'Equal Protection Clause'.[72] This has ramifications for a federation where there is a division of legislative power between the state and federal legislatures. In the Australian context, significant areas of intersection between the state and religion such as education, healthcare, and criminal law are formally within the exclusive legislative competence of the States.[73] A full consideration of the anchors of the state-religion relationship in each Australian state is beyond the scope of this paper but would include legislative bills of rights and charters of rights in the Australian Capital Territory,[74] Queensland,[75] and Victoria,[76] as well as Tasmania's constitutional freedom of religion provision.[77] While some have argued for the existence of a right to freedom of religion at common law, which could arguably act as an anchor to the state-religion relationship if it existed, it is doubtful such a right exists.[78]

4.2 ITALY'S ANCHOR

Italy's anchor can be found in the existing constitutional provisions dedicated to the regulations of religion. Italy operates as a Republic under a written and entrenched Constitution established in 1948, which includes a Bill of Rights.[79]

To fully understand the current Italian state-religion model and the anchor to that model found in the 1948 Constitution, it is essential to first compare the 1948 Constitution with the previous Albertine Statute of 1848. This was the Constitutional Charter of the Kingdom of Sardinia-Piedmont, that was extended after the unification to the newly formed state.

Article 1 of the Albertine Statute of 1848 stated that:

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[71] See Parliament of Australia, Order 38, Acknowledgment of Country and Prayer*, House of Representatives Standing and Sessional Orders* (2 August 2022); Parliament of Australia, Order 50, Acknowledgment of Country and Prayer, *Standing Orders and Other Orders of the Senate* (October 2022).
[72] Barker, *State and Religion* (n 16) 87.
[73] The Commonwealth does, however, exercise significant influence in these areas.
[74] See *Human Rights Act 2004* (ACT).
[75] See *Human Rights Act 2019* (Qld).
[76] See *Charter of Human Rights and Responsibilities Act 2006* (Vic).
[77] *Constitution Act 1934* (Tas) s 46.
[78] See *Grace Bible Church Inc v Reedman* (1984) 36 SASR 376.
[79] See Marta Cartabia and Nicola Lupo, *The Constitution of Italy: A Contextual Analysis* (Bloomsbury Publishing, 2022). For FoRB, the relevant constitutional provisions in the Italian Constitution are arts 3 para 2, 7, 8, 19, 20.

> The Catholic, Apostolic, and Roman religion is the sole religion of the state. All other forms of worship now existing are tolerated in conformity with the law.

The legal distinction between the establishment of Catholicism as the state religion and the toleration of non-Catholic religions, however, was accompanied by the enactment of other laws that introduced and substantially strengthened civil and political rights for all citizens, in accordance with the principles of a liberal state.

The dramatic shift brought about by the rise of a totalitarian and fascist state saw a significant development in 1929, with the signing of the Concordat between the Catholic Church and the Italian state. This agreement compromised the principle of religious equality by elevating Catholicism to the privileged status of the sole state religion. The Concordat was part of the so-called Lateran Pacts, signed when Benito Mussolini was in charge, and consisted of three different agreements:

1. An International Treaty granting full sovereignty of the Holy See, establishing the State of Vatican City and recognizing to it international personhood (the Lateran Treaty or Conciliation Treaty);
2. A Concordat regulating the relations between the Roman Catholic Church in Italy and the Italian state; and
3. A financial Convention finally settling the loss of territory and properties by the Pontifical State after its annexation to the Kingdom of Italy in 1870.[80]

Article 1 of the 1929 Lateran Treaty granted the Catholic Church a privileged position by recognising and reaffirming that 'the Catholic, Apostolic, and Roman Religion is the only State religion'.[81] To counterbalance this clear breach of religious equality, the State attempted to preserve religious freedom, at least formally, by promulgating Law No 1159 of 1929.[82] This law, titled 'Provisions on the Exercise of the Approved Religions and on Marriages Conducted by their Ministers', addressed the practice of approved religions. It reflected, however, a fascist ideology, aiming to regulate religious practices to control them. It also underscored Mussolini's strategy of using religion to strengthen political control and enforce national unity.[83]

The 1948 Republican Constitution eliminates the principle of a State religion, although it continues to differentiate between the Catholic Church and other non-Catholic religious organisations.

Article 7 of the modern Italian Constitution states that the relations between the Catholic Church and the Italian State are regulated by means of International Treaties (the Lateran Pacts). Article 7 prevents the Italian state from amending unilaterally the Lateran Pacts and states:

> The State and the Catholic Church are independent and sovereign, each within its own sphere.

[80] The legals text can be read at <https://www.uniset.ca/nold/lateran.htm>. For comment, see e.g., Vincent P. Bucci, *Chiesa e Stato: Church-State Relations in Italy within the Contemporary Constitutional Framework* (Springer Netherlands, 1969).
[81] See Lateran Pacts of 1929 <https://www.uniset.ca/nold/lateran.htm>.
[82] Legge 24 giugno 1929, n 1159 [Law 24 June 1959, n 1159].
[83] See Roberto Mazzola, 'State and Church in Italy' in Gerhard Robbers (ed) *State and Church in the European Union* (Nomos Verlag, 2019) 265–280.

> Their relations are regulated by the Lateran Pacts. Amendments to such Pacts which are accepted by both parties shall not require the procedure of constitutional amendments.

Article 8 acknowledges equal freedom for all religious organisations and grants the right to self-organisation to religions other than Catholicism. It provides that relationships between non-Catholic groups and the Italian state *can* be regulated through mutual agreements, which must be approved by law. The provision States:

> All religious denominations are equally free before the law.
>
> Denominations other than Catholicism have the right to self-organisation according to their own statutes, provided these do not conflict with Italian law.
>
> Their relations with the State are regulated by law, based on agreements with their respective representatives.

For a religious group, entering into an agreement with the State has two primary legal implications. Firstly, religious denominations can negotiate specific aspects concerning their religious practices, such as religious holy days and receiving funding through taxpayer contributions. Secondly, upon agreement approval, religious denominations depart from the application of the illiberal and fascist Law No 1159 of 1929. Italy has not enacted a new general statute on FoRB to replace the fascist-era law and despite several modifications to its substantive scope by case law of the Italian Constitutional Court,[84] this Law remains formally applicable to organisations that have failed to enter an agreement with the State, such as Islam.[85] Therefore, while not as entrenched as art 7 and 8 of the Constitution, it forms part of the anchor to the Italian state-religion relationship.

The Italian Constitution also enshrines the right to individual and collective religious freedom and belief for all, regardless of the existence of a specific agreement with the Italian state.[86] Article 19 provides that:

> Anyone is entitled to freely profess their religious belief in any form, individually or with others, and to promote them and celebrate rites in public or in private, provided they are not offensive to public morality.

Finally, as outlined above, Italy is party to the *ECHR* and the *Charter of Fundamental Rights of the European Union*,[87] leading to the incorporation of arts 9 and 10, both of which deal with FoRB and thus form part of the anchor to the Italian state-religion relationship.

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[84] See, eg, Corte costituzionale [Italian Constitutional Court], No 59, 18 November 1958.

[85] Marco Canonico, 'La stipulazione di intese con lo Stato: diritto delle confessioni religiose o libera scelta del Governo?' ['The signing of agreements with the State: a right of religious groups or a free choice of the Government?'] (2012) 15 *Stato, Chiese e pluralismo confessionale* [*State, Church and Confessional Pluralism*] Rivista telematica [online] 1, 2.

[86] *Costituzione* (n 32). Important provisions related to religious freedom more generally include: Article 2, protecting the inviolable rights of the person; Article 3, protecting from discrimination on religious grounds; and Article 20, stating the 'No special limitation or tax burden may be imposed on the establishment, legal capacity or activities of any organisation on the ground of its religious nature or its religious or confessional aims'.

[87] *Charter of Fundamental Rights of the European Union* [2012] OJ C 326 /02, arts 9, 10.

5. UNDERSTANDING THE POTENTIAL RANGE

It is often the anchor of the state-religion relationship which forms the focus of analysis of many state-religion models. Temperman, for example, focuses his analysis on constitutions and other formal documents of state.[88] However, identifying the anchor is just the first step in our methodology for applying the Durham and Scharff model for a more holistic and comprehensive understanding of state-religion relationships. To go deeper requires an analysis of the full range of potential state-religion relationships permitted by the anchoring law/s. The range is not limited to the current interpretation or application of the anchoring law. Nor is it limited to historical interpretations of the law, although the history of its interpretation is important. Nor is it limited to the probable or likely interpretations. Rather, the full range of possible interpretations reasonably open on the law must be considered.

Interpretations can change over time, allowing new expressions of the state-religion relationship which may have been considered unthinkable at another time. Understanding the potential range involves examining all interpretations — even those that have been rejected by the majority — and testing hypothetical laws to determine whether they could, at least theoretically, be permitted by the anchor. Here the work of scholars, dissenting judicial opinions and historical understandings of the state-religion relationship can be drawn upon to understand the full scope of the potential range of the relationship.

It is important to distinguish between laws or public policy which are possible and permitted by the anchoring law and those which have in fact been enacted. For example, a state's anchoring laws may permit state funding of religious schools, but that does not necessarily mean that the government will choose to fund religious schools. Similarly the anchor may permit the state to enter into agreements with religious bodies, however, that does not necessarily mean those religious organisations will necessary be required or desire to enter into such agreements.

Once the potential range of the state-religion relationship has been identified, historical or proposed changes in law can be analysed considering that potential range. Shifts in the relationship which occurred within the range are likely to be the work of ordinary political processes. While ordinary laws may have been changed, the anchoring law (and therefore the bedrock of the state-religion relationship) is likely to have remained the same. However, where a proposed or historical change takes the state-religion relationship outside the identified potential range it is more likely to be revolutionary and fundamental, or alternatively impermissible.

5.1 AUSTRALIA'S POTENTIAL RANGE

As Beck has observed '[t]he standards and principles employed by section 116 are capable of broad and narrow construction'.[89] This opens the way for a wide range of state-religion relationships stretching from cooperation through to separation and *laïcité*. This potential can be seen in the divergent descriptions in the literature. Scholars have variously described Australia's state-religion relationship as non-sectarian Christianity,[90] formal establishment

[88] Temperman (n 2); see also Barker and Clarke (n 63).
[89] Beck (n 22) 161.
[90] Stephen Chavura, John Gascoigne, and Ian Tregenza, *Reason, Religion and the Australian Polity: A Secular State?* (Routledge, 2019) 254–257; see also Deagon (n 39) 155.

(symbolic),[91] pragmatic pluralism,[92] cooperation,[93] accommodation,[94] non-establishment pluralism,[95] non-establishment,[96] neutral separation / neutrality,[97] and flexible separation.[98] While in some instances this difference is merely a matter of nomenclature, in others it stems from a fundamental disagreement about the nature of the Australian state-religion relationship.[99] It is beyond the scope of this analysis to attempt to solve this debate; however, we would argue that all of these understandings of the Australian state-religion relationship are within the potential range permitted by section 116 of the *Australian Constitution*.

Beck has argued that contrary to the approach of the Australian High Court, section 116 should be interpreted broadly, arguing that this was the original intention of the section. He notes that in *A-G (Vic) ex rel Black v Commonwealth* ('*DOGS Case*'),[100] the majority consciously interpreted section 116 narrowly by inferring the intention of the framers from the words of the provision rather than by direct reference to the constitutional convention debate. However, as Beck correctly points out, the convention that judges not refer to the convention debates was abandoned after the *DOGS Case*, opening the possibility that future High Court decisions could have reference to the drafting history of section 116.[101] Whether this would result in a broader interpretation of section 116, and the prohibition on the Commonwealth 'establishing any religion', is a matter for future High Courts.[102] A glimpse of what this might look like can be seen in Murphy J's dissenting judgment in the *DOGS Case*. Unlike the majority, Murphy J held that 'establishing any religion' should be interpreted as including any support or sponsorship, including financial, of any religion.[103] In that case, he found that federal funding of religious schools, even on a non-discriminatory basis, was a breach of the establishment clause in section 116. Had Murphy J's view prevailed, a significant element of the modern federal state-religion relationship — the funding of religious schools[104] — would not exist, leading to a greater separation between state and religion. While a reinterpretation of section 116 is a possibility, it is not necessary to re-interpret section 116 for there to be a strict separation between state and religion at the federal level; all that would be required is a change of federal policy.

