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# *Secularization by law? The establishment clauses and religion in the public square in Australia and the United States*

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*While there is an enormous body of case law and literature on the American establishment clause, there has been considerably less attention devoted to its Australian counterpart. As Australia is confronting the question of what role religion should play in public life, the Australian establishment clause is likely to become caught up in controversies similar to its American counterpart.*

*The argument in this article is, first, that religion historically had a place in the public square in both the U.S. and Australia, and, second, that the U.S. and Australian constitutions never repudiated this tradition. Third, this article argues that the Australian establishment clause is interpreted and applied today in a way that is very similar to the way the U.S. establishment clause was understood in the early Republic, before the modern era of Supreme Court decisions on the subject began in the mid-twentieth century. The U.S. Supreme Court has departed further from the early positions on establishment than has its Australian counterpart. Finally, this article argues that the U.S. decisions tend to reflect a modern “culture of disbelief,” moving the culture toward privatization of religion. Australian courts have so far resisted the pressure to follow the American path of encouraging the privatization of religion through establishment clause jurisprudence (even though, ironically, religion holds a less prominent place in Australian culture than it does in the U.S.). While it is likely that there will be increased pressure on the Australian courts to do precisely this in the near future, this article argues that this would be a mistake.*

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*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .*

—U.S. Constitution, Amendment I

*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.*

—Australian Constitution, § 116

## 1. Introduction

The federal constitutions of the United States and Australia both include establishment clauses prohibiting religious establishments. In both countries, these constitutional provisions are entangled in the debate over religion and its influence in society. The United States and Australia each possess a strong religious heritage. Historically, this religious heritage has had particular impact on the legal and political spheres in both countries. Yet such a commitment to religion appears anachronistic (if not invidious) to many, today, in light of the church-state separation recognized in these nations' constitutions. The "separation of church and state" is often viewed as a separation of religion and government.<sup>1</sup>

Since 1947, the U.S. Supreme Court has been talking about a "high and impenetrable" wall of separation between church and state.<sup>2</sup> In the 1960s the Court began applying the establishment clause to keep religion and government "hermetically separated," as one critic described it.<sup>3</sup> This position is commonly known as "strict separation" in the legal literature.<sup>4</sup> This, in turn, is sometimes viewed as a justification for, and sometimes as a result of, a larger cultural discounting of religion in public life—what Yale law professor Stephen Carter has called the "culture of disbelief."<sup>5</sup> However, a number of legal scholars<sup>6</sup> and jurists<sup>7</sup> have challenged the strict separationist view, arguing that modern interpretations of

<sup>1</sup> See, e.g., STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF* (1993).

<sup>2</sup> *Everson v. Board of Education*, 330 U.S. 1, 18 (1947).

<sup>3</sup> *Books v. Elkhart County*, 401 F.3d 857, 870 (7th Cir. 2005) (Easterbrook, J., dissenting). See Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 120 (1992); CARTER, *supra* note 1.

<sup>4</sup> ANN W. DUNCAN & STEVEN L. JONES, *CHURCH-STATE ISSUES IN AMERICA TODAY* 48 (2008).

<sup>5</sup> CARTER, *supra* note 1.

<sup>6</sup> See, e.g., PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* (2002); DANIEL L. DREIBACH, *THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE* (2002); McConnell, *Crossroads*, *supra* note 3.

<sup>7</sup> See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 91–114 (Rehnquist, J., dissenting); *Van Orden v. Perry*, 545 US 677, 692 (2005) (Scalia, J., concurring in judgment); *McCreary County v. ACLU*, 545 U.S. 844, 885–900 (2005) (Scalia, J., dissenting); *Lee v. Weisman*, 505 U.S. 577, 631–646 (1992) (Scalia, J., dissenting); *Elk Grove Unified School District v. Newdow*, 542 US 1, 52–53 (2003) (Thomas, J., concurring in judgment); *Van Orden v. Perry*, 545 US 677, 692–696 (2005) (Thomas, J., concurring in judgment).

the establishment clause fail to appreciate the historical place of religion in public life, and that the result is the current legal treatment of religion that is insensitive, stilted, and wrong. This debate over the proper interpretation of the Constitution's religion clauses is inevitably intertwined with the larger cultural debate over the place of religion in the public square.<sup>8</sup>

While there is an enormous body of case law and literature on the U.S. establishment clause, its history, interpretation, and cultural implications, there has been considerably less attention devoted to its Australian counterpart. Literature discussing the Australian clause often notes its apparent similarities with the American version but quickly goes on to explain that the U.S. and Australian establishment clauses have received very different interpretations in the courts.<sup>9</sup> This is true as far as it goes, yet many parallels remain unexplored. As Australia (with most of the Western world) is confronting the question of what role religion should play in public life, the Australian establishment clause is likely to be caught up in controversies similar to those that have embroiled its American counterpart for some six decades already. Perhaps it is already on the same path.

Our goal is to compare both establishment clauses, highlighting similarities and differences in the historical context and legal setting of the U.S. and Australian conceptions of church-state separation. We argue, first, that religion historically had a place in the public square in both the U.S. and Australia, and, second, that the U.S. and Australian constitutions never repudiated this tradition. Third, we argue that the Australian establishment clause is interpreted and applied today in a way that is very similar to the way the U.S. establishment clause was understood in the early Republic, before the modern era of Supreme Court decisions on the subject began in the mid-twentieth century. The U.S. Supreme Court has departed further from the early positions on establishment than has its Australian counterpart. Finally, we argue that the U.S. decisions tend to reflect a modern "culture of disbelief," moving the culture toward privatization of religion (although religion still holds a prominent place in American culture). Australian courts have so far resisted the pressure to follow the American path of encouraging the privatization of religion through establishment clause jurisprudence (even though, ironically, religion holds a less prominent place in Australian culture than it does in the U.S.). While we think it likely that there will be increased pressure on the Australian courts to do precisely this in the near future, we argue that this would be a mistake.

<sup>8</sup> See, e.g., Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195 (1992) (U.S. establishment clause mandates secular public square) and McConnell, *Crossroads*, *supra* note 3, at 126 (secular public square violates the establishment clause).

<sup>9</sup> See, e.g., Robert M. O'Neil, *A Comment on "Traditions of Church-State Separation,"* 18 J.L. & POL. 323, 323–324 (2002); Carolyn Evans, *Constitutional Narratives*, 23 EMORY INT'L L. REV. 437, 468 (2009); Denise Meyerson, *The Protection of Religious Rights Under Australian Law*, B.Y.U. L. REV. 529, 538 (2009).

## 2. Context: Religion in American and Australian history

When dealing with the establishment clauses of the U.S. and Australia, the religious traditions of the cultures provide the context for good interpretations. Historically, religion has played an important role in the cultures of both countries. So as a preliminary matter, we engage in an historical excursus to put the religious heritage of these nations side-by-side. Some claim that the U.S. and Australia are “Christian” nations, and what exactly this might mean and whether this is true has been the subject of considerable debate.<sup>10</sup> For our purposes, we need not enter into this debate. We merely intend to show what is not controversial but is sometimes neglected: that religion has played a prominent role in the public discourse of both Australia and the U.S. An appreciation of this fact will not only provide context for understanding the establishment clauses but will also contextualize recent claims about the liberal state that we will examine later.

### 2.1. Christianity and the English common law

At the time of English settlement in both America and Australia, Christianity formed an integral part of the theory of English law and civil government.<sup>11</sup> Sir William Holdsworth explained the traditional view of the close relationship between Christianity and English law: “Christianity is part and parcel of the common law of England, and therefore is to be protected by it; now whatever strikes at the very root of Christianity tends manifestly to dissolution of civil government.”<sup>12</sup> Holdsworth did not make his terminology up out of thin air. In a 1649 case, an English court stated that “the law of England is the law of God” and “the law of God is the law of England.”<sup>13</sup> In a 1676 case, Lord Hale wrote, “Christianity is parcel of the laws of England.”<sup>14</sup> Chief Justice Raymond paraphrased Hale with his statement, “Christianity in general is parcel of the common law of England.”<sup>15</sup> Sir William Blackstone matter-of-factly remarked that “the Christian religion . . . is a part of the law of the land. . . .”<sup>16</sup> Lord Hale’s statement achieved an almost axiomatic status and retained this status throughout the nineteenth century, so that Holdsworth could

<sup>10</sup> In the American context, compare, e.g., GARY DEMAR, *AMERICA’S CHRISTIAN HISTORY* (1995), MARK A. NOLL, NATHAN O. HATCH, & GEORGE M. MARSDEN, *THE SEARCH FOR CHRISTIAN AMERICA* (1989), and ISAAC KRANICK & R. LAURENCE MOORE, *THE GODLESS CONSTITUTION: A MORAL DEFENSE OF THE SECULAR STATE* (2005).

<sup>11</sup> David Mitchell, paper presented at the seminar “Religious Tolerance Laws: A Challenge to Our Freedom of Speech?” Christian Legal Society of Victoria, Melbourne: Religious Tolerance Laws Are Not Only a Challenge to our Freedom of Speech but Also to the Under-Girding of our Historic Legal System (June 2, 2005).

<sup>12</sup> WILLIAM S. HOLDSWORTH, *HISTORY OF ENGLISH LAW* 410–416 (3rd ed. 1932).

<sup>13</sup> Quoted in Stuart Banner, *When Christianity was Part of the Common Law*, 16 L. & HIST. REV. 27, 29 (1998).

<sup>14</sup> *Id.* See also Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2102–03 (1996).

<sup>15</sup> *Rex v. Woolston*, Fitzg. 64, 94 Eng. Rep. 655 (K.B. 1729), cited in Banner, *supra* note 13, at 29.

<sup>16</sup> BLACKSTONE, 2 COMMENTARIES \*59.

state that the “maxim would, from the earliest times, have been accepted as almost self-evident by English lawyers.”<sup>17</sup>

## 2.2. America’s colonization

The colonization of Virginia brought representatives of Protestant Christianity to the new world<sup>18</sup> and simultaneously transplanted the common law to the Americas.<sup>19</sup> The leading advocate for colonization of the Americas, Richard Hakluyt, had an explicitly evangelical motivation,<sup>20</sup> and this was reflected in the First Charter of Virginia.<sup>21</sup> Perry Miller commented that in Virginia, as in the later Puritan colonies to the north, “religion, in short, was the really energizing power in this settlement.”<sup>22</sup>

The Puritan and English Separatists who settled New England also came with evangelical motives.<sup>23</sup> The Plymouth colony’s founding document, the Mayflower Compact, cited its commitment to plant a colony “for the Glory of God, and Advancement of the Christian Faith.”<sup>24</sup> Following the Plymouth settlement (1620) was a massive influx of Puritans—probably 20,000 immigrated by 1642.<sup>25</sup> These earliest colonists came from the Calvinist tradition<sup>26</sup> and were followed by Catholics in Maryland, English Quakers to Pennsylvania,<sup>27</sup> then by German Mennonites and, later, Germans from mainline Lutheran and Reformed traditions.<sup>28</sup> On the eve of the War for Independence, there was a mass influx of Presbyterian Scots and Protestant Irish (40,000 of the former and 55,000 of the latter between 1760 and 1775).<sup>29</sup>

<sup>17</sup> Quoted in Banner, *supra* note 13, at 29–30.

<sup>18</sup> See Perry Miller, *The Religious Impulse in the Founding of Virginia: Religion and Society in the Early Literature*, 5 WM. & MARY Q. 492, 499–503 (1948).

<sup>19</sup> First Charter of Virginia, April 10, 1606, in DOCUMENTS OF AMERICAN HISTORY 10 (Henry Steele Commager ed., 3rd ed. 1947).

<sup>20</sup> See, e.g., Hakluyt, “Discourse on Western Planting,” quoted in PETER C. MANCALL, HAKLUYT’S PROMISE 140 (2007).

<sup>21</sup> First Charter of Virginia (1606), in DOCUMENTS OF AMERICAN HISTORY, *supra* note 19, at 8 (Henry Steele Commager ed., 3rd ed. 1947); and see Miller, *supra* note 18, at 494–498.

<sup>22</sup> Miller, *supra* note 18, at 493.

<sup>23</sup> WILLIAM BRADFORD, OF PLYMOUTH PLANTATION 21 (Harold Paget ed., 1909) (photo. reprint, 1998).

<sup>24</sup> Mayflower Compact (1620), in DOCUMENTS OF AMERICAN HISTORY, *supra* note 19, at 15.

<sup>25</sup> JAMES H. HUTSON, RELIGION AND THE FOUNDING OF THE AMERICAN REPUBLIC 5, 7 (1998). De Tocqueville called the Puritans the true founders of America. See Sanford Kessler, *Tocqueville’s Puritans: Christianity and the American Founding*, 54 J. POL. 776 (1992).

<sup>26</sup> Even in Virginia, where the first waves of settlers were adventurers and businessmen rather than religious refugees, the influence of Puritan Calvinism was prevalent among the clergy. See Miller, *supra* note 18, at 499–503, and HUTSON, *supra* note 25, at 17–18. In fact, John Rolfe quoted Calvin’s *Institutes* to the governor when explaining his reasons for seeking to marry the native princess, Pocahontas. See Rolfe to Sir Thomas Dale, in JAMESTOWN NARRATIVES 854 n. 3 (Edward Wright Hale ed., 1998).

<sup>27</sup> HUTSON, *supra* note 25, at 10–13.

<sup>28</sup> HUTSON, *supra* note 25, at 10–13.

<sup>29</sup> BERNARD BAILY, VOYAGERS TO THE WEST: A PASSAGE IN THE PEOPLING OF AMERICA ON THE EVE OF THE REVOLUTION 26 (1986); Joseph Morecraft, III, “Lectures in Early American History,” 78–79 (n.d.) (unpublished paper, on file with Chalcedon Presbyterian Church, Cummings, Georgia).

The legal codes of the colonies reflected the religious perspective of the citizenry. Whether it was the code of the “holy commonwealth” of Massachusetts Bay<sup>30</sup> (with capital laws enacted straight from the Pentateuch),<sup>31</sup> or Pennsylvania’s moral codes, or the church attendance laws of Virginia,<sup>32</sup> the colonies seemed to embrace Lord Hale’s maxim that Christianity was an integral part of the law.<sup>33</sup>

Religious influences remained pervasive in the formation of the new nation in 1776.<sup>34</sup> The Declaration of Independence drew on the language and concepts of higher law promoted by generations of theologians.<sup>35</sup> The public discourse of the time continued to be infused with religious references.<sup>36</sup> State governors, legislatures, and the Continental Congress itself called for days of prayer and fasting and days of thanksgiving.<sup>37</sup> Legislatures heard and sponsored sermons.<sup>38</sup> The many state constitutions that were drafted following independence included official religious statements.<sup>39</sup> The Constitution, the Bill of Rights, and First Amendment itself were created in this religion-permeated cultural context.

### 2.3. Australia’s colonization

Australia also had religious influences in its early colonization—starting with the first English fleet departing for Australia in 1787, when Captain Arthur Phillip was instructed to take such steps as were necessary for the celebration of public worship.<sup>40</sup> More substantively, Australia’s governor from 1809 to 1821, Lachlan Macquarie, encouraged religion in a number of ways. Macquarie began Australia’s transformation from dumping ground for convicts into a model British colony.<sup>41</sup> He believed that

<sup>30</sup> For an excellent study of the theology of Puritan New England’s laws, see JOHN WITTE, JR., *REFORMATION OF RIGHTS* 277–319 (2007).

<sup>31</sup> See Massachusetts Body of Liberties (1641), in *OLD SOUTH LEAFLETS* 7:261–67 (Boston: Directors of the Old South Work), available online at <http://history.hanover.edu/texts/masslib.html>.

<sup>32</sup> See HUTSON, *supra* note 25, at 18.

<sup>33</sup> Banner, *supra* note 13, at 29; John W. Welch, *Biblical Law in America*, 2002 B.Y.U. L. REV. 611 (2002); Epstein, *supra* note 14, at 2102–2103; Colin Kidd, *Civil Theology and Church Establishments in Revolutionary America*, 42 *HIST. J.* 1007, 1015 (1999)

<sup>34</sup> John F. Wilson, *Religion and Revolution in American History*, 23 *J. INTERDISC. HIST.* 597 (1993).

<sup>35</sup> For instance, the reference to “the laws of nature and nature’s God” would have been understood as a reference to special revelation (Scripture). See BLACKSTONE, 1 *COMMENTARIES*, \*39–\*42. For further discussion of the religious origins of the Declaration, see GARY T. AMOS, *DEFENDING THE DECLARATION* (1989).

<sup>36</sup> See, e.g., Donald S. Lutz, *The Relative Importance of European Writers on Late Eighteenth Century American Political Thought*, 78 *AM. POL. SCI. REV.* 189 (1984) (the Bible, and specifically St. Paul, was the most cited literary source in founding era political writings); Harry S. Stout, *Religion, Communications, and the Ideological Origins of the American Revolution*, 34 *WM. & MARY Q.* 519 (1977) (preachers of the Great Awakening provided the vocabulary of the revolutionary period).

<sup>37</sup> HUTSON, *supra* note 25, at 49–74; DANIEL J. FORD, *IN THE NAME OF GOD, AMEN* 170–172 (2003).

<sup>38</sup> FORD, *supra* note 37, at 173, 241.

<sup>39</sup> See John K. Wilson, *Religion Under the State Constitutions, 1776–1800*, 32 *J. CHURCH & STATE* 753 (1990).

<sup>40</sup> Charles Francis, *Why Australia’s Christian Heritage Matters*, *NEWS WEEKLY*, MELBOURNE, March 1, 2008, <http://www.newsweekly.com.au/articles/2008mar01a.html>.

<sup>41</sup> Macquarie’s mausoleum in Mull, Scotland, describes him without exaggeration as “the Father of Australia.”

New South Wales was a land of redemption where “convicts would be transformed into citizens”<sup>42</sup>—and, late in life, he could accurately claim, “I found New South Wales a gaol and left it a colony.”<sup>43</sup> Under Macquarie’s benign rule, Christianity made considerable progress in Australia. In 1815, he appointed clergymen to all districts of the colony, ordering that all convicts attend Sunday church services.<sup>44</sup> On the first Sunday of compulsory church service, Macquarie was in attendance.<sup>45</sup> As Manning Clark<sup>46</sup> noted, Macquarie believed that Christian principles could render the next generation “dutiful and obedient to their parents and superiors, honest, faithful and useful members of society,” and he attempted to educate children in these principles through the schools he established.<sup>47</sup> Macquarie considered these principles “indispensable both for liberty and for a high material civilisation,”<sup>48</sup> and he “hoped to give satisfaction to all classes, and see them reconciled.”<sup>49</sup>

Christian traditions also came to Australia through the English legal system itself, which was transplanted to Australia in accordance with the doctrine of reception.<sup>50</sup> The supreme courts of the colonies were empowered to decide which English laws were applicable to the Australian situation,<sup>51</sup> and Christianity was included in the law applicable to the situation of the colonists. The early disregard of Aboriginal customary law was based on a combination of established common law principles and an interpretation of the “Divine Law.” This is evident in the Supreme Court of New South Wales decision *R v. Jack Congo Murrell*, where Justice Burton bluntly expressed his view that Aborigines “had no law but only lewd practices and irrational superstitions contrary to Divine Law and consistent only with the grossest darkness.”<sup>52</sup>

The reception of Christian legal principles was perhaps best encapsulated in Justice Hargraves’s comment for the Supreme Court of New South Wales in *Ex Parte Thackeray* (1874):<sup>53</sup>

We, the colonists of New South Wales, “bring out with us” . . . this first great common law maxim distinctly handed down by Coke and Blackstone and every other English Judge long

<sup>42</sup> NIALL FURGASON, *EMPIRE: HOW BRITAIN MADE THE MODERN WORLD* 105 (2003).

<sup>43</sup> *Id.* at 105, 107.

<sup>44</sup> See ELIZABETH ROGERS KOTLOWSKI, *STORIES OF AUSTRALIA’S CHRISTIAN HERITAGE* 42 (2006), and Francis Nigel Lee, *The Christian Foundations of Australia* 10 (Queensland Presbyterian Theological Seminary, Brisbane, August 2000), available at <http://www.dr-finlee.org/docs6/cfa/cfa.html>.

<sup>45</sup> Lee, *supra* note 44, at 10.

<sup>46</sup> Manning Clark (1915–1991) was the author of *A History of Australia*, a six-volume work on the general history of Australia published between 1962 and 1987. Opinionated and prolific, Clark is broadly recognized as “Australia’s most famous historian.” See GRAENE DAVIDSON ET AL., *OXFORD COMPANION TO AUSTRALIAN HISTORY* 128 (1998).

<sup>47</sup> C.M.H. CLARK, *A HISTORY OF AUSTRALIA* 280–281 (1997). See also KOTLOWSKI, *supra* note 44, at 42.

<sup>48</sup> CLARK, *supra* note 47, at 16.

<sup>49</sup> Lee, *supra* note 44, at 10.

<sup>50</sup> See WILLIAM BLACKSTONE, 1 COMMENTARIES \*108–\*109. The reception of English law into Australia was statutorily recognised by the Australian Courts Act of 1828. See PATRICK PARKINSON, *TRADITION AND CHANGE IN AUSTRALIAN LAW* 119 (2005).

<sup>51</sup> CATRIONA COOK ET AL., *LAYING DOWN THE LAW* 29 (2001).

<sup>52</sup> (1836) *Legge* 72; see also PARKINSON, *supra* note 50, at 107.

<sup>53</sup> *Ex parte Thackeray* (1874) 13 S.C.R. 1.

before any of our colonies were in existence or even thought of, that “Christianity is part and parcel of our general laws”; and that all the revealed or divine law, so far as enacted by the Holy Scripture to be of universal obligation, is part of our colonial law. . . .<sup>54</sup>

This pronouncement exemplifies the judicial recognition of the Christian heritage of the English common law. The court took the major step of declaring the supremacy of Christian legal principles—namely, that the divine or revealed law is applicable, and superior, to colonial laws.

## 2.4. Two constitutions

### 2.4.1. Australia

Australia’s Constitution was infused with religiosity from the outset. The Constitution of Australia Bill was passed by the Imperial (British) Parliament on July 5, 1900. Queen Victoria assented four days later and, in September, proclaimed that the Commonwealth of Australia would come into existence on the first day of the twentieth century (January 1, 1901). On that occasion, one of the Constitution’s most distinguished coauthors, Sir John Downer, declared: “The Commonwealth of Australia will be, from its first stage, a Christian Commonwealth.”<sup>55</sup>

Many of the leading writers of the Constitution had strong views on the importance of Christianity to the Commonwealth. For example, Sir Henry Parkes, known as “the Father of Australia’s Federation,” believed that Christianity constituted an essential part of Australia’s common law.<sup>56</sup> In a paper published in the *Sydney Morning Herald* on August 26, 1885, Sir Henry stated: “We are pre-eminently a Christian people—as our laws, our whole system of jurisprudence, our Constitution . . . are based upon and interwoven with our Christian belief.”<sup>57</sup> Similar views could be found among the drafters of the Constitution Bill in 1897. Among these were Edmund Barton, who entered politics under the influence of his Presbyterian minister, and the leading federalist and statesman Alfred Deakin.<sup>58</sup> On the day following the referendum concerning the draft of the Constitution, which was held in New South Wales, Victoria, and Tasmania on June 3, 1898, Deakin offered a prayer, giving thanks for the progress that had been made and asking for God’s blessing on the endeavor: “Thy blessing has rested upon us here yesterday and we pray that it may be the means of creating and fostering throughout all Australia a Christlike citizenship.”<sup>59</sup>

All of these statements were more than just rhetoric, for this belief made its way into the preamble of the Australian Constitution: “Whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, *humbly relying on the blessing of Almighty God*, have agreed to unite in one indissoluble Federal Commonwealth. . . .”

<sup>54</sup> *Id.*

<sup>55</sup> COL STRINGER, *DISCOVERING AUSTRALIA’S CHRISTIAN HERITAGE* 103 (2000).

<sup>56</sup> Lee, *supra* note 44, at 17.

<sup>57</sup> *Id.*

<sup>58</sup> KOTLOWSKI, *supra* note 44, at 152.

<sup>59</sup> Deakin’s Prayer 223, 4 June 1898, in STRINGER, *supra* note 55, at 104.

As Professor Irving has suggested, the preamble is that part of the Constitution laying out “the hopes and aspirations of the parties involved,”<sup>60</sup> and, indeed, the reference to God received the strongest popular support of any part of the Constitution. According to Irving:

During the 1897 Convention delegates have been inundated with petitions . . . in which the recognition of God in the Constitution was demanded. The petitions, organised nationally . . . asked for the recognition of God as the supreme ruler of the universe; for the declaration of national prayers and national days of thanksgiving and ‘humiliation’. But, the essence of their petition was that the Constitution should include a statement of spiritual—specifically Christian—identity for the new nation.<sup>61</sup>

In the process of popular consultation, which took place during the constitutional drafting, the legislative assemblies of Western Australia, Tasmania, New South Wales, and South Australia all submitted proposed wording for the preamble acknowledging God.<sup>62</sup> Hence, John Quick (one of the drafters of the Constitution) and Robert Garran (who played a significant role in the Australian federation movement) wrote in their standard commentary on the Australian Constitution:

This appeal to the Deity was inserted in the Constitution at the suggestion of most of the Colonial Legislative Chambers, and in response to numerous and largely signed petitions received from the people of every colony represented in the Federal Convention. . . . In justification of the insertion of the words stress was laid on the great demonstration of public opinion in their favour, as expressed in the recommendations of the Legislative bodies and in the petitions presented.<sup>63</sup>

It may well be argued that the overwhelming public support for a reference to God in the Commonwealth Constitution reflected the view that the validity and success of an Australian federation was dependent on the providence of God. Speaking at the constitutional convention, Patrick Glynn of South Australia declared that it was to Australia’s credit that it had “[t]he stamp of religion . . . fixed upon the front of our institutions.”<sup>64</sup> The inclusion of the words “humbly relying on the blessing of Almighty God” in the Constitution exemplifies Australia’s religious, and specifically Christian, heritage.

### 2.4.2. *United States*

The U.S. Constitution contains no reference to God comparable with Australia’s preamble.<sup>65</sup> By comparison with early American politics up to that time, it initially

<sup>60</sup> HELEN IRVING, *TO CONSTITUTE A NATION: A CULTURAL HISTORY OF AUSTRALIA’S CONSTITUTION* 196 (1999).

<sup>61</sup> *Id.* at 166.

<sup>62</sup> JOHN QUICK & ROBERT RANDOLPH GARRAN, *THE ANNOTATED CONSTITUTION OF THE AUSTRALIAN COMMONWEALTH* 283–284 (1901).

<sup>63</sup> *Id.* at 287.

<sup>64</sup> 5 OFFICIAL RECORD OF THE DEBATES OF THE AUSTRALASIAN FEDERAL CONVENTION 1733 (1898) (proceedings of March 2, 1898).

<sup>65</sup> The explicit reference to God is in the date (“in the year of our Lord”). See, e.g., *Newdow v. Congress*, 328 F.3d 466, 473 (9th Cir. 2003) (O’Scannlain, J., dissenting from the denial of rehearing in en banc) (citing this constitutional clause).

seems that the Constitutional Convention of 1787 was remarkably nonreligious. Some believe this indicates that the Constitution ushered in a major change in the government's approach to religion.<sup>66</sup> This is a questionable argument from silence,<sup>67</sup> especially given the fact that the Constitution was not a dramatic change from prior practice. The Articles of Confederation were also silent on religion, and, as James Hutson has noted, "That religion was not otherwise addressed in the Constitution did not make it an 'irreligious' document any more than the Articles of Confederation was an 'irreligious' document."<sup>68</sup>

The better explanation for the Constitution's lack of religious content is that the people would have taken such content as a potential assertion of federal authority in religious issues. The states were jealous of federal power, and would not yield their own brands of religious freedom—and, in many, their religious establishments—to federal interests.<sup>69</sup> Hutson has noted:

Experience in Congress shaped the delegate's approach to religion. . . . Congress launched its religious initiatives with a keen appreciation of the risks involved, for the diversity of the nation's denominations and their passionate attachment to their own confessional procedures always raised the possibility that the most innocent-looking religious measure might offend a powerful segment of the population. . . . The Convention . . . wanted the Constitution to be a "clean bill. . . ."<sup>70</sup>

In other words, it was the very religiosity of the people of the United States that made it impossible for the Constitution to include religious statements. While there was no reason to delegate powers over religion to the federal government,<sup>71</sup> the states often invoked and recognized God in their state constitutions.<sup>72</sup>

One additional consideration needs to be mentioned. Since the founding period, there have been those who see the Declaration of Independence as a kind of ideological preamble to the Constitution.<sup>73</sup> In this view, the Constitution essentially would have

<sup>66</sup> KRAMNICK & MOORE, *supra* note 10.

<sup>67</sup> L. Scott Smith, *Religion, Politics, and the Establishment Clause: Does God Belong in American Public Life?*, 10 CHAPMAN L. REV. 299, 313–317 (2006).

<sup>68</sup> HUTSON, *supra* note 25, at 77.

<sup>69</sup> Smith, *supra* note 67, at 313–317; Daniel L. Dreisbach, *In Search of a Christian Commonwealth: An Examination of Selected Nineteenth-Century Commentaries on References to God and the Christian Religion in the United States Constitution*, 48 BAYLOR L. REV. 927, 949–962 (1996).

<sup>70</sup> HUTSON, *supra* note 25, at 77.

<sup>71</sup> See HUTSON, *supra* note 25, at 77.

<sup>72</sup> Wilson, *supra* note 39.

<sup>73</sup> Dan Himmelfarb, *The Constitutional Relevance of the Second Sentence of the Declaration of Independence*, 100 YALE L. J. 169 (1990); Clarence Thomas, *Toward a "Plain Reading" of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 HOW. L.J. 691 (1987); JOHN EIDSMOE, CHRISTIANITY AND THE CONSTITUTION 360–362 (1987); Timothy Sandefur, *Liberal Originalism: A Past for the Future*, 27 HARV. J.L. & PUB. POL'Y 489, 505 (2004); Stephen H. Galebach, *The Declaration of Independence and Original Intent*, 6 J. CHRISTIAN JURISPRUDENCE 57 (1987); Herbert W. Titus, *The Law of Our Land*, 6 J. CHRISTIAN JURISPRUDENCE 57 (1987). The analogy has been made between a corporation's articles of incorporation (the Declaration) and its by-laws (the Constitution). See Gary T. Amos, *A Limited National Congress: The Law of Nature and Constitutional Limitations*, 7 J. CHRISTIAN JURISPRUDENCE 99 (1987). For a critical perspective, see Lee J. Strang, *Originalism, the Declaration of Independence, and the Constitution: A Unique Role in Constitutional Interpretation?*, 111 PENN STATE L. REV. 413 (2006).

an acknowledgment of God via the Declaration’s confessed “reliance on Divine Providence” and appeals “to the Supreme Judge of the world.”<sup>74</sup>

## 2.5. Current symbolic acknowledgments of religion: A sampler

The United States retains a host of reminders of its highly religious history.<sup>75</sup> Congress continues<sup>76</sup> to employ chaplains for both House<sup>77</sup> and Senate,<sup>78</sup> who open sessions of Congress with prayer.<sup>79</sup> The Supreme Court opens with the invocation of God.<sup>80</sup> Courtroom oaths end with the words, “So help me God,”<sup>81</sup> as do statutory oaths for federal judges,<sup>82</sup> court clerks,<sup>83</sup> and other elected officials.<sup>84</sup> The national motto proclaims, “In God we trust”<sup>85</sup> and is displayed on all U.S. coinage.<sup>86</sup> The national Pledge of Allegiance includes the words, “one nation, under God.”<sup>87</sup> The national anthem, adopted by statute, includes an entire verse about divine preservation of the nation.<sup>88</sup> By statute, the first Thursday in May is a national day of prayer.<sup>89</sup> Most U.S. presidents have issued proclamations with religious references.<sup>90</sup> Traditionally, presidents add the words, “So help me God,” to their oath of office,<sup>91</sup> and ministers to begin the inauguration ceremonies with prayer.<sup>92</sup>

<sup>74</sup> Daniel L. Dreisbach, *supra* note 69.

<sup>75</sup> “There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789.” *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984). Chief Justice Burger went on to discuss many of the examples we discuss here, *id.* at 675–678.

<sup>76</sup> See the history of congressional chaplains in *Marsh v. Chambers*, 463 U.S. 783 (1983) (finding the employment of chaplains by a state legislature constitutional).

<sup>77</sup> 2 U.S.C.S. § 84-2 (2009).

<sup>78</sup> 2 U.S.C.S. § 61d (2009).

<sup>79</sup> Epstein, *supra* note 14, at 2104–2105.

<sup>80</sup> “God save the United States and this honourable court.” See *Zorach v. Clauson*, 343 U.S. 306, 313 (1952) (citing this practice in support of the conclusion, “We are a religious people whose institutions presuppose a Supreme Being”).

<sup>81</sup> See *Zorach v. Clauson*, 343 U.S. 306, 313 (1952); U.S. JUDICIAL CENTER, BENCHBOOK FOR U.S. DISTRICT COURT JUDGES 221–227 (4th ed. 2000).

<sup>82</sup> 28 U.S.C.S. § 453 (2009) (judges and magistrates).

<sup>83</sup> 28 U.S.C.S. § 951 (2009).

<sup>84</sup> 5 U.S.C.S. § 3331 (2009) (federal elected or appointed officials other than the president).

<sup>85</sup> 36 U.S.C.S. § 302 (2009). Upheld against constitutional challenges in *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970), *Gaylor v United States*, 74 F3d 214 (D. Colo. 1996), and *Newdow v. Cong. of the United States*, 435 F. Supp. 2d 1066 (E.D. Cal. 2006).

<sup>86</sup> 31 U.S.C.S. § 5112 (d) (1) (2009), 31 U.S.C.S. § 5114 (b) (2009).

<sup>87</sup> 4 U.S.C.S. § 4 (2009). The constitutionality of this statement has been litigated in the circuit courts, with a split of opinion. *Sherman v. Community Consolidated School Dist. 21*, 980 F.2d 437 (7th Cir. 1992) upheld the pledge’s constitutionality; *Newdow v. U.S. Congress*, 328 F.3d 466 (9th Cir. 2002) struck it down. *Newdow* was reversed on appeal to the Supreme Court on standing issues. *Elk Grove Unified School District v. Newdow*, 542 US 1, 52–53 (2003). The Supreme Court has not resolved the substantive question.

<sup>88</sup> 36 U.S.C.S. § 301 (2009). See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 322–323 (2000) (Rehnquist, C.J., dissenting) (suggesting that the national anthem’s final verse is as religious as the prayer at issue in the case).

<sup>89</sup> 36 U.S.C.S. § 119 (2009).

<sup>90</sup> See Epstein, *supra* note 14, at 2113–2114; *Lynch v. Donnelly*, 465 U.S. 668, 675–676 (1984).

<sup>91</sup> Epstein, *supra* note 14, at 2110–2111.

<sup>92</sup> *Id.* at 2106–2109.

Religious practices also permeate Australia's legal traditions. Religion is still taught in Australia's public schools, and the Bible is still present in every court of the land. Furthermore, prayers are conducted prior to opening proceedings at both state and federal parliaments. Standing orders for the House and Senate determine that the speaker must read a prayer for Parliament<sup>93</sup> followed by the Lord's Prayer before calling for the first item of business.<sup>94</sup> The governor-general,<sup>95</sup> who is authorized to exercise the executive power given by the Constitution as the Queen's representative,<sup>96</sup> swears allegiance to the Queen under section 42 of the Constitution, binding himself to the principles expressed in the Queen's oaths of office.<sup>97</sup> These oaths include significant Christian undertakings. Among other things, at her enthronement, "Queen Elizabeth II promised that she would 'to the utmost of [her] power maintain the Laws of God and the true profession of the Gospel.'"<sup>98</sup>

### 3. A tale of two nations' establishment clauses

Australia's establishment clause in section 116 of the Constitution currently receives a more narrow application than does the establishment clause of the First Amendment to the U.S. Constitution. First, while a nondiscriminatory law directed toward assisting religion may contravene the U.S. First Amendment, only a law that promotes the interest of one religious denomination above others would contravene Australia's section 116.<sup>99</sup> Second, while the U.S. Supreme Court has found constitutional violations when the effect of a law was to advance or inhibit religion, Australia's High Court has refused to find a violation of section 116 unless the legislation has the express purpose of establishing religion.<sup>100</sup> In both respects, the U.S. Court's approach evinces a much broader conception of the establishment clause and a conversely narrower conception of permissible government religious expression. However, historically, the common interpretation of the U.S. establishment clause looked much more like the current Australian law.

#### 3.1. Forgotten similarities: Federalism and the drafting of the establishment clauses

The fact that the U.S. and Australian courts currently see establishment so differently should not obscure some important similarities between their respective establishment

<sup>93</sup> "Almighty God, we humbly beseech Thee to vouchsafe Thy blessing upon this Parliament. Direct and prosper our deliberations to the advancement of Thy glory, and the true welfare of the people of Australia."

<sup>94</sup> Senate Standing Order 50, House Standing Order 38.

<sup>95</sup> Mitchell, *supra* note 11.

<sup>96</sup> Section 61 of the Australian Constitution gives the Queen executive power over Australia.

<sup>97</sup> Mitchell, *supra* note 11.

<sup>98</sup> *Id.*

<sup>99</sup> GABRIËL A. MOENS & R. D. LUMB, *THE CONSTITUTION OF THE COMMONWEALTH OF AUSTRALIA ANNOTATED* 372 (2001).

<sup>100</sup> See Gabriël A. Moens, *Church and State Relations in Australia and the United States: The Purpose and Effect Approaches and the Neutrality Principle*, 4 B.Y.U. L. REV. 787 (1996).

clauses. The first major similarity between the U.S. and Australian establishment clauses is that both were originally designed to prevent a national government from forcing religious conformity on the people. This could be considered a “federalism” parallel.

### 3.1.1. *Australia*

Historians have highlighted the fact that the Australian Constitution originated in the 1890s constitutional conventions, which featured strong competition between different interests, including clashes “between free-traders and protectionists, nationalists and imperialists, and big and small colonies.”<sup>101</sup> These differences of perspective on nation-building issues such as roads, rivers, railways, and revenue distribution fostered sharp disputes during the proceedings.

An overriding concern among the Australian framers was the implementation of a system that prevented monopolization of economic life by the new Commonwealth government. Consequently, within the Constitution the principle that “government, and particularly the national government, should be modest and unobtrusive was clearly evident. . . . The prevailing view of delegates to the 1890s Conventions . . . was that governments existed essentially to hold the ring for a laissez-faire economy: their job was to provide a stable and peaceful environment for the operation of free market forces.”<sup>102</sup>

This antimonopolistic attitude also guided the founding fathers as they drafted section 116, the part of the Constitution that deals with Australian religious life. The Australian Constitution originated in a social environment in which different branches of the Christian church competed strongly for cultural influence within the new nation. It is likely that a majority of the framers maintained at least a formal affiliation with major Protestant groups, although the views of Catholics and Jews were also included.<sup>103</sup> It is against this historical background that section 116 must be interpreted. This section, obviously inspired by the American First Amendment, states:

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 qualification for any office or public trust under the Commonwealth.

This section has several elements. It prohibits: the establishment of any religion (in other words, the creation of an official religion); the imposition of any requirement to engage in religious observance; any law prohibiting the free exercise of religion; and the imposition of religious qualifications for public office.

Whereas section 116 restricts only Australia’s Federal Parliament with respect to religion, the areas of federal legislative power are listed in sections 51 and 52 of the Australian Constitution. They grant legislative power over thirty-nine specific areas

<sup>101</sup> JOHN McMILLAN, GARETH EVANS & HADDON STORY, *AUSTRALIA’S CONSTITUTION: TIME FOR CHANGE?* 40 (1983).

<sup>102</sup> *Id.* at 47.

<sup>103</sup> See GEOFFREY BLAINY, *A SHORTER HISTORY OF AUSTRALIA*, ch. 11 (1994).

ranging from areas like marriage to quarantine to defense but not over religion. The legislative restriction in section 116 applies only to the legislation enacted under one of the Commonwealth's grants of legislative power. So far as the application of the guarantee is concerned, section 116 binds only the federal legislature.

In contrast to the American legal doctrine of incorporation, section 116 does not apply to the six Australian states<sup>104</sup> (although the High Court held in *Kruger v. Commonwealth*<sup>105</sup> that section 116 applies to the territories when the Commonwealth exercises its section 122 "territories power").<sup>106</sup> An attempt to change this, via a referendum that would have made section 116 applicable to the states, failed in 1988.<sup>107</sup>

Since section 116 does not apply to the six Australian states, this provision does not prohibit state governments from enacting laws either restricting or establishing religion. Indeed, the Australian framers never intended to achieve a "true separation" between religion and state at all levels of government. Instead, their intention was simply to reserve the power to make laws with respect to religion to the states.<sup>108</sup> As commented by Patrick Higgins in the 1898 convention debates:

I want to leave that power with the state; I will not disturb that power; . . . I object to giving to the Federation of Australia a tyrannous and overriding power over the whole of the people of Australia as to what day they shall observe for religious reasons and what day they shall not observe for that purpose.<sup>109</sup>

Since section 116 operates only as a fetter upon the exercise of federal legislative power, this raises the important question whether section 116 applies to executive and administrative acts of the federal government.<sup>110</sup> Commenting on the establishment of religion clause, Chief Justice Garfield Barwick argued that even though section 116 is directed at the legislative power of the Commonwealth, if a federal executive act comes "within the ambit of the authority conferred by the statute, and does amount to the establishment of religion, the statute which supports it will most probably be a statute for establishing a religion and therefore void as offending § 116."<sup>111</sup>

<sup>104</sup> Moens, *supra* note 100, at 788.

<sup>105</sup> (1997) 190 CLR 1.

<sup>106</sup> Australian Constitution, section 122: "The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit."

<sup>107</sup> Reid Mortensen, *The Unfinished Experiment: A Report on Religious Freedom in Australia*, 21 EMORY INT'L L. REV. 167, 177 (2007).

<sup>108</sup> Jared Clements, *Section 116 of the Constitution and the jurisprudential pillars of neutrality and action-belief dichotomy*, 11 INT'L TRADE & BUSINESS L. REV. 236, 239 (2008).

<sup>109</sup> 5 OFFICIAL RECORD OF THE DEBATES OF THE AUSTRALASIAN FEDERAL CONVENTION 1736 (1898) (March 2, 1898), *quoted in* Clements, *supra* note 108, at 239.

<sup>110</sup> Moens, *supra* note 100, at 788.

<sup>111</sup> Attorney-General of Victoria *ex rel. Black v Commonwealth* (DOGS case), (1981) 146 CLR 559, 551. Although this statement has been made in the context of the establishment clause, "there appears no reason why his observation should not equally apply to the free exercise guarantee of § 116." Moens, *supra* note 100, at 788.

### 3.1.2. *The United States*

The interests behind the First Amendment to the U.S. Constitution were similar to those that animated the drafters of Australia's section 116. After the U.S. Constitution was drafted in the Philadelphia Convention of 1787, the Constitution was sent to the states for ratification. The federalists, supporters of the Constitution, did not believe that a bill of rights was necessary or desirable; since the federal government had only the powers delegated to it, such a bill would be a redundancy at best.<sup>112</sup> The federal government had no delegated authority to legislate in regard to religion, so there was no need for concern.<sup>113</sup> Still, the states, suspicious of a federal government encroaching on their rights, ratified the Constitution with the demand that a bill of rights would be amended to the Constitution as an additional safeguard against federal usurpation of power, and the bill of rights was drafted to keep the bargain.<sup>114</sup> The First Amendment deals with religion by providing, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

There are two important points here. First, like the Australian Constitution's section 116, the American First Amendment was originally a limit on federal power, one that seemed virtually redundant because the Constitution had not delegated Congress any power over religion anyway.<sup>115</sup> Second, also like the Australian Constitution's section 116, the American First Amendment was originally a limit on federal power only, allowing the states to continue to deal with religion as they saw fit.<sup>116</sup> Those states that already had religious establishments kept them for as long as they wanted them.<sup>117</sup>

<sup>112</sup> FORREST McDONALD, *E PLURIBUS UNUM* 316–317 (1965); Thomas B. McAfee, *The Federal System as Bill of Rights: Original Understandings, Modern Misreadings*, 43 VILLANOVA L. REV. 17, 77–97 (1998); Lael Daniel Weinberger, *Enforcing the Bill of Rights in the United States*, in JURISPRUDENCE OF LIBERTY (Suri Ratnapala & Gabriël A. Moens eds., 2011).

<sup>113</sup> Douglas G. Smith, *The Establishment Clause: Corollary of Eighteenth-Century Corporate Law?*, 98 NW. U. L. REV. 239, 271–272 (2003); McAfee, *supra* note 112, at 94.

<sup>114</sup> Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991); McAfee, *supra* note 112, at 77–97; McDONALD, *supra* note 112, at 351–352, 367. See also the historical summary in *Wallace v. Jaffree*, 472 U.S. 38, 91–114 (Rehnquist, J., dissenting).

<sup>115</sup> Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 321 (1986).

<sup>116</sup> Amar, *supra* note 114, at 1158–1159; Paulsen, *supra* note 115, at 321–323.

<sup>117</sup> Wilson, *supra* note 39; Paulsen, *supra* note 115, at 320–321; Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105 (2003); Kidd, *supra* note 33, at 1019–1021, 1024–1025. Following independence, "six states either upheld religious establishments in practice . . . or had constitutional provisions permitting non-preferential establishment." *Id.* at 1019–1020; and see Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1436–1437 (1990). The states remained free to pass their own establishment clause analogues, as many eventually did. G. Alan Tarr, *Church and State in the States*, 64 WASH. L. REV. 73 (1989); see also Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEXAS L. REV. 7, 31–33 (2008).

That, of course, has changed since the First Amendment has been “incorporated” against the states by judicial interpretation of the Fourteenth Amendment.<sup>118</sup>

### 3.2. What is a religious establishment?

It may be readily conceded that, historically, there was a federalism parallel between the U.S. and Australian establishment clauses, without actually considering the larger issue: What *sort* of national establishment was to be prohibited? What exactly does it mean to “establish” a “religion”? This is where Australia’s High Court most clearly parted ways with the U.S. approach in the *DOGS* case—at least, parted ways with the modern U.S. approach. Really, the discord is a matter of timing. The American courts today take a different approach from that of Australia, but American jurists in the eighteenth and nineteenth centuries were closer to the view of establishment that Australia’s High Court expressed in 1981. Let us then examine in a bit more detail the Australian and American answers to the question, “What is ‘establishment’?”

#### 3.2.1. Australia’s answer

In their authoritative commentary on the Constitution, Quick and Garran elucidated the purpose and effect of the Australian clause:

By the establishment of religion is 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. It is not intended to prohibit the Federal Government from recognizing religion or religious worship.<sup>119</sup>

This would dispel any claims that the Australian Constitution established secularism by virtue of section 116. Quick and Garran further elaborated upon the implications of section 116 to Christianity:

The Christian religion is . . . recognised as a part of the common law. There is abundant authority for saying that Christianity is part and parcel of the law of the land. . . . Consequently the fundamental principles of the Christian religion will continue to be respected, although not enforced by Federal legislation. For example, the Federal Parliament will have to provide for the administration of oaths in legal proceedings, and there is nothing to prevent it from enabling an oath to be taken, as at common law, on the sanctity of the Holy Gospel.<sup>120</sup>

Section 116 was drafted with careful consideration of the American example. During the Australian constitutional convention, it was noted that in America, Christianity continued to be a major influence in federal legislation regardless of the First Amendment. The example was given that federal legislation relating to Sunday observance had been enacted in America simply on the basis that America

<sup>118</sup> *Everson v. Board of Education*, 330 U.S. 1, 8 (1947). For an account of the incorporation of the religion clauses, see Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 479–484 (1991). For critiques of incorporation of the establishment clause, see Amar, *supra* note 114; Paulsen, *supra* note 115; *Elk Grove Unified School District v. Newdow*, 542 US 1, 49–51 (2003) (Thomas, J., concurring in judgment).

<sup>119</sup> QUICK & GARRAN, *supra* note 62, at 952.

<sup>120</sup> *Id.*

was a Christian nation.<sup>121</sup> This enactment was in spite of the fact that there was no Constitutional recognition of America as a Christian nation, with no mention of God, let alone Christianity, in the American Constitution. The Australian framers feared that if “such Federal legislation could be founded on a Constitution which contained no reference whatever to the Almighty . . . [it would be very likely] that the Federal Parliament might, owing to the recital in the preamble, be held to possess power with respect to religion”<sup>122</sup> in the absence of a provision to the contrary.

Recognizing the potential for exploitation of the new federal system by individual religious bodies, section 116 guards against any individual religious body attempting to establish dominance by government power. For instance, it would prohibit a situation in which members of one denomination might dominate Federal Parliament and thereby pass legislation to establish their own body as the national church, or where such a group would introduce religious tests favoring admission of individuals from their own body to the Commonwealth bureaucracy.

On the other hand, the Australian Constitution itself expressly recognizes the legitimacy of religion in the public square when, in its preamble, it declares that the Australian people are “humbly relying on the blessings of Almighty God.” It is, therefore, erroneous, although increasingly popular, to assert that the establishment clause in the Australian Constitution was aimed at enshrining secularism. Far from seeking to banish religion from Australian government and society, its constitutional framers intended a *laissez-faire* environment that ensured no particular religious body would enjoy unfair advantage on account of federal government endorsement. An accompanying benefit is that section 116 also protects religious bodies in Australia against unwanted intrusions of the federal government.

Thus the inclusion of section 116 was aimed at establishing a limitation on the powers of Australia’s Commonwealth Parliament to legislate with respect to religion. This was expressed by the High Court in the *Jehovah’s Witnesses Case* in 1943, where Chief Justice John Greig Latham stated: “The prohibition in § 116 operates not only to protect the freedom of religion, but also to protect the right of a man to have no religion. No Federal law can impose any religious observance.”<sup>123</sup>

The main object of this guarantee is, therefore, to preserve individual liberties. This is quite different from expressly prohibiting the promotion of Christianity by Parliament. Indeed, this section could not be used to prohibit federal laws to assist the practice of religion or to provide financial support to religious schools. To fall afoul of section 116 the Commonwealth Parliament would have to go so far as to establish, effectively, an official religious denomination or to value one denomination over the others. In this sense, what the guarantee really means is that the Commonwealth Parliament is not authorized to set up a state religion on the lines of the Church of England. This is after all an antiestablishment clause. But section 116 does not inhibit the federal government from identifying itself with the religious impulse, as such, or from authorizing religious practices where all could agree on their desirability.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Adelaide Company of Jehovah’s Witnesses v. Commonwealth* (1943) 67 C.L.R. 116, 123.

In *Harkianakis v. Skalkos* (1997),<sup>124</sup> however, Justice John Dunford of the New South Wales Supreme Court regrettably suggested that section 116 makes religion entirely “irrelevant” to government and politics in Australia. In *Harkianiks*, a defamation case, the defendants contended that allegedly defamatory matters were published “pursuant to an implied or express right of freedom of speech concerning religious matters.”<sup>125</sup> Justice Dunford, who heard the application, considered that the defense had “no prospect of success,” arguing, among other things, that section 116 has “nothing to do with the essential nature” of the representative system of government established by the Australian Constitution. Rather, he said, section 116 “excludes religion from the system of government.”

Justice Dunford’s reasoning in *Harkianakis* regarded any religious considerations as absolutely irrelevant to the system of representative government prescribed by the Australian Constitution. As Nicholas Aroney has noted, Justice Dunford “adopted a particular perspective about the relationship between religion and politics which would exclude religious speech entirely from political discussion—and in this sense, to privilege secularism over religion.”<sup>126</sup> Of course, such a conclusion has never been supported by the High Court’s decisions concerning the scope of section 116. On the contrary, as noted by Aroney,

the High Court has very explicitly affirmed that the non-establishment clause does not prohibit governmental assistance being given to religious bodies, and it certainly has never held that s. 116 somehow prohibits the enactment of federal laws or the execution of government policies that are supported, either in whole or in part, on the basis of religious considerations or reasons. . . . In the United States, the equivalent provision contained in the First Amendment has been interpreted, at times, to prohibit virtually all forms of state assistance; but in Australia, state aid to religious schools has been upheld. To suggest that the non-establishment principle makes religious considerations entirely irrelevant to federal law-making and policy-formation is simply beyond the pale—particularly in Australia, but even in the United States.<sup>127</sup>

### 3.2.2. *America’s Answer*

While the current U.S. Supreme Court has had a much more restrictive interpretation than the Australian High Court of their respective establishment clauses, the differences diminish if we move the American clock back. The U.S. Supreme Court did not construe the establishment clause for more than a century after its adoption,<sup>128</sup> so we cannot say there was a time when that Court construed the First Amendment in the

<sup>124</sup> 47 N.S.W.L.R. 302.

<sup>125</sup> *Harkianakis* (1999) 47 N.S.W.L.R. 302, 303. The controversy involved actions for defamation and contempt of court initiated by the Archbishop of the Greek Orthodox Archdiocese of Australia, regarding articles published in two Greek language newspapers that contained imputations concerning the plaintiff’s personal conduct and fitness of ecclesiastical office.

<sup>126</sup> Nicholas Aroney, *The Constitutional (In)Validity of Religious Vilification Laws: Implications for their Interpretation*, 34 FEDERAL L. REV. 287, 302 (2006).

<sup>127</sup> *Id.* at 301–02.

<sup>128</sup> See KATHRYN PAGE CAMP, *IN GOD WE TRUST: HOW THE SUPREME COURT’S FIRST AMENDMENT DECISIONS AFFECT ORGANIZED RELIGION* 47–64 (2006).

same manner as Australia’s High Court construed section 116. We can, however, observe that the conduct and commentaries of framers and early legal scholars suggest that many in the eighteenth and nineteenth centuries interpreted the federal prohibition of religious establishment as more nearly resembling the current Australian precedents than the current U.S. case law.

In the early Republic, the establishment clause of the U.S. Constitution was widely viewed as a limit on the federal government’s power to establish a national religion<sup>129</sup> or disestablish a state’s establishment.<sup>130</sup> To cite just a few examples,<sup>131</sup> James Madison seemed to think of it as simply prohibiting a national church or denomination like the Church of England, based on both his original drafts of the amendment that he introduced into Congress and on his personal comments written many years later.<sup>132</sup> No official records of the debates are extant; however, the unofficial compilation of the debates records Madison’s belief that “the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform.”<sup>133</sup>

Early legal commentators seemed to agree that the national church issue was at the heart of concern.<sup>134</sup> For instance, the influential nineteenth-century law professor and Supreme Court Justice Joseph Story stated that “the real object of the amendment was . . . to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government.”<sup>135</sup> The influential legal commentator St. George Tucker explicitly put the establishment clause in the context of a repudiation of the Church of England’s privileged position as a national denomination.<sup>136</sup>

Perhaps the most interesting angle on this issue is that of corporate-law terms of art.<sup>137</sup> Establishment was a technical term of eighteenth-century corporate law, referring to the granting of a charter, special rights, or privileges.<sup>138</sup> If the term “establishment” in the First Amendment was understood in this sense, then the establishment clause would merely “prohibit [ ] the federal government from issuing a corporate charter to a particular religion or from regulating the states and their

<sup>129</sup> HAMBURGER, *supra* note 6, at 89–107.

<sup>130</sup> Paulsen, *supra* note 115, at 321–323; Eric R. Claeys, *Justice Scalia and the Religion Clauses: A Comment on Professor Epps*, 21 WASH. U. J.L. & POL’Y 349, 351–354 (2006).

<sup>131</sup> See also HAMBURGER, *supra* note 6.

<sup>132</sup> HUTSON, *supra* note 25, at 78.

<sup>133</sup> House of Representatives, August 15, 1789, in 1 ANNALS OF CONGRESS 758 (1834), available in 5 THE FOUNDERS’ CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987), Amendment I (Religion), Document 53, online at [http://press-pubs.uchicago.edu/founders/documents/amendI\\_religions53.html](http://press-pubs.uchicago.edu/founders/documents/amendI_religions53.html).

<sup>134</sup> See Smith, *supra* note 113, at 291–292.

<sup>135</sup> 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1871 (Boston, 1833).

<sup>136</sup> ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA (1803), 1:App. 296–97, 2:App. 3–11, in 5 THE FOUNDERS’ CONSTITUTION, *supra* note 133, Amendment I (Religion), Document 59, online at [http://press-pubs.uchicago.edu/founders/documents/amendI\\_religions59.html](http://press-pubs.uchicago.edu/founders/documents/amendI_religions59.html).

<sup>137</sup> Smith, *supra* note 113.

<sup>138</sup> *Id.* at 243–256, 74–75.

power to grant such corporate charters.”<sup>139</sup> Such an interpretation has more than a little potential for making sense of attitudes in the late eighteenth and early nineteenth centuries.

Certainly, the amendment did prohibit such sectarian establishments. That is not controversial.<sup>140</sup> Nor is it controversial that such a prohibition was at the very heart of the amendment. The controversial question is whether the amendment prohibited anything else.<sup>141</sup> The answer in the early federal period seems to have been, not much. Indeed, as Samuel Huntington pointed out,

The Framers of the American Constitution prohibited an established national church in order to limit the power of government and to protect and strengthen religion. The “separation of church and state” is the corollary to the identity of religion and society. Its purpose . . . was not to establish freedom *from* religion but to establish freedom *for* religion.<sup>142</sup>

The first federal Congress attended church after Washington’s inauguration; this was the same Congress that drafted and approved the Bill of Rights.<sup>143</sup> Three days before approving the final draft of the Bill of Rights, Congress authorized the appointment of paid chaplains.<sup>144</sup> While debating the Bill of Rights, Congress passed legislation enacting the Northwest Ordinance, with its assurance that “religion, morality and knowledge” will “forever be encouraged” through the schools.<sup>145</sup> After the bill was approved, this Congress voted to request a presidential proclamation of a day of “thanksgiving and prayer,” a request with which President Washington readily complied.<sup>146</sup> Presidents Washington and Adams spoke frequently of the necessity of religion for a strong republic and proclaimed days of fasting and prayer.<sup>147</sup> Thomas Jefferson, generally perceived as the most freethinking founding father,<sup>148</sup> did not issue presidential proclamations of days of prayer; however, in other respects, he outdid his predecessors by allowing executive-branch buildings (the War Office and the Treasury) to be used for church services.<sup>149</sup> He personally attended church services in the House of Representatives, where members of the Marine Corps Band (under

<sup>139</sup> *Id.* at 241.

<sup>140</sup> *Everson v. Board of Education*, 330 U.S. 1, 15 (1947) (“The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church”).

<sup>141</sup> This could be viewed as another way of asking the question posed by Kent Greenawalt, namely, what does “respecting” (in the phrase, “respecting an establishment of religion”) mean? Kent Greenawalt, *Common Sense About Original and Subsequent Understandings of the Religion Clauses*, 8 U. PENN. J. CONST. L. 479, 484–485 (2006). Does it simply mean “for” establishing religion? If it means something broader than that, how close to “establishing” religion could Congress get before the law would be “respecting an establishment”? For more on the term “respecting,” see Smith, *supra* note 113, at 273–275, 293.

<sup>142</sup> SAMUEL P. HUNTINGTON, *WHO ARE WE? AMERICA’S GREAT DEBATE* 85 (2004).

<sup>143</sup> HUTSON, *supra* note 25, at 79.

<sup>144</sup> See *Marsh v. Chambers*, 463 U.S. 783, 787–789 (1983).

<sup>145</sup> Northwest Ordinance, Art. 2, July 13, 1787, in *DOCUMENTS OF AMERICAN HISTORY*, *supra* note 19, at 131.

<sup>146</sup> HUTSON, *supra* note 25, at 79–80. Washington’s Proclamation: A National Thanksgiving, Oct. 3, 1789, is in 5 *THE FOUNDERS’ CONSTITUTION*, *supra* note 133, Amendment I (Religion), Document 54, available at [http://press-pubs.uchicago.edu/founders/documents/amendI\\_religions54.html](http://press-pubs.uchicago.edu/founders/documents/amendI_religions54.html).

<sup>147</sup> HUTSON, *supra* note 25, at 80–81.

<sup>148</sup> For a discussion of Jefferson’s practices, see Dreisbach, *supra* note 6.

<sup>149</sup> HUTSON, *supra* note 25, at 89.

direct presidential direction) participated in the music.<sup>150</sup> The judiciary was not left out either—church services were also held in the original Supreme Court chambers.<sup>151</sup>

These historical actions have become almost canonical components of the argument for the critics of strict separation.<sup>152</sup> When they are paraded out to make one or another of several arguments based on history, it is often objected that history is not a clear and definitive source for constitutional interpretation. It is certainly true that history can be misused; for instance, it obviously does not follow that because George Washington and Thomas Jefferson did something (for example, allowed religious groups to use government buildings), it must be constitutionally permissible. No one framer could possibly be authoritative about the interpretation or intention of a legislative act drafted and enacted by many.<sup>153</sup> On the other hand, it is certainly going too far in the other direction to suggest that we cannot learn anything about the original public meaning from history. For instance, the actions of the entire first Congress can hardly be considered entirely *irrelevant*.<sup>154</sup>

The historical anecdotes from the founding era do play a role, as cumulative evidence of the way that the amendment was commonly understood when it was enacted.<sup>155</sup> More precisely, we can say that the records of Congress and the writings of the early legal commentators suggest a major reason for the establishment clause, while the public religious actions of the first few presidents and congresses constitute evidence of what was *not* the publicly perceived reason for the establishment clause. The evidence suggests that the prohibition of a national church was a major reason for the establishment clause, while a general prohibition of public expressions of religiosity was not. Insofar as this was the case, the parallel with the Australian establishment clause, as interpreted by the High Court, is striking. The Australian and American drafters did not intend to undermine the religious, and specifically Christian, heritage of their nations. The U.S. legal system has, in many ways, turned away from this historic approach, while the Australian legal system still more closely adheres to it.

<sup>150</sup> HUTSON, *supra* note 25, at 85, 89.

<sup>151</sup> HUTSON, *supra* note 25, at 91–92.

<sup>152</sup> See, e.g., *Marsh v. Chambers*, 463 U.S. 783 (1983); *Wallace v. Jaffree*, 72 U.S. 38, 91–114 (Rehnquist, J., dissenting).

<sup>153</sup> See Kidd, *supra* note 33, at 1008 (“it is impossible to recover a single position which adequately describes the views of the founders”).

<sup>154</sup> It seems at least *more reasonable* to believe that we have something to learn about the original meaning of the Constitution from its drafters than the other way around. Thus, the statement in *Marsh v. Chambers*, “It can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a chaplain for each House and also voted to approve the draft of the First Amendment for submission to the states, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable,” *Marsh v. Chambers*, 463 U.S. 783, 790 (1983), strikes us as at least more plausible than Justice Brennan’s dissenting suggestion that the entire Congress failed to understand its legislation. *Marsh v. Chambers*, 463 U.S. 783, 814–815 (1983) (Brennan, J., dissenting). See also Greenawalt, *supra* note 141, at 497–499.

<sup>155</sup> For one of the most thorough recent discussions of the philosophy of original public meaning as a legal interpretive tool, see Lawrence B. Solum, “Semantic Originalism,” *Illinois Public Law Research Paper No. 07-24*, Draft Version, November 22, 2008, available at <http://ssrn.com/abstract=1120244>, and Lawrence B. Solum, “A Reader’s Guide to Semantic Originalism and a Reply to Professor Griffin,” *Illinois Public Law Research Paper No. 08-12*, available at <http://ssrn.com/abstract=1130665>.

### 3.3. Modern application: The divergence of the Australian and American approaches

In 1981, Australia's High Court offered its first (and, to date, only) decision construing Australia's establishment clause in the so-called *DOGS* case.<sup>156</sup> The majority emphasized the differences between the U.S. and Australian establishment clauses and refused to follow the lead of the U.S. courts.

The *DOGS* case involved the validity of federal financial support for religious schools by means of a series of grants to the states. Most of the private schools benefiting from this aid were religious schools, and the Australian Council for Defence of Government Schools (*DOGS*) challenged the grants, arguing that government funding of church schools amounted to an "establishment" of religion. The argument was rejected in a six-to-one decision. The High Court majority held that section 116 does not prohibit federal laws from assisting the practice of religion or providing financial support to religious schools on a nondiscriminatory basis. The Court made it clear that the federal government can indirectly give benefits to religion as long as the purpose is not to establish a state church or religion. To fall afoul of section 116, the Commonwealth would have to go so far as to establish effectively an official religion or to value one particular denomination over all the others.

If the establishment clause were to be read so broadly as to require "strict separation" between church and state,<sup>157</sup> then it is hard to see what room is left for the operation of traditional practices such as the coronation oath and the opening prayers at the nation's parliaments, not to mention the explicit acknowledgment of "Almighty God" in the preamble of the Australian Constitution. Justice Ronald Wilson contended that a "narrow notion of establishment" is necessary, not only to preserve these traditional practices and legal provisions but to make sense of the other legal provisions that are contained in section 116.<sup>158</sup>

Justice Anthony Mason took a similar view, suggesting that establishment required only "the concession to one church of favours, titles and advantages [that] must be of so special a kind that it enables us to say that by virtue of the concession the religion has become established as a national institution, as, for example, by becoming the official religion of the State."<sup>159</sup> Justice Ninian Stephen concurred with him, noticing that the precise language of section 116 effectively precludes a wide interpretation of the word "establish." Justice Stephen said:

<sup>156</sup> *A-G (Vic) (ex rel Black) v. Commonwealth (DOGS Case)* (1981) 146 C.L.R. 559.

<sup>157</sup> Courts in the U.S. and Australia have, unfortunately, used the term "separation of church and state" as a shorthand way of referring to any religious activity that needs to be kept separate from the state. This is, not to put too fine a point on it, sloppy. Is a Ten Commandments monument a "church"? Is the reading of the Bible in a school classroom the intrusion of a church into the classroom? Are federal funds going to a denomination school to buy textbooks funds going to a church? What about a prayer by a chaplain in Congress or in Parliament? Some of these involve churches, and some do not. Whether the phrase, "separation of church and state," is applicable ought to depend on what practices are at issue.

<sup>158</sup> *A-G (Vic) (ex rel Black) v. Commonwealth (DOGS Case)* (1981) 146 C.L.R. 559, at 653 (opinion of Wilson, J.).

<sup>159</sup> *Id.* at 612 (opinion of Mason, J.).

The very form of § 116, consisting of four distinct and express restrictions upon legislative power . . . cannot readily be viewed as the repository of some broad statement of principle concerning the separation of church and state. . . . On the contrary by fixing upon four specific restrictions of legislative power, the form of the section gives no encouragement to the undertaking of any such distillation.<sup>160</sup>

Justice Harry Gibbs concurred with the majority opinion, writing that the establishment clause requires that the Commonwealth “not make any law for conferring on a particular religion or religious body the position of a state (or national) religion or church.”<sup>161</sup> According to Gibbs, “the natural meaning of the phrase *establish any religion* is, as it was in 1900, to constitute a particular religion or religious body as a state religion or state church.”<sup>162</sup>

Chief Justice Barwick agreed with Gibbs that the word “establishment,” “involves the identification of the religion with the civil authority so as to involve the citizens in a duty to maintain it and the obligation of, in this case, the Commonwealth to patronise, protect, and promote the established religion.” In other words, “establishing religion involves its adoption as an institution of the Commonwealth, part of the Commonwealth ‘establishment.’”<sup>163</sup>

Justice Lionel Keith Murphy was the only judge to disagree. He based his dissent mainly on U.S. Supreme Court decisions that have required a “wall of separation” between church and state. He explicitly referred in that case to the ruling of Justice Hugo Black in the first modern establishment clause case, *Everson v. Board of Education*,<sup>164</sup> where he wrote: “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.”<sup>165</sup> This was premised on Black’s view of the First Amendment: “The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach.”<sup>166</sup> Relying on the reasoning in *Everson*, Justice Murphy decided to interpret section 116 of the Australian Constitution as equally prohibiting any financial assistance by the federal government to religious schools.

By contrast, the majority in the *DOGS* case opted not to consider those precedents relevant for Australia. Given the differences in wording between the American and Australian constitutional guarantees (“Congress shall make no law respecting an establishment of religion” as against “the Commonwealth shall not make any law for establishing any religion”), the majority held that only a law *for* the establishment of religion violates section 116. As Chief Justice Barwick pointed out:

[B]ecause the whole expression is “*for* establishing any religion,” the law to satisfy the description must have that objective as its express and, as I think, single purpose. Indeed, a law establishing

<sup>160</sup> *Id.* at 609 (opinion of Stephen, J.).

<sup>161</sup> *Id.* at 604 (opinion of Gibbs, J.).

<sup>162</sup> *Id.* at 597 (opinion of Gibbs, J.).

<sup>163</sup> *Id.* at 582 (opinion of Barwick, C.J.).

<sup>164</sup> 330 U.S. 1 (1947).

<sup>165</sup> *Id.* at 16.

<sup>166</sup> *Id.* at 18.

a religion could scarcely do so as an incident of some other and principal objective. In my opinion, a law which establishes a religion will inevitably do so expressly and directly and not, as it were constructively.<sup>167</sup>

In contrast to Chief Justice Barwick's opinion, the U.S. Supreme Court has long employed a test that views purpose as just one factor in determining whether a law or other government act "establishes" religion. Per the well-known *Lemon* test, a law must, "First . . . have a secular legislative purpose; second . . . [a] principal or primary effect . . . that neither advances nor inhibits religion, and finally, must not foster an excessive government entanglement with religion."<sup>168</sup> The clear import of the *Lemon* test's "effect" prong is that even where there was no religious purpose, government action—for instance, a religious display—could be unconstitutional simply because, to an outside observer, the government appeared to be siding with a religious viewpoint. This is essentially what Justice Sandra Day O'Connor tried to make explicit with her "endorsement test."<sup>169</sup> This test asked whether a reasonable observer would interpret any such conduct as a government endorsement of religion. If so, the conduct had a religious effect (and this can be the case regardless of the conduct's purpose)<sup>170</sup> and was, therefore, unconstitutional.<sup>171</sup>

The U.S. Supreme Court has differed from Chief Justice Barwick's view that a law establishing religion will "inevitably do so expressly and directly" because the U.S. Court has employed a more expansive view of the "establishment of religion." In enforcing the Australian establishment clause, the Australian court has looked for organized religion, religious denominations, or formalized religious dogmas or sectarian practices. If any of these are established by law for the whole nation, then there is a violation of the establishment clause. Clearly, if a religion has to be imposed upon everyone before it can become an establishment, then it would indeed be difficult to do this "constructively."

American courts have been willing to find establishment clause violations with far less serious instances of religiosity. There need not be an imposition of a doctrine or a practice on the population by a general law. Religious-display cases are the classic example, where Ten Commandments displays<sup>172</sup> or crèches,<sup>173</sup> for example, have been found unconstitutional. A display may give offense, but it does not coerce.<sup>174</sup> No one forces passers-by to venerate or even look at the display. There is no legal coercion of

<sup>167</sup> *A-G (Vic) (ex rel Black) v Commonwealth (DOGS Case)* (1981) 146 CLR 559, at 559 (opinion of Barwick, C.J.).

<sup>168</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612–614 (1971) (internal citations and quotation marks omitted).

<sup>169</sup> See *Lynch v. Donnelly*, 465 U.S. 668, 687–688 (1984) (O'Connor, J., concurring in judgment); *Allegheny County v. ACLU*, 492 U.S. 573, 624–625 (1989) (O'Connor, J., concurring in judgment); see also *Allegheny County v. ACLU*, 492 U.S. 573, 597 (1989) and *ACLU v. Schundler*, 104 F.3d 1435, 1444–1445 (3d Cir. 1997) (applying the Endorsement Test).

<sup>170</sup> *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring in judgment).

<sup>171</sup> See *McCreary County v. ACLU*, 545 U.S. 844 (2005); *Adland v. Russ*, 307 F.3d 471, 484–487 (6th Cir. 2002).

<sup>172</sup> See, e.g., *Stone v. Graham*, 449 U.S. 39 (1980), *McCreary County v. ACLU*, 545 U.S. 844 (2005).

<sup>173</sup> See, e.g., *Allegheny County v. ACLU*, 492 U.S. 573 (1989).

<sup>174</sup> *Books v. Elkhart County*, 401 F.3d 857, 869–870 (7th Cir. 2005) (Easterbrook, J., dissenting).

religion.<sup>175</sup> As a result, the displays are a far cry from what Chief Justice Barwick had in mind, an adoption of a religious institution into the Commonwealth's institutional establishment.<sup>176</sup>

The historical understanding of separation of church and state has unfortunately been obscured in the controversies over separation of religious practices from the civil sphere. The phrase "separation of church and state" has become almost synonymous with separation of religion from government, among both supporters and critics of the idea. Thus, when Michael Hogan at the University of Sydney offered a commentary on the relationship of modern American and Australian conceptions of establishment, his point was accurate as far as it goes but contained potential grounds for misunderstanding:

Australia does not have a legally entrenched principle, or even a vague set of conventions, of the separation of church and state. From the appointment of Rev. Samuel Marsden as one of the first magistrates in colonial New South Wales, to the adoption of explicit policies of state aid for denominational schools during the 1960s . . . Australia has had a very consistent tradition of cooperation between church and state. "Separation of church and state," along with "the separation of powers" or "pleading the Fifth," are phrases that we have learned from the US, and which merely serve to confuse once they are taken out of the context of the American Constitution.<sup>177</sup>

Hogan is correct on two counts. First, there is great danger in blindly copying ideas from one constitution and inserting them into another, no matter how similar the two documents appear. Second, the phrase "separation of church and state," as commonly employed by U.S. courts since 1947, is indeed foreign to the Australian experience. Yet at another level, as we have seen, both the U.S. and Australia do have common experiences in the form of religious heritage and constitutional values. And both do have an institutional separation of church and state. When that is recognized, then the supreme irony becomes evident: the clause so often viewed as separating religion from civil government was itself a consequence of religion's influence on government.<sup>178</sup> As we have argued, the prohibition of a state church was historically

<sup>175</sup> A good case has been made that real legal coercion is a more appropriate test for establishment clause cases. See *Elk Grove Unified School District v. Newdow*, 542 US 1, 52–53 (2003) (Thomas, J., concurring in judgment); *Van Orden v. Perry*, 545 US 677, 692–696 (2005) (Thomas, J., concurring in judgment); and see James A. Campbell, Note: *Newdow Calls for a New Day in Establishment Clause Jurisprudence: Justice Thomas's "Actual Legal Coercion" Standard Provides the Necessary Renovation*, 39 AKRON L. REV. 541 (2006). See also McConnell, *Establishment and Disestablishment*, *supra* note 117; Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986); *American Jewish Congress v. Chicago*, 827 F.2d 120, 128–140 (7th Cir. 1987) (Easterbrook, J., dissenting).

<sup>176</sup> *A-G (Vic) (ex rel Black) v. Commonwealth (DOGS Case)* (1981) 146 CLR 559 at 582 (opinion of Barwick, C.J.).

<sup>177</sup> Michael Hogan, *Separation of Church and State?*, AUSTRALIAN REVIEW OF PUBLIC AFFAIRS, <http://www.australianreview.net/digest/2001/05/hogan.html> (16 May 2001).

<sup>178</sup> Nicholas Tonti-Fillipini provides helpful perspective on the Reformation-era influence on the Australian Constitution:

Having come from a society where the king nationalised religion and made the church a department of state under parliamentary control . . . it is not surprising that the founders wanted a constitution which would allow maximum freedom of religion. Where religion is concerned, it

the core value of the establishment clause for both the United States and Australia. The state is not to control the church, and the church is not to control the state. This jurisdictional separation is essentially the doctrine of institutional separation of church and state propounded in the Reformation and developed by Reformed theologians thereafter. In this sense, both the First Amendment and Section 116 are actually theistic in their heritage in that they reflect this theological conception of society.<sup>179</sup>

## 4. Cultures of disbelief

Despite the historical record, and despite the confusing and confused state of establishment clause jurisprudence in the U.S.,<sup>180</sup> there are still those in Australia who prefer the American path. Why might Australia want to import modern American establishment clause jurisprudence?

### 4.1. Private religion and secular society

Although the role of the Christian religion in Australia's history is irrefutable, so, too, is the decline of Christianity's role in the country. Australia today is largely viewed as secular,<sup>181</sup> and many would suggest that Judeo-Christian principles should have no bearing upon the law. Christianity is almost never mentioned, much less promoted, in political and intellectual discourse. When it is mentioned among the country's public figures, Judeo-Christian values and traditions are often an object of criticism or contempt. Many Australians are now convinced that there should be no relationship between religious values and their country's legal system. Yet this road leads not just toward a rejection of the nation's historical heritage but also toward the rejection

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is the church that needs protection from the hubris of politicians . . . . The church did not impose religion upon England. England imposed its views on the church . . . .

Nicholas Tonti-Fillipini, *Religion in a Secular Society*, 52 *QUADRANT* 82, 83 (2008).

On the Reformation's influence on the American Constitution's establishment clause, see Robert Joseph Renaud & Lael Daniel Weinberger, *Spheres of Sovereignty: Church Autonomy Doctrine and the Theological Heritage of the Separation of Church and State*, 35 *N. KY. L. REV.* 67 (2008).

<sup>179</sup> John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 *NOTRE DAME L. REV.* 372 (1996); JOHN WITTE, JR., *REFORMATION OF RIGHTS* 277–319 (2007); Tonti-Fillipini, *supra* note 178, at 83; David S. Clark, *The Medieval Origins of Modern Legal Education: Between Church and State*, 35 *AM. J. COMP. L.* 653 (1987) (reviewing the medieval history of the tension between church and state); Renaud & Weinberger, *supra* note 178. In addition to the Reformation arguments about the structure of society, there was yet another “religious argument made by Baptists and others who condemned the contaminating effects upon Christianity of a state connection,” providing yet another link between separation of church and state and religion itself. Kidd, *supra* note 33, at 1025.

<sup>180</sup> Glendon & Yanes, *supra* note 118, at 478 (religion clause jurisprudence has become “a body of law that has been described on all sides, and even by Justices themselves, as unprincipled, incoherent, and unworkable”); McConnell, *Crossroads*, *supra* note 3, at 117–120 (establishment clause jurisprudence “a mess”); Phillip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 *CAL. L. REV.* 817, 839 (1984) (“first amendment religion law is a mess”); CARTER, *supra* note 1.

<sup>181</sup> See, for instance, a description of religion's “highly circumscribed” relevance to culture: Patrick O'Farrell, *The Cultural Ambivalence of Australian Religion*, in *AUSTRALIAN CULTURAL HISTORY* 8 (S.L. Goldberg & F.B. Smith eds., 1988).

of religious opinion in public discourse, which would be anything but authentic democracy.<sup>182</sup>

In the U.S., religious input into the public square is not exactly welcomed, either.<sup>183</sup> Notwithstanding the international reputation the United States possesses as a highly religious society, there is still very real pressure to avoid employing religion in anything more than a platitudinous manner.<sup>184</sup> That is, a politician may utter a platitude such as “God bless America” without creating too much controversy. However, if that politician lets it slip that his religious convictions affect his policy choices, he is then fair game for attack as some sort of religious zealot. Some have suggested that the American public square is generally hostile to religion; others would say that the problem is more that religion is devalued, viewed as a hobby that you should keep to yourself.<sup>185</sup>

Whereas the Western tradition of church-state separation and religious freedom is often traced back to the teaching of New Testament, particularly to Christ’s admonition to “render therefore unto Caesar the things which be Caesar’s, and unto God the things which be God’s,”<sup>186</sup> the current secular discourse rules out the religious premise that gave rise to that tradition in the first place. Thus religious beliefs and institutions are deemed as just one class among the many other factors and interests that should be treated with justice and fairness by the secular state. And yet, as Steven Smith points out,

The commitment to church-state separation and the derivative commitment to freedom of conscience arose in—and acquired their sense and their urgency from—a classical, Christian world view in which the spiritual and temporal were viewed as separate domains within God’s overarching order. In the prevailing modern framework, by contrast, the jurisdictional and religious problem has receded, and has been replaced by a problem of justice: the question is simply how a secular liberal state should treat those subject to its governance. But in that secular framework, the inherited commitments of church-state separation and to free exercise of religion lose their grounding, and their sense; indeed, there seems to be no very powerful reason to regard religion as a special category at all.<sup>187</sup>

The concept of a secular public square has achieved significant academic support as the “secular liberal state.”<sup>188</sup> The idea is that everyone ought to support their positions about law, politics, and public policy on nonreligious grounds.<sup>189</sup> This limitation of public debate to only “neutral” secular rationales is thought necessary to preserve civil discourse. Among the more notable recent proponents of some form of this secular view are the legal-political philosophers Bruce Ackerman and the late John Rawls.<sup>190</sup> It is suggested that metaphysical issues could not be resolved

<sup>182</sup> See Tonti-Fillipini, *supra* note 178, at 82–84.

<sup>183</sup> Frederick Mark Gedicks, *Public Life and Hostility to Religion*, 78 VIRGINIA L. REV. 671 (1992).

<sup>184</sup> CARTER, *supra* note 1, at 51–52.

<sup>185</sup> CARTER, *supra* note 1, at 51.

<sup>186</sup> Luke 20:25 (King James), and see Renaud & Weinberger, *supra* note 178, at 96–98.

<sup>187</sup> Steven D. Smith, *Discourse in the Dusk: The Twilight of Religious Freedom?*, 122 HARV. L. REV. 1869, 1887 (2009).

<sup>188</sup> Gedicks, *supra* note 183; PAUL HORWITZ, *THE AGNOSTIC AGE* 10–21 (2011).

<sup>189</sup> See CARTER, *supra* note 1, at 54–55; McConnell, *Crossroads*, *supra* note 3, at 122–125.

<sup>190</sup> JOHN RAWLS, *POLITICAL LIBERALISM* (2nd ed. 2005); BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980).

by discussion, since each person's personal philosophy was absolute for them.<sup>191</sup> Religion involves metaphysical beliefs. To have a civil and reasonable public square, then, it is argued that religion cannot be part of the discourse, for religion involves metaphysical beliefs and positions not capable of rational discussion.<sup>192</sup> Rawls thus says that we must "bypass" religion and try to have dialogue on matters of "overlapping consensus."<sup>193</sup> Ronald Dworkin articulated the same philosophy when he explained that the liberal state "must be neutral on . . . the question of the good life. . . . [P]olitical decisions must be, so far as is possible, independent of any particular conception of the good life."<sup>194</sup> The proponents of the neutral public square believe that it is possible to detach citizens from their religious convictions, and that their reasoning abilities would be capable of being exercised in a religiously neutral manner.<sup>195</sup>

#### 4.2. American jurisprudence and private religion

For supporters of a secular public square, it is easy to understand why modern U.S. establishment clause jurisprudence is appealing. The basic principle the U.S. Supreme Court has used in interpreting the establishment clause since 1947 has been *neutrality*. That the establishment clause requires neutrality was the one thing that all the judges could agree on in the first modern establishment decision.<sup>196</sup> Since then, neutrality has remained the "touchstone"<sup>197</sup> of establishment clause interpretation.<sup>198</sup> Justices of various commitments have professed adherence to the neutrality ideal.<sup>199</sup> Neutrality is a malleable concept<sup>200</sup>—which leads to the question, why then does it even matter?

It matters because neutrality is not a rule of law; it is articulated as a philosophical ideal that is basically compatible with the concept of a neutral, secular public

<sup>191</sup> See Gedicks, *supra* note 183; PHILLIP E. JOHNSON, *REASON IN THE BALANCE* 173–185 (1995); Smith, *supra* note 67, at 339–340.

<sup>192</sup> Johnson, *supra* note 191, at 173–185; William A. Galston, *Public Morality and Religion in the Liberal State*, 19 PS 807, 816 (1986).

<sup>193</sup> RAWLS, *supra* note 190, at 152. See also Edward B. Foley, *Political Liberalism and Establishment Clause Jurisprudence*, 43 CASE W. RES. L. REV. 963 (1993) (describing the application of Rawls's philosophy to the American establishment clause).

<sup>194</sup> Ronald Dworkin, *Liberalism*, in *PUBLIC AND PRIVATE MORALITY* 127 (Stuart Hampshire ed., 1978).

<sup>195</sup> CARTER, *supra* note 1, at 56.

<sup>196</sup> *Everson v. Board of Education*, 330 U.S. 1, 18 (1947) (majority opinion); *id.* at 24 (Jackson, J., dissenting); *id.* at 59 (Rutledge, J., dissenting) (all professing adherence to neutrality).

<sup>197</sup> *McCreary County v. ACLU*, 545 U.S. 844, 860 (2005).

<sup>198</sup> See, e.g., *McCreary County v. ACLU*, 545 U.S. 844, 860 (2005); *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985); *Epperson v. Arkansas*, 393 U.S. 97, 103–104 (1968); *Van Orden v. Perry*, 545 U.S. 677, 708–12, 722, 733–734 (2005) (Stevens, J., dissenting). See also Thomas B. Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause*, 100 Nw. U. L. REV. 1097, 1099–1101 (2006); Timothy L. Hall, *Sacred Solemnity: Civic Prayer, Civil Communion, and the Establishment Clause*, 79 IOWA L. REV. 35, 37–38 (1993); Smith, *supra* note 113, at 287–289; HORWITZ, *supra* note 188, at 41–47.

<sup>199</sup> See JOHN WITTE, JR., *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* 289 (2005) (diagram of trends in establishment clause jurisprudence).

<sup>200</sup> Johnson, *supra* note 180, at 820–825.

square.<sup>201</sup> Neutrality is commonly interpreted to mean that religion should not have discernible consequences on law or government action; government action is neutral so long as there is no reference to or reliance upon religious authorities or concepts. It fits comfortably with the privatization of religion.<sup>202</sup> As the Court stated in *dicta*, “The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice. . . .”<sup>203</sup> To be clear, the U.S. court precedents do not, at this point, mandate the privatization of religion and its exclusion from public discourse—religious expression is protected as a matter of free speech.<sup>204</sup> Moreover, in an instance where neutrality was used to make a good point, the Supreme Court warned that “a pervasive bias or hostility to religion . . . could undermine the very neutrality the Establishment Clause requires.”<sup>205</sup> Yet the establishment clause analysis employed by U.S. courts (the *Lemon* test in particular) favors legislation and other forms of government action that are not influenced or motivated by religious considerations. From this position, it is not a far leap to the concept that religion is, