

COMPARATIVE CONSTITUTIONAL INTERPRETATION OF RELIGIOUS FREEDOM

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Abstract When adjudicating religious disputes, constitutional courts often resort to a particular discursive register. The notions ‘tolerance’ and ‘respect’ are an integral part of this religion-specific constitutional register. But what do judges mean when they deploy the language of tolerance and respect? And what substantive role, if any, do both notions play in the constitutional interpretation of religious freedom? This article seeks to answer these conceptual and substantive questions by comparing constitutional case law on religious freedom from India, Israel and the United States. It also provides linkages to ongoing processes of (alleged) constitutional retrogression in the three jurisdictions.

Keywords: Comparative law, tolerance, respect, religious freedom, constitutional interpretation, India, Israel, United States.

In today’s pluralistic societies, constitutional courts are inevitably confronted with divisive religious disputes. Controversies over religion are among the hardest cases constitutional judges face, given the (un)reasonable disagreement that often envelops them. This difficulty translates to a shift in constitutional discourse. When adjudicating religious disputes, constitutional courts tend to reach beyond general constitutional language to open up a particular discursive register, composed of notions such as neutrality, accommodation and separation. The philosophical notions of tolerance and respect are also an integral part of this religion-specific constitutional register. Constitutional courts frequently invoke the values of tolerance and respect to indicate how society, and citizens within it, should engage with religious diversity.

Consider, by way of illustration, two recent examples from United States constitutional law: *Masterpiece Cakeshop v Colorado Civil Rights Commission* and *American Legion v American Humanist Association*. In

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Masterpiece Cakeshop, a Christian baker who refused to make a wedding cake for a same-sex couple was found in breach of anti-discrimination legislation by the Colorado Civil Rights Commission. The United States Supreme Court, reviewing the case under the First Amendment to the US Constitution, found that the Commission's treatment of the case disclosed constitutionally impermissible hostility towards religion.¹ How the baker was treated, the Court held, 'was neither tolerant nor respectful of [his] religious beliefs'.² In future, the Supreme Court concluded in *obiter*,

these [kinds of] disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.³

In *American Legion* the Supreme Court also repeatedly invoked the notions of tolerance and respect. In upholding the constitutionality of a 32-foot Latin cross on public grounds, the Court held that 'destroying or defacing [a] Cross that has stood undisturbed for nearly a century would not ... further the ideals of respect and tolerance embodied in the First Amendment'.⁴ Earlier in its judgment, the Court emphasised that

[t]he practice begun by the First Congress [by enacting the First Amendment] stands out as an example of respect and tolerance for differing views ... and a recognition of the important role that religion plays in the lives of many Americans.⁵

Both examples indicate that tolerance and respect play an important part in constitutional discourse on religious freedom. The US Supreme Court is, moreover, not the only constitutional court to deploy the language of tolerance and respect in adjudicating religious disputes. The Supreme Courts of India and Israel, among others,⁶ also do so.⁷ But what do constitutional judges mean when they use the language of tolerance and respect? Are constitutional understandings of tolerance and respect antagonistic, as they are in political philosophy? Or do both concepts have distinct meanings in constitutional law? Apart from these conceptual questions, we should also ask substantive questions. What role do tolerance and respect play in constitutional adjudication? Do constitutional courts merely deploy them for rhetorical effect? Or does judicial reliance on tolerance and respect have an impact on constitutional interpretation of religious freedom and, concomitantly, the resolution of religious disputes?

¹ *Masterpiece Cakeshop v Colorado Civil Rights Commission*, 584 US ___ (2018) at 12.

² *ibid* 17.

³ *American Legion v American Humanist Association*, 588 US ___ (2019) 18.

⁴ *ibid* 31.

⁵ *ibid* 28.

⁶ Among international courts, see especially the European Court of Human Rights. See, for instance, *SAS v France* [2014] ECHR 695, para 127 ('the State's role as the neutral and impartial organiser of the exercise of various religions . . . requires the State to ensure mutual tolerance between opposing groups').

⁷ As shown throughout this article.

These important questions have received less attention from constitutional scholars than they deserve. This article aims to provide answers by comparing constitutional case law on religious freedom in three liberal democracies marked by reasonable disagreement on the place of religion in public life: India, Israel and the United States. The aims of the article are twofold. First, the article seeks to identify the *conceptualisation* of tolerance and respect favoured by the Supreme Courts of these three jurisdictions. Second, the article aims to analyse the *substantive impact* of these diverging conceptualisations on the constitutional interpretation of religious freedom. The main conclusions of the comparative analysis are foreshadowed here and unpacked throughout the article.

With regard to the conceptual aim, the comparative analysis—based on a dataset of 117 Supreme Court judgments—indicates both convergence and divergence. At a more superficial level of analysis, the comparative study shows convergence in that the Supreme Courts of India, Israel and the United States frequently deploy tolerance and respect in adjudicating religious disputes. At a deeper level of analysis, however, salient divergences begin to emerge. The comparative study reveals that the three courts resort to notions of tolerance and respect to varying degrees and, more importantly, rely on different conceptions of both concepts (see Sections II and III).

With regard to its substantive aim, the article's main claim is that, although the three Supreme Courts favour *diverging* conceptions of tolerance and respect, a striking *convergence* unfolds when it comes to the actual impact that these distinct understandings have on the constitutional interpretation of religious freedom. The comparative analysis discloses that each Supreme Court relies on its distinctive understanding of tolerance in particular to *circumscribe* the constitutional right to freedom of religion (see Section IV).

The structure of the article is as follows. Section I provides a conceptual sounding board by outlining the multiple meanings of tolerance and respect in political philosophy. This section also explains why constitutional choices between tolerance and respect matter (in theory). Section II introduces the three jurisdictions and offers a broad overview of the relevant case law. Section III identifies the conceptualisation of tolerance and respect favoured by each Supreme Court. Section IV goes on to analyse the substantive impact of the distinctive understanding of tolerance in particular on the constitutional interpretation of religious freedom across the three jurisdictions. This section also provides linkages to ongoing processes of (alleged) democratic erosion and constitutional retrogression in all three jurisdictions.⁸ The conclusion, finally, ties the comparative analysis back to the debate about tolerance and respect in political philosophy.

⁸ Data from V-Dem indicate a downwards trend in the Liberal Democracy Index in all three countries since (at least) 2015, although the trend is less pronounced in respect of Israel. See <<https://www.v-dem.net/en/analysis/VariableGraph>>.

I. THE MEANINGS OF TOLERANCE AND RESPECT IN POLITICAL PHILOSOPHY

Throughout this article, the primary aims are to (i) identify constitutional understandings of tolerance and respect across jurisdictions; and (ii) analyse the impact this has on constitutional interpretation of religious freedom. But to fully appreciate the ambivalence in comparative understandings of the philosophical notions of tolerance and respect, we first need to get our bearings straight. We must begin by grasping (the essentials of) the meaning of tolerance and respect in political philosophy.

In political philosophy, tolerance and respect are usually pitted against each other as antagonistic idea(l)s. Arguments for tolerance date back to at least the seventeenth century, when John Locke and Pierre Bayle advocated for the toleration of (most)⁹ religious difference.¹⁰ Tolerance has remained a core building block of liberalism ever since.¹¹ Yet some contemporary political philosophers argue that ‘mere’ tolerance of religious difference is not enough. Martha Nussbaum and Emanuela Ceva, for instance, posit that we should move beyond tolerance towards (equal) respect.¹² In historical perspective, this is not a novel or radical position to defend. The contemporary argument not only recalls the thoughts of Kant (who equated tolerance to arrogance) and Goethe (who found tolerance insulting).¹³ It also echoes the thoughts of several founding figures of the US Constitution. James Madison, in particular, objected to the language of tolerance, because it suggested legislative grace,¹⁴ ‘as if it were by the blessing of the majority that the minority was not persecuted’.¹⁵ Among contemporary political philosophers, however, John Horton has countered that the alternative project of respect may well be too ambitious. Horton claims that mutual tolerance is the best we can hope for in contemporary pluralistic societies marked by ‘mutually antagonistic and hostile’ ways of life.¹⁶ In political philosophy, in short, the role of

⁹ Locke and Bayle, both Protestants, excluded Catholics from religious tolerance. Locke further denied tolerance to atheists.

¹⁰ R Forst, ‘The Limits of Toleration’ (2004) 11(3) *Constellations* 312; DAJ Richards, *Toleration and the Constitution* (Oxford University Press 1986) 89.

¹¹ See for instance JS Mill, *On Liberty and Other Essays* (J Gray ed, Oxford University Press 1991); J Rawls, *Political Liberalism* (expanded edn, Columbia University Press 2005).

¹² MC Nussbaum, *Liberty of Conscience: In Defense of America’s Tradition of Religious Equality* (Basic Books 2010); E Ceva, ‘Why Toleration Is Not the Appropriate Response to Dissenting Minorities’ Claims’ (2015) 23(3) *European Journal of Philosophy* 633. See also W Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton University Press 2008).

¹³ Forst (n 10) 315; R Forst, *Toleration in Conflict: Past and Present* (Cambridge University Press 2013) 334.

¹⁴ MW McConnell, ‘The Origins and Historical Understanding of Free Exercise of Religion’ (1990) 103 *HarvLRev* 1409, 1443; Nussbaum (n 12) 90.

¹⁵ Nussbaum (n 12) 90.
¹⁶ J Horton, ‘Why the Traditional Conception of Toleration Still Matters’ (2011) 14(3) *Critical Review of International Social and Political Philosophy* 289, 292–4 and 299–302. See also P Jones, ‘Toleration and Tolerance: Between Belief and Identity’ in L Bialasiewicz and V Gentile (eds), *Spaces of Tolerance: Changing Geographies and Philosophies of Religion in Today’s Europe*

tolerance and respect in shaping liberal responses to religious diversity remains contested.

This ongoing debate has important implications, at least in theory, for constitutional law. In theory, it matters whether constitutional courts view religious claims through the lens of tolerance or the lens of respect, since both lenses operate differently and thus generate different outcomes. Tolerance, at least as understood in political philosophy, operates as a negative lens.¹⁷ It relies on disapproval by those with power (usually a majority) of those without power (generally a minority).¹⁸ In its most pernicious mode, tolerance involves drawing boundaries of societal belonging, of in-groups and out-groups. Tolerance's negativity has led Nussbaum, among others, to reject it as 'too grudging and weak' an attitude towards religion.¹⁹ Nussbaum prefers the rival notion of (equal) respect.²⁰ Unlike tolerance, respect does not have a 'condescending and superior air' about it.²¹ In its strongest form, respect instead equates to esteem or positive regard for difference. In other words, respect operates as a positive lens.²² But Brian Leiter and others categorically reject this positive lens as unsuited to resolve religious disputes. Leiter argues that religion is not the sort of thing that warrants respect, at least not in the strong sense intended by Nussbaum.²³ Instead, he submits, tolerance is all that is required in the face of religious difference.²⁴ This disagreement on the competing roles of tolerance and respect is not merely philosophical. It has practical consequences for constitutional law as well. On Nussbaum's respect framework, at least some religious exemptions from facially neutral laws that burden religious exercise are constitutionally required.²⁵ On Leiter's tolerance framework, by contrast, the State is under no obligation to grant such religious exemptions.²⁶

It thus matters, in theory, how constitutional courts view religion: through the lens of tolerance or of respect. Yet to fully understand the role of tolerance and respect in comparative constitutional law, we must dig deeper into the content of both notions. Although tolerance has a broadly accepted core meaning—of forbearance from coercively interfering with disapproved of beliefs, practices and opinions²⁷—the concept is usually broken down into multiple modes and

(Routledge 2020) 61–77 (arguing that tolerance of beliefs is the best possible approach; not second-best).

¹⁷ Horton (n 16) 290 ('Negativity [lies] at the heart of ... toleration'); F Boucher and C Laborde, 'Why Tolerate Conscience?' (2016) 10 CLPH 493, 505 ('toleration is conceptually linked to a negative attitude of disapproval').

¹⁸ I Carter, 'Are Toleration and Respect Compatible?' (2013) 30 JAppliedPhil 195, 196.

¹⁹ Nussbaum (n 12) 24. See also M Minow, 'Tolerance in an Age of Terror' (2006) 16(3) Southern California Interdisciplinary Law Journal 453, 457. ('Liberal tolerance has always struck me as a second-best, a kind of "putting up with" difference that falls short of genuine respect.')

²⁰ *ibid.* ²¹ Horton (n 16) 290.

²² Boucher and Laborde (n 17) 506 (referencing the 'positive attitude of respect').

²³ B Leiter, *Why Tolerate Religion?* (Princeton University Press 2013) 68. ²⁴ *ibid.* 64.

²⁵ Nussbaum (n 12) 24.

²⁶ Leiter (n 23) 103.

²⁷ Horton (n 16) 290; Carter (n 18) 196; Forst (n 10) 314–15.

conceptions. In terms of modes, tolerance can be either a moral virtue displayed by individuals in interpersonal relations or a political practice adopted by the State towards its subjects.²⁸ When the Israeli Supreme Court notes that '[m]utual tolerance among persons of different... faiths is a fundamental precondition for the existence of a free, democratic society', it refers to tolerance as an interpersonal moral virtue.²⁹ Conversely, when the United States Supreme Court rules that '[t]he Free Exercise Clause commits government itself to religious tolerance', it speaks of tolerance as a State practice.³⁰

Importantly, philosophical objections to tolerance tend to target *State* tolerance, not interpersonal tolerance.³¹ These objections moreover take aim at a specific conception of State tolerance, at what Rainer Forst terms the 'permission conception' of tolerance.³² On this conception, 'the authority [gave] qualified permission to the members of [a] minority to live according to their beliefs on the condition that the minority accept[ed] the dominant position of the authority'.³³ This is the understanding of tolerance deployed in early modern political acts of toleration,³⁴ which struck Goethe as insulting and Kant as arrogant.³⁵ It is also against this specific conception of State tolerance that contemporary arguments for respect instead of tolerance are generally made.³⁶

But tolerance and respect are not *necessarily* incompatible. Ian Carter argues that respect for *persons* is compatible with tolerance of their *practices*, under certain conditions.³⁷ Compatibility of tolerance and respect depends, Carter posits, on a specific conception of the latter as 'recognition respect', a notion coined by Stephen Darwall.³⁸ 'To have recognition respect for someone as a person', Darwall states, 'is to give appropriate weight to the fact that he or she is a person by being willing to constrain one's behavior in ways required by that fact.'³⁹ Recognition respect is thus due to all persons.⁴⁰ As long as tolerance is reserved for responses to beliefs, opinions and practices, it is *compatible* with recognition respect for persons. Yet Darwall also identifies a different understanding of respect, as 'consist[ing] in an attitude of positive appraisal of [a] person' and her projects.⁴¹ Such 'appraisal respect', he explains, is synonymous with esteem or high regard.⁴² Because appraisal respect entails *positive* evaluation, it is logically incompatible with tolerance,

²⁸ Forst (n 10) 315.

²⁹ *Universal City Studios Inc v Films and Plays Censorship Board*, H CJ 806/88 (15 June 1989) para 7. ³⁰ *Church of the Lukumi Babalu Aye, Inc v Hialeah* 508 US 520, 547 (1993).

³¹ J Gray, 'Pluralism and Toleration in Contemporary Political Philosophy' (2000) 48(2) *Political Studies* 323, 323 and 326. ³² Forst (n 10) 315. ³³ *ibid.*

³⁴ *ibid.* 316 (discussing the 1598 Edict of Nantes).

³⁶ Horton (n 16) 290–3.

³⁸ *ibid.* 198. See also Leiter (n 23) 72.

³⁹ SL Darwall, 'Two Kinds of Respect' (1977) 88(1) *Ethics* 36, 45.

⁴¹ *ibid.*

³⁵ *ibid.*; Forst (n 13) 334.

³⁷ Carter (n 18) 196–7.

⁴⁰ *ibid.* 38.

⁴² *ibid.* 39.

which necessarily implies disapproval.⁴³ Appraisal respect is, in other words, inherently *incompatible* with tolerance.⁴⁴

The above conceptual puzzle may be unfamiliar to most (constitutional) lawyers. But the salient takeaway for constitutional law is that the meanings of tolerance and respect are multiple and nuanced. While some of these understandings are incompatible, others are not. There is, in other words, nothing inherently contradictory in the Indian Supreme Court ruling that ‘religious *tolerance* [is] an essential part of secularism enshrined in our Constitution’ in one judgment,⁴⁵ only to state in the next that ‘[o]ur concept of secularism is that the State ... shall treat all religions ... with equal *respect*’.⁴⁶ It all depends on how constitutional judges understand tolerance and respect, which is where we must look next.

II. TOLERANCE AND RESPECT IN CONSTITUTIONAL LAW

To analyse the role of tolerance and respect in constitutional law, this article compares constitutional case law from India, Israel and the United States. The Supreme Courts of India, Israel and the United States operate in secular constitutional democracies marked by reasonable disagreement on the place of religion in public life.⁴⁷ This reasonable disagreement moreover runs along similar cleavages. Although India and Israel are characterised by a majority–minority religion relationship in which Islam is the minority religion, the central *constitutional* cleavage in both countries is between the religious and the secular.⁴⁸ A similar religious–secular chasm is at the heart of most contemporary religious disputes in the United States.

All three countries are also home to a majority religion—Judaism, Hinduism and Christianity—that is itself fragmented. Yet, the State’s response to this fragmentation differs across the three jurisdictions. In the United States, the great diversity of Protestant sects was seen at the time of the founding, and continues to be perceived today, as a positive guarantee against religious domination by one sect over the others.⁴⁹ In other words, the social fact of religious pluralism sustains constitutional protection of religious liberty in the

⁴³ *ibid* 199.

⁴⁴ Carter (n 18) 196–7.

⁴⁵ *SR Bommai v Union of India* (1994) 3 SCC 1, 147–148 (Sawant, J, and Kuldeep Singh, J) (emphasis added).

⁴⁶ *Dara Singh v Republic of India* (2011) 2 SCC 490, 531 (emphasis added).

⁴⁷ GJ Jacobsohn, ‘Three Models of Secular Constitutional Development: India, Israel, and the United States’ (1996) 10(1) *Studies in American Political Development* 1, 1; D Barak-Erez, ‘Symbolic Constitutionalism: On Sacred Cows and Abominable Pigs’ (2010) 6(1) *Law, Culture and the Humanities* 420, 421.

⁴⁸ S Fischer, ‘Intolerance and Tolerance in the Jewish Tradition and Contemporary Israel’ (2003) 2(1) *Journal of Human Rights* 65, 65; Jacobsohn (n 47) 10.

⁴⁹ PB Kurland, ‘The Origins of the Religion Clauses of the Constitution’ (1986) 27(5) *William Mary Law Review* 839, 857.

United States. I will argue that the notions of tolerance and respect have played an important role in shaping this constitutional framework.

In India, by contrast, fragmentation of the majority Hindu religion—through caste-based segregation—was considered a threat to national unity in the aftermath of independence and Partition.⁵⁰ The ideal of tolerance held the key to dissolving this threat. As CS Adcock explains, ‘Gandhi’s deployment of Tolerance’ was instrumental in ‘disengaging Indian secularism from the politics of caste’.⁵¹ This, in turn, ‘helped to secure a Hindu majority in India’ by bringing the Untouchables or Dalit into the Hindu fold.⁵² Tolerance was not only central to ensuring Hindu unity in post-independence India, but also—as a necessary concomitant—to the creation of a Muslim minority.⁵³ More recently, however, constitutional emphasis on Hindu unity has taken a pernicious turn in the resurgence of the nationalist Hindutva ideology.⁵⁴ Hindutva ideologues draw on a narrative that depicts Hinduism as a uniquely tolerant religion, and the only religion truly compatible with the constitutional commitment to secularism.⁵⁵ Islam, conversely, is constructed as inherently *intolerant* and, therefore, a threat to the secular constitutional order.⁵⁶ In section IV, I trace how these pernicious Hindutva views have gradually burrowed their way into the doctrines of the Indian Supreme Court. I will argue that, ironically, this evolution has been facilitated by the Indian Court’s positive conception of tolerance.

In Israel, finally, the legal presence of religion in public life is shaped by Orthodox Judaism. Public protection of Orthodox Judaism is the legal norm. Other streams of Judaism, conversely, are the object of varying degrees of accommodation. These religious accommodations, of Ultra-Orthodox Jews in particular, have caused increased tension with the secular majority.⁵⁷ This is evident in the opening sentence of the Israeli Supreme Court’s judgment in *Horev*, on the closing of a central street in Jerusalem on the Sabbath. ‘[I]n Israeli public discourse’, the Court explains, ‘Bar-Ilan Street is no longer simply a street. It has become a social concept reflecting a deep-seated political dispute between the Ultra-Orthodox and the secular populations.’⁵⁸ Throughout the article, it is explained how the Israeli Supreme Court has attempted to defuse these tensions by adopting a compromise approach to

⁵⁰ Partition refers to the division of the territory of the former British colony in the independent States of India and Pakistan.

⁵¹ CS Adcock, *The Limits of Tolerance: Indian Secularism and the Politics of Religious Freedom* (Oxford University Press 2013) 14.

⁵² *ibid.* 151 (explaining that ‘the founding text of the Hindu Nationalist movement, Veer Savarkar’s *Hindutva: Who is a Hindu?*’ was published in 1923).

⁵³ R Kapur, ‘The “Ayodhya” Case: Hindu Majoritarianism and the Right to Religious Liberty’ (2014) 29(1) *Maryland Journal of International Law* 305, 361–2.

⁵⁴ D Barak-Erez, ‘Law and Religion under the Status Quo Model: Between Past Compromises and Constant Change’ (2009) 30(6) *CardozoLRev* 2495, 2501–2. See for instance *Horev v Minister of Transportation*, HCJ 5016/96 (13 April 1997); *Ressler v Knesset*, HCJ 6298/07 (12 February 2012).

⁵⁵ *Horev* (n 57) para 1.

religious disputes. Insistence on the value of tolerance has been instrumental in legitimating the Court's search for compromise solutions.

Although this article has comparative ambitions, it does not purport to *explain* the above-described and other convergences and divergences across the three studied jurisdictions.⁵⁹ Instead, it aims at a more profound *understanding* of the disparate meanings and impacts of tolerance and respect in the three jurisdictions.⁶⁰ To gain this deeper understanding, linkages will be made to other legal tools, doctrines and interpretive devices, used by the three Supreme Court to resolve religious disputes. To this end, a dataset of 117 constitutional judgments was composed: 45 judgments of the Supreme Court of India, 16 of the Supreme Court of Israel, and 56 of the Supreme Court of the United States.⁶¹ The dataset is representative of the constitutional case law on religious freedom across the three jurisdictions.⁶² It contains the landmark judgments, along with less dominant judgments, across time.⁶³ Initial screening of all 117 judgments for references to tolerance and respect discloses the rate at which both notions are deployed in constitutional discourse, as shown in the table below.⁶⁴

Table 1 depicts the frequency of explicit⁶⁵ references to tolerance and respect in the dataset. The table's first row reflects the distribution of the dataset across the three jurisdictions. Rows 2–5 give, per jurisdiction, the number of judgments that contain (i) no relevant⁶⁶ references to either tolerance or respect; (ii) only references to tolerance; (iii) only references to respect; and (iv) references to both tolerance and respect. Rows 6–7, finally, give the total

⁵⁹ R Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press 2014) 186.

⁶⁰ A von Bogdandy, 'Comparative Constitutional Law as a Social Science? A Hegelian Reaction to Ran Hirschl's *Comparative Matters*' (2016) Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2016-09 <<https://ssrn.com/abstract=2773738>>.

⁶¹ Judgments were gathered through literature review on law and religion in the three jurisdictions, complemented with targeted database searches (Manupatra for India, Versa for Israel, and Justia for the United States) and the snowball method. Search terms used in the database search: tolerance; toleration; tolerate; equal respect AND religion; mutual respect AND religion; due respect AND religion; respect AND religion.

⁶² Due to language limitations and limited availability of English translations of Israeli Supreme Court judgments, the dataset in respect of Israel is smaller than that in respect of India and the United States. Based on a literature review, however, the dataset appears to include most leading Israeli freedom of religion judgments.

⁶³ Ranging from 1954 to 2019 for India, 1951 to 2012 for Israel, and 1878 to 2019 for the United States.

⁶⁴ Search terms used were 'tolera*' and 'respect'. Combined, these allowed identification of multiple variations, including tolerance, toleration, tolerate, tolerant, tolerated, tolerable, intolerance, intolerant, intolerable, respect, equal respect, mutual respect, due respect, respected, respecting and respectful.

⁶⁵ 'Explicit' refers to literal uses of the concepts tolerance and respect, including variations (as listed in n 64).

⁶⁶ 'Relevant' means that uses such as 'in respect of', 'we respectfully disagree' or 'respecting an establishment of religion', among many others, are excluded from the data.

TABLE 1.

Explicit references to tolerance and respect in dataset

| | India | Israel | United States |
|---------------------------------|----------|----------|---------------|
| # judgments (total) | 45 | 16 | 56 |
| # judgments no refs | 20 (44%) | 2 (13%) | 26 (46%) |
| # judgments tolerance | 7 (16%) | 10 (63%) | 10 (18%) |
| # judgments respect | 7 (16%) | 0 | 4 (7%) |
| # judgments tolerance + respect | 11 (24%) | 4 (25%) | 16 (29%) |
| # refs tolerance (total) | 63 | 215 | 72 |
| # refs respect (total) | 39 | 17 | 52 |

number of references to tolerance and respect across the entire dataset, disaggregated per jurisdiction.

A few immediate observations stand out from the data. Perhaps most strikingly, the data indicate that the notion of tolerance dominates constitutional law and religion in Israel. Not only do most judgments of the Israeli Supreme Court only reference tolerance (63 per cent), the total number of references to tolerance also dwarfs the number of references to respect in the Israeli dataset (at 215 to 17). The data for India and the United States are comparatively more balanced, indicating at best a slight preference for tolerance over respect. But, as we will see, this minor statistical difference is inconsequential. A more significant finding is that, compared to the data for Israel, the total number of references to tolerance and respect is markedly lower in Indian and United States constitutional law and religion, at 232 for Israel, 102 for India and 124 for the United States.⁶⁷

It may seem, then, as if tolerance and respect play a less central role in Indian and US constitutional law. Chronological analysis of the data, however, reveals a different picture. In India, the 1994 judgment in *SR Bommai* is an undisputable defining moment for constitutional law and religion. In *SR Bommai*, the Indian Supreme Court entrenched secularism in the basic structure of the Indian Constitution. As discussed below, notions of tolerance and respect played an important justificatory role in support of this entrenchment. This (r)evolution in the case law has resulted in a notable increase in references to tolerance and respect in the Indian case law post-*SR Bommai*. Of all references in the Indian dataset, 88 per cent occur in *SR Bommai* and onwards.⁶⁸ In the United States, the number of references to tolerance and respect also rises noticeably

⁶⁷ In India and the United States, these references are moreover spread over a larger number of judgments.

⁶⁸ Roughly half (21) of the 45 judgments in the Indian dataset predate *SR Bommai* (n 45); the other half (23) postdate *SR Bommai*. Pre-*SR Bommai*, 8 of 21 judgments (or 38 per cent) contain references to tolerance and/or respect. From *SR Bommai* onwards, 16 of 23 judgments (or 70 per cent) contain references to tolerance and/or respect.

after the pivotal 1984 case of *Lynch*. Of all references in the US dataset, 77 per cent occur in *Lynch* and onwards.⁶⁹

Overall, the data suggest that constitutional discourse on tolerance and respect emerged gradually in all three jurisdictions. This is not surprising in relation to respect, which is—also in political philosophy—a more recent concept.⁷⁰ But the finding is more striking in relation to tolerance, which has been a core building block of liberalism since the seventeenth century. Some of the early freedom of religion cases in all three jurisdictions were furthermore open to examination through the lens of tolerance (and its inverse: intolerance). Consider the religious practice of polygamy, for instance. Polygamy was the subject of early constitutional judgments in post-independence India, Israel and the United States. Polygamy moreover elicited profound disapproval among powerful segments of society in all three jurisdictions. In theory, we could thus expect notions of (in)tolerance to play a central role in early constitutional responses to polygamy. In reality, (in)tolerance only makes a fleeting appearance in the leading Israeli⁷¹ and United States⁷² judgments (from 1951 and 1878, respectively). It does not feature at all in India's landmark polygamy ruling (from 1951).⁷³ Tolerance was, in other words, not yet embedded in the constitutional repertoire at the time of the polygamy cases. Instead, the notion of tolerance—and later that of respect—only gradually gained prominence in constitutional discourse on religious freedom in India, Israel and the United States.

III. DIVERGING CONCEPTUALISATIONS OF TOLERANCE AND RESPECT IN CONSTITUTIONAL LAW

As stated earlier, this article pursues two aims: the conceptual aim of identifying understandings of tolerance and respect in constitutional discourse in India, Israel and the United States; and the substantive aim of analysing the impact of these diverging conceptualisations on constitutional interpretation of

⁶⁹ 31 judgments in the US dataset predate *Lynch v Donnelly* 465 US 668 (1984); 24 judgments postdate *Lynch*. Pre-*Lynch*, 13 of 31 judgments (or 42 per cent) contain references to tolerance and/or respect. From *Lynch* onwards, 17 of 24 judgments (or 71 per cent) contain references to tolerance and/or respect.

⁷⁰ Dozens of works in political philosophy identify and critique different conceptions of tolerance. The literature on respect, by contrast, remains scarce. For some important contributions, see Darwall (n 39); Ceva (n 12); Carter (n 18).

⁷¹ *Yosifov v Attorney General*, CrimA 112/50 (29 March 1951) (in which Justice Silberg notes as an afterthought that 'bigamy was never an institution which was rooted, or permanent or favoured, in the life of the Jewish people. It was merely "tolerated"' (Silberg, J, para 17)).

⁷² The notion of tolerance does not feature in the landmark 1878 *Reynolds* ruling, although the judgment does contain a reference to disapproval: 'Polygamy has always been odious among the northern and western nations of Europe.' See *Reynolds v United States* 98 US 145, 164 (1878). The 1890 *Davis* judgment does reference tolerance explicitly, but only once: 'While ... free exercise [of religion is] permitted, it does not follow that everything which may be so called can be tolerated.' See *Davis v Beason* 133 US 333, 345 (1890).

⁷³ *State of Bombay v Narasu Appa Mali* (Bombay HC) 1951 SCC Online Bom 72.

religious freedom in the same jurisdictions. Both aims require detailed analysis of the case law. To this end, a more limited number of judgments was selected for study in a second phase of analysis. The selection was based on three parameters: (i) the extent to which a judgment is (or was) considered controlling;⁷⁴ (ii) the number of textual references to tolerance and/or respect in a judgment;⁷⁵ and (iii) representativeness of the entire dataset (that is, reflecting a wide range of religious freedom issues).⁷⁶ On the basis of these parameters, 47 judgments were selected for in-depth analysis: 18 judgments of the Supreme Court of India, 10 of the Supreme Court of Israel, and 19 of the Supreme Court of the United States. The results of the second phase of analysis—supplemented with references from the entire dataset and from the scholarly literature—are presented here, in section III, and in section IV.

This section pursues the conceptual aim of determining which conceptions of tolerance and respect the three constitutional courts rely on. The main claim is that the three courts rely on *diverging* conceptions of tolerance and respect, only some of which align with their understanding in political philosophy. The Supreme Court of the United States tracks the understanding of tolerance and respect in political philosophy most closely. At the same time, however, it interprets both Religion Clauses of the First Amendment differently. The Court has especially undergone a marked evolution—from tolerance to respect and back to tolerance—in its interpretation of the Free Exercise Clause. The Supreme Court of Israel, for its part, seems convinced that tolerance is more suitable than respect to tackle religious difference in a divided society. Tolerance dominates the analysed cases from Israel, whereas the rival value of respect only plays a marginal role. The Supreme Court of India, finally, does not conceive of respect and tolerance as incompatible values, but as two sides of the same coin. In Indian constitutional law, tolerance and respect align to support a positive conception of ‘ameliorative’ secularism. These claims will be unpacked in reverse order.

A. The Indian Supreme Court: Wavering between Tolerance and Respect?

The Supreme Court of India operates in a constitutional setting marked by two antagonistic claims on constitutional identity: the secular and the Hindutva.⁷⁷ Advocates from both camps have drawn on the notion of tolerance to support their aspirational claims. Initially, this ideological battle was fought outside the courts. As a result, tolerance does not feature prominently in the early case law

⁷⁴ Determined on the basis of discussion in the literature and citations in later judgments.

⁷⁵ Ranging from zero references to dozens; and regardless of whether references were to tolerance or respect.

⁷⁶ Including, insofar as possible, judgments on issues that cut across at least two jurisdictions (for instance on polygamy and slaughter of animals). Also including both establishment *and* free exercise cases in the US dataset.

⁷⁷ GJ Jacobsohn, *Constitutional Identity* (Harvard University Press 2010) 111.

of the Indian Supreme Court.⁷⁸ This changed, however, with the 1994 landmark case of *SR Bommai*. In this landmark judgment, the Supreme Court identified ‘religious tolerance’ as ‘an essential part of secularism enshrined in [the Indian] Constitution’.⁷⁹

SR Bommai would have a profound influence on the Supreme Court’s religious freedom case law. One immediate consequence was a marked increase in references to tolerance and respect in subsequent judgments.⁸⁰ This change suggests that Indian Supreme Court justices have found, in the aftermath of *SR Bommai*, value in casting their religious freedom judgments in the language of tolerance and respect. A recurring passage on the links between tolerance and respect, India’s religious diversity, and the secular nature of the Indian Constitution is indicative:

Since India is a country of great diversity, it is absolutely essential if we wish to keep our country united to have tolerance and equal respect for all communities and sects. It was due to the wisdom of our founding fathers that we have a Constitution which is secular in character, and which caters to the tremendous diversity in our country.⁸¹

The Supreme Court’s attitude towards religion, then, seems to be driven by both tolerance *and* respect. The Supreme Court can note in one judgment that ‘[a]rticles 25 and 26 [of the Constitution] embody a tolerance for all religions’,⁸² to find in the next that ‘the Constitution gives equal respect to all ... sects’.⁸³ It is tempting to construe this as wavering between incompatible values. But, as mentioned earlier, both statements are not *inherently* contradictory. Much depends on the conceptions of respect and tolerance employed.

In examining which conceptions of tolerance and respect find favour in the Indian Supreme Court, we should however remain mindful of the ‘polyvocality’ of the Indian Court.⁸⁴ Unlike the US Supreme Court, which sits *en banc*, the

⁷⁸ 13 of the 21 judgments (or 62 per cent) that predate *SR Bommai* (n 44) do not contain any explicit references to tolerance or respect (or variations thereof). Of the remaining eight, seven contain only a single reference (the eighth judgment contains five references: one to respect, four to tolerance. See *Bijoe Emmanuel v State of Kerala* (1986) SCC 615.

⁷⁹ *SR Bommai* (n 45) 147–148 (Sawant, J, and Kuldip Singh, J).

⁸⁰ 17 of the 24 judgments (or 71 per cent) in the dataset from *SR Bommai* (n 45) onwards contain explicit references to tolerance and/or respect (this includes *SR Bommai* itself; in contrast to the data in n 68). In those 17 judgments, the number of references is also noticeably higher than in the pre-*SR Bommai* era, at an average of 5.3 references per judgment (compared to an average of 1.5 references in the eight pre-*SR Bommai* judgments mentioned in n 67).

⁸¹ *Hinsa Virodhak Sangh v Mirzapur Moti Kuresh Jamat* (2008) 5 SCC 33, 50; *Kailas v State of Maharashtra* (2011) 1 SCC 801; *Prafull Goradia v Union of India* (2011) 2 SCC 568, 574.

⁸² *Commissioner of Police v Acharya Jagdishwaranand Avadhuta* (2004) 12 SCC 770, 800 (Lakshmanan, J, dissenting). See also *SR Bommai* (n 44) 147–148 (Sawant, J, and Kuldip Singh, J) (‘religious tolerance [is] an essential part of secularism enshrined in our Constitution’).

⁸³ *Hinsa Virodhak Sangh* (n 81) 50. See also *Dara Singh* (n 46) 531 (‘[o]ur concept of secularism is that the State ... shall treat all religions ... with equal respect’).

⁸⁴ N Robinson, ‘Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts’ (2013) 61(1) *AmJCompL* 173, 184.

multi-bench Indian Court speaks with many voices in a wide array and immense number of cases.⁸⁵ Different benches of the Court can, and do, interpret the Indian Constitution differently.⁸⁶ Conflicting preferences of individual justices further add, especially on smaller benches,⁸⁷ to interpretive inconsistencies between judgments.⁸⁸ Nick Robinson has nevertheless argued that the Court's polyvocality does not automatically cause incoherence in its case law.⁸⁹ Robinson also posits that polyvocality can be valuable, in that it generates opportunities for justices to innovate by strategically pushing precedents in a new direction.⁹⁰ This last point is key to understanding the evolving role of tolerance in the Indian court's case law (see Section IV).

The image to emerge from the case law is, in any event, not one in which the Indian Constitution treats religion with indifference.⁹¹ Instead, the Supreme Court reads the Constitution as extending appraisal respect to religion, against objections and disapproval in society: 'our Constitution is benign and sympathetic of all religious creeds however unacceptable they may be in the eyes of the non-believers'.⁹² Yet, herewith the spectre of incompatibility between tolerance and respect re-emerges. Following Carter, the kind of appraisal respect extended to religion by the Indian Constitution is logically incompatible with tolerance. Crucially, however, this conclusion only follows if tolerance is understood in its usual philosophical terms, as implying inherent disapproval. But the Indian Supreme Court seems to conceptualise tolerance *differently*. In Indian constitutional law, the disapproval inherent in tolerance is pushed to the background, allowing it to be recast as a positive value that *aligns* with appraisal respect.

This distinct conceptualisation is borne out most clearly in how the Supreme Court correlates tolerance—and respect—directly to India's positive conception of secularism. In *SR Bommai*, the Court characterises 'religious tolerance' as 'an essential part of secularism enshrined in our Constitution'.⁹³ Importantly, the Court has said the same about respect: '[o]ur concept of secularism ... is that ... [t]he State shall treat all religions ... with equal respect'.⁹⁴ At the same time, the Court has been fairly consistent in rejecting what it perceives to be the American conception of secularism, based on

⁸⁵ The Court is composed of up to 31 justices, who mostly sit in benches of two or three to manage the Court's large caseload. See *ibid* 175–6 and 181.

⁸⁶ *ibid* 184–5. See also AK Thiruvengadam, *The Constitution of India: A Contextual Analysis* (Hart 2017) 111.

⁸⁷ G Bhatia, 'What Is the Role of a Judge in a Polyvocal Court?' (Indian Constitutional Law and Philosophy Blog, 1 April 2017) <<https://indconlawphil.wordpress.com/2017/04/01/what-is-the-role-of-a-judge-in-a-polyvocal-court/>>. ⁸⁸ Robinson (n 84) 185. ⁸⁹ *ibid* 186.

⁹⁰ *ibid* 188–9.

⁹¹ *Abhiram Singh v CD Commachen*, Supreme Court of India (2 January 2017) para 18 (Chandrachud, J, Kumar Goel, J, and Umesh Lalit, J) ('the Constitution does not display an indifference to issues of religion').

⁹² *Acharya Jagdishwaranand Avadhuta* (n 82) 800 (Lakshmanan, J).

⁹³ *SR Bommai* (n 45) 147–148 (Sawant, J, and Kuldip Singh, J).

⁹⁴ *Dara Singh* (n 46) 531. See also *Bal Patil v Union of India* (2005) 6 SCC 690, 704.

neutrality and a 'wall of separation'.⁹⁵ Instead, the Court accords secularism 'a positive meaning'.⁹⁶ Rajeev Bhargava calls this approach one of 'principled distance':

a value-based strategy that presupposes disestablishment and that enjoins the State to intervene in or abstain from such interventions depending upon whether specific values integral to the secular ideal are advanced.⁹⁷

All this suggests that the Indian Supreme Court relies on a distinctly positive conception of tolerance, which aligns with the idea of equal respect to inform the Constitution's positive secular stance towards religion. Ironically, however, this distinct notion of tolerance has enabled interpretive moves that ultimately undermine the Constitution's 'benign' stance towards religion. As will be explained in Section IV, tolerance has become a powerful tool in the Indian Supreme Court's efforts to (re)shape religion through the essential practices doctrine.

B. The Israeli Supreme Court: Committed to Tolerance

Whereas India is a secular State, the same can hardly be said of Israel. The constitutional identity of Israel is, instead, that of both a democratic and a Jewish State.⁹⁸ A central feature of Israeli constitutionalism is persistent debate on how to interpret and reconcile its 'dual normative commitment' to Jewish and democratic values.⁹⁹ Some constitutional scholars emphasise the 'tension which arises from the definition of Israel as both a Jewish and a democratic state, two principles that apparently contradict one another'.¹⁰⁰ Gideon Sapir and Daniel Statman, for instance, highlight the clash between both values when they point out that 'promoting the Jewish nature of the state ... necessarily includes the promotion of the Jewish religion ... over other religions'.¹⁰¹ This, however, appears to rely on a particular understanding of 'a Jewish state' as equivalent with a theological State (ie. a halakic State). Ruth Gavison, by contrast, has argued that 'the idea(l) of a state both Jewish and democratic, is—under some conceptions—both

⁹⁵ See *SR Bommai* (n 45) 166 (Ramswamy, J.) ('this Court did not accept the wall of separation between law and ... religion'); *Aruna Roy v Union of India* (2002) 7 SCC 368, 406 (Dharmadhikari, J.) (rejecting the 'complete[ly] neutral approach towards religions' in favour of a 'positive approach'). See also Jacobsohn (n 47) 3.

⁹⁶ *Aruna Roy* (n 66) 406 (Dharmadhikari, J.) ('"Secularism" ... is susceptible to a positive meaning that is developing understanding and respect towards different religions').

⁹⁷ R Bhargava, 'Introduction—Outline of a Political Theory of the Indian Constitution' in R Bhargava (ed), *Politics and Ethics of the Indian Constitution* (Oxford University Press 2008) 10.

⁹⁸ See Basic Law: Human Dignity and Liberty (1992), section 1a ('The purpose of this Basic Law is to protect human dignity and liberty, in order to anchor in a Basic Law the values of the State of Israel as a Jewish and democratic state.').

⁹⁹ G Stopler, 'Semi-liberal Constitutionalism' (2019) 8 *Global Constitutionalism* 94, 101.

¹⁰⁰ S Navot, *The Constitution of Israel: A Contextual Analysis* (Hart 2014) 71.

¹⁰¹ G Sapir and D Statman, 'Minority Religions in Israel' (2015) 30(1) *Journal of Law and Religion* 65, 67.

coherent and feasible'.¹⁰² On Gavison's argument, understanding 'a Jewish state' as the State in which the Jewish people exercise their right to self-determination (that is, a nation State) is compatible with a thin conception of democracy that includes some political rights (such as the right to vote and freedom of expression) but not all human rights.¹⁰³ A constitutional commitment to liberal democracy is, on Gavison's argument, ill-advised in Israel, since uniting all segments of the divided society 'will be made much more difficult if we add to the definition of democracy notions such as liberalism'.¹⁰⁴

Nevertheless, as Suzie Navot explains, the Supreme Court insists 'that "Jewish" and "democratic" are compatible as constitutional characteristics',¹⁰⁵ even under a thicker understanding of *liberal* democracy that encompasses a full register of human rights. Indeed, in *United Mizrahi Bank*, the case in which the Supreme Court established its powers of strong judicial review of legislation, Justice Shamgar emphasised the *integration* of Jewish and democratic values,¹⁰⁶ while Justice Barak anticipated that *solving the clash* between both values would occupy the Court greatly in the future.¹⁰⁷ Navot argues that the Supreme Court 'has been particularly cautious' in adjudicating cases in which the Jewish and democratic nature of Israel appear to be in tension.¹⁰⁸ In such cases, many of which pertain to issues of law and religion, the Court has 'attempt[ed] to bridge the gap and find compromises between' the Jewish and democratic values of Israeli constitutionalism.¹⁰⁹ Thus, in *Shavit*, Justice Barak stated that '[o]nly the attempt to find a synthesis between the conflicting values will allow society to function [since] a rigid ruling that leaves no room for compromise ... is a recipe for societal division and disintegration'.¹¹⁰ As we will see shortly, the value of tolerance plays an important role in legitimating this constitutional search for compromise solutions.

Theoretically, we might expect the majority status of Jews in Israeli society, which translates into their 'dominance in all fields of public life', to obstruct compromise solutions in the name of tolerance.¹¹¹ We might be tempted to assume that the permission conception of tolerance—in which the Jewish majority would extend tolerance to subordinated minorities by way of grace—garners particular traction in Israel. But contrary to the broader political context—in which ethnicity plays a central role¹¹²—Israeli constitutional law

¹⁰² R Gavison, 'Can Israel Be Both Jewish and Democratic?' in A Ma'oz (ed), *Israel as a Jewish and Democratic State* (Jewish Law Association 2011) 115, 115. ¹⁰³ *ibid.* ¹⁰⁴ *ibid.* 127.

¹⁰⁵ Navot (n 100) 72.

¹⁰⁶ *United Mizrahi Bank v Migdal Cooperative Village*, CA 6821/93 (9 November 1995) (Shamgar, P) para 51. ¹⁰⁷ *ibid.* (Barak, P) para 90. ¹⁰⁸ Navot (n 100) 73. ¹⁰⁹ *ibid.*

¹¹⁰ *Shavit v Rishon Lezion Jewish Burial Society*, CA 6024/97 (6 July 1999), para 22 (Barak, P, concurring).

¹¹¹ Sapir and Statman (n 101) 68. See also N Perez, 'The Limits of Liberal Toleration: The Case of the Ultra-Orthodox in Israel' (2014) 56(2) *Journal of Church and State* 223, 234.

¹¹² Jacobsohn (n 77) 272 ('non-Jews, particularly Palestinian Arabs, are confronted with many reminders – both symbolic and material – that their status as full and effective citizens is something less than what is enjoyed by the favoured majority'). See the adoption of Basic Law: Israel – The

appears to live up to the promise of moving beyond the permission conception of tolerance in responding to religious diversity. One manifestation is that the deepest religious cleavage in Israeli society is not between the Jewish majority and the Muslim and Christian minorities, but between Ultra-Orthodox Jews and secular Jews.¹¹³ This cleavage was once subdued by a particular approach to reasonable disagreement on the place of Judaism in public life: the ‘status quo model’.¹¹⁴ On this model, Daphne Barak-Erez explains, the aim was to preserve ‘an existing status quo that acknowledges the priority of religious demands in some areas in a way that reflects a social-political compromise rather than a principled decision-making’.¹¹⁵

Although the status quo model itself has been steadily eroding,¹¹⁶ a search for compromise solutions continues to undergird the Israeli Supreme Court’s approach to religious controversies. Rather than immediately truncate religious disputes, the Court tends to nudge parties to find an amicable solution.¹¹⁷ ‘Social consensus, based on compromise, is by far preferable to an imposed judicial decision’, the Court has repeatedly held.¹¹⁸ The ‘hope’¹¹⁹ of the Court is that parties will find a ‘social solution’, ‘based on mutual tolerance’,¹²⁰ thereby avoiding the need for a ‘legal solution’.¹²¹ The idea, in other words, is that the moral virtue of tolerance will propel parties to a religious dispute towards a compromise, thereby avoiding the need for (constitutional) litigation.

Even when the Court sees no option but to truncate the religious dispute itself, it often settles on a compromise solution in the name of tolerance.¹²² As Justice Barak held in *Shavit*, a case on the use of non-Hebrew characters and dates on gravestones in a Jewish cemetery, ‘[i]t is appropriate that the legal ruling should reflect, as much as possible, the spirit of compromise and tolerance, since only through these principles can the unity of society be preserved’.¹²³ Justice Barak, and Justice Shamgar before him, have been key figures in Israel’s constitutional tolerance-narrative. *Horev* is arguably the defining judgment.¹²⁴ In *Horev*,

Nation State of the Jewish People (2018) (discussed below at nn 262–263 and accompanying text). See also Israel’s persistent and serious violations of international law in the Occupied Territories.

¹¹³ See, for instance, D Barak-Erez, *Outlawed Pigs: Law, Religion, and Culture in Israel* (University of Wisconsin Press 2007) 11; Stopler (n 99) 107.

¹¹⁵ *ibid* 2495.

¹¹⁴ Barak-Erez (n 57).

¹¹⁶ *ibid* 2501–2.

¹¹⁷ See for instance *Gur Aryeh v Second Television and Radio Authority*, HCJ 1514/01 (18 June 2001) para 3 (‘When the petition was filed we sought to resolve the matter by amicable means.’). See also *Hoffman v Director of the Western Wall*, HCJ 257/89 (26 January 1994); *Horev* (n 57); *Ressler* (n 57).

¹¹⁸ *Horev* (n 57) para 93. See also *Hoffman* (n 117) para 2 (Shamgar, P) (‘a solution achieved through agreement and understanding has the advantage of deriving from the parties, and the spirit [of tolerance] that led to the agreement will imbue its results’).

¹¹⁹ *Horev* (n 57) para 31.

¹²⁰ *ibid*, paras 31 and 93. See also *ibid*, para 4 (Tal, J, concurring) (‘We were not so fortunate as to see the matter resolved the way of tolerance. We must therefore assess the issues from a judicial perspective.’).

¹²² See for instance *Director General of the Prime Minister’s Office v Hoffman*, HCJ 4128/00 (6 April 2003).

¹²³ *Shavit* (n 110) para 22 (Barak, P, concurring).

¹²⁴ The judgment even contains a section on ‘Tolerance’. See *Horev* (n 57) para 102.

building on what Shamgar had said earlier in *Universal City Studios*,¹²⁵ Barak notes that ‘the principle of tolerance [is] a basic tenet of democratic theory, vital to a pluralistic democracy’.¹²⁶ Barak further builds on his own concurring opinion in *Universal City Studios* to perfect the Israeli Supreme Court’s ‘threshold of tolerance’ doctrine.¹²⁷ This doctrine provides the answer, says Barak in *Horev*, to the following question: ‘How do we resolve the complications flowing from the fact that tolerance ... simultaneously justifies both protecting rights and infringing them?’¹²⁸ The answer: by searching for compromise solutions to religious disputes. Section IV unpacks the implications of this intertwining of tolerance and compromises for the constitutional interpretation of religious freedom in Israel.

C. The US Supreme Court: Contrasting Attitudes under Both Religion Clauses

Compared to Israel and India, the conceptualisation of tolerance and respect in US constitutional law is more difficult to identify. Another register of language—that of neutrality, coercion, separation, endorsement and accommodation—has partly displaced the language of tolerance and respect in US constitutional discourse on religion. The latter notions, however, arguably remain foundational to a proper understanding of the First Amendment to the US Constitution. The Supreme Court has for instance noted that ‘[a]lmost 200 years after the First Amendment was drafted, tolerance and respect for all religions still set us apart from most other countries’,¹²⁹ clarified that ‘[t]he whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views’,¹³⁰ and indicated that ‘[m]anifesting a purpose to favor one faith over another ... clashes with ... a religious tolerance that respects the religious views of all citizens’.¹³¹

The historical record also supports the claim that tolerance and respect are key to understanding the Religion Clauses of the First Amendment.¹³² The converse of one of these notions—intolerance—was of course central to the emergence of what is now the United States. Many of the early settlers were escaping religious persecution in pre-tolerance Europe.¹³³ But ironically, most of the newly founded colonies continued to engage in practices of establishment and treat adherents to other faiths with intolerance.¹³⁴

¹²⁵ *Universal City Studios* (n 29) para 7 (‘Mutual tolerance among persons of different outlook, opinions and faiths is a fundamental precondition for the existence of a free, democratic society’).

¹²⁶ *Horev* (n 57) para 56.

¹²⁷ *Universal City Studios* (n 29) para 11 (Barak, P).

¹²⁸ *Horev* (n 57) para 58.

¹²⁹ *Goldman v Weinberger* 475 US 503, 523 (1986) (Brennan, J, and Marshall, J, dissenting).

¹³⁰ *Santa Fe Independent School District v Doe* 530 US 290, 304 (2000) (citing *Board of Regents of Univ of Wis System v Southworth* 529 US 217 (2000)).

¹³¹ *McCreary County v ACLU* 545 US 844, 856 (2005) (partly citing *Zelman v Simmons-Harris* 536 US 639, 718 (2002) (Breyer, J, dissenting)).

¹³² For discussion, see McConnell (n 14).

¹³³ Nussbaum (n 12) 34.

¹³⁴ Kurland (n 49) 852.

Gradually, however, practices of toleration began to emerge.¹³⁵ These practices culminated in the adoption of the Religion Clauses, which brought about the ‘tolerance and respect for all religions’ that is said to mark the present-day United States.¹³⁶

Because the American trajectory included first-hand experience with the persecution that attended establishment in England,¹³⁷ its constitutional history of tolerance diverges from the Lockean path towards the permission conception of tolerance.¹³⁸ Some of the founding figures of the US Constitution, most notably Thomas Jefferson, did adopt the Lockean argument for religious toleration.¹³⁹ But others followed a different route. As David Richards argues,

The American conception is radical in that it calls for more than toleration in Locke’s sense, requiring, as Madison early insisted, a respect for the rights of conscience ... [that is] motivated ... by an ethics of equal respect.¹⁴⁰

Appreciating the ways in which some of the founding figures departed from Locke is thus key to understanding the distinct American approach to religious liberty.¹⁴¹ Madison—‘the primary architect of [the] First Amendment’¹⁴²—was the central counter-figure to the Lockean-inspired Jefferson. When George Mason drafted the Virginia Declaration of Rights to read that ‘all men should enjoy the fullest toleration in the exercise of religion’,¹⁴³ Madison objected, insisting that the term ‘toleration’ be removed.¹⁴⁴ He objected, because to him the notion of toleration suggested legislative grace,¹⁴⁵ ‘as if it were by the blessing of the majority that the minority was not persecuted’.¹⁴⁶ A similar rejection of tolerance is evident in George Washington’s letter to the Jewish congregation at Newport, in which he famously noted that ‘[i]t is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights’.¹⁴⁷ The historical record, in short, shows that a distinctive debate on the role of tolerance surrounded the

¹³⁵ *ibid* 857. See also *County of Allegheny v ACLU* 492 US 573, 589 (1989).

¹³⁶ *Goldman* (n 129) 523 (Brennan, J, and Marshall, J, dissenting) (‘Almost 200 years after the First Amendment was drafted, tolerance and respect for all religions still set us apart from most other countries’).

¹³⁷ J Madison, *Memorial and Remonstrance against Religious Assessments* (‘Torrents of blood have been spilt in the old world, by vain attempts of the secular arm, to extinguish Religious discord, by proscribing all difference in Religious opinion.’).

¹³⁸ Nussbaum (n 12) 348; McConnell (n 14) 1416 and 1515.

¹³⁹ Richards (n 10) 112. Note, however, that Jefferson also diverged from Locke, by rejecting establishment of religion and by extending toleration to Catholics and atheists.

¹⁴⁰ *ibid* 133.

¹⁴¹ McConnell (n 14) 1431.

¹⁴² Nussbaum (n 12) 75. See also Kurland (n 49) 853.

¹⁴³ Nussbaum (n 12) 90.

¹⁴⁴ *ibid* 90. The adopted Declaration reads ‘all men are equally entitled to the full and free exercise of religion’.

¹⁴⁵ McConnell (n 14) 1443; Nussbaum (n 12) 90.

¹⁴⁶ Nussbaum (n 12) 90.

¹⁴⁷ *Letter from George Washington to the Hebrew Congregation in Newport, Rhode Island* (18 August 1790) <<https://founders.archives.gov/documents/Washington/05-06-02-0135#p>>.

adoption of the Religion Clauses of the First Amendment.¹⁴⁸ Moving across time towards the present day, however, a complication emerges: the possibility of diverging tracks of constitutional interpretation under both Religion Clauses. In what follows, it is shown that the Supreme Court's interpretation of the Establishment Clause is respect-based, whereas its understanding of the Free Exercise Clause is (or remains) tolerance-based.

1. A tolerance-based understanding of the Free Exercise Clause

The Supreme Court's understanding of the Free Exercise Clause has undergone an evolution that is best appreciated by evaluating the Court's stance on religious exemptions. One should look there, because—as we saw earlier—exemptions are precluded on the Lockean understanding of tolerance,¹⁴⁹ while they are required under respect-based interpretations of religious freedom.¹⁵⁰

Initially, the Supreme Court favoured the Jeffersonian/Lockean toleration track. This is evident in the Court's categorical rejection of religious exemptions from criminal law in the free exercise cases of *Reynolds* and *Davis*. In these early cases, the Supreme Court expressed strong disapproval of the Mormons' religious practice of polygamy. In *Reynolds*, the Court held that '[p]olygamy has always been odious among the northern and western nations of Europe'.¹⁵¹ Twelve years later, in *Davis*, it added that not 'everything which may be ... called [religion] can be tolerated. Crime is not the less odious because sanctioned by what any particular sect may designate as "religion"'.¹⁵²

In *Reynolds* and *Davis*, disapproval of the Mormons' religious practice was moreover attended by the power dynamics that characterise tolerance. Nussbaum argues that the growing power of the Mormon sect played a central role in the Supreme Court's polygamy judgments.¹⁵³ *Reynolds* was decided in a societal context in which a Protestant majority refused to tolerate an 'odious' religious practice of a rival religious minority. The *Reynolds* Court did note that '[a]n exceptional colony of polygamists under an exceptional leadership may sometimes exist for a time without appearing to disturb the social condition of the people who surround it'.¹⁵⁴ But the Mormon Church, having established a strong regional power in Utah, did not fit the pattern of an 'exceptional colony'.¹⁵⁵ In the face of their growing power, instead a constitutional message needed to be sent: Mormons were as much subject to

¹⁴⁸ Surprisingly, the records of the debate in the House of Representatives do not provide insights on the historical understanding of the Free Exercise Clause. See McConnell (n 14) 1481.

¹⁴⁹ Locke argued that 'the private judgment of any person concerning a law enacted in political matters, for the public good, does not take away the obligation of that law, nor deserve a dispensation' (as cited in McConnell (n 14) 1434).¹⁵⁰ See Nussbaum (n 12).

¹⁵¹ *Reynolds* (n 72) 164. The Court also compares polygamy to, among others, human sacrifices. See *ibid* 166.¹⁵² *Davis* (n 72) 345.¹⁵³ Nussbaum (n 12) 189.

¹⁵⁴ *Reynolds* (n 72) 166.

¹⁵⁵ Compare *Wisconsin v Yoder* 406 US 205 (1972), discussed below.

the laws of the land as any other person.¹⁵⁶ Their religious practice of polygamy could, therefore, not be tolerated.

The Supreme Court's tolerance-based understanding of minority religious practices continued at least until *Minersville*.¹⁵⁷ In a judgment it would overrule a few years later,¹⁵⁸ the Court refused to grant Jehovah's Witnesses an exemption from reciting the pledge of allegiance to the American flag in school. In rejecting the exemption claim, the *Minersville* Court explicitly relied on the Lockean understanding of tolerance: '[c]onscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs'.¹⁵⁹

Gradually, however, the constitutional pendulum would swing away from a tolerance-based understanding of free exercise towards respect. The Supreme Court, one could say, moved from a Jeffersonian to a Madisonian interpretation of the Free Exercise Clause. This process culminated in a couple of landmark cases, spread about a decade apart: *Sherbert* and *Yoder*. These are the judgments on which Nussbaum relies when she claims that the American constitutional tradition of religious liberty is founded on equal respect.¹⁶⁰ In both cases, the Court carved out a constitutional exception from general, neutral laws for adherents to minority religions. Seventh Day Adventist Mrs Sherbert, who refused to work on Saturdays for religious reasons, no longer saw her access to unemployment benefits conditioned on a willingness to work on her religion's day of rest.¹⁶¹ And the Yoder family could take their children out of school at the age of 14, although state law required children to attend school until the age of 16.¹⁶²

Crucially, the constitutional exemptions mandated in *Sherbert* and *Yoder* are precluded by the Lockean understanding of tolerance. The Supreme Court finding them constitutionally *required* thus signalled a shift towards a (more) respect-based understanding of the Free Exercise Clause. This hypothesis is supported by the constitutional discourse used in both judgments. In *Sherbert*, Justice Stewart held that 'the guarantee of religious liberty embodied in the Free Exercise Clause affirmatively requires government to create an atmosphere of hospitality and accommodation to individual belief or disbelief'.¹⁶³ A similar respect-based view is borne out by the Court's description of the Old Order Amish in *Yoder*. Through *Reynolds'* lens of tolerance, the Court had viewed the Mormons as a dangerous minority rife with 'odious' practices. But through *Yoder's* lens of respect, it described the

¹⁵⁶ Jacobsohn (n 77) 235.

¹⁵⁷ *Minersville School District v Board of Education* 310 US 586 (1940).

¹⁵⁸ See *West Virginia State Bd of Educ v Barnette* 319 US 624 (1943) (treated as a free speech case).

¹⁵⁹ *Minersville* (n 157) 594.

¹⁶⁰ Nussbaum (n 12) 135–47.

¹⁶¹ *Sherbert v Verner* 374 US 398, 403–407 (1963).

¹⁶² *Yoder* (n 155) 220 and 225.

¹⁶³ *Sherbert* (n 161) 415–416 (Stewart, J, concurring).

Amish as a benevolent, ‘highly successful social unit’.¹⁶⁴ The *Yoder* Court even noted that ‘their idiosyncratic separateness exemplifies the diversity we profess to admire and encourage’.¹⁶⁵

Yet, the respect-based understanding of the Free Exercise Clause foreshadowed in *Sherbert* and *Yoder* never gained a firm foothold in the Supreme Court’s case law. The Court rejected most claims for religious exemptions.¹⁶⁶ Ultimately, the Court would shift back towards a Lockean understanding of tolerance, in *Smith*.¹⁶⁷ The dissent in *Smith* marked the majority judgment as effectuating ‘a wholesale overturning of settled law concerning the Religion Clauses’.¹⁶⁸ This is hardly an overstatement. *Smith* allowed the earlier rulings in *Sherbert* and *Yoder* to stand.¹⁶⁹ But the Supreme Court was adamant that the *Sherbert* framework should be replaced by a ‘sounder approach’ to the Free Exercise Clause, one that precludes exemptions from generally applicable criminal law.¹⁷⁰ To achieve this end, the majority reverted back to the permission conception of tolerance favoured in *Reynolds* and *Minersville*. The majority cited the ‘conscientious scruples’ passage from *Minersville* and borrowed from *Reynolds* the idea that a general system of exemptions would make ‘each conscience ... a law unto itself’, before concluding that religious tolerance under the Free Exercise Clause does not require exemptions from general, facially neutral laws.¹⁷¹

2. A respect-based understanding of the Establishment Clause

Since *Smith* remains controlling today, the Free Exercise Clause is best understood in terms of the permission conception of tolerance. The Supreme Court’s conceptualisation of the Establishment Clause, conversely, is arguably more respect-based. The Court has even rejected a tolerance-based understanding of the Establishment Clause, finding that it ‘affirmatively mandates accommodation, not merely tolerance, of all religions’.¹⁷² ‘Anything less’, the Court has noted, ‘would require the “callous indifference” we have said was never intended by the Establishment Clause’.¹⁷³

If the Establishment Clause mandates more than tolerance *and* was never intended to display indifference towards religion, appraisal respect for religion looms large to displace these attitudes. To appreciate why the US Supreme Court treats religion with respect under the Establishment Clause,

¹⁶⁴ *Yoder* (n 155) 222. See also *ibid* 225.

¹⁶⁵ *ibid* 226. But see *ibid* 218 (deploying the language of tolerance: ‘[under prevailing state law, the Old Order Amish] must either abandon belief and be assimilated into society at large or be forced to migrate to [a] more tolerant region’).

¹⁶⁶ See for instance *Goldman* (n 129) 503 (ruling that the Free Exercise Clause does not mandate an exemption from military dress code regulations for a Jew who wore the *yarmulke*).

¹⁶⁷ *Employment Division v Smith* 494 US 872 (1990).

¹⁶⁸ *ibid* 908 (Blackmun, J, Brennan, J, and Marshall, J, dissenting).

¹⁶⁹ *ibid* 881–883.

¹⁷⁰ *ibid* 884–885.

¹⁷¹ *ibid* 879 and 890, respectively.

¹⁷² *Lynch* (n 69) 673.

¹⁷³ *ibid*.

we need to examine the distinct American constitutional view of religion as special. The Supreme Court insists that '[t]he First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State'.¹⁷⁴ Underlying the Court's interpretation of the Religion Clauses is, in part, a 'conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful'.¹⁷⁵ Ironically, this engrained Protestant emphasis of belief over practice has led the Court to revert to tolerance under the Free Exercise Clause in *Smith*.¹⁷⁶ Religious *beliefs* remain unaffected by the *Smith* ruling. But the Court has acknowledged that religious *practices*—especially those of minority religious groups—suffer from its ruling.¹⁷⁷

Under the Establishment Clause, by contrast, the special respect due to religious beliefs retains its force: 'respect for religious pluralism [is] commanded by the Constitution'.¹⁷⁸ As a result, 'the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society'.¹⁷⁹ Most recently, this respect-based understanding of the Establishment Clause led a plurality to rule in *American Legion* that 'destroying or defacing [a] Cross that has stood undisturbed for nearly a century would not ... further the ideals of respect and tolerance embodied in the [Establishment Clause of the] First Amendment'.¹⁸⁰

This does not mean, however, that all public acts and displays of religion are constitutionally accepted. Indeed, respect for religious beliefs cuts both ways. It is not only due to those who support religious displays, but also to those with opposing views.¹⁸¹ Under the Establishment Clause, then, the Court continuously walks a tightrope, attempting to be respectful of the religious beliefs of competing groups. Or, as Justice O'Connor put it three decades ago in *County of Allegheny*:

[e]ndorsement [of religion] sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. ... [But] [d]isapproval of religion conveys the opposite message.¹⁸²

¹⁷⁴ *Lee v Weisman* 505 US 577, 589 (1992).

¹⁷⁵ *Wallace v Jaffree* 472 US 38, 53 (1985).

¹⁷⁶ Justice Scalia, author of the majority opinion in *Smith*, was Catholic. But he also favoured the major monotheistic religions over various minority religions, which are often more practice-based. See *McCreary County* (n 131) 844 (2005) (Scalia, J, Rehnquist, CJ, and Thomas, J, dissenting) ('the Establishment Clause permits ... disregard of polytheists and believers in unconcerned deities').

¹⁷⁷ *Smith* (n 167) 890 ('leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in').

¹⁷⁸ *ibid* 610 (majority opinion). See also *ibid* 613 (arguing that 'the county's endorsement of Christianity [represents] the respect for religious diversity that the Constitution requires').

¹⁷⁹ *County of Allegheny* (n 143) 657 (Kennedy, J, Rehnquist, CJ, White, J, and Scalia, J, concurring in part and dissenting in part).

¹⁸¹ See, among others, *Jaffree* (n 175) 38; *County of Allegheny* (n 143) 573.

¹⁸² *County of Allegheny* (n 135) 625 (O'Connor, J, Brennan, J, and Stevens, J, concurring) (citing, in part, Justice O'Connor's concurring opinion in *Lynch* 668).

IV. THE IMPACT: TOLERANCE CIRCUMSCRIBES THE INTERPRETATION
OF RELIGIOUS FREEDOM

The preceding section discussed the diverging conceptions of tolerance and respect that inform constitutional discourse on religion in India, Israel and the United States. The comparative analysis revealed that the Supreme Court of the three jurisdictions resorts to diverging understandings of tolerance and respect. But why and how does this matter? This section aims to show that the conceptual discourse has a substantive impact on constitutional interpretation of religious freedom in the three jurisdictions.

The principal claim in this section is that, although the three Supreme Courts favour *diverging* conceptions of tolerance and respect, a striking *convergence* unfolds in terms of the actual impact that these distinct understandings have on the constitutional interpretation of religious freedom. The comparative analysis discloses, in particular, that each Supreme Court relies on its distinctive understanding of tolerance to circumscribe freedom of religion. The US Supreme Court has resorted to an antiquated notion of tolerance to virtually eliminate religious exemptions under the Free Exercise Clause. This, however, has prompted a legislative response to bring respect back in. The Israeli Supreme Court, for its part, insists on compromise solutions in the name of mutual tolerance, but in doing so excludes religious feelings from the scope of religious freedom. In Indian constitutional law and religion, finally, tolerance has been instrumental in enabling the exclusionary workings of the Indian Supreme Court's essential practices doctrine, under which minority religious practices are increasingly deprived of constitutional protection.

A. The United States: Legislative Efforts to Bring Respect Back In

In its interpretation of the Free Exercise Clause, we saw, the US Supreme Court has shifted from a permission conception of tolerance to appraisal respect, and back again. Along with this shifting position, the scope of the constitutional right to religious freedom broadened and narrowed until *Smith* closed the constitutional door on religious exemptions. Yet, in *Smith* the Supreme Court did not consider exemptions to be wholly unwarranted. Rather, it did not find them to be *constitutionally required*. In other words, the Supreme Court left the decision to grant exemptions to the legislature, while anticipating that minority religions would struggle to find favour in this political arena.¹⁸³

In a sense, the *Smith* ruling knowingly surrendered minority religious practices to the kind of legislative grace that was so vigorously opposed by James Madison. But Congress and state legislatures have disagreed with the Court. Various US legislatures have sought to legislatively restore the

¹⁸³ *Smith* (n 167) 890.

respect-based, pre-*Smith* case law of the Supreme Court.¹⁸⁴ They have done so by enacting the Religious Freedom Restoration Act (RFRA) and, following RFRA's being partially struck down in *Flores*,¹⁸⁵ State-level RFRAs and the Religious Land Use and Institutionalized Persons Act (RLUIPA).

RFRA prohibits the federal government from 'substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability', unless a *Sherbert*-style compelling interest test is met.¹⁸⁶ RLUIPA does the same for 'the religious exercise of a person [such as a prisoner] residing in or confined to an institution', both at federal and state level.¹⁸⁷ Both pieces of legislation have reinstated religious exemptions, albeit at the sub-constitutional level.¹⁸⁸

Although *Smith*'s tolerance-based rejection of exemptions under the Free Exercise Clause still stands, there are some indications that RFRA and RLUIPA have nudged the Supreme Court back to a more respect-based understanding of the free exercise of religion. This was already evident in *Cutter* and *Hobby Lobby* and has been confirmed more recently in *Masterpiece Cakeshop*. In upholding the constitutionality of RLUIPA in *Cutter*, the Court noted in *obiter* that 'the Free Exercise Clause ... requires government respect for ... the religious beliefs and practices of our Nation's people'.¹⁸⁹ In *Hobby Lobby*, the Supreme Court applied RFRA to 'closely held'¹⁹⁰ religious corporations who claimed to be burdened by the Affordable Care Act's contraception mandate. In finding for the claimants, the Court ruled that a less restrictive alternative was available that 'achieves all of the Government's aims while providing greater respect for religious liberty'.¹⁹¹ In *Masterpiece Cakeshop*, finally, the Court held that religious beliefs should be treated with tolerance and respect.¹⁹² Under the influence of legislative efforts, then, it seems that the notion of respect might be regaining a foothold in the Supreme Court's understanding of the Free Exercise Clause.¹⁹³

Yet, the impact of a respect-based understanding of the Religion Clauses is not *necessarily* positive. According to certain political philosophers, appraisal respect for religious difference is to be preferred over bare tolerance thereof.¹⁹⁴ But this is arguably only true if respect is meted out equally. Hence Martha Nussbaum's insistence on *equal* respect. Based on the recent docket of the US Supreme Court, however, there are indications that majoritarian Christian denominations are benefitting disproportionately from the Supreme Court's

¹⁸⁴ *Burwell v Hobby Lobby Stores* 573 US ___ 5 (2014) (describing the Religious Freedom of Restoration Act as Congress's response to the *Smith* ruling, 'to ensure broad protection for religious liberty').

¹⁸⁶ 42 US C section 2000bb-1(a), (b).

¹⁸⁸ RFRA and RLUIPA do not profess to interpret the Free Exercise Clause.

¹⁸⁹ *Cutter v Wilkinson* 544 US 709, 717 (2005).

¹⁹¹ *ibid* 3.

¹⁹³ Note, however, that *Hobby Lobby* and *Cutter* were not Free Exercise Clause cases. One should not deduce, therefore, from either judgment an overruling of *Smith*'s tolerance-based understanding of the Free Exercise Clause.

¹⁸⁵ *City of Boerne v Flores* 521 US 507 (1997).

¹⁸⁷ 42 US C section 2000cc.1(a).

¹⁹⁰ *Hobby Lobby* (n 184) 29.

¹⁹² *Masterpiece Cakeshop* (n 2) 12 and 17.

¹⁹⁴ See (n 12) and accompanying text.

reliance on respect for religion.¹⁹⁵ *Hobby Lobby* notoriously upheld the claims of Christian ‘closely held’ corporations and *Masterpiece Cakeshop* did the same (even if ‘only’ on procedural grounds) for a Christian baker who refused to serve a same-sex couple.¹⁹⁶ Similarly, in *American Legion* and earlier Establishment Clause cases (including *Lynch* and *Van Orden v Perry*), the Court upheld the constitutionality of Christian symbols by secularising their religious meaning and/or emphasising their ‘passive’ nature.¹⁹⁷

A pro-Christian bias thus seems to have crept into the Court’s case law, along with the notion of respect. Justices Ginsburg and Sotomayor have a point when they argue in dissent in *American Legion* that displaying a Latin cross on public land ‘elevates Christianity over other faiths’ and ‘conveys a message of exclusion’.¹⁹⁸ Richard Schragger and Micah Schwartzman have similarly posited that *American Legion* entails an ‘inversion of the Establishment Clause’ under which ‘the Court has ... opened the way toward Christian preferentialism’.¹⁹⁹ Even before *American Legion*, Christian Joppke claimed that a majority of Supreme Court Justices are pandering to the conservative ‘Christian Right’ by reinterpreting the Establishment Clause to be more accommodating of religious (predominantly Christian) displays in public.²⁰⁰ It is tempting to relate these pro-Christian elements in the Supreme Court’s case law to the ongoing process of (alleged) democratic erosion in the United States, as pursued—or instigated—by Donald Trump’s brand of right-wing and ethno-nationalist populism (as evident in, among others, his ‘Muslim travel ban’, at least the first and second iteration of which overtly targeted Muslims). Yet, even in the wake of *Trump v Hawaii*,²⁰¹ such conclusions would disregard the fact that the (seeming) pro-Christian bias in the Court’s case law is part of a constitutional interpretive process that predates Trump’s election.²⁰²

¹⁹⁵ But see *Holt v Hobbs* (2015) 135 S Ct 853 (in which the Court ruled that prohibiting a Muslim prisoner from growing a short beard violated RLUIPA).

¹⁹⁶ For critical discussion of the majoritarian implications of *Hobby Lobby* and *Masterpiece Cakeshop*, see respectively G Stopler, ‘*Hobby Lobby*, S.A.S., and the Resolution of Religion-Based Conflicts in Liberal States’ (2016) 14(4) *ICON* 941–60; M Murray, ‘Inverting Animus: *Masterpiece Cakeshop* and the New Minorities’ (2018) *The Supreme Court Review* 257–97.

¹⁹⁷ See *American Legion* (n 4) 48; *Lynch* (n 68) 686; *Van Orden v Perry* 545 US 677, 683–684 (2005).

¹⁹⁸ *American Legion* (n 4) (Justices Ginsburg and Sotomayor, dissenting) 3 and 6.

¹⁹⁹ R Schragger and M Schwartzman, ‘Establishment Clause Inversion in the *Bladensburg Cross Case*’ (2019) *ACS Supreme Court Review* 21, 24.

²⁰⁰ C Joppke, ‘Beyond the Wall of Separation: Religion and the American State in Comparative Perspective’ (2016) 14(4) *ICON* 984–1008.

²⁰¹ *Trump v Hawaii* 585 U. S. ____ (2018). For criticism, see *ibid* (Sotomayor, J, and Ginsburg, J, dissenting) (‘the majority here completely sets aside the President’s charged statements about Muslims as irrelevant. That holding erodes the foundational principles of religious tolerance that the Court elsewhere has so emphatically protected’).

²⁰² *American Legion* (n 4), for instance, clearly builds on *Van Orden* (n 197). For discussion, see Joppke (n 200).

B. Israel: The Delineating Effect of the Threshold of Tolerance Doctrine

Shlomo Fischer has argued that Israel utilises a model of tolerance that differs dramatically from the Protestant, American conceptualisation of tolerance.²⁰³ The divergence rests chiefly, Fischer posits, in an inversion of the public–private divide.²⁰⁴ On the American Protestant model, tolerance aims to protect religious liberty by relegating it to the private realm, as evidenced by the tolerance-based *Smith* ruling. On the Israeli model, conversely, tolerance is used as a tool to navigate the tensions that accompany the *public* presence of Judaism. This is espoused in Justice Joubbran’s holding in *Ragen* that ‘the value of tolerance’ should guide the Supreme Court on ‘fraught issues’ of religious diversity.²⁰⁵ Justice Joubbran refers, here, to horizontal tolerance, which ‘requires [an] individual to come to terms with opinions and cultural customs ... even if he perceives [them] to be outrageous, abhorrent and negative’.²⁰⁶

In other words, whereas the US Supreme Court resorted to the most pernicious mode of tolerance—the permission conception—in *Smith*, its Israeli counterpart relies on a more constructive view of tolerance. By emphasising the importance of mutual tolerance in Israel’s pluralistic society, the Israeli Supreme Court aims to secure compromise solutions to divisive religious disputes.²⁰⁷ ‘Tolerance is essentially the rejection of the “all or nothing” approach’, Justice Barak has noted, ‘and [supports] the promotion of mutual compromise’ instead.²⁰⁸ Barak moreover considered it the Supreme Court’s constitutional task to reach for tolerance-based compromises: ‘[i]t is appropriate that the legal ruling should reflect ... the spirit of compromise and tolerance’.²⁰⁹

The constitutional link between tolerance and compromise is evident in the Supreme Court’s proposed solution to the (in)famous case on coerced gender segregation on *mehadrin* (‘meticulous’) bus lines. In *Ragen*, the Court ruled that coercive segregation could not be tolerated.²¹⁰ At the same time, however, the Court indicated that there was ‘no legal impediment to allowing’ *voluntary* gender segregation on buses.²¹¹ ‘[I]t is even possible’, the Court continued, ‘that we must try to help’ those who wish to voluntarily practise gender segregation, out of ‘consideration [for their] religious needs and beliefs’.²¹² In *Ragen*, the Supreme Court thus hinted at the need for

²⁰³ Fischer (n 48) 79.

²⁰⁴ *ibid.*

²⁰⁵ *Ragen v Ministry of Transport*, HCJ 746/07 (5 January 2011) para 4 (Joubbran, J, concurring).

²⁰⁶ *ibid.*, paras 4–5.

²⁰⁷ See *Shavit* (n 110) para 19 (Barak, P, concurring) (‘A healthy society is based ... on mutual compromise and tolerance.’); *Horev* (n 57) at para 46 (Or, J, dissenting) (‘mutual tolerance and compromise are the recipe for maintaining communal life in ... Israeli society’).

²⁰⁸ *Shavit* (n 110) at para 19 (Barak, P, concurring).

²⁰⁹ *ibid.*, para 22. See also *ibid.*, para 2 (England, J, dissenting) (‘all agree that we must behave with tolerance in order to reach compromises’).

²¹⁰ *Ragen* (n 205).

²¹¹ *ibid.*, para 8.

²¹² *ibid.*

pragmatic compromises in the face of the divisive presence of religion in Israeli public life.²¹³

As indicated in Section III, the importance of compromises in Israeli constitutional law and religion is predicated on the idea that ‘compromise is required by the values of the State of Israel as a Jewish and democratic state’.²¹⁴ ‘Tolerance’, in turn, ‘is among Israel’s values as a democratic state [and] as a Jewish state’.²¹⁵ A primary function of tolerance in Israeli constitutional law, then, is to enable compromise solutions: ‘tolerance serves as a measure for striking the proper balance between various clashing values’.²¹⁶ But concrete balancing exercises also reveal the limits of tolerance, which ‘delineate the multicultural “playing field”’.²¹⁷ Coercive gender segregation on buses is ‘outside the multicultural playing field’,²¹⁸ but voluntary segregation may remain within it. Voluntary segregation can, in other words, be constitutionally tolerated.

In linking tolerance to a constitutional search for pragmatic compromises, the Israeli Supreme Court diverges from the US Supreme Court. The latter principally²¹⁹ excludes religious exemptions from the scope of the Free Exercise Clause, in pursuit of the permission conception of tolerance. An analogous interpretation of religious freedom appears inconceivable under the Israeli Court’s compromise-based approach.²²⁰ Yet in other ways, the Israeli Court has also circumscribed the scope of the constitutional right to freedom of religion, in pursuit of its own conception of tolerance.²²¹

The Israeli Supreme Court has specifically limited the scope of religious freedom in its case law on religious feelings, which spans a wide range of issues, including broadcasting of films,²²² car traffic on the Sabbath,²²³ use of non-Hebrew in Jewish cemeteries,²²⁴ and the sale of pig meat.²²⁵ In this specific area of its case law, the Supreme Court has translated the constitutional concern for compromise solutions into a doctrinal tool: the ‘threshold of tolerance’ test. The Court has held that ‘a society whose values are Jewish and democratic

²¹³ See also *Director General of the Prime Minister’s Office* (n 114) para 47 (acknowledging that the ‘Women of the Wall’ have ‘a right ... to pray at the Wall in their manner’, but nevertheless ruling that they should pray at a *separate* site of the Western Wall, ‘to minimize the affront that other religiously observant people sense’).

²¹⁴ *Solodkin v Beit Shemesh Municipality*, HCJ 953/01 (14 June 2004) para 23.

²¹⁵ *Horev* (n 57) para 102.

²¹⁷ *Ragen* (n 205) para 6 (Joubran, J, concurring).

²¹⁹ With the exception of unemployment compensation cases and ‘hybrid’ cases.

²²⁰ Even in the highly sensitive area of compulsory military conscription, the Israeli Supreme Court only found exemptions for Ultra-Orthodox *yeshiva* students unconstitutional after seven failed attempts at reaching a compromise solution *and once* exemptions had reached very high proportions (14 per cent of the conscription pool). See *Ressler* (n 57).

²²¹ The discussion that follows is limited to one (albeit broad) segment of the Court’s case law. For discussion of other segments of the case law, see for instance Stopler (n 99) (critically discussing case law on personal law).

²²² This includes allegedly blasphemous films (see *Universal City Studios Inc*) and documentary films aired on TV on the Sabbath against the wishes of those featured in the film (see *Gur Aryeh* (n 117)).

²²³ *Horev* (n 57).

²²⁴ *Shavit* (n 110).

²²⁵ *Solodkin* (n 214).

protects ... religious feelings'.²²⁶ This protection of religious feelings, however, raises the spectre of conflict with other rights. '[T]olerance', the Court has acknowledged, 'simultaneously justifies both protecting rights and infringing them.'²²⁷ To reconcile the competing demands of tolerance, the Court has formulated a threshold of tolerance test. This test is predicated on the idea that citizens must 'absorb' a certain level of offensiveness 'as part of the social contract'.²²⁸ Only if the threshold of tolerance is exceeded, does protection of religious feelings justify interference with human rights.²²⁹

But the threshold of tolerance doctrine is—by design—skewed *against* religious feelings. Under the doctrine, the Israeli Supreme Court does not engage in 'horizontal balancing', in which two clashing rights or two competing public interests enter a balancing exercise on equal footing.²³⁰ Instead, the Court resorts to 'vertical balancing', in which the competing right (for instance freedom of expression) prevails 'unless the violation of religious feelings is nearly certain and their violation is real and severe'.²³¹ That is, religious feelings only 'trump' human rights when offence goes 'beyond the tolerable threshold of Israeli society'.²³² The bar is thus set very high.

The Court's reason for setting it so high relates to the constitutional status of religious feelings. The Court principally *excludes* such feelings from the scope of the constitutional right to freedom of religion. Instead, it equates them to a public interest.²³³ And as a public interest, religious feelings are principally subordinated to constitutional rights.²³⁴ Like any other public interest, they can overcome this principled subordination, but only when a high threshold has been exceeded. The constitutional threshold of tolerance doctrine is thus, for better or worse, stacked against religious feelings.²³⁵

Solodkin illustrates how all of this plays out in practice. In *Solodkin*, the Supreme Court was confronted with deeply divisive bans on the sale of pig meat in Israeli cities.²³⁶ As the judgment explains, consumption of pig meat traditionally elicits profound disgust in many Jews, both for religious and national-identity reasons.²³⁷ Yet bans on the sale of pig meat have become increasingly controversial since the 1990s, when a large number of Jewish

²²⁶ *Gur Aryeh* (n 117) para 5.

²²⁷ *Horev* (n 57) para 58.

²²⁸ *ibid.*, paras 5–58. See also *Solodkin* (n 214) para 26 (referencing the "level of tolerance" of injury to feelings, which each member of a democracy takes upon himself as part of the social consensus that forms the basis of society").

²²⁹ *Horev* (n 57) para 58.

²³⁰ *ibid.*, para 50; *Gur Aryeh* (n 117) para 8.

²³¹ *Gur Aryeh* (n 117) para 6.

²³² *ibid.*

²³³ *Horev* (n 57) para 50.

²³⁴ *Gur Aryeh* (n 117) paras 6 and 8 (in relation to freedom of expression); *Horev* (n 56) para 68 (in relation to freedom of movement).

²³⁵ *Horev* (n 57) para 57 ('a democratic society must be most careful in recognizing the legitimacy of infringing on human rights for the purpose of protecting feelings'). But see *Gur Aryeh* (n 117) para 8 (Dorner, J, dissenting) (arguing that the majority's balance is struck against those whose religious feelings have been infringed, who 'have nowhere "to retreat back" to' whereas the other party does 'have room to maneuver').

²³⁶ *Solodkin* (n 214).

²³⁷ *ibid.*, para 20.

immigrants from former Soviet Union republics arrived in Israel.²³⁸ These immigrants—and a growing number of secular Jews—were habituated to eating pig meat, whereas many other Jews (both religious and secular) continued to find consumption of pigs disgusting.²³⁹ This constellation made *Solodkin* a particularly hard case for tolerance to emerge from. The Supreme Court nevertheless ruled that municipal authorities should aim for compromise solutions in regulating the sale of pig meat.²⁴⁰

The judgment's famous scenario of the three villages (A, B and C) is particularly instructive. Running through the scenario, the Supreme Court applies its threshold of tolerance doctrine to three hypothetical settings: a village composed entirely of residents who oppose the sale of pig meat (village A), a village composed entirely of residents who wish to eat pig meat (village B), and a village of mixed inhabitants (village C).²⁴¹ The Court finds that tolerance is not at issue in village A, since all its inhabitants agree on banning the sale of pig meat. Municipal authorities in A-like villages can thus prohibit the sale of pig meat without violating the constitutional framework. But in village B, the Court holds, the sale of pig meat should be allowed. Here, an issue of tolerance does arise, in that inhabitants of nearby villages of the A variety might object to the sale of pig meat in an adjacent village of the B variety. But the Court argues that this 'injury does not exceed the "tolerance level"', because the harm is geographically removed from the objectors.²⁴²

The most interesting of the three scenarios in *Solodkin* is, of course, that of Village C. Here, the challenges of mutual tolerance play out in full force. Under the threshold of tolerance doctrine, the Supreme Court nevertheless settles on a pragmatic compromise. It rules that it is open to municipal authorities in C-like villages to consider the sale of pig meat in their village to exceed 'the "level of tolerance" that every resident ought to tolerate as a part of his living in that place'.²⁴³ Acknowledging the harm to the religious feelings of those disgusted by the consumption of pig meat thus justifies banning its sale in C-like villages. But the Court also finds that inhabitants of C-like villages who wish to eat pig meat should have access to it. The Court specifically notes that they should be able to purchase products in the outskirts of their own village or in a neighbouring B-like village.²⁴⁴ In the final analysis, then, *Solodkin* suggests that exclusion of religious feelings from the scope of religious freedom need not preclude the kinds of pragmatic compromises that otherwise mark the Israeli constitutional conception of tolerance.

Not everyone agrees, however, that the Supreme Court has succeeded in finding pragmatic compromises that secure an adequate balance between Israel's constitutional values as a Jewish State and a (liberal-)democratic

²³⁸ See *ibid.*, paras 5 and 20; Barak-Erez (n 47) 431–2.

²⁴⁰ *Solodkin* (n 214) para 23.

²⁴³ *ibid.*, para 32.

²³⁹ Barak-Erez (n 47) 431–2.

²⁴¹ *ibid.*, paras 25–34.

²⁴² *ibid.*, para 28.

²⁴⁴ *ibid.*, para 34.

State.²⁴⁵ In the political realm, conservatives have perceived the ‘activist’ Supreme Court as paying lip service to both values, while in fact giving primacy to liberal values over Jewish values.²⁴⁶ Under subsequent Benjamin Netanyahu-led governments, this has resulted in a series of counterbalancing measures, which Yaniv Roznai describes as a ‘counterrevolution’ to the constitutional revolution initiated by the Supreme Court in *United Mizrahi Bank*.²⁴⁷ These countermeasures include the recent appointment of conservative justices to the Supreme Court,²⁴⁸ adoption of Basic Law: Israel—The Nation State of the Jewish People (to shift the constitutional balance (back) in the direction of the Jewish nature of the State in the sense intended by Ruth Gavison,²⁴⁹ that is as the nation State of the Jewish People),²⁵⁰ and the tabling of a Bill for Basic Law: Legislation (which would, among others, introduce an override clause and a non-justiciability clause to prevent the Supreme Court from reviewing Basic Laws).²⁵¹

These developments have prompted debate on whether Israel is affected by democratic erosion and constitutional retrogression. Some Israeli scholars argue that the above measures signal ‘incremental erosion of Israel’s strong democratic institutions’,²⁵² indicate that Israel is ‘in the developing stages of constitutional capture’,²⁵³ or even that ‘Israel is already in a constitutional crisis’.²⁵⁴ Other scholars, however, dispute the claim ‘that Israel has already slid into a process of “constitutional capture”’,²⁵⁵ or even argue that the recent countermeasures ‘constitute a generally legitimate democratic response by one side of the political map in Israel—the Right—to its relative weakness in several public spheres’.²⁵⁶

Since the primary concern here is with constitutional interpretation of religious freedom in this article, it is not my intention to take a stand on either side of the ‘constitutional capture’ debate. Rather, it is interesting to note how (alleged and variable) processes of democratic erosion and

²⁴⁵ Barak-Erez (n 113) 99 (‘Although the decision [in *Solodkin*] represented an attempt to refrain from normative judgment, at a deeper level it reflects a secular worldview completely alien to the symbolism of the pig prohibition in Jewish culture.’).

²⁴⁶ Barak-Erez (n 57) 2504–5.
²⁴⁷ Y Roznai, ‘Israel: A Crisis of Liberal Democracy?’ in MA Graber, S Levinson and M Tushnet (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018) 355, 357.

²⁴⁸ I Porat, ‘Symposium—Part 6 of 7: Is There Constitutional Capture in Israel?’ (I●CONnect, 25 August 2017) <<http://www.iconnectblog.com/2017/08/is-there-constitutional-capture-in-israel/>>.

²⁴⁹ See (nn 103–105) and accompanying text.

²⁵⁰ Basic Law: Israel – The Nation State of the Jewish People, section 1(b) (‘The State of Israel is the nation state of the Jewish People, in which it realizes its natural, cultural, religious and historical right to self-determination.’).

²⁵¹ Roznai (n 247) 363–4.
²⁵² *ibid* 372.

²⁵³ G Stopler, ‘Special Symposium—Part 2 of 7: Constitutional Capture in Israel’ (I●CONnect, 21 August 2017) <<http://www.iconnectblog.com/2017/08/constitutional-capture-israel/>>.

²⁵⁴ R Ahren, ‘Israel Is Already in a Constitutional Crisis, Leading Law Scholar Warns’ *Times of Israel* (28 May 2019) <<https://www.timesofisrael.com/israel-is-already-in-a-constitutional-crisis-leading-law-scholar-warns/>> (interview with Suzie Navot).

²⁵⁵ B Medina, ‘Symposium—Part 5 of 7: The Israeli Liberal Democracy: A Critical Assessment’ (I●CONnect, 24 August 2017) <<http://www.iconnectblog.com/2017/08/the-israeli-liberal-democracy-a-critical-assessment/>>.

²⁵⁶ Porat (n 248).

constitutional retrogression link the three studied jurisdictions together. As in the United States, the Israeli ‘constitutional capture’ debate responds to the implications of (religiously) conservative populism in the executive branch of government. And similarly to India, as we will see shortly, the Israeli debate centres around an ethno-religious nationalist State-formation project. But in India, contrary to in Israel, the nationalist executive has found a powerful (if possibly unwitting) ally in the Supreme Court to further their ethno-religious agenda. In the next sub-section, it is argued that a distortion of the Supreme Court’s positive conception of tolerance into an instrument of power has been instrumental in facilitating this synergy between both branches of government.

C. India: The Power of Tolerance to Constitutionally Redefine Religion

Both the US and Israeli Supreme Court have, as we have seen, restricted the scope of religious freedom in pursuit of their respective conceptions of tolerance. Neither court, however, has gone so far as to limit the scope of religion itself. Quite the opposite, the US Supreme Court is adamant that it is not a constitutional court’s business to define or interpret religion.²⁵⁷ Its Indian counterpart, however, does not share that position. Through its essential practices doctrine, the Indian Supreme Court is more than willing to (re)interpret and (re)define religion. This distinctive approach results in a more drastic delineation of the constitutional right to religious freedom in India than in Israel or the United States. Ironically, a distorted version of the Indian Court’s positive conception of tolerance has been instrumental in facilitating this interpretive move.

The Supreme Court’s conception of tolerance is devoid of the element of disapproval inherent in the prevailing conceptions in American and Israeli constitutional law. Instead, in Indian constitutional law tolerance aligns with the positive lens of respect to generate a benign constitutional environment for religious freedom.²⁵⁸ But this benign stance comes with a catch. To preserve its understanding of the secular constitutional framework, the Indian Supreme Court has—unlike its Israeli and American counterparts—become heavily invested in (re)defining religion. Whenever religious practices contradict secular values, they cannot—on the Indian Court’s understanding of the secular constitutional framework—be part of religion. The alternative would jeopardise the Court’s conception of religion as an unambiguously good thing that aligns entirely with the Constitution’s secular values.²⁵⁹ In its

²⁵⁷ *Hernandez v Commissioner* 490 US 680, 699 (1989) (‘It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith’).

²⁵⁸ R Sen, ‘Secularism and Religious Freedom’ in S Choudhry, M Khosla and PB Mehta (eds), *The Oxford Handbook of the Indian Constitution* (Oxford University Press 2016) 902.

²⁵⁹ I am grateful to Farrah Ahmed for explaining this aspect of Indian constitutional law and religion.

drive to preserve the (romantic) moral goodness of religion and its (fictional) constitutional alignment with secularism, the Court regularly casts out pernicious religious practices from the scope of religious freedom.²⁶⁰ It does this by applying the ‘essential practices doctrine’.²⁶¹ On this doctrine, only practices that are essential to a religion, as ultimately defined by the Court itself, are worthy of constitutional protection.²⁶²

Initially, the essential practices doctrine aimed to ‘ameliorate’ Hinduism, especially in relation to abolition of the caste system and opening up access to temples.²⁶³ But more recently, the doctrine appears to have become a tool to curb Muslim minority religious practices, in particular. In its early freedom of religion case law, the Indian Supreme Court already restricted constitutional protection to the ‘essential part’ of religion.²⁶⁴ But importantly, the Court initially left the definition of ‘essential practices’ to religious denominations, because ‘no outside authority has any jurisdiction to interfere with their decision in such matters’.²⁶⁵ The Court construed its judicial role as limited to assessing the reasonableness of government intrusions on religious freedom by conducting limitation-style analysis.²⁶⁶ Under the influence of Justice Gajendragadkar’s views, however, the Court gradually reserved for itself the power to define the essential practices of religion.

Justice Gajendragadkar initially struck a famous ‘note of caution’, which would revolutionise the Supreme Court’s essential practices doctrine, in *Durgah Committee*.²⁶⁷ There, he warned that ‘purely secular practices ... clothed with a religious form’ may well make invalid claims for constitutional protection.²⁶⁸ He also noted that nominally religious practices ‘may have sprung from merely superstitious beliefs’ and are in that sense ‘unessential accretions to religion itself’.²⁶⁹ Genuine religious practices thus needed to be distinguished from secular practices and superstitious beliefs.²⁷⁰ Whereas the delineation was originally left to religious authorities, in *Tilkayat Shri Govindlalji* Justice Gajendragadkar insisted that the Supreme

²⁶⁰ See S Shankar, ‘A Juridical Voyage of “Essential Practices of Religion”’: From India to Malaysia and Pakistan’ (2016) 60(8) *American Behavioral Scientist* 941, 948.

²⁶¹ The doctrine is contested. See, for instance, J Neo, ‘Definitional Imbroglios: A Critique of the Definition of Religion and Essential Practice Tests in Religious Freedom Adjudication’ (2018) 16(2) *ICON* 574, 576 (‘a deferential approach that relies primarily on the self-definition of the religious claimant is to be preferred’); RA Abeyratne, ‘Privileging the Powerful: Religion and Constitutional Law in India’ (2018) 13(2) *ASJCL* 307, 330 (‘the Court must abandon the “essential practice test”’).

²⁶² *Indian Young Lawyers Association v State of Kerala* 2018 SCC Online, para 112 (‘Article 25 merely protects the freedom to practise rituals, ceremonies, etc. which are an integral part of a religion’).
²⁶³ *Thiruvengadam* (n 86) 170.

²⁶⁴ *Commissioner Hindu Religious Endowments Madras v Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* 1954 SCC Online, para 20.
²⁶⁵ *ibid.*, para 23.

²⁶⁶ See for instance *Rev Stainislaus v State of Madhya Pradesh* (1977) 1 SCC 677 (on proselytism).
²⁶⁷ *Durgah Committee v Syed Hussain Ali* 1962 SCC Online, para 33.

²⁶⁸ *ibid.*
²⁶⁹ *ibid.*

²⁷⁰ See *Indian Young Lawyers Association* (n 262) para 35 (Chandrachud, J) (noting that the cited passages in *Durgah Committee* were ‘considered a necessary safeguard to ensure that superstitious beliefs would not be afforded constitutional protection in the garb of an essential religious practice’).

Court should bear the burden of deciding what counts as an essential practice of religion.²⁷¹ ‘The question will always have to be decided by the Court’, he held, ‘because the community might speak with more than one voice’ and would thus fail to come up with an unequivocal answer.²⁷²

This shift in the Indian Supreme Court’s understanding of the essential practices doctrine should be read in the context of a ‘transformative’²⁷³ Indian Constitution. Article 25(2) of the Constitution grants the Indian State the power to regulate ‘secular activity which may be associated with religious practice’ and to provide for social welfare and reform (including by removing caste-based limitations on entry to Hindu temples).²⁷⁴ Although nothing precludes the Supreme Court from incorporating these powers in limitation-style analysis under Article 25(1),²⁷⁵ the Court has opted to pursue a different path under the revised essential practices doctrine.²⁷⁶ To achieve the social reform ambitions of the secular Constitution, in *Sastri Yagnapurushadji* the Supreme Court for instance rejected a Hindu sect’s claim for separate status as a religious denomination distinct from Hinduism as ‘entirely misconceived’, to prevent the sect from acting upon its ‘apprehension ... founded on superstition, ignorance and complete misunderstanding of the true teachings of Hindu religion’ to let other Hindus access its temple.²⁷⁷ More recently, in the *Sabarimala*²⁷⁸ case on access of women to the Lord Ayyappa Temple at Sabarimala, the Court held that the practice of excluding women aged 10 to 50 from accessing the temple was not an essential practice of Hindu religion and therefore did not merit constitutional protection.²⁷⁹

Under the essential practices doctrine, the Supreme Court thus tends to *reinterpret* religious practices as non-essential to religion whenever the spectre of incompatibility with the secular values of the Constitution arises.²⁸⁰ By so circumscribing the scope of religious freedom, the Court has ‘tried to sustain the happy illusion that a deep pluralism of comprehensive doctrines is compatible with the public purposes of a liberal state’.²⁸¹ Although a search for perfect alignment of religion with the secular

²⁷¹ *Tilkayat Shri Govindlalji v State of Rajasthan*, as cited in R Sen, *Articles of Faith: Religion, Secularism, and the Indian Supreme Court* (Oxford University Press 2010) 56.

²⁷² *Durgah Committee* (n 267) para 33.

²⁷³ Robison (n 84) 182.

²⁷⁴ Constitution of India, art 25(2)(a)–(b).

²⁷⁵ See, for instance, *Narasu Appa Mali* (n 73) para 9.

²⁷⁶ See *Indian Young Lawyers Association* (n 262) para 16 (Chandrachud, J) (‘Much of our jurisprudence on religion has evolved, as we shall see, around what constitutes an essential religious practice’).

²⁷⁷ *Sastri Yagnapurushadji v Muldas Bhudardas Vaishya* 1966 SCC Online, paras 50 and 55.

²⁷⁸ *Indian Young Lawyers Association* (n 262).

²⁷⁹ *Indian Young Lawyers Association* (n 262) para 122 (‘In no scenario, it can be said that exclusion of women of any age group could be regarded as an essential practice of Hindu religion and on the contrary, it is an essential part of the Hindu religion to allow Hindu women to enter into a temple as devotees and followers of Hindu religion and offer their prayers to the deity.’).

²⁸⁰ PB Mehta, ‘Passion and Constraint – Courts and the Regulation of Religious Meaning’ in Bhargava (n 98) 323.

²⁸¹ *ibid* 337.

Constitution's aim of social reform explains the Court's interpretive move,²⁸² it is important to recognise that tolerance has *facilitated* this interpretive move. In what follows, I will argue that India's distinctly positive conception of tolerance has gradually been distorted into an instrument of power, thereby enabling circumscription of religious freedom through the essential practices doctrine. The primary 'victims' of this distortion have been minority Hindu sects and, especially, Muslims.

Two contextual factors are relevant to the distortion. The first is a constitutional vision of the majority religion of Hinduism as distinctly tolerant. The Supreme Court has described Hinduism as a religion that 'bred a spirit of tolerance' and as 'a tolerant faith [whose] tolerance ... has enabled [other religions] to find shelter and support upon this land'.²⁸³ Ronojoy Sen has explained that the Court's views on this point correspond, in historical perspective, to the inclusivist strand of reformist Hinduism, which 'argued for Hinduism as a universal and tolerant religion'.²⁸⁴ But, Sen has added, proponents of inclusivist Hinduism also 'believed in the superiority of Hinduism'.²⁸⁵

Here enters the second factor: the benevolent majoritarianism that underlies majority–minority religious relations in India. In *SR Bommai*, Justices Jeevan Reddy and Agrawal noted that 'the Indian tradition of tolerance and fraternity' inspired the creation of a secular State that would not stand minorities being treated as second-class citizens.²⁸⁶ At the same time, however, they also found that 'the dominant thinking appears to be that the majority community, Hindus, must be secular and thereby *help* the minorities to become secular'.²⁸⁷ Rochana Bajpai has remarked, in this context, that the tolerance of the Hindu majority towards religious minorities is that of a

responsible, easygoing, benevolent, and self-sacrificing older brother – indulgent, protective, and accommodating of even the excessive and unreasonable demands of his younger and weaker brothers, the minorities.²⁸⁸

This 'benevolent' tolerance is positive, in the sense that it is devoid of disapproval. But it remains marked by the second component of tolerance: power. In this case the power of the older brother (Hinduism) to help his younger siblings (chiefly Islam) to become secular. Such exercise of power in the absence of disapproval has arguably enabled tolerance to justify the

²⁸² Jacobsohn (n 48) 42; Sen (n 271) 41.

²⁸³ *Sastri Yagnapurushadji* (n 277) para 33; *Ismail Faruqui v Union of India* (1994) 6 SCC 360, 442 (Barucha, J, and Ahmadi, J, dissenting).²⁸⁴ Sen (n 271) 5. ²⁸⁵ *ibid* 8.

²⁸⁶ *SR Bommai* (n 45) 236 (Jeevan Reddy, J, and Agrawal, J).

²⁸⁷ *ibid* (emphasis added).

²⁸⁸ R Bajpai, 'Minority Representation and the Making of the Indian Constitution' in Bhargava (n 97) 364. See also Adcock (n 51) 168 ('By the end of the 1920s ... [t]he secularist ideal of Tolerance was conjoined with a trope of Hindu gentleness, generosity, and culturedness ... [reconfiguring tolerance] to posit an essential difference between tolerant, "secular" Hindus, and Muslims.').

Supreme Court's interpretive moves in the (re)calibration of the essential practices doctrine.

We know, for instance, that Justice Gajendragadkar was part of the 'progressive elites who desire[d] to use the power of the State to "bring about enormous changes" [in Indian society]'.²⁸⁹ In this judicial project, he was 'profoundly influenced by the Nehruvian vision of an "all-embracing and all-powerful Leviathan of state power and bureaucracy" radically transforming Indian society'.²⁹⁰ By taking up the 'Hobbesian mandate',²⁹¹ Justice Gajendragadkar and the Supreme Court with him have drawn on the power element inherent in tolerance to reshape the contours of the constitutional right to religious freedom.

Once the leviathan had been unleashed, however, it proved impossible to control. Later Justices seized upon Gajendragadkar's description of Hinduism as 'a way of life'²⁹² to (unwittingly) further the Hindutva conception of a homogenous Hinduism on which 'Christians and Muslims [are constructed] as a threat to the Hindu nation'.²⁹³ In a second major recalibration of the essential practices doctrine, the Indian Supreme Court has, Ratna Kapur explains, 'construct[ed] a singular and unitary religion that has inadvertently aligned with the agenda of the Hindu Right and reinforced Hindu majoritarianism'.²⁹⁴

In *Ramesh Yeshwant Prabhuo*, a bench of the Indian Supreme Court not only described the nationalist Hindutva belief as 'a synonym of "Indianisation", i.e., development of uniform culture by obliterating the differences between all the cultures co-existing in the country'.²⁹⁵ The bench also legitimated the Hindutva belief by describing it as 'indicative ... of a way of life of the Indian people' rather than a religion.²⁹⁶ As it was held not to be a religion, promoting Hindutva beliefs could not contravene electoral legislation, which bars candidates from appealing to religion during election campaigns.²⁹⁷ Instead, the Court held, use of the words Hindutva and Hinduism should be understood to 'promote secularism' or 'criticize the policy of any political party as discriminatory or intolerant'.²⁹⁸ The Hindutva movement was thereby cast in the role of the tolerant party promoting secularism against 'intolerant' political parties.

Here, the interplay between the Supreme Court's role as an (unwitting) enabler of Hindu-nationalist discourse, on the one hand, and the ongoing process of democratic retrogression in India, on the other, becomes

²⁸⁹ *ibid* 194.

²⁹⁰ Sen (n 271) 159.

²⁹¹ Mehta (n 280) 312.

²⁹² *Sastri Yagnapurushadji* (n 277) para 29 ('Hindu religion ... may broadly be described as a way of life and nothing more').

²⁹³ R Kapur, 'A Leap of Faith: The Construction of Hindu Majoritarianism through Secular Law' (2014) 113(1) *South Atlantic Quarterly* 109, 111. See also Sen (n 271) 198 (describing this evolution as a 'complete negation of what Gajendragadkar had originally set out to achieve').

²⁹⁴ Kapur (n 293) 121.

²⁹⁵ *Ramesh Yeshwant Prabhuo* (1996) 1 SCC at 159.

²⁹⁶ *ibid* 161.

²⁹⁷ *ibid* 162.

²⁹⁸ *ibid*.

particularly salient. Several commentators have pointed out that the Court's equating of the nationalist Hindutva ideology with a 'way of life' in the 'Hindutva' cases has ultimately contributed to electoral victories of Narendra Modi's Hindu-nationalist Bharatiya Janata Party (BJP), since the BJP could now openly advocate its Hindu-nationalist ideology in electoral campaigns without falling foul of the ban on appeals to religion for electoral purposes.²⁹⁹

Following Modi's rise to power in 2014 (confirmed and strengthened during the 2019 elections), India has been described as being on a trajectory towards an 'illiberal democracy',³⁰⁰ marked by 'national-populism'³⁰¹ and 'executive aggrandizement'.³⁰² The Modi government is pursuing a Hindu-nationalist State-formation project attended by exclusion of minorities, especially of Muslims.³⁰³ To cite just one recent example,³⁰⁴ in December 2019 the BJP-controlled Parliament passed the Citizenship (Amendment) Act 2019, which enables migrants 'belonging to Hindu, Sikh, Buddhist, Jain, Parsi or Christian community from Afghanistan, Bangladesh or Pakistan' who initially entered India without a valid permit to regularise their stay and apply for citizenship. The Act, however, does not cover Muslim migrants, who remain designated as 'illegal migrants' and can thus not claim citizenship.

Importantly, the Modi government's exclusionary project can draw on (potentially unwitting) historical support by the Supreme Court. As Kapur argues, in 'a series of decisions ... the Indian Supreme Court has endorsed the Hindu Right's majoritarian and homogenising understanding of religion'.³⁰⁵ By contrast, minority religious practices that could have been the object of 'benign' and 'benevolent' tolerance, have instead been *excluded* from the scope of religious freedom as non-essential. Muslim minority practices, in particular, have suffered from this pernicious turn in the essential practices doctrine. The relevant cases often centre on divisive issues on which Hindu-nationalist interests are diametrically opposed to the interests of the Muslim minority (or segments thereof). Two such issues are discussed here.³⁰⁶

²⁹⁹ Abeyratne (n 261) 310; Thiruvengadam (n 86) 202; R Kapur, "'Belief" in the Rule of Law and the Hindu Nation and the Rule of Law' in AP Chatterji, TB Blom and C Jaffrelot (eds), *Majoritarian State: How Hindu Nationalism is Changing India* (Hurst 2019) 353, 353–4.

³⁰⁰ TB Hansen, 'Democracy Against the Law: Reflections on India's Illiberal Democracy' in Chatterji *et al.*, *Majoritarian State* (n 299) 19–39.

³⁰¹ C Jaffrelot, 'A De Facto Ethnic Democracy? Obliterating and Targeting the Other, Hindu Vigilantes, and the Ethno-State' in Chatterji *et al.*, *Majoritarian State* (n 299) 41, 41.

³⁰² T Khaitan, 'Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India' (forthcoming in *Law and Ethics of Human Rights*) <<https://ssrn.com/abstract=3367266>>.

³⁰³ Another example is the alteration, in August 2019, of the constitutional status of the Muslim-majority states of Jammu and Kashmir through questionable means (ie the use of a Presidential Order and Governor Rule). For discussion, see G Bhatia, 'Undermining Constitutional Resilience: Judicial Endorsement of the Imperial Executive' (draft paper on file with the author).

³⁰⁴ Kapur (n 299) 354.

³⁰⁵ Another divisive issue is the persistence of Muslim personal law outside codification. See *Sarla Mudgal v Union of India* (1995) 3 SCC 635, 650 ('The Hindus along with Sikhs, Buddhists and Jains have forsaken their sentiments in the cause of the national unity and

One of the most divisive religious issues in India concerns the destruction of the Babri mosque in Ayodhya by Hindu nationalists in 1992. With the express support of the BJP, Hindu nationalists have claimed the disputed site as the birthplace of Lord Ram and aim to (re)construct a temple to this deity at the site.³⁰⁷ In a series of cases, the Supreme Court has effectively ruled in favour of the Hindu-nationalist majority, thereby paving the way for the (re)building of the temple. In *Ismail Faruqui*, the Court rejected the claim that government acquisition of the site of the destroyed mosque had violated Muslims' religious freedom. Although the Court could have dispensed with the case on other grounds, it did so by *excluding* prayer at a mosque from the very scope of religious freedom. In the name of tolerance and secularism,³⁰⁸ the Court ruled that '[a] mosque is not an essential part of the practice of the religion of Islam and *namaz* (prayer) by Muslims can be offered anywhere'.³⁰⁹ Once prayer at a mosque had been labelled a non-essential practice of Islam, the conclusion swiftly followed that acquisition of the mosque in exercise of the 'sovereign or prerogative power of the State' did not contravene the Constitution.³¹⁰

In its 2019 ruling on the *Ayodhya* case, the Supreme Court definitively settled the religious dispute in favour of the Hindu-nationalists by upholding a petition submitted in the name of the Lord Ram himself.³¹¹ The Court paid lip service to the values of tolerance and respect in its judgment, noting that '[t]olerance, respect for and acceptance of the equality of all religious faiths is a fundamental precept of fraternity [in the Indian constitutional framework]'.³¹² In principle, this translates to a 'solemn duty which was cast upon the State to preserve and protect the equality of all faiths as an essential constitutional value'.³¹³ In practice, however, the 2019 ruling supports the Hindutva agenda by paving the way for (re)construction of a Hindu temple on the site.

A similarly divisive issue concerns the slaughter of cows. The sacred nature of the cow to (most) Hindus is reflected in the Indian Constitution. A non-justiciable Directive Principle in Article 48 of the Constitution enjoins the State to 'take steps for ... prohibiting the slaughter, of cows and calves'. As Arun Thiruvengadam explains, this Directive Principle 'was originally inserted [in the Constitution] to appease Constituent Assembly members of a Hindu nationalist persuasion who had a specific commitment to cow

integration, some other communities would not, though the Constitution enjoins the establishment of a "common civil Code" for the whole of India.'). See also *Shayara Bano v Union of India* 2017 SCC Online at para 25 (Nariman, J, and Lalit, J) ('it is clear that Triple Talaq is only a form of Talaq which is permissible in law, but at the same time, stated to be sinful by the very Hanafi school which tolerates it. According to [our established case law], therefore, this would not form part of any essential religious practice.'). For critical discussion of *Shayara Bano*, see Kapur (n 299).

³⁰⁷ I use '(re)construct' and '(re)build' to indicate that it is disputed that there ever stood a temple to Lord Ram on the disputed site.

³⁰⁹ *Ismail Faruqui* (n 283) 418.

³¹¹ *M Siddiq (D) Thr Lrs v Mahant Suresh Das* 2019 SCC Online.

³¹³ *ibid*, para 83.

³⁰⁸ Kapur (n 293) 113.

³¹⁰ *ibid* 415–416 and 418.

³¹² *ibid*, para 82.

protection'.³¹⁴ Several Indian states, among which the state of Gujarat, have adopted an absolute ban on cow slaughter over the past couple of decades. The Supreme Court reviewed—and upheld—the Gujarat ban in *Mirzapur Moti Kureshi*.³¹⁵ This ruling allows us to draw insightful contrasts to the Israeli tolerance-based approach. Whereas the Israeli *Solodkin* case deals with an animal—the pig—that provokes disgust among Jews, the Indian *Mirzapur Moti Kureshi* case focuses on another animal—the cow—that enjoys great reverence among Hindus.³¹⁶ Yet both cases are also analogous in the sense that what is done to the animal—selling its meat in Israel, slaughtering it in India—elicits strong disapproval in powerful segments of society. This makes cow slaughter in India, much like the sale of pig meat in Israel, a difficult case for tolerance.³¹⁷

Under the tolerance-based compromise solution favoured in the Israeli *Solodkin* judgment, an absolute ban such as the one in place in Gujarat would arguably not stand. The Israeli Supreme Court would likely consider it to impede the compromise required by the Israeli conception of tolerance. The Indian Supreme Court, however, upheld the absolute ban in Gujarat. In an *obiter* passage, the Court applied its essential practices doctrine to confirm that '[s]laughtering of cows on [the Muslim holy day of] *Bakr I'd* is neither essential to nor necessarily required as part of the religious ceremony'.³¹⁸ Immediately afterwards, the Court noted that 'it is common knowledge that the cow and its progeny, i.e., bull, bullocks and calves are worshipped by Hindus'.³¹⁹ It further held, in line with the Hindu-majoritarian argument, that it would be 'an act of reprehensible ingratitude to condemn a cattle in its old age as useless and send it to a slaughter house taking away the little time from its natural life that it would have lived'.³²⁰ In sharp contrast to the Israeli approach, the Indian Court thereby rejected the possibility of a compromise solution. Instead, as in other cases, the Court sided with the Hindu-majoritarian argument by finding a minority religious practice 'optional' and 'not covered' by the constitutional right to religious freedom.³²¹ This has emboldened the Hindu-nationalist BJP to enact absolute bans on cattle slaughter in several other states.³²² It is in these kinds of cases, then, that the pernicious distortion of India's conception of tolerance—

³¹⁴ Thiruvengadam (n 86) 108.

³¹⁵ *State of Gujarat v Mirzapur Moti Kureshi* (2005) 8 SCC 534.

³¹⁶ For discussion, see Barak-Erez (n 47).

³¹⁷ As Jaffrelot notes, '[t]he sacred cow is an identity symbol. [that] has become the focus of intense activism on the part of Hindu vigilantes [leading to] a series of lynchings of Muslims'. See Jaffrelot (n 301) 59.

³¹⁸ *Mirzapur Moti Kureshi* (n 315) 555. The case was litigated under the right to carry on a trade or business (Constitution of India, art 19), not under freedom of religion, because the Supreme Court had already rejected the argument that the Muslim religious practice of sacrificing a cow on Eid al-Adha is an essential practice of Islam. See *Mohd. Hanif Quareshi v State of Bihar* 1958 SCC Online, para 13.

³¹⁹ *Mirzapur Moti Kureshi* (n 315) 555.

³²⁰ *ibid* 571.

³²¹ *ibid* 555.

³²² Thiruvengadam notes that the process of enacting absolute bans on cow slaughter has further accelerated since the 2014 electoral victory of the BJP. See Thiruvengadam (n 86) 108.

benevolent in principle, but a majoritarian instrument of power in practice—bears its teeth.

V. CONCLUSION

Tolerance and respect are powerful notions in political arguments about how liberal democracies should respond to religious diversity. An ongoing debate in political philosophy pits both concepts against each other. Political philosophers like Nussbaum favour appraisal respect over tolerance, because the former grants greater protection to religious minorities. In part, Nussbaum's argument is borne out by the comparative analysis presented in this article. This is unsurprising in relation to US constitutional law and religion, since the case law of the US Supreme Court provided the backdrop against which Nussbaum proposed her argument for equal respect.

The Supreme Court's interpretation of the Free Exercise Clause can, we saw, be likened to a pendulum swinging from tolerance to respect and back again. In resorting to the permission conception of tolerance to interpret the Free Exercise Clause, in particular, the Supreme Court tracked a common (if outdated) understanding of tolerance that is particularly detrimental to the rights of religious minorities (who are more likely to demand exemptions from facially neutral laws). At the same time, however, there are indications that constitutional reliance on respect can *also* go hand in hand with pro-majoritarian biases. This is especially the case when respect is not meted out equally but ends up privileging (adherents to) the majority religion. In that sense, the constitutional analysis in this article underscores the importance of arguments for *equal* respect in political philosophy.

We have seen that the other Supreme Courts studied in this article conceive of tolerance and respect in ways that do not mirror their understanding in political philosophy. In relation to tolerance in particular, diverging conceptions can be found in Indian and Israeli constitutional law. The Israeli Supreme Court, for its part, has secured a constructive role for tolerance as a pragmatic tool in the search for compromise solutions to divisive religious disputes. The Indian Supreme Court has moved even further away from the philosophical understanding of tolerance by deploying tolerance as a distinctively positive concept, devoid of the disapproval that attends the notion in political philosophy.

But the Indian case also indicates that the political philosophy debate might have overlooked—or, rather, underestimated—the salience of power differentials in the workings of tolerance.³²³ In philosophical debates, *disapproval* is often taken as the core problem with tolerance in liberal

³²³ But see Brown (n 12); B Berger, 'The Cultural Limits of Legal Tolerance' (2008) 21(2) *Canadian Journal of Law and Jurisprudence* 245, 248 ('the rhetoric of ... tolerance ... can be experienced as a language of power').

democracies.³²⁴ When political philosophers argue against tolerance, they tend to focus on the disapproval inherent in tolerance.³²⁵ Yet in Indian constitutional law, a disapproval-free conception of tolerance has gradually morphed into a majoritarian instrument of power. The Indian example thereby indicates that power differentials may *irrevocably* separate tolerance from respect, ultimately rendering both notions incompatible regardless of which conceptions one favours.

Constitutional choices therefore have to be made. Nussbaum and others may well be right to insist that we ought to view religious diversity through the lens of equal respect, since doing so precludes the kind of subordination and domination that attends tolerance. But this does not mean we should abandon tolerance altogether. For one thing, among citizens of pluralistic societies the disapproval-laden notion of tolerance may be the only viable response to divisive beliefs and practices.³²⁶ In its distinctive understanding in Israeli constitutional law, tolerance also seems to be working rather well. Finally, as has been argued elsewhere, tolerance continues to play an important role in how the law responds to controversial moral issues.³²⁷ Nevertheless, both political philosophy and constitutional law would do well to further unpack the relationship between tolerance and respect, on the one hand, and power and subordination, on the other.

³²⁴ See for instance Jones (n 16) (mentioning the argument from power against tolerance, but only engaging with the argument from disapproval).

³²⁵ See for instance Horton (n 16) 290–2 (discussing objections to tolerance as targeting the ‘negative, condescending, judgmental character’ of tolerance). See also the (other) sources cited in (n 16) and (n 18). But see Brown (n 11).

³²⁶ Horton (n 16); Jones (n 16).

³²⁷ See S Smet, ‘The Pragmatic Case for Legal Tolerance’ (2019) 39(2) OJLS 344.