While the current interpretation of section 116 permits the federal government to fund religious schools on a non-discriminatory basis, it is not required to do so. As late as 1960, the federal government maintained that education, including the funding of schools, was purely a matter

[91] Ahdar and Leigh (n 53) 104.
[92] Soper et al (n 39) 121; Deagon (n 39) 154–155.
[93] Durham and Scharffs (n 3) 124, 126–127, 145–146.
[94] Fox (n 1) 45.
[95] Barker, 'Pluralism Versus Separation' (n 42).
[96] Temperman (n 2) 118–119.
[97] Shetreet (n 53) 90.
[98] Paul Babie et al, *Religion and Law in Australia* (Kluwer Law International, 2nd ed, 2019) 52–56; Stephen McLeish, 'Making Sense of Religion and the Constitution: A Fresh Start for Section 116' (1992) 18(2) *Monash University Law Review* 221–222.
[99] Barker, 'Pluralism Versus Separation' (n 42).
[100] (1981) 146 CLR 559.
[101] Beck (n 22) 116-163. For the drafting history of section 116, see also Barker, *State and Religion* (n 16) 73–86.
[102] For a discussion raising doubt as to the correctness of the interpretation of section 116 in the *DOGS* case, see *Hoxton Park Residents Action Group Inc v Liverpool City Council (No 2)* (2011) 256 FLR 156, 165 (Basten JA); Luke Beck, 'Dead DOGS? Towards a Less Restrictive Interpretation of the Establishment Clause: *Hoxton Park Residents Action Group Inc v Liverpool City Council (No 2)*' (2014) 37(2) *University of Western Australia Law Review* 59; Luke Beck, 'The Establishment Clause of the Australian Constitution: Three Propositions and a Case Study' (2014) 35(2) *Adelaide Law Review* 226.
[103] *Attorney-General (Vic); Ex Rel Black v Commonwealth*, 146 CLR 559 622–623 (Murphy J).
[104] For the emphasis placed on this aspect of Australia's state religion relationship see Soper et al (n 39) ch. 5.

for state governments.[105] Just three years later, in 1963, the Menzies government introduced the School Science Laboratories Scheme[106] which provided funding for the building of science classrooms in both government and non-government schools. While 'the amount of funding was targeted and relatively small, it was an important first step in the federal government's funding of education'[107] most notably because it was the first time since federation that a government at any level had provided direct funding to religious schools. However, had circumstances been different, this aspect of the modern state-religion relationship may never have existed. Other factors that are often pointed to as part of the federal state-religion relationship, such as prayers in parliament and tax exemptions for religious charities, are similarly not required by section 116. Indeed, there have been significant campaigns arguing for the abolition of both.

While section 116 prohibits the federal government from making laws prohibiting the free exercise of religion, this has not stopped the federal government imposing significant restrictions on religion. Just like the 'establishment clause', the 'free exercise' clause has been interpreted narrowly by the High Court. In particular, the High Court has found that the use of the word 'for' prior to each of the first three clauses of section 116 requires that any imputed law have the purpose of, for example, prohibiting the free exercise of religion. Laws which do not have this purpose, but which may impact on the free exercise of religion in their application do not breach section 116. As Gaudron J explained in *Kruger v Commonwealth:*[108]

> [t]he use of the word 'for' indicates that purpose is the criterion and the sole criterion selected by section 116 for validity. Thus, a purpose must be taken into account. Further, it is the only matter to be taken into account in determining whether a law infringes section 116.[109]

In *Adelaide Company of Jehovah's Witnesses v Commonwealth*,[110] the court found that a wartime ban on the Jehovah's Witnesses did not breach section 116. Similarly, in *Krygger v Williams*,[111] the Court found that laws requiring a religious conscientious objector to undertake military training did not breach section 116. In *Minister for Immigration and Ethnic Affairs v Lebanese Moslem Association*,[112] the full federal court found that the Minister had not breached section 116 when he cancelled the visa of an Imam. In each case, the decision turned on the fact that the purpose of the relevant law was not to prohibit the free exercise of religion. Indeed, no law has ever been found to be invalid via operation of section 116. Other examples of federal restrictions on freedom of religion and belief include the removal of religious exemptions from childhood vaccination requirements,[113] declared area laws under the terrorism provisions of the *Criminal Act 1995* (Cth),[114] and exclusion of religious bodies from the exceptions provided

[105] Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 30 August 1960, 514 (Mr James and Robert Menzies).
[106] *States Grants (Science Laboratories and Technical Training) Act 1964* (Cth) assented to 28th May and commenced on 25th June 1964.
[107] Barker, *State and Religion* (n 16) 252.
[108] *Kruger v Commonwealth* (1997) 190 CLR 1.
[109] Ibid 132 (Gaudron J).
[110] (1943) 67 CLR 116.
[111] (1912) 15 CLR 336.
[112] *Minister for Immigration and Ethnic Affairs v Lebanese Moslem Association* (1987) 17 FCR 373.
[113] See Renae Barker, 'No Jab – No Pay, No Jab – No Play, No Exceptions: The Removal of Conscientious and Religious Exemptions from Australia's Childhood Vaccination Policies' (2017) 20(2) *Quaderni di diritto e politica ecclesiastica* [*Notebooks of Ecclesiastical Law and Politics*] 513.
[114] Section 119.3 gives the Foreign Affairs Minister the power to declare an area in a foreign country. Once declared it is an offence to enter the area. The broadness of this power opens up the possibility of religiously

to religious organisations in the *Sex Discrimination Act 1984* (Cth) where they are also a Commonwealth funded aged care provider.[115] Hewitt and Koch have also argued that a federal ban on religious face coverings would be valid.[116] Following their logic, so long as the federal government was legislating within an area of legislative competence, laws prohibiting religious practices and dress which were enacted for a legitimate purpose other than restricting 'the free exercise of religion' would similarly be valid.[117]

At the other end of the spectrum, Deagon has argued that Australia should move towards mild establishment (of Christianity) in order to better reconcile 'religious freedom and equality to facilitate peaceful coexistence'.[118] Despite the use of the term 'establishment' he argues that:

> [M]ild establishment . . . does not amount to formal or substantive state identification with a religion or legally preferring one religion to another. Mild establishment is also conceptually consistent with the acknowledgment of God in the preamble of the Constitution and the understanding of section 116 as a pluralist freedom of religion provision.

Deagon's concept of mild establishment requires a recognition of a shared Christian heritage and history in political decision-making while at the same time 'not imposing religious belief or coercing religious actions'.[119] In his emphasis on Australia's historical Christian basis, and contrary to Beck's position, he argues that '[p]eople at the time of federation did not believe in a separation of religion and state and were not, for the most part, suspicious of the influence of religion'[120] and therefore section 116 should be interpreted in light of this history. Arguably a federal *Religious Discrimination Act,* should one ever be passed, would move the relationship between the state and religion closer together, with greater accommodations and protections for the exercise of religion in the public sphere. Babie has similarly suggested in relation to section 116 that a wider interpretation incorporating personal religious freedom may have been accepted by constitutional scholars, contrary to the High Court's later interpretation of the provision.[121]

While Beck's, Deagon's, and Babie's advocated interpretations of section 116 (and consequently the Australian state-religion relationship) are outside the current High Court's interpretation, they are at least plausible. Indeed, as outlined above, even without a reinterpretation of section 116, both mild establishment and strict separation could be achieved via ordinary legislation and public policy. As shown in Figure 1, this provides a wide range of potential state-religion relationships:

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significant sights becoming declared areas, potentially prohibiting the exercise of religious practices such a pilgrimages or Hajj.

[115] *Sex Discrimination Act 1984* (Cth) s 23(3A).

[116] Anne Hewit and Cornelia Koch, 'Can and Should Burqas Be Banned: The Legality and Desirability of Bans of the Full Veil in Europe and Australia' (2011) 36(1) *Alternative Law Journal* 16, 20.

[117] While the focus of this paper is on the federal state-religion relationship it is worth noting significant restrictions on religious belief and practice have been enacted at the state level. For example, Victoria, Western Australia, and South Australia attempted to ban the Church of Scientology in the 1960s and 1970s. See Barker, *State and Religion* (n 16) 201–209.

[118] Deagon (n 39).

[119] Ibid 167–168.

[120] Ibid 167.

[121] Babie, 'The Ethos of Protection' (n 25) 71–73.

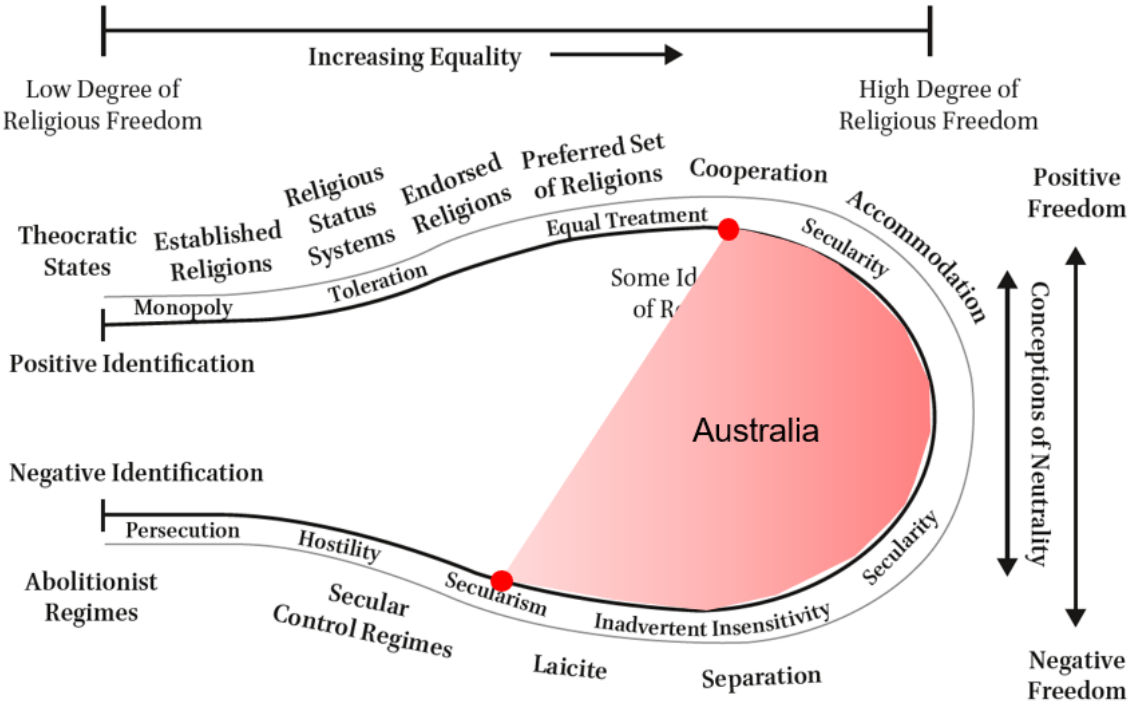

Figure 1: Range of the Australian state-religion relationship.

5.2 ITALY'S RANGE

As with Australia, and as alluded to above, Italy has been variously classified in the international literature on religion-state relationships: one religion,[122] confessional secularism,[123] cooperationist,[124] or even anti-church.[125] Indeed, Temperman discusses Italy in the various contexts of State-supported Roman Catholicism,[126] Cooperation,[127] and Separation between state and religion,[128] noting 'there may in practice be a discrepancy between constitutional separationism and actual state practice'.[129] In the Italian literature, debate focuses on categories such as separatism, re-confessionalisation, and cooperation.[130] As with Australia, we would argue that most, if not all of these, understandings of the Italian state-religion relationship fit within the potential range permitted by the anchoring provisions.

[122] Fox (n 1) 44–45.
[123] Rosenfeld (n 53) 2349–2350.
[124] Durham and Scharffs (n 3) 124, 126–127, 145–146.
[125] Alibašić (n 53) 46. Although it must be noted that, in this context, Alibašić did not intend anti-church to mean anti-religion but rather anti-establishment or non-identification.
[126] Temperman (n 2) 69.
[127] Ibid 102–103.
[128] Ibid 102–103, 121, 123.
[129] Ibid 122–123.
[130] See, eg, Arturo Carlo Jemolo, *Chiesa e Stato in Italia negli ultimi cento anni* [*Church and State in Italy in the Last Hundred Years*] (Einaudi, 1975); Francesco Ruffini, *Corso di diritto ecclesiastico italiano: la libertà religiosa come diritto pubblico subiettivo* [*Course on Italian ecclesiastical law: freedom of religion as a subjective public entitlement*] (F.lli Bocca, 1924); Salvatore Berlingó and Giuseppe Casuscelli, *Diritto ecclesiastico italiano: I fondamenti. Legge e religione nell'ordinamento e nella società d'oggi* [*Italian ecclesiastical law: The fundamentals*] (Giappichelli, 2020); Francesco Finocchiaro, Andrea Bettetini, and Gaetano Lo Castro, *Diritto ecclesiastico* [*Ecclesiastical law*] (Zanichelli, 2015).

Article 7, para 2 (regarding the Lateran Pacts with the Catholic Church) and art 8, para 3 (concerning agreements with non-Catholic religions) of the 1948 Italian Constitution form the foundational pillars of what is known as Italian bilateralism.[131] These agreements with religious denominations serve as instruments that, while upholding general constitutional rights and freedoms, consider the religious identity of each denomination.[132] In the mind of the constitutional fathers and mothers, entering into an agreement with the Italian state could foster and value religious pluralism and diversity: an agreement could create a 'tailor-made dress' crafted for each religious community.[133] The main issue is that, as we will see, the implementation of this constitutional project partly failed.

As outlined above, while all religious communities in Italy enjoy the collective constitutional right to religious freedom (art 19), in practice a four-tier system has emerged:[134]

i) The Catholic Church is regulated under the Lateran Pacts as outlined in art 7 of the Constitution and enjoys a unique constitutional status;

ii) There can be religious (non-Catholic) communities that may be self-organized according to their own statutes and, in addition to that, may have entered successfully into agreements with the Italian state (art 8 paras 2 and 3);

iii) There can be religious (non-Catholic) communities that may also have exercised their right to self-organization and have obtained legal capacity according to Law No 1159 of 1929 on 'admitted religions';[135]

iv) There can be religious (non-Catholic) communities that may have self-organized themselves, but according to the relevant and general provisions of the Civil Code (as any other type of associations, such as unions or political parties).

Articles 7, 8, and 19 of the Constitution have remained unamended since 1948. Yet, a broader analysis reveals that in the latter half of the 20th century, Italy's approach to bilateralism underwent significant changes.

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[131] Francesco Alicino, 'The Legal Treatment of Muslims in Italy in the Age of Fear and Insecurity' (2022) 37(3) *Journal of Law and Religion* 478.

[132] Jlia Pasquali Cerioli, 'L'approvazione delle intese ex art. 8, 3° comma, Cost. nella XVI legislatura: luci e ombre di una nuova «stagione»' ['The approval of agreements pursuant to Article 8, paragraph 3, of the Constitution in the XVI legislature: lights and shadows of a new "season"'] (2013) 16(2) *Quaderni di diritto e politica ecclesiastica* [*Notebooks of ecclesiastical law and politics*] 395; Pierluigi Consorti, '1984-2014: le stagioni delle intese e la «terza età» dell'art. 8, ultimo comma, della Costituzione' ['1984-2014: the seasons of agreements and the "third age" of Article 8, last paragraph, of the Constitution'] (2014) 17(1) *Quaderni di diritto e politica ecclesiastica* [*Notebooks of ecclesiastical law and politics*] 90.

[133] Francesco Margiotta Broglio, 'I culti in sartoria: uguaglianza giuridica e tutela delle specificità confessionali' ['Religion in tailoring: legal equality and protection of religious specificities'] (2009) 2(1) *Percorsi costituzionali* [*Constitutional Pathways*] 181.

[134] Alessandro Ferrari and Silvio Ferrari, 'Religion and the Secular State: The Italian Case' in Javier Martinez-Torrón and W Cole Durham (eds) *Religion and the Secular State: National Reports* (online, 2010) 440 <https://classic.iclrs.org/content/blurb/files/Religion%20and%20the%20Secular%20State%20-%20Interim%20Reports%20 2010.07.27.pdf> accessed 26 June 2024.

[135] This is an essential requirement to launch negotiations with the State. To sign an agreement, the acknowledgement of legal capacity according to Law No 1159 of 1929 has great significance, because it confirms the religious nature of the recognized group. It forms the basic precondition (in fact, if not in law) for an application for an agreement with the Italian State. See Ferrari and Ferrari (n 134) 441.

A pivotal transformation occurred in 1984 with the revision of the Lateran Pacts, bringing them in line with a more modern understanding. This revision was formalised through the so-called Villa Madama Accord, with the Preamble acknowledging 'the process of political and social transformation that has taken place in Italy in recent decades and the developments promoted in the Church by the Second Vatican Council…'[136] Among the key amendments, Catholicism ceased to be the state religion; the compulsory church tax was replaced with a voluntary contribution system; and the teaching of Catholic religion in public schools transitioned from mandatory to optional, premised on the assumption that the principles of Catholicism constitute part of the historical heritage of the Italian people.

In the same year, the first agreement with a non-Catholic religion (the Waldensian Church) was approved by Parliament and paved the way for others with various non-Catholic religious communities. There are now 13 such agreements, reflecting Italy's cooperative model of state-religion relations.[137] However, agreements signed to date are essentially 'photocopy agreements', crafted in a highly similar manner. They replicate each other's content and emulate the Accords with the Catholic Church in key areas.[138] This implies that the 'agreements are seen by the religious groups more as an instrument of political legitimation than as an opportunity for expressing their identity'.[139] As a consequence, they establish privileges reserved to few minority religions and result in discriminatory treatment between the 13 denominations that benefit from bilateralism (and the Catholic Church) and those that remain subject to the restrictive Law No 1159 of 1929 concerning admitted religions.[140] The overall result is a far cry from the 'tailor-made dress' intended by the founders of the 1948 Constitution.[141] But importantly, the nature of the Italian state-religion relationship could change simply by embracing the intended bespoke agreements and bringing more and more diverse religions into the fold through bilateral pacts.

A third milestone of the changed landscape of the Italian state-religion model is represented by the recognition of the supreme, fundamental, and overriding constitutional principle of *laicità* (secularism) by the Constitutional Court. In 1989 the Court was called upon to scrutinise the optional teaching of the Catholic religion in public state schools, particularly addressing the alleged detrimental effects on students who chose not to attend such instruction (today 15.95% of all students).[142] For the first time, the Court defined Italy as a '*stato laico*' and articulated

[136] *Accordo di Villa Madama [Villa Madama Accord]* and Legge 25 marzo 1985, n 121 [Law, 25 March 1985, n 121].

[137] The text of all the agreements with non-Catholic religions can be found (in Italian language only) at <https://presidenza.governo.it/usri/confessioni/intese_indice.html#3>. The 13 religions with agreements are: Union of Methodist and Waldensian Churches, Evangelical Christian Churches Assemblies of God in Italy, Italian Union of Seventh-day Adventists Christian Churches, Union of Jewish Communities in Italy, Baptist Evangelical Christian Union of Italy, Evangelical Lutheran Church in Italy, Sacred Orthodox Archdiocese of Italy and Exarchate of Southern Europe, The Church of Jesus Christ of Latter-day Saints in Italy, Apostolic Church in Italy, Italian Buddhist Union, Italian Hindu Union, Soka Gakkai Italian Buddhist Institute, and Association Church of England.

[138] Alicino (n 131): 'the practical implementation of relations between the state and minority religions has been characterized by "copy-and-paste" production of law'.

[139] Ferrari and Ferrari (n 134) 439.

[140] Alicino (n 131). See also Rossella Bottoni, 'The Legal Regulation of Religious Minorities in Italy' in Helena Vilaça, Maria João Oliveira, and Anne-Laure Zwilling (eds), *Contemporary Challenges to the Regulation of Religions in Europe* (Universidade do Porto Press, 2023) 177.

[141] Broglio (n 133).

[142] According to 2023 statistics available at <https://irc.chiesacattolica.it>. There are four options available to those who do not participate in Catholic religious instruction: (i) attending other educational activities; (ii) studying with the assistance of a teacher; (iii) studying independently; or (iv) leaving the school premises. See *Circolare ministeriale* [*Ministerial circular*] No 51, 8 December 2014.

'the overriding principle of the *laicità* of the State, which is one of the aspects of the form of State outlined in the Constitution of the Republic'.[143] Italian *laicità* 'emerges from arts 2, 3, 7, 8, 19 and 20 of the Constitution' and 'does not imply the indifference of the State to religions but rather a guarantee of State protection of the freedom of religion, in a regime of confessional and cultural pluralism.'[144]

This brief overview indicates that although the constitutional provisions anchoring and delineating the cooperative or bilateral model of the state-religion relationship in Italy have not been formally amended, significant changes have occurred in the policy and implementation of that constitutional framework — indicating the full potential range of the state-religion relationship in Italy. It is not by chance that Italian doctrine urges an examination not only of 'hard' laws about religion, but also of all the players responsible for implementing the constitutional project.[145]

Consequently, within the current Italian cooperation model, which is unequivocally identified by the Constitution, there exist laws or areas of law and religion that align with different categories of state-religion relationship.

The Catholic Church enjoys a preferential endorsement in some areas, such as the teaching of Catholic religion in public schools. Although the Constitutional Court has declared the optional teaching as compatible with the principles of the Republican Constitution of 1948, some concerns persist. Specifically, teachers of the Catholic religion are appointed by school authorities in line with the Catholic Church, which must approve their 'suitability' and approve the syllabus and textbooks. While the optional teaching of Catholic religion is funded via general taxation, the financial responsibility for the study of minority religions is borne by the respective religious communities.[146]

On the other hand, Catholicism and the 13 denominations with agreements with the Italian state enjoy a set of rights not afforded to religions without such agreements. These include the recognition of legal personhood for religious, educational, and charitable entities; the guarantee of spiritual assistance in hospitals, prisons, and in the military; the observance of religious holidays; and the recognition of religious marriages for civil purposes and effects. Most importantly, 'agreed religions' can participate in the *otto per mille* (eight per thousand) system[147]. At the end of each fiscal year, Italian taxpayers can choose to allocate 8% of their income tax to either state-run social programs, to the Catholic church, or to non-Catholic denominations that have signed an agreement with the state.[148]

[143] Corte costituzionale [Italian Constitutional Court], No 203, 7 March 1989 reported in [1989] p 2 [4] <https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/Sentenza_203_1989_Casavola_en-fin.pdf>.
[144] Ibid.
[145] Pietro Faraguna, 'Regulating Religion in Italy: Constitution Does (Not) Matter' (2019) 7(1) *Journal of Law, Religion and State* 32.
[146] See, e.g., the Agreement with the Jewish community of 27 February 1987, approved by Law no. 101 of 8 March 1989. The Agreement was amended on 6 November 1996 and approved by Law no. 638 of 20 December 1996.
[147] See, e.g., the Agreement with the Jewish community, as amended on 6 November 1996 and approved by Law no. 638 of 20 December 1996, Art. 2, titled 'Distribution of the revenue arising from the personal income tax'.
[148] If no choice is made, the contribution is distributed proportionally based on the preferences specified by all taxpayers.

Finally, the Italian legal system incorporates elements of an accommodation category. A notable example is the recent legal development concerning the display of crucifixes in classrooms. This issue has prompted extensive interventions from both Italian and European judges, including the European Court of Human Rights,[149] and has sparked considerable scholarly debate.[150] It has garnered renewed attention following the ruling by the United Sections of the Supreme Court of Cassation in 2021. According to this judgment, the mandatory display of Catholic religious symbols violates several constitutional principles, foremost among them the principle of *laicità*. Conversely, an absolute prohibition of any religious symbols in public schools would also be incompatible with a regime of religious and cultural pluralism. As a result, not only crucifixes but also other religious and cultural symbols can be 'accommodated'[151] on the walls of public schools, with each school community deciding upon the presence of such symbols in its classroom. It is premature to fully predict the legacy and implementation of this judgment, yet it undeniably represents a significant and transformative shift. However, we would argue, despite the transformative nature of the shift, it still falls within the potential range permitted by the anchor of the Italian state-religion relationship.

The primary unresolved issue in Italy's state-religion dynamic is the lack of new comprehensive legislation on religious freedom,[152] which allows the illiberal Law No 1159 of 1929 to remain in force for religions without formal agreements with the state, such as Islam. Despite various interventions by the Constitutional Court, this law frequently fails to align with the principles enshrined in the Constitution.[153]

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[149] See, eg, *Lautsi v Italy* (European Court of Human Rights, Grand Chamber, Application No 30814/06, 18 March 2011); *Lautsi v Italy* (European Court of Human Rights, Second Section Chamber, Application No 30814/06, 3 November 2009); Corte di cassazione [Italian Supreme Civil Court] it., sezioni unite, sent. No 24414, 9 September 2021; Consiglio di Stato it [Council of the State of Italy], sez. VI, [sixth sessions] sent, no 556 del 13 febbraio 2006 [no 556 of 13 February 2006]; T A R. Veneto, sez. III, sent. n. 1110 del 22 marzo 2005.

[150] Susanna Mancini, 'Taking Secularism (Not Too) Seriously: The Italian "Crucifix Case"' (2006) 1(2) *Religion & Human Rights* 179; Andrea Pin, 'Public Schools, the Italian Crucifix, and the European Court of Human Rights: The Italian Separation of Church and State' (2011) 25 *Emory International Law Review* 95; Luca P Vanoni, 'La sentenza della Grande Camera sul crocifisso: è una pronuncia corretta' ['The Grand Chamber's ruling on crucifixes: it is a correct decision'] (2011) 31(2) *Quaderni costituzionali* [*Constitutional Notebooks*] 419; Joseph H H Weiler, '*Lautsi*: A Reply' (2013) 11(1) *International Journal of Constitutional Law* 230; Nahshon Perez, '*Lautsi v Italy*: Questioning the Majoritarian Premise' (2015) 8(3) *Politics and Religion* 565; Andreas Follesdal, 'Religion and the State: The "Lautsi" Case of the European Court of Human Rights about Crucifixes in Italian Class Rooms' in Dirk Ehlers and Glaser Hennig (eds), *State and Religion: Between Conflict and Cooperation* (Momos, 2020); Jeroen Temperman, *The Lautsi Papers* (Martinus Nijhoff, 2012).

[151] Marcello Toscano, 'Il crocifisso "accomodato": Considerazioni a prima lettura di Corte cass., Sezioni Unite civili, n 24414 del 2021' ['The Crucifix "Accommodated": Considerations at First Reading of the Judgment No 24414/2021 by the United Sections of the Italian Supreme Court of Cassation'] [2021] (18) *Stato, Chiese e pluralismo confessionale* [*State, Church and Confessional pluralism*] (Rivista telematica) [Online Journal] 45 <www.statoechiese.it>.

[152] Roberto Zaccaria et al (eds), *La legge che non c'è. Proposta per una legge sulla libertà religiosa in Italia* [*The law that does not exist. Proposal for a law on religious freedom in Italy*] (il Mulino, 2020). The government has also a discretionary power to decide whether to initiate negotiations for new agreements with religious denominations: see Corte costituzionale [Italian Constitutional Court], No 52, 26 January 2016; Elena Ervas, 'The Agreements Between Church and State: The Italian Perspective' [2017] (4) *Brigham Young Law Review* 869; Adelaide Madera, 'Atheism in Judicial Discourse: An Analysis of the Italian Constitutional Scenario' (2023) 16(2) *International Journal for Religious Freedom* 57.

[153] Cerioli (n 132) 405. The legal doctrine suggests that the general set of rights granted by these agreements may be the basis for a new general law on religious freedom, in substitution of Law 24 giugno 1929, No1159 [Italian Law 24 June 1929, No 1159].

Numerous oscillations have occurred over time within the Italian landscape of bilateralism or cooperation model. An enquiry of the 'living constitution' — not limited to the Italian Constitution only — reveals that 'the constitutional provisions have been implemented in diverging directions throughout the history of Italian secularism'.[154] Negotiating an agreement with the State remains within the spectrum of constitutional possibilities rather than mandatory obligations, and various other indicators suggest the presence of elements typical of other categories of state-religion relationships. As outlined in Figure 2 below, the potential range therefore stretches from endorsed religion (Roman Catholic Church), equivalent to Fox's multi-tiered preferences — one religion category, through to accommodation and possibly non-establishment. While a number of commentators have described Italy as having a separation between state and religion or as being secular (*laicità*), arts 7 and 8 which explicitly provide for agreements between the state and religious organisations precludes a complete separation of state and religion.

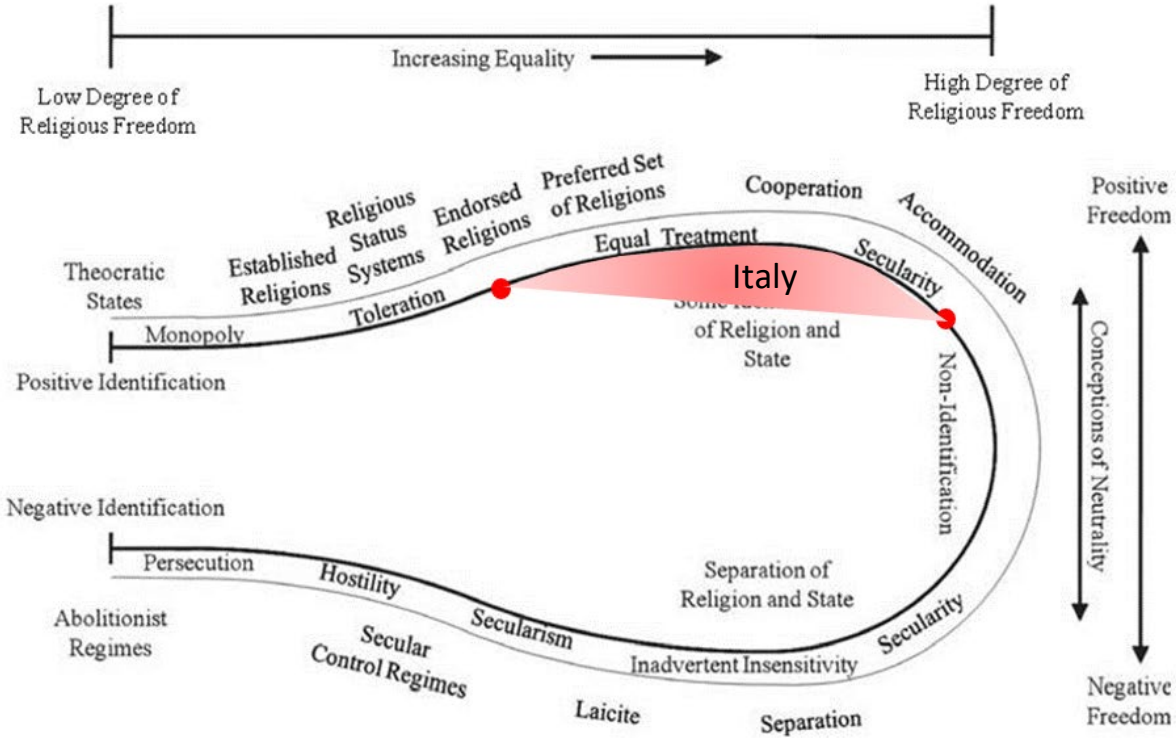

Figure 2: Range of the Italian state-religion relationship.

6. DISCUSSION

As observed at the outset, Australia and Italy, despite prima facie differences in the constitutional articulation of their respective state-religion relationships, ultimately manifest a similar interaction between state and religion. Both preclude the establishment of a state religion or church via their constitution, while at the same time there are significant areas of cooperation between the state and religion generally. In Australia, this can be seen in, for example, federal funding of religious schools, while in Italy it is manifested in policies such as the *otto per mille* taxation. Similarity can also be seen in the manifestation of FoRB in practice. In the 2021 Pew Research Centre Government Restriction Index ('GRI'), Australia and Italy

[154] Faraguna (n 145) 32.

scored 1.6 and 2.9 respectively, placing them in the 'low' and 'moderate' restriction categories.[155] Both States, however, were categorised as 'moderate' on the Pew Research Centre's Social Hostility Index, with scores of 2.7 and 3.1 respectively.

Overlaying the range of possible state-religion relationships for the two jurisdictions on the Durham and Scharffs loop model (Figure 3) highlights this area of overlap in the current manifestation of the respective relationships.

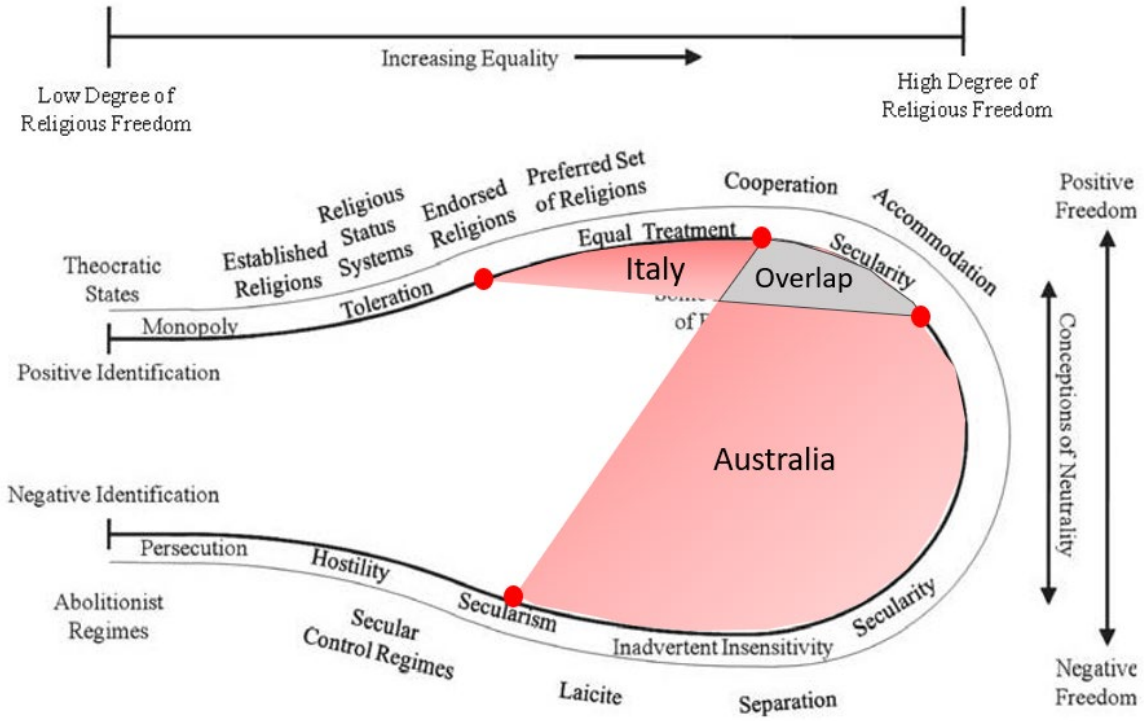

Figure 3: Overlay of Australian and Italian state-religion relationships.

However, as highlighted in our discussion above, the way in which the state-religion relationship has manifested historically is very different. So too are potential alternative manifestations of the relationship. These historical and alternative manifestations pull in opposite directions. In Australia, as observed by Durham and Scharffs, there 'is a vacillation between cooperation and a reasonably robust secularism'.[156] Consequently, and due to the operation of section 116 of the *Australian Constitution* as the anchor to the Australian state-religion relationship, the relationship cannot move beyond cooperation towards preferencing one or even a defined set of religions — although arguably Deagon's suggestion of a form of mild (Christian) establishment may well do just that. The Australian State could not, for example, establish a series of agreements with religious organisations in a similar way to that contemplated under art 8 of the Italian Constitution. Instead, tension exists between cooperation and separation.

[155] Samirah Majumdar and Sarah Crawford, *Globally, Government Restrictions on Religion Reaches Peak Levels in 2021, While Social Hostilities Went Down* (Pew Research Centre 2024) online, accessed 26 June 2024 <https://www.pewresearch.org/wp-content/uploads/sites/20/2024/03/PR_2024.3.5_religious-restrictions_REPORT.pdf>.

[156] Durham and Scharffs (n 3) 124.

By contrast the operation of arts 7 and 8 of the Italian Constitution sets up a special relationship between the state, the Roman Catholic Church, and religions which choose to enter into agreements with the State. While, at least theoretically, the Italian State could enter into agreements with all religious organisations operating in Italy, this would only enable the relationship to move towards cooperation and accommodation — true separation is impossible. The agreements, and therefore at least some level of cooperation or accommodation, are inevitable and inherent. Consequentially the tension in the Italian state-religion relationship is between accommodation / non-identification and the endorsement of a single (or a small number of) historically favoured religions.[157]

7. CONCLUSION

State-religion relationships are complex. The nature of that relationship at any given point in time is determined not only by constitutional provisions (anchors) but also by less permanent laws, state practice, public policy, and public opinion. Yet it is constitutional provisions which have tended to be the focus of analysis in models of state-religion relationships. In this paper we have proposed a new methodology for applying models of state-religion relationships using the Durham and Scharffs loop typology as applied to Australia and Italy as an exemplar of the method we propose. Rather than focusing on constitutional provisions alone, we argue that regard should be had to the less permanent and, therefore changeable, elements in the relationship. This includes not only current laws, public policy, and state practice, but also historical interpretations and applications of the anchoring law as well as proposed or imagined possibilities which are permissible under the anchoring constitutional arrangements. Further, and as a consequence of the broader approach, rather than being fixed within a single category of relationship, state and religion interactions exist within a potential range permitted by changeable interpretations and applications of the anchoring laws. As demonstrated via the Australian and Italian case studies discussed above, the size of this potential range will vary.

The methodology we propose for better understanding state-religion relationships via their anchor and potential range assists in explaining apparent inconsistencies in the literature regarding state and religion. It can explain why two scholars working on the same jurisdiction may ascribe the state-religion relationship to two different categories. It is simply that they are focusing on different aspects of the relationship within the range of possible relationships or are interpreting the anchoring constitutional arrangements in differing (narrower or broader) ways. Understood in this way, competing interpretation of a jurisdiction's state-religion relationship are not inconsistent with one another. Rather, they add further depth to our understanding of the full potential range of the relationship. Similarly, ascribing jurisdictions such as Australia and Italy with prima facie very different constitutional arrangements into the same category can be explained by the crossover of the full potential range of their individual state-religion relationships. Analysing a range of different jurisdictions in the way we propose should lead to an overlapping mosaic of differing potential ranges of state-religion interaction reflecting the intricate complexities of state-religion relationships.

[157] Ibid 126.