THE WALL OF SEPARATION: SECTION 116, THE FIRST AMENDMENT AND CONSTITUTIONAL RELIGIOUS GUARANTEES

*Joshua Puls**

INTRODUCTION

> The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.
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> Constitution of the Commonwealth of Australia[1]
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> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...
>
> [N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.
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> Constitution of the United States of America[2]

The Australian Constitution expressly guarantees very few individual rights.[3] One of its rights-conferring provisions is s 116. Incongruously situated in the Chapter dealing with the States, s 116 prohibits the Commonwealth from, amongst other things, legislating against the free exercise of religion or for the establishment of any religion. The United States Constitution, by contrast, includes a comprehensive Bill of Rights which includes a similar, though not identical, religious guarantee. In very different contexts therefore both the High Court of Australia and the Supreme Court of the United States of America have adjudicated upon a similar constitutional provision.

The courts of Australia and the United States have been, and will continue to be, required to address several important issues relating to these provisions. Courts need to decide how far the religious guarantees extend. The resolution of this question depends primarily on the definition of religion adopted by the courts. This is of course a task laden with value judgments, but a task which cannot be avoided. The extent to which the state may legitimately interfere with a person's religious beliefs and practices must therefore be identified. Conversely there must be clear guidelines as to just how

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* BA (Hons) LLB (Hons) (Melb). Tutor, Newman College, The University of Melbourne.

1 Section 116.

2 First Amendment and ArticleVI, cl 3, respectively.

3 There is debate about quite how many rights are expressly guaranteed by the Constitution and about the extent to which implied rights reside in the Constitution.

far the state can go to protect the religious beliefs of some people before it infringes on the rights of others who wish to be free from religion. This requires a delicate balance to be adopted by the state and principally by the courts, who are charged with supervising that balance.

HISTORICAL BACKGROUND TO THE CONSTITUTIONAL PROVISIONS

Australia — section 116 and its history

> The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.[4]

The late nineteenth century in Australia was characterised by an "anti-sectarian endorsement of religion".[5] A climate of tolerance prevailed throughout the Australian colonies, based principally on a concern for the advancement of religion generally.[6] For many years state aid was provided to the major Christian religions, only to be discontinued later due to practical difficulties and some controversy surrounding its distribution.[7]

It was in that context that the religion clause in the Australian Constitution was drafted. During the 1897 Convention a movement emerged to have some recognition of the providence of God in the Constitution. Edmund Barton and Henry Higgins, particularly Higgins, were concerned to ensure that a reference to God did not indicate an implicit federal power to make laws with respect to religion, believing that such a power was the rightful preserve of the States, and proposed a safeguard clause to prevent this occurring.[8] At first neither the motion for recognition nor the safeguard was passed.

A motion to include in the Preamble the words "humbly relying on the blessing of Almighty God" was later successful. It seems that this inclusion was an exercise in politics, rather than religion. Patrick Glynn, who proposed the motion, said that this inclusion would "recommend the Constitution to thousands to whom the rest of its provisions may for ever be a sealed book".[9]

In response Higgins was again concerned to ensure protection from federal interference with religion. He proposed a clause in the following form:

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4 Constitution, s 116.

5 S McLeish, "Making Sense of Religion and the Constitution: A Fresh Start for Section 116" (1992) 18 *MonULR* 207 at 217.

6 Ibid. Note of course that colonial Australia would have been most concerned with the advancement of Christian religion.

7 Ibid.

8 J Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 951. See also S McLeish, above n 5 at 219-220. The original safeguard clause was to bind the States and the Commonwealth, hence the somewhat anomalous appearance of s 116, which binds only the Commonwealth, in the Constitution's Chapter on the States.

9 *Official Record of the Debates of the Australasian Federal Convention* (rep 1986), Vol V at 1732.

> The Commonwealth shall not make any law prohibiting the free exercise of any religion, or for the establishment of any religion, or imposing any religious observance, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.[10]

The Convention agreed that, even if it was arguably unnecessary, the measure was not pointless, in that it might attract support from non-religious voters or from voters whose religions were marginalized.[11]

The drafting committee later made some slight changes to provide the form of s 116 eventually enacted. The inclusion of s 116 in the Constitution has been described as "an historical accident based on an incredible legal analysis by a man who was later to become a justice of the High Court of Australia".[12]

The United States — The First Amendment and its history

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ... [13]
>
> [N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.[14]

The First Amendment has been held to apply to the American States by virtue of the due process clause of the Fourteenth Amendment.[15]

The First Amendment to the Constitution of the United States was drafted in a quite different context from that in which s 116 of the Australian Constitution was drafted. These differences in background are material.

The background to the religious provisions of the First Amendment was described by the American Supreme Court in 1947 as follows:

> [T]he expression "law respecting the establishment of religion," probably does not so vividly remind present-day Americans of the evils, fears, and political problems that caused that expression to be written into our Bill of Rights. ... A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government favoured churches. The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy.[16]

The religious climates in America and Australia were very different at the times of writing their respective constitutions; so too were their political climates. The fact that the United States has a constitutional Bill of Rights and Australia does not may be evidence of this fact. The American colonies had revolted against British rule and sought to enshrine in the new Constitution the rights for which they had fought. Speaking extra-judicially, Justice Toohey of the Australian High Court has described the difference thus:

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10 Ibid at 1769.

11 Ibid at 1773.

12 C Pannam, "Travelling Section 116 with a U.S. Road Map" (1963) 4 *MULR* 41 at 55, referring to Higgins.

13 United States Constitution, First Amendment.

14 Ibid, Art VI, cl 3.

15 *Cantwell v Connecticut* 310 US 296 (1940); *Murdock v Pennsylvania* 319 US 105 (1943).

16 *Everson v Board of Education* 330 US 1 (1947); 168 Am LR 1392 (1947) at 1400-1402.

> In the United Kingdom, Parliament had been the liberating agent from monarchical despotism, so that it was perceived as a guardian of liberty. ... For the United States, by contrast, nationhood and the constitution adopted to formalise it were the products of a revolution into which American colonists had been galvanized by what they considered to be the abuse of plenary power by the United Kingdom Parliament. ... The American perspective involved a more pessimistic view of human nature, but it was a scepticism born of painful and bitter experience.[17]

Institutionalised religion had been a significant component of this "painful and bitter experience".

This background to the drafting of the American Constitution and the First Amendment in particular is an indispensable aid to understanding properly the jurisprudence which follows.

AUSTRALIAN AND AMERICAN JURISPRUDENCE

Australian jurisprudence

The first consideration of s 116 by the High Court was in 1910 in *Krygger v Williams*.[18] The case required Griffith CJ and Barton J to consider whether the compulsory military training provisions of the *Defence Act* 1903-1910 violated the free exercise of religion. The Court adopted an extremely narrow view of what it meant to deny the free exercise of religion. For the early High Court, religion began and ended at the church door.[19]

The first extensive consideration of s 116 came in 1943 with *Adelaide Company of Jehovah's Witnesses v The Commonwealth*[20] which concerned a successful attempt by the Commonwealth to prohibit the advocacy of doctrines which it considered to be prejudicial to the war effort. The Jehovah's Witnesses sought a declaration that the measure contravened s 116.

Latham CJ gave the following rationale for s 116:

> [It is] based upon the principle that religion should, for political purposes, be regarded as irrelevant. It assumes that citizens of all religions can be good citizens, and that accordingly there is no justification in the interests of the community for prohibiting the free exercise of any religion.[21]

The Chief Justice held that s 116 applied to all laws, regardless of the power under which those laws were made.[22] Further, it was "difficult, if not impossible"[23] to

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17 J Toohey, "A Government of Laws, and Not of Men?" (1993) 4 *PubLR* 158 at 164-165. See also A Mason, "The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience" (1986) 16 *F L Rev* 1 at 8: "The founders [of the Australian federation] did not share the American framers' lack of faith in parliamentary supremacy and their belief that it was necessary to protect minority rights against majority oppression".

18 (1912) 15 CLR 366.

19 C Pannam, above n 12 at 68.

20 *Adelaide Company of Jehovah's Witnesses Incorporated v The Commonwealth* (1943) 67 CLR 116.

21 Ibid at 126.

22 Ibid at 123.

23 Ibid.

construct a definition of religion which would satisfy the adherents of all the world's religions. His Honour also held that s 116 must operate "irrespective of varying opinions in the community as to the truth of particular religious doctrines"[24] and that it was required to protect the religion of minorities, particularly unpopular ones.[25] His Honour held that the free exercise guarantee in s 116 operates "not only to protect the freedom of religion, but also to protect the right of man to have no religion"[26] and that the section goes beyond opinion to protect "acts done in pursuance of religious belief as part of religion".[27] In understanding the Court's approach to interpretation, it is also important to note that the Chief Justice said that the presence of the word "for" in s 116 shows that the purpose of the legislation may properly be taken into account in determining whether it is prohibited.[28]

His Honour considered the American treatment of the guarantee of free exercise and agreed with the United States Supreme Court that a law will not necessarily be impugned because it interferes with freedom of religion. The Court must determine whether the infringement of that freedom is "undue".[29] Because the Commonwealth has the power to protect the state, and because religion cannot be freely exercised if civil government is not maintained or the continued existence of the community is prejudiced, the Regulations were a justifiable infringement of religious freedom. The rest of the Court was in basic agreement with Latham CJ's proposition that freedom of religion was not absolute, and that the Court had to consider whether an infringement was "reasonably necessary".[30]

Section 116 remained largely uncontroversial until 1980 when the High Court was required to consider the prohibition on establishment in the *DOGS* case.[31] This case was a challenge by Victorian tax-payers to the making of grants by the Commonwealth to the States on condition that some of the money then be paid to non-government schools to finance their educational programs. These funds were received principally, but not exclusively, by Roman Catholic schools. The tax-payers sought a declaration that the scheme was in breach of s 116 because it amounted to an establishment of religion.

Barwick CJ placed great reliance on the difference between the American ("respecting establishment") and Australian ("for establishing") wordings and, on that basis, said that the American jurisprudence was inapplicable.[32] In the Australian context, the presence of the word "for" meant that the establishment of religion had to

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24 Ibid.
25 Ibid at 124.
26 Ibid at 123.
27 Ibid at 124.
28 Ibid at 132.
29 Ibid at 128. His Honour relied on American cases such as *De Jonge v Oregon* 299 US 353 (1937), *Stromberg v California* 283 US 359 (1931), *Schneider v State (Town of Irvington)* 308 US 147 (1939), *Cantwell v Connecticut* 310 US 296 (1940).
30 *Jehovah's Witnesses* (1943) 67 CLR 116 at 155 per Starke J. See also at 149 per Rich J, at 157 per McTiernan J and at 160 per Williams J.
31 *Attorney General for Victoria (ex rel Black) v The Commonwealth* (1981) 146 CLR 559; known as the *DOGS* case because it was brought by an organisation called Defence Of Government Schools.
32 Ibid at 579 and 598 per Gibbs J.

be the express and single purpose of the challenged law.[33] He said that the meaning of "establish" had remained constant since 1900:

> [T]he entrenchment of a religion as a feature of and identified with the body politic. ... It involves the identification of the religion with the civil authority so as to involve the citizen in a duty to maintain it and the obligation of, in this case, the Commonwealth to patronize, protect and promote the established religion ...[34]

Gibbs J referred to establishment as constituting a particular religion a "state religion or state church".[35]

Stephen J agreed that "respecting" in the First Amendment to the United States Constitution was broader than "for" in s 116.[36] Furthermore, even if the framers of s 116 had been trying to adopt the American understanding of the prohibition against establishment, "they would have been doing no more than writing into our Constitution what was then believed to be a prohibition against two things: the setting up of a national church and the favouring of one church over another".[37] The American understanding of the prohibition in 1900 did not, according to Stephen J, deny power to grant non-discriminatory financial aid to churches or church schools.[38]

Mason J emphasised the presence of the word "any" in s 116. His Honour said:

> The text of s. 116 more obviously reflects a concern with the establishment of one religion as against others than the language of the [comparable American provision] which speaks of the "establishment of religion," not the "establishment of any religion."[39]

Murphy J dissented in the *DOGS* case, arguing for an expansive reading of "establishing".[40] His Honour said that "non-preferential sponsoring of or aiding religion is still 'establishing' religion".[41] He relied on American jurisprudence in support of a strict view of establishment. Accordingly the grants scheme was, in his view, in violation of s 116.

The approach of the majority to the meaning of "establishment" could not have been more strict. Based on the presence of the words "for" and to a lesser extent "any", the Court felt justified in taking a very narrow view of what constitutes a "law for establishing any religion". Much emphasis was placed in the judgments on the meaning of the word "establish" in this context in 1900. This attempt by the Court in the late twentieth century to give a nineteenth century definition to a word which had had particular political and religious connotations for many centuries has been described as "historically defective".[42] Whether or not this criticism is true, it will be argued presently that this approach to the meaning of "establishment" is most consistent with

33 Ibid at 579.
34 Ibid at 582.
35 Ibid at 597. All members of the Court, with the exception of Murphy J, were in broad agreement with this understanding of "establishment": at 606 per Stephen J, 612 per Mason J, 635 per Aickin J and 653 per Wilson J.
36 Ibid at 609.
37 Ibid at 610.
38 Ibid.
39 Ibid at 615
40 Ibid at 623.
41 Ibid at 624.
42 R Ely, "The View from the Statute: Statutory Establishments of Religion in England Ca 1300 to Ca 1900" (1986) 8 *UTasLR* 225.

the objectives of the founders and has provided the High Court with a clear, meaningful and, most importantly, manageable jurisprudence.

Having considered the meaning of free exercise of religion in *Jehovah's Witnesses* and of establishment of religion in the *DOGS* case, the High Court then considered the meaning of "religion" in the *Scientology* case.[43] This was not a case under s 116; the Court was required to decide whether the Church of Scientology came within the definition of "religion" for the purpose of pay-roll tax exemptions.

Mason ACJ and Brennan J described freedom of religion as "the paradigm freedom of conscience"[44] and as being "of the essence of a free society".[45] For this reason a definition was not adequate merely because it satisfied the majority of the community. They made the point that minority religions were in need of "especial protection".[46] Nevertheless the immunity would be worthless if it protected every religion which called itself a religion. Therefore some criteria were required. Mason ACJ and Brennan J advocated a two part test: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief.[47]

Their Honours also reiterated that freedom to act in accordance with religious beliefs is "not as inviolate as the freedom to believe, for general laws to preserve and protect society are not defeated by a plea of religious obligation to breach them".[48] "Religious" action is not protected if it offends against the "ordinary laws".[49]

Murphy J preferred an open view of religion: "Any body which claims to be religious, and offers a way to find meaning and purpose in life, is religious. ... The list is not exhaustive; the categories of religion are not closed".[50] This approach is supported by one author who criticised the majority for minimising the essential subjective factor in religious belief.[51]

Wilson and Deane JJ preferred to list some of the more important indicia of religious belief, including belief in the supernatural, a concept of man's nature and place in the universe, adherence to certain codes of conduct, and so on.[52]

There have been other judicial considerations of religious issues in Australia which are beyond the scope of this paper.[53] There has also been some academic debate about the application of s 116 to the exercise of Commonwealth power under s 122, the power

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43 *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR.
44 Ibid at 130.
45 Ibid.
46 Ibid at 132.
47 Ibid at 136.
48 Ibid.
49 Ibid.
50 Ibid at 151.
51 "The Law and the Definition of Religion" in "Current Issues" (1984) 58 *ALJ* 366.
52 *Scientology* (1983) 154 CLR 120 at 173-174.
53 See for example, *R v Winneke; ex parte Gallagher* (1982) 152 CLR 211; *Grace Bible Church v Reedman* (1984) 36 SASR 376; *Minister for Immigration and Ethnic Affairs v Lebanese Moslem Association* (1987) 17 FCR 373; *Thompson v Catholic College, Wodonga* (1988) EOC ¶92-217; *Burke v Tralaggan* (1986) EOC ¶92-161; and *Tarumi v Bankstown City Council* (1987) EOC ¶92-214.

to legislate for the territories. This has been largely settled and, in any case, is also beyond the scope of this paper.[54]

American jurisprudence[55]

Whereas all the Australian High Court cases on s 116, and some other Australian cases on religious freedom, have been considered above, due to its longer federal constitutional history and other reasons which will be considered shortly, the United States has seen a much greater volume of litigation on the religious guarantees in the First Amendment. Some of the major cases are surveyed.

In 1802, in his Reply to the Danbury Baptist Association, Thomas Jefferson said:

> Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between church and State.[56]

The importance of Jefferson's "wall of separation" in judicial consideration of the First Amendment cannot be overestimated. The current Chief Justice of the United States has said "[i]t is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly forty years".[57] It will become clear that too much emphasis has been placed on realising this wall of separation, and not enough emphasis placed on the state of affairs which this wall of separation was supposed to facilitate.

The first significant Supreme Court case on religious freedom was *Reynolds v United States*.[58] This case concerned a claim by a Mormon that his criminal conviction for religiously motivated polygamy infringed upon the free exercise of his religion. Waite CJ gave the judgment of the Court in an opinion Pannam describes as "studded with question-begging, generality and rhetorical fervour".[59] The basis for the decision that the right had not been infringed was this:

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54 See F D Cumbrae-Stewart, "Section 116 of the Constitution" (1946) 20 *ALJ* 207; H T Gibbs, "Section 116 of the Constitution and the Territories of the Commonwealth" (1947) 20 *ALJ* 375; and C Pannam, "Section 116 and the Federal Territories" (1961) 35 *ALJ* 209. See also *DOGS* (1981) 146 CLR 559 at 593 and 649; *Lamshed v Lake* (1958) 99 CLR 132 at 143; *Teori Tau v The Commonwealth* (1969) 119 CLR 564 at 570. Cf *R v Bernasconi* (1915) 19 CLR 629 and *Spratt v Hermes* (1965) 114 CLR 226 at 250.

55 For a helpful although not exhaustive overview of American Supreme Court decisions on religious liberty see A Adams and C Emmerich, *A Nation Dedicated to Religious Liberty: The Constitutional Heritage of the Religion Clauses* (1990) at 122.

56 T Jefferson, "Reply to the Danbury Baptist Association, 1802" in A Adams and C Emmerich, ibid at 112.

57 W Rehnquist, "The True Meaning of the Establishment Clause: A Dissent" in R Goldwin and A Kaufman (eds), *How Does the Constitution Protect Religious Freedom?* (1987) at 99; chapter taken from Rehnquist J's dissenting judgment in *Wallace v Jaffree* 472 US 38 (1985).

58 98 US 145 (1879).

59 C Pannam, above n 12 at 64.

> Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. ... Can a man excuse his practices ... because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.[60]

The leading case on non-establishment was *Everson v Board of Education.*[61] This case considered state reimbursements for the bus fares of children attending religious schools. The Supreme Court first gave an historical account of the climate of religious intolerance in which the First Amendment was born. In a passage which has been heavily relied upon since, the Court said that "establishment of religion" means at least this:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."[62]

The Court cautioned that it "must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general State law benefits to all its citizens without regard to their religious belief".[63] On that basis the Court could not hold that the First Amendment prohibited New Jersey from spending public funds to pay the bus fares of children attending religious schools, as a part of a general program under which it paid the fares of children attending public and other schools.

The difficult question of conscientious objections arose in *United States v Seeger*[64] and again in *Welsh v United States.*[65] The Universal Military Training and Service Act 1948 permitted exemption to those who by reason of religious training or belief were conscientiously opposed to participation in war in any form. The Act established as a prerequisite to exempting a conscientious objector "a belief in a relation to a Supreme Being involving duties superior to those arising from any human relation".[66] In *Seeger* the Court concluded that by using the term "Supreme Being" Congress was attempting to clarify the meaning of religious training and belief "so as to embrace all religions and to exclude essentially political, sociological or philosophical views".[67] The Court said that the test of belief is whether:

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60 *Reynolds* 98 US 145 (1879) at 166-167.
61 168 Am LR 1392 (1947).
62 Ibid at 1404.
63 Ibid at 1405.
64 380 US 163 (1965).
65 398 US 333 (1970).
66 Section 6(j)
67 380 US 163 (1965) at 165.

> a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption. Where such beliefs have parallel positions in the lives of their respective holders we cannot say that one is "in relation to a Supreme Being" and the other is not.[68]

Seeger thereby endorsed a very broad definition of religious belief. The Court further held than in such an area "the claim of the registrant that his belief is an essential part of a religious faith must be given great weight".[69] The "truth" of a belief was not open to question; however, it was open to the Court to inquire as to whether a belief was "truly held".[70]

In *Welsh* the test of belief was broadened further. The Court held that the opposition to war "must stem from the registrant's moral, ethical or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions".[71] The Court went on to say:

> If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual "a place parallel to that filled by ... God" in traditionally religious persons. Because his beliefs function as a religion in his life, such an individual is as much entitled to a "religious" conscientious objector exemption under s.6(j) as is someone who derives his conscientious opposition to war from traditional religious convictions.[72]

In 1971 in *Lemon v Kurtzman*[73] the Supreme Court again had to consider the question of establishment. Direct aid was being given by two states to religious schools for the teaching of state required secular subjects. This was held to be in violation of the non-establishment clause. This case is most significant for its three-pronged test of establishment:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an "excessive government entanglement with religion".[74]

The Court held that the "cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion".[75] This relationship was objectionable principally because of the administrative arrangements which would have to exist between the schools and the state to monitor and administer the scheme.

In *Wisconsin v Yoder*[76] the Court had to consider the claim of Amish parents that the free exercise clause required the exemption of their children from compulsory schooling beyond the eighth grade. The Court held that secondary schooling would expose Amish children to influences which contravened the basic religious principles

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68 Ibid at 166. For a comment on this statement by an English court see text at n 118 below.
69 Ibid at 184.
70 Ibid at 185.
71 *Welsh* 398 US 333 (1970) at 340.
72 Ibid.
73 403 US 602 (1971).
74 Ibid at 612. This "excessive entanglement" involved "comprehensive, discriminating, and continuing state surveillance": at 619.
75 Ibid at 614.
76 406 US 205 (1972).

and practices of the Amish faith.[77] Furthermore, as only two years of compulsory schooling was at stake, the state's interest was not so compelling that the religious interests of the Amish people could not take priority.[78] It is important to note that the Court moved away somewhat from the *Seeger* and *Welsh* positions and stressed that exemption from compulsory schooling would not be granted for "purely secular considerations".[79] This departure has been rationalised on the basis of the different moral duties involved: a more liberal test should be applied for something as sensitive as military service.[80]

In 1983 the Court decided *Mueller v Allen*.[81] This case involved a challenge to a state tax deduction for "tuition, textbooks and transportation" expenses for parents with children in public and private schools on the basis that it was an establishment of religion. The scheme was upheld applying the *Lemon* test. The Court pointed to its "consistent rejection of the principle that 'any program which in some manner aids an institution with a religious affiliation' violates the Establishment Clause".[82] The Court held that the tax deduction had a clearly secular purpose, stating that governmental assistance programs have consistently survived this stage of the test.[83] Further, the Court held that the scheme did not advance the sectarian aims of the non-public schools. This scheme was simply one of many deductions, the state legislature being the best judge as to the most equitable distribution of the tax burden.[84] Furthermore, the deduction was available to all parents, not just those with children at non-public schools, and the assistance was given to parents rather than to the schools directly.[85] There was also very little interaction required between the state and the school for the administration of the scheme.[86]

In 1984 *Lynch v Donnelly*[87] involved a challenge to the inclusion of a nativity scene in a public park as part of a Christmas display. The display was held not to constitute an establishment of religion. The Court began with a restatement of the proposition that it is neither possible nor desirable to enforce a regime of total separation of church and state.[88] The Court then proceeded to consider the "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789".[89] These acknowledgments included the proclamation of Christmas Day and Thanksgiving Day as national holidays, the payment of military chaplains, the statutorily prescribed national motto "In God We Trust", the reference to "One nation under God" in the Pledge of Allegiance to the American flag, the inclusion of religious art in public galleries, and so on.

77 Ibid at 211.
78 Ibid at 225.
79 Ibid at 215.
80 W Sadurski, "Neutrality of Law Towards Religion" (1990) 12 *SydLR* 420 at 446.
81 463 US 388 (1983).
82 Ibid at 393.
83 Ibid at 394.
84 Ibid at 396.
85 Ibid at 397 and 399.
86 Ibid at 403.
87 465 US 668 (1984).
88 Ibid at 673.
89 Ibid at 674.

This case indicated a slight move away from the *Lemon* test, in that the Court asserted its repeated unwillingness to be confined to a single test or criterion, identifying the *Lemon* test as merely "useful".[90] The Court was anxious to consider this question in the context of the Christmas season. It held that the display had a legitimate secular purpose: to depict the origins of the holiday.[91] The Court could not say, as it would need to for the challenge to be successful, that the display advanced religion more than the many other examples of alleged advancement which had been held not to constitute advancement.[92] Further there was no excessive entanglement involved with the design or erection of the scene.[93]

A general theme which emerges from the American cases on establishment is the great importance placed on the "wall of separation" between church and state. Jefferson's analogy and its application in *Reynolds*[94] are referred to repeatedly. The third stage of the *Lemon* test, inquiring as to excessive entanglement, would seem to highlight this point.

FREEDOM FROM RELIGION AND FREEDOM OF NON-RELIGION: THE PROBLEM OF DEFINITIONS

Why protect religion?

In order to ascertain whether s 116 is an adequate guarantee of religious freedom a number of tasks must first be undertaken. To begin, "religion" must be defined. However, before religion can properly be defined in this context, consideration must first be given to what it was that the guarantees were designed to achieve. It would seem that many of the problems which have beset the application of these guarantees have been complicated, if not caused, by misguided conceptions of the purposes of the guarantees. Hence, the definition of "religion" must be determined in light of the purpose of the guarantees. For this reason a discussion of the definition of religion will follow shortly. For present purposes the two principal religious guarantees will be treated as being aimed at the same thing, in so far as one of the greatest threats to free exercise is establishment, and one of the best guarantees of non-establishment is free exercise.[95]

McLeish argues that:

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90 Ibid at 679.

91 Ibid at 681.

92 Ibid at 681-2. The following have all been permissible as not infringing the prohibition against establishment: the supply of textbooks to children in religious schools: *Board of Education v Allen* 392 US 236 (1968); reimbursement for transport expenditure to attend religious schools: *Everson* 168 Am LR 1392 (1947); federal grants for capital works at religious universities: *Tilton v Richardson* 403 US 672 (1971); noncategorical grants to religious colleges and universities: *Roemer v Board of Public Works* 426 US 736 (1976); and tax exemptions for church properties: *Walz v Tax Commission* 397 US 664 (1970).

93 *Lynch* 465 US 668 (1984) at 684.

94 98 US 145 (1879).

95 There is a body of opinion which views the two prohibitions as merely aspects of the same concern, for example S Smith, *Foreordained Failure* (1995) at 36.

> [T]he impulse animating s 116 is the preservation of neutrality in the federal government's relations with religion so that full membership of a pluralistic community is not dependent on religious positions and divisions are not created along religious lines.[96]

It is suggested that this formulation, which is similar to the purpose as described by Latham CJ in *Jehovah's Witnesses*,[97] is the best statement yet made as to why, at least in Australia, the religious guarantees were given. Given the climate which existed in Australia at the time of federation, that is, one of "anti-sectarian endorsement of religion",[98] s 116 was an attempt to ensure that religion was kept out of public discourse and that religious considerations would not colour issues of public policy. At no stage do the founders of the Australian federation seem to have been motivated by a sense that engagement between religion and the state was in itself an undesirable thing. The desired end was not the "neutrality in the federal government's relations with religion". Rather, the desired end was "full membership" of all Australians in the "pluralistic community" regardless of their religion.

An area of continuing controversy is the expansion in American jurisprudence of the operation of religious guarantees, particularly with reference to free exercise. This has been motivated by an understandable desire to protect the values and scruples of those who are not religious, as much as those who are religious. As adherence to organised religions, especially mainstream ones, declines in western societies, those societies have increasingly sought to protect freedom of belief and of conscience, as much as of religion. They are often treated as different aspects of the one freedom.[99]

It is suggested that this approach is misguided; that these freedoms should be treated separately; and that there is a reason why religion deserves to continue to be singled out for special treatment. The reason is that, rightly or wrongly, the framers of both the American and Australian constitutions saw fit to protect religious sensibilities and no others.

Attempts at definition

Attempts at defining "religion" have been fraught with difficulty. Yet for a court to decide whether religion has been established or whether free exercise of religion has been interfered with, it cannot avoid setting boundaries within which certain beliefs will be considered religious, and other beliefs will not.

There have been many academic and judicial attempts to define religion. McLeish defined religion as "a set of deeply personal and fundamental beliefs or assumptions about the nature of reality and existence".[100] Pannam considers definitions based on whether the religion is theistic, "reasonable", or organized, and concludes that a

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96 S McLeish, above n 5 at 208.

97 See above text at n 21.

98 See above n 5.

99 For example, Mason ACJ and Brennan J described religion as the "paradigm freedom of conscience": *Scientology* (1983) 154 CLR 120 at 130. The statement "Everyone has the right to freedom of thought, conscience and religion" appears in Article 18 of the United Nations Declaration on Human Rights and in Article 18 of the International Covenant on Civil and Political Rights. For a discussion of this aspect, see "The Law and the Definition of Religion" above n 51 at 367.

100 S McLeish, above n 5 at 227.

religious belief "involves man's relationship with a force greater than himself."[101] Sadurski favoured a "functional" definition, by reference to the function a given set of beliefs plays in the life of the believer.[102] Madison and others in the Virginia Declaration of Rights considered religion to be "the duty which we owe to our Creator and the manner of discharging it".[103] The United States Supreme Court in *Welsh* and *Seeger* "settled for a fully subjective-functional approach, in which virtually the only indicium of the "religious belief" is the sincerity with which it is held, and the function it plays, but not its tenets".[104] This approach was specifically rejected by the High Court of Australia in *Scientology*, in which the judges adopted the variety of definitions and indicia outlined above. Other writers have questioned the pursuit of a definition at all.[105]

The task of defining religion is difficult enough. Jurists and writers however have made the task more difficult by attempting to give "religion" a meaning which, it is respectfully suggested, the word simply will not bear. This movement has been motivated by an understandable desire to avoid discrimination based on whether a set of beliefs is religious or not. The reality which this movement seeks to avoid is that the founders of both the American and the Australian federations saw fit to protect religious beliefs, but no others. It is suggested that it is logically difficult, if not impossible, and jurisprudentially dishonest, to attempt to use constitutional religious guarantees to protect non-religious beliefs.

In the American context, Adams and Emmerich have said:

> [C]ourts must continue to distinguish religion from nonreligion. The task is compelled by our fundamental law, for special protection is granted religion in the constitutional text. The Framers did not define the term, but they did earmark the free exercise of religion for protection not accorded other conduct. ... This status derived from a conviction that religious exercise, as opposed to other personal and social forces, needed and deserved unique treatment. Although the Framers did not define religion for constitutional purposes, they clearly did not envision special protection for every deeply held moral code, ideology or set of beliefs.[106]

In *Jehovah's Witnesses* Latham CJ considered the guarantee of free exercise of religion to include a guaranteed right not to exercise a religion.[107] This view finds considerable support with McLeish who argues that the exercise of a chosen religion is not "free" if it is compulsory to select "something religious" to begin with.[108] Furthermore he argues that denying the freedom not to exercise a religion would sit uneasily with the notion of neutrality between religion and the state. These propositions contain nothing controversial. He then asserts that "[s]ection 116 must therefore encompass some right

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101 C Pannam, above n 12 at 56-62.

102 W Sadurski, "On Legal Definitions of 'Religion'" (1989) 63 *ALJ* 834 at 838.

103 Virginia Declaration of Rights, Art 16 in A Adams and C Emmerich, above n 55 at 115.

104 W Sadurski, above n 102 at 835.

105 G Freeman, "The Misconceived Search for the Constitutional Definition of 'Religion'" (1983) 71 *Georgetown LJ* 1519. See also J Weiss, "Privilege, Posture and Protection: 'Religion' in the Law" (1964) 73 *Yale LJ* 593 at 602-607.

106 A Adams and C Emmerich, above n 55 at 91.

107 *Jehovah's Witnesses* (1943) 67 CLR 116 at 123.

108 S McLeish, above n 5 at 224.

of free exercise of non-religious belief".[109] He asks "what kind of non-religion is protected by s 116?" and identifies an analogous kind of non-religion, which he calls "quasi-religion".[110]

This reckoning by McLeish exposes one of the principal problems which arises when applying the freedom of religion guarantee. Latham CJ was surely correct when his Honour said that freedom of religion also encompasses the right not to exercise a religion. However McLeish proceeds to treat the right not to exercise a religion as being the same as a freedom to exercise a non-religion. It is suggested that these are two very different things. To be free not to exercise a religion is to be free from any state sanctioned requirement to adhere to or to practise a religion. Latham CJ was pointing to the sound principle that one should be able to place oneself at any point on the spectrum of religiosity, ranging from the atheistic to the devout. If, however, one chooses to be irreligious, a choice the state ought to respect, by definition one cannot expect to rely on that provision of the Constitution which protects freedom of religion. It is contrary to logic and to the plain text of s 116 to ask "what kind of non-religion is protected by s 116?"[111] The answer must surely be none.

Sadurski asserts that:

> There is no basis, in an ideology of a liberal and secular state, to draw the line between the religiously motivated and other deep moral beliefs, with respect to bearing common burdens and fulfilling societal duties.[112]

Sadurski may be right to describe the distinction between religion and non-religion as anachronistic,[113] and to argue for no distinction between the religious and the deeply moral. Even if one does not accept the proposition made above that there is a sound basis for distinguishing between the two types of belief, one cannot assert that there is no basis for such a distinction when the basis is found in the constitutional provisions themselves.[114] Sadurski later admits in parentheses that the Constitution "after all, puts 'religion' in a preferred position vis-à-vis other forms of conscience"[115] and acknowledges that the American Supreme Court pays "lip service"[116] to this fact whilst still expanding the definition of religion. To some it may seem incongruous to protect religious scruples but not moral ones. If other beliefs are deserving of, or in need of, constitutional protection then the appropriate response is not expansion of the notion of religion but amendment of the relevant provision.

An attempt was made in England to define the content of religion. In *Barralet v Attorney-General*,[117] a trusts case, Dillon J had to decide whether an ethical society's objects were charitable because they were for the advancement of religion. Dillon J gave a very honest response to the question:

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109 Ibid at 225.
110 Ibid at 225-226.
111 See above text at n 110.
112 W Sadurski, above n 80 at 444.
113 Ibid at 445. This author would disagree with him.
114 White J, in dissent in *Welsh* 398 US 333 (1970) at 372, said "[i]t cannot be ignored that the First Amendment itself contains a religious classification".
115 W Sadurski, above n 80 at 445.
116 Ibid.
117 [1980] 3 All ER 918

> [I]t is natural that the court should desire not to discriminate between beliefs deeply and sincerely held, whether they are beliefs in a god or in the excellence of man or in ethical principles or in Platonism or some other scheme of philosophy. But I do not see that that warrants extending the meaning of the word 'religion' so as to embrace all other beliefs and philosophies. Religion, as I see it, is concerned with man's relations with God, and ethics are concerned with man's relations with man. The two are not the same, and are not made the same by sincere inquiry into the question, what is God. If reason leads people not to accept Christianity or any known religion, but they do believe in the excellence of qualities such as truth, beauty and love, or believe in the Platonic concept of the ideal, their beliefs may be to them the equivalent of a religion, but viewed objectively they are not religion. The ground of the opinion of the Supreme Court in *Seeger's* case, that any belief occupying in the life of its possessor a place parallel to that occupied by belief in God in the minds of theists is religion, prompts the comment that parallels, by definition, never meet.[118]

His Honour then provided to name two essential attributes of religion: "faith in a god and worship of that god".[119]

A further attempt at definition will be made here. It is not expected that this definition would satisfy everyone. It is suggested, however, that by dispelling the misconception that religious guarantees are supposed to protect every form of belief the task is greatly simplified.

When something requires characterisation by a court as being a "religion" or not, the first question should be whether it has long standing recognition and acceptance as a religion in this country or another country. If it does then that ought to dispose of the question. One issue which constantly arises in cases and in literature is Buddhism, which, some say, would fall outside many proposed definitions of religion.[120] By having this preliminary question, problems such as Buddhism could be overcome. Of course, this question would seldom be asked because usually the source of contention with respect to definitions of religion is a "new" religion which requires characterisation.

Assuming that it is a "new" religion, the question should then be asked whether the adherents to that religion regard themselves as belonging to a religion. Notwithstanding what the Supreme Court said in *Welsh*[121] if the adherents of the so-called "religion" do not consider themselves a religion then the court's inquiry should cease there.

The critical question then remains. It is suggested that the defining feature of a religion is whether the actions of its adherents have ramifications or consequences beyond the here and now. In other words, will their action or inaction in a particular respect put their soul, or karma, or other comparable concept, in peril? Yet another way of putting the question is, do they believe that their action or inaction has consequences

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118 Ibid at 924.

119 Ibid.

120 See for example, Latham CJ in *Jehovah's Witnesses* (1943) 67 CLR 116 at 124; Lord Denning in *R v Registrar General* [1970] 3 All ER 886 at 890; Douglas J in *Seeger* 380 US 163 (1965) at 189; and a lengthy discussion of the question by Dillon J in *Barralet* [1980] 3 All ER 918 at 925 ff. See also F D Cumbrae-Stewart, above n 54 at 211: "Pure Buddhism is a philosophy not a religion"; and A Adams and C Emmerich,above n 55 at 90.

121 398 US 333 (1970) at 341.

for lives beyond their own? It is not sufficient that someone may have qualms or scruples about a particular matter, no matter how strong those might be. There must be more than that for it to be a religion. Jefferson identified it in his Reply to the Danbury Baptist Association when he said that "religion is a matter which lies solely between man and his God, that he *owes account* to none other for his faith or his worship".[122] This sense of owing account to something other than oneself is what defines a religion and makes it deserving of protection. Beliefs, no matter how firmly held, will not suffice.

Although this may at first appear a narrow definition, its operation would seem to be potentially quite wide. Any Christian denomination, traditional or modern, with any notion of a "judgment" would fall within it; Jewish and Muslim faiths would obviously qualify; Hindus and Buddhists, both with notions of karma and reincarnation, would also fall within the definition. Most importantly the minor religions, those with fewer adherents, or less well known, which are the principal beneficiaries of religious guarantees, would qualify. For instance, religions based on the worship of nature would satisfy the test if they considered that the way a person treated the natural world in some way affected the "cosmic balance". The only respect in which this definition could be considered narrow is in the way it excludes those people whose beliefs render their actions relevant only to themselves and only in the present.

This approach at definition would seem to have a number of advantages over other attempts. It does not become involved in the question of deities, or other "supreme beings". Attempts at describing the object, as it were, of religion have continually met with difficulty and with criticism. This approach, by placing the emphasis on the individual rather than the object, enables courts to avoid this inquiry entirely. Further, much of the controversy surrounding the distinction between actions and beliefs is avoided, because there would now be something of a guide as to when a person's beliefs could defeat a state interest in regulation. People would only be able to claim exemption from a law when they considered their soul to be at stake. That is not to say that they will be able to claim an exemption in every case: Mr Reynolds in *Reynolds*[123] believed that refusal to practise polygamy would be followed by damnation in the life to come. The court could, however, use this as a guide for the balancing exercise which must be undertaken.

It is arguable whether or not this test should also require that the adherents to a religion be a member of some identifiable group. It has been suggested that the reference to "any religion" indicates an organised system of religion.[124] Even Murphy J in his wide test of religion spoke of a group.[125] Whilst it would obviously be possible for a religion to have only one adherent, for the sake of certainty the courts might wish to impose a requirement that a religion have more than one adherent, and that those adherents identified with each other as members of the same religion. If this were not

122 Above n 56 (emphasis added).

123 98 US 145 (1879).

124 P H Lane, "Commonwealth Reimbursements for Fees at Non State Schools" (1964) 38 *ALJ* 130 at 132. It is interesting to compare this article with the *DOGS* case because Lane considers the viability of the very type of scheme which was challenged in *DOGS*.

125 Above n 59.

the case the danger could remain that merely personal beliefs could bring themselves within the definition.

FREE EXERCISE AND NON-ESTABLISHMENT — A QUESTION OF BALANCE

Free exercise and proportionate incursions

It has never been questioned that the right to free exercise of religion is not absolute. If it were the law could be rendered powerless. A regulatory regime will not be defeated merely because it infringes freedom of religion. Both the Australian and American courts have engaged in balancing exercises to determine whether a particular regulatory regime is a legitimate and proportional infringement of freedom of religion.

An earlier approach in both the United States and Australia was to consider beliefs to be immune from state control but not actions. This was not really a response, but merely a way of restating the question, because the controversy in this area is only ever to do with actions, not beliefs. The case of *Reynolds*[126] is a classic application of this doctrine by the American Supreme Court. This approach has now been largely discredited. As Waite CJ said "belief and action cannot be neatly confined in logic-tight compartments".[127]

The courts have more recently been guided in this area by notions of proportionality. The Supreme Court requires the state interest to be "compelling"[128] and that the least restrictive means available are employed for pursuing that interest.[129] *Yoder*[130] applied an even stricter test, requiring not just a compelling state interest but also evidence that the state's objectives would be substantially undermined by the granting of the requested exemption.[131]

The High Court of Australia has adopted a similar approach. The High Court is no stranger to the balancing of competing interests. In *Jehovah's Witnesses* the Court performed this balancing task, saying that it is for "the court to determine whether a particular law is an *undue* infringement of religious freedom".[132] The Court has used an approach based on proportionality in its considerations of obstacles to free trade between the States under s 92 of the Constitution.[133] A law which was said to infringe s 92 had to be "directed at a legitimate object, be appropriate and adapted to the achievement of that object and not impose a burden on interstate trade and commerce

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126 98 US 145 (1879).

127 *Yoder* 406 US 205 (1972) at 220.

128 Ibid at 215.

129 See, eg, *Sherbert v Verner* 374 US 398 (1963) at 407. See also *Braunfeld v Brown* 366 US 599 (1961); *West Virginia State Board of Education v Barnette* 319 US 624 (1943); *People v Woody* 394 P 2d 813 (1964); *Shapiro v Dorin* 99 NWS 2d 830 (1950).

130 406 US 205 (1972).

131 For a more general discussion of this area see G Moens, "The Action-Belief Dichotomy and Freedom of Religion" (1989) 12 *SydLR* 195 at 203.

132 *Jehovah's Witnesses* (1943) 67 CLR 116 at 131 per Latham CJ (emphasis added).

133 Before *Cole v Whitfield* (1988) 165 CLR 360, s 92 was treated not unlike an individual right to trade.

disproportionate to its attainment".[134] Recently in *Australian Capital Television v Commonwealth,*[135] based on an implied constitutional right to freedom of political expression, Brennan J said that to determine the validity of a law which sought to restrict that right, it was necessary to consider "the proportionality between the restriction which a law imposes ... and the legitimate interest which the law is intended to serve".[136] The implications of the free speech cases, of which *ACTV* is one, are considered below.

It is submitted that the approach of proportionality is an appropriate one when judging state infringements of the free exercise of religion. For the maintenance of ordered government, religion cannot be allowed to prevail over the law in every case. In order to be most faithful to the notion of free exercise, Australia might benefit from adopting the further requirement imposed in *Yoder* that, not only is the state's interest compelling and its measures the least restrictive available, but its attempt to realise that interest would have to be substantially undermined by the giving of the exemption for the exemption not to be given. It has already been suggested that by adopting the rationale outlined above for the religious guarantees the task of the courts in considering these cases might perhaps be made a little easier and the results more principled.

A residual and important question remains when considering a person's right to free exercise. In setting tests in areas such as this, courts will often reserve to themselves a final stage: that of public policy.[137] It may be that a "religion" for some reason is abhorrent to "common decency". Pannam suggests that "[i]f every individual could exercise his religion completely free of all legal impediment then anarchy would be with us. Rape, human sacrifice, suicide, incest, theft and arson, would all become legal".[138] Cumbrae-Stewart points to the prohibition on Bacchanalian orgies by the Roman Republic; he says that s 116 "will not protect those degraded manifestations of religion ... which require or induce their followers to break the generally accepted rules of criminal law".[139] If something duly qualifies as a religion but the free exercise of that religion is sought to be curtailed, there must be some principled rationale for that curtailment. This is true particularly in cases such as polygamy where all the participants may be consenting. One such rationale, highly controversial, but at least arguable, would be a recognition that, whilst Australia and the United States are both multi-cultural, pluralistic societies, they are societies founded on, and still principally

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134 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 473-4. See also F D Cumbrae-Stewart, above n 54, at 209; G Kennett, "Individual Rights, the High Court and the Constitution" (1994) 19 *MULR* 581 at 612; and J G Starke, "Interpretation of Constitutionally Guaranteed Freedoms (as distinct from rights)" (1991) 65 *ALJ* 440.

135 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

136 Ibid at 157. A helpful review of this area can be found in B Fitzgerald "Proportionality and Australian Constitutionalism" (1993) 12 *UTasLR* 263.

137 See for example, the Supreme Court of Queensland in *Mauger v Mauger* (1966) 10 FamLR 285, which denied a father custody of children on the basis that his religious practices would be "harmful to the children and harmful to the community" and "contrary to public policy": at 286. See also *Evers v Evers* (1972) 19 Fam LR 296.

138 C Pannam, above n 12 at 63.

139 F D Cumbrae-Stewart, above n 54 at 211.

directed by Judeo-Christian values.[140] To speak of common decency merely disguises this reality, because these notions of common decency are drawn, it is suggested, from Judeo-Christian principles.

What constitutes establishment?

The Australian and in particular the American courts have had to concern themselves with what constitutes an establishment of religion. There is a wide variety of views as to what constitutes "establishment". Some judges and commentators take the view that any support for a religion constitutes establishment of that religion, or support of religion generally constitutes establishment of religion generally. In 1964 Lane said that it was sufficient if a law "is merely directed towards, or tends to" the establishment of religion.[141] Other judges and commentators consider that establishment requires complete state adoption of a religion, of which the status of the Church of England in England, particularly in the past, is the paradigmatic example. The result in the *DOGS* case[142] is a good example of this attitude to establishment. In 1946 Cumbrae-Stewart said that a limitation on a plenary power is to be construed strictly; accordingly "establishment" was to be construed to exclude "endowment". He placed considerable emphasis on the word "any" in this analysis.[143] In 1901 Professors Quick and Garran considered it self-evident that establishment meant "the erection and recognition of a State Church, or the concession of special favours, titles, and advantages to one church which are denied to others".[144]

Sadurski argues that the only way to ensure neutrality between religious and non-religious beliefs is with strict separation. He describes the "unattractive dilemma": "either favour religion to the detriment of non-religious beliefs, or interpret genuinely secular beliefs as "religious".[145] This can be resolved, he argues, "by adopting the policy of strict neutrality: no aid and no disadvantage is to be triggered by a description of a certain belief or activity as 'religious'".[146] However, the need for this strict separation is eliminated if one recognises that a lack of neutrality between religious and non-religious beliefs does not necessarily constitute establishment of religious beliefs, and that, furthermore, there is a textual constitutional basis for non-neutrality in the treatment of religion and non-religion.

Accusations of "establishment" of religion should be judged in light of this statement by Pannam:

> [T]he existence of innumerable interactions [between church and state in the United States] casts a great deal of doubt upon the legal and sociological good sense of the doctrine. Church and State cannot be divided into separate aid-proof compartments.

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140 This point was made by J Quick and R Garran (above n 8) in 1901, that "The Christian religion is, in most English speaking countries, recognized as a part of the common law. ... In America the courts of the Union and of the States find it necessary, in administering the common law, to take notice that the prevailing religion is Christian."

141 P H Lane, above n 124 at 132.

142 (1981) 146 CLR 559.

143 F D Cumbrae-Stewart, above n 54 at 207-208.

144 J Quick and R Garran, above n 8 at 951.

145 W Sadurski, above n 80 at 452.

146 Ibid.

They are not two societies that can be separated by the erection of a wall between them. Religion exists within a society and is a part of it.[147]

He notes that "[e]ven if it were desirable it would be a complete impossibility. The idea of a wall separating church and State is misleading because it can never be a reality. It may be a good battle cry but it is poor law".[148] Pannam would seem to be right.

The tension between free exercise and non-establishment

Free exercise and non-establishment cannot be considered in isolation. Frequently these provisions operate independently of each other and an impugned law will be said to violate one guarantee or the other, but this will not always be the case. There will be times when the satisfaction of one might require a violation of the other. An inherent tension therefore resides in the relationship between the two guarantees. It is said that if too strict a view is taken of non-establishment, it could amount to hostility to religion and constitute an infringement of free exercise. On the other hand if an overly accommodationist view is taken of free exercise, it could constitute an establishment, at least of religion generally if not of any one particular religion.

Sadurski says that "[n]either of the two principles need to prevail over the other because they both serve, in their distinct spheres of application and in their own specific ways, the overall idea of legal neutrality".[149] He then uses that as a basis for "adopting a broad definition of religion for the purposes of the Free Exercise Principle and a narrow one for the purposes of the Non-Establishment Principle".[150] Sadurski's suggestion of resolving the tension by the use of two separate definitions is at best counter-intuitive. Furthermore, it is suggested that it is logically unsound and, in any event, unnecessary.[151] The very reason there is tension between the two principles is that in some situations both principles will need to be called upon for the resolution of the problem. It is suggested that it is untenable for two different definitions of religion to be applied to the one problem. Sadurski is wrong to opt for a narrow definition of "religion" for the purposes of the non-establishment prohibition; instead he should be opting for a narrow definition of "establish". This would achieve the same result he seeks to achieve, but without the logical gymnastics. Adams and Emmerich agree:

No dilemma exists if the establishment clause is understood in its historical sense as a prohibition against those institutional alliances of church and state that threaten to coerce or influence religious choice. With this understanding, both "free exercise" and "religion" can be given broad content without fear of infringing the nonestablishment guarantee.[152]

It is possible to avoid, to a significant extent, having to solve the tension between the two principles by eliminating that tension. The tension is created by the fact that the two principles are said to overlap. They only overlap, however, if a broad view is taken

147 C Pannam, above n 12 at 80.
148 Ibid at 81.
149 W Sadurski, above n 102 at 841.
150 Ibid.
151 For further criticism of proposals for two definitions, although not specifically directed at Sadurski's suggestion, see A Adams and C Emmerich, above n 55 at 91-92: "The view that religion should be more broadly construed for free exercise than for establishment purposes is of recent vintage, arising primarily because of problems generated by the Court's sweeping definition of the establishment clause in *Everson* and its progeny."
152 A Adams and C Emmerich, above n 55 at 92.

of establishment. It has already been suggested that this broad view has prevailed in the United States because of an exaggerated concern with separation for its own sake. If a narrow view is taken of establishment, as was taken in the *DOGS* case, then a government may permit, in a non-discriminatory fashion, as much free exercise as it sees fit and it will still not have established religion; it certainly will not have established "any" religion. Free exercise can then have the "expanding dynamic"[153] it is said to require and the prohibition on establishment will not have been violated. It is further suggested that, in Australia at least, this narrow view of "establish" is most consistent with the purpose of the clause.

The tension between free exercise of religion and non-establishment of religion becomes most unmanageable when one tries to give "religion", "free exercise" and "establishment" meanings they will not bear. The tension is greatly relieved if one adopts definitions which are both more narrow and more reasonable, and applications which are more flexible. It is suggested that this is the approach which, by and large, has prevailed in Australia and has to a remarkable degree been successful in ensuring that full membership of Australia's pluralistic community is not dependent on religious positions and divisions are not created along religious lines.

THE ADEQUACY AND APPROPRIATENESS OF SECTION 116

Section 116 is adequate and appropriate if one does not expect it to do too much. If it is accepted that there are some beliefs which are religious and some which are not; that those beliefs which are religious have been designated, rightly or wrongly, for special protection; that the free exercise of religion is not an unlimited freedom; that the establishment of religion has not occurred until there is such a high level of state support that it infringes the right of others to be free from religion; and that non-establishment rather than a wall of separation is the desired outcome: then s 116 is a more than adequate guarantee of free exercise and non-establishment. If the First Amendment to the United States Constitution were interpreted with these principles in mind, it too would probably be an appropriate guarantee in the American context.

The question remains whether anything should be added to s 116. The most obvious addition would be to extend its operation to the States, as was the original intention, revealed by its place in the Constitution. This was attempted in the constitutional amendment referendum in 1988.[154] There would seem to be no apparent benefit in doing this; certainly no imperative. One of the problems with the American treatment of the religious guarantees has been the vigilance with which the public, the government and the courts have sought to keep the church and state separate. The American experience ought to inform Australia's consideration of this question. The more safeguards one tries to introduce, the more focussed one can become on the means rather than the end. By doing this the treatment (or non-treatment) of religion by governments becomes political, thereby propelling religion on to the political stage, and ninety five years of non-sectarian politics could be rendered wasted.

153 W Sadurski, above n 80 at 423.

154 The Constitutional Alteration (Rights and Freedoms) Act 1988 (Cth) sought to apply s 116 equally to the States and Territories; to cover any government act, not just legislation; and to remove "for", such that the government could not "establish any religion" or "prohibit the free exercise" thereof.

A NEW BATTLEFIELD? IMPLIED CONSTITUTIONAL RIGHTS

The Australian Constitution contains only four "rights" as traditionally identified: the right to trial by jury in s 80; the right to acquisition of property on just terms in s 51(xxxi); the right to freedom of religion in s 116; and the right to be free from discrimination based on State of residence in s 117.[155] As identified above in relation to the English situation, the framers of the Australian Constitution saw Parliament as the guardian of their rights, not as a threat to them. American citizens who consider their rights to have been breached have a whole Bill of Rights within which to identify a basis for their action. On the other hand, if only due to the absence of alternatives, Australian citizens might be forced to base a claim on s 116 when they ought properly to be pleading a different, but unprotected, right.[156]

The High Court has recently identified a right to freedom of political expression. This right is said to emerge from the democratic nature of the Constitution. A move towards a more rights-based interpretation of the Constitution could see the scope of s 116 widen. On the other hand it could be the very thing which prevents its scope widening. Trying to fit a general rights-based action within s 116 could be said to be an attempt to fit a square peg into a round hole, and this has been argued against consistently throughout this discussion. However if the High Court starts to identify other rights in the Constitution which had been previously unidentified, the need to use s 116 disappears. The forces of expansion operating on s 116 would therefore cease.

The Court has also shown a more general move towards a rights-based jurisprudence. Between 1990 and 1993 the High Court handed down twelve decisions all of which had some form of rights considerations.[157] Bailey points to these cases as evidence of a "greater awareness of rights content" and a "considerably more 'rights-oriented' interpretation" being given to constitutional rights.[158]

Notwithstanding the shift in the High Court's jurisprudence in recent years, it is suggested that those who turn to the implied rights jurisprudence for an expansion of s 116 or for the implication of other rights, most importantly a general freedom of conscience, will be disappointed. In the *DOGS* case the High Court emphasised that the non-establishment clause did not amount to a "constitutional guarantee of the rights of

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155 Although writers such as G Kennett, above n 134 at 584, take the view that there are four express rights, others identify six such as N O'Neill in "Constitutional Human Rights in Australia" (1987) 17 *F L Rev* 85 (adding freedom of movement between the states in section 92 and rights of electors of states in section 41) or P Bailey in "'Righting' the Constitution without a Bill of Rights" (1995) 23 *F L Rev* 1 at 33 (adding s 92 and s 51(23A)). Bailey has previously suggested that there might be as many as twenty-four: see P Bailey, *Human Rights: Australia in an International Context* (1990) at 79, 84-86 and chapter 4 generally.

156 F D Cumbrae-Stewart, above n 54 at 241.

157 *Bropho v Western Australia* (1990) 171 CLR 1; *Mabo v Queensland [No 2]* (1992) 175 CLR 1; *ACTV* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Chu Khen Lim and Others v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1; *Polyukhovic v The Commonwealth* (1991) 172 CLR 401; *Dietrich v The Queen* (1992) 177 CLR 292; *Cheatle v The Commonwealth* (1993) 177 CLR 541; *Plenty v Dillon* (1990) 171 CLR 635; *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218; *Leeth v The Commonwealth* (1992) 174 CLR 455; *Waters v Public Transport Corporation* (1991) 173 CLR 349. For an analysis of all these cases see P Bailey, above n 155.

158 P Bailey, above n 155 at 33.

individuals".[159] More recently the Court has consistently emphasised that its implication of a freedom of political expression is not the beginning of the implication of a general bill of rights. In the *ACTV* case Mason CJ said that:

> it is difficult, if not impossible, to establish a foundation for the implication of general guarantees of fundamental rights and freedoms. To make such an implication would run counter to the prevailing sentiment of the framers that there was no need to incorporate a comprehensive Bill of Rights in order to protect the rights and freedoms of citizens. That sentiment was one of the unexpressed assumptions on which the Constitution was drafted.[160]

If any more rights were to be implied it seems that they would have to be strictly related to the operation of the democratic political system. The sorts of freedoms in issue here would fall outside this field of inquiry. It is therefore highly unlikely that the Court is going to identify an implied right to freedom of conscience, freedom of belief, or freedom of religion of a kind greater than that already guaranteed by s 116. To imply that there is any form of common law right to these freedoms would require history to be rewritten.[161] The only platform from which one could make such a claim would be the statement of Mason ACJ and Brennan J in *Scientology* that "[f]reedom of religion, the paradigm freedom of conscience, is of the essence of a free society".[162] As a platform for a rights-based action this isolated statement would be tenuous at best.

Perhaps the only way in which this rights jurisprudence could affect questions of religious and other freedoms could be in the characterisation of laws which require scrutiny. McLeish has criticised the approach of the High Court for treating s 116 as a limitation on federal power rather than as a guarantee of personal freedoms. He argues that s 116 should be treated as a guarantee of personal freedoms, and accordingly the focus of the Court should shift to considering the impact of impugned legislation on individuals.[163] This shift in emphasis has occurred more recently in cases dealing with implied constitutional rights. For instance, the *ACTV* case[164] has been said to have adopted an approach "which sees the application of constitutional rights as more a matter of the weighing or balancing of competing interests and less a process of finding the 'true nature' of the law under challenge".[165]

Whilst the High Court has not shown any inclination to give wider scope for s 116 based on implied rights, if it were to adopt a rights-based approach to the characterisation of legislation the implications for s 116 could be far-reaching. If *Jehovah's Witnesses* had been considered in this way the effect on the individuals concerned would have been much more relevant, perhaps even persuasive. The same applies in reverse for establishment cases. If *DOGS* had been considered in light of the effect of the aid schemes on the religions concerned, the result might have been quite different.

159 *DOGS* (1981) 146 CLR 559 at 605 per Stephen J.
160 *ACTV* (1992) 177 CLR 106 at 136.
161 *Grace Bible Church v Reedman* (1984) 36 SASR 376 at 379 per Zelling J.
162 *Scientology* (1983) 154 CLR 120 at 130.
163 S McLeish, above n 5 at 210.
164 (1992) 177 CLR 106.
165 A Glass, "Freedom of Speech and the Constitution: *Australian Capital Television* and the Application of Constitutional Rights" (1995) 17 *SydLR* 29 at 32.

CONCLUSION

A comparison of Australia and the United States reveals an extraordinary irony. It is likely that the situation which exists in Australia in the late twentieth century is not dissimilar to that which the American constitutional framers and courts sought to achieve. Religion and religious allegiances play very little part in modern Australian public discourse. Of course, religion has a voice in that discourse, but it is only one of many voices. It has no state sanction and the state has no institutionalised religious approbation. When Prime Minister Keating suggested that the Pope would support Labor rather than Coalition policies,[166] he was subjected to widespread criticism by non-Catholics and Catholics alike. It is precisely this type of religious polarisation which both the Australian and American framers sought to avoid. The infrequency with which religion is specifically imported into general public policy debates in Australia seems to be an indication of a widespread acceptance that religion and politics are to be distinct.

The Australian framers were merely trying to design a federation and to protect the right of the States to support the advancement of religion in a non-discriminatory way; the American framers were seeking to escape "turmoil, civil strife and persecutions".[167] With such lofty ideals, by injecting into the emerging national consciousness such a zeal for religious freedom, the American framers would seem to have brought about the very situation which they sought to avoid. The extent to which the religious guarantees of the First Amendment have been litigated, and the extent to which religious notions and loyalties permeate American public life, are indications of the politicisation of religion and the evangelisation of politics in the United States.[168] Whilst there may be a "wall of separation" between church and state, this wall has only increased the desire of these neighbours to look over the wall into each other's yard, constantly paranoid that the other is silently shifting the wall during the night. In contrast, the less distinct division between church and state in Australia seems to have facilitated a more peaceful, more reasonable, and ironically, arguably more separate co-habitation.

To the extent that there can be adequate and appropriate protection of freedom of religion and adequate prohibition of establishment of religion, s 116 is both adequate and appropriate. Australia seems to have benefited from the fact that its provision was drafted and subsequently enforced in a much less dogmatic climate than was its American equivalent. Australia has also benefited significantly from what may have been merely a quirk of drafting: the inclusion of the word "for" in the section, giving the High Court a legitimate basis on which to inquire into the purpose of impugned legislation, thereby freeing it from a strict "wall of separation" approach to the section.

If one theme emerges most clearly from a comparison of Australian and American constitutional jurisprudence involving religion, it is that probably it does not matter

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166 See I Willox, "PM says Pope is on his side on policy" *Age* 11 October 1995 at 7; M Grattan, "Mixed Signals from on High" *Age* 11 October 1995 at 4; P Daley, "Leaders on a Mission from God" *Sunday Age* 15 October 1995 at 11.

167 Above n 16.

168 In the 1996 Presidential election President Clinton feared that "the [Christian] coalition can make a difference of five points in a lot of states": M Walker, "Religious Right Sets Sights on Clinton in the South" *Age* 5 November 1996 at A9.

what the provision says. The effect of any constitutional provision as loaded with value judgments as one involving religion will inevitably be dependent not so much on the fine wording of that section but on the desired outcome sought by the judges applying it. Even if that is the case, to the extent that s 116 has enabled the High Court of Australia to aid the development of a society which is, by and large, neither sectarian nor dogmatically suspicious of relations between government and religion, the section has been faithful to its purpose and has served Australia well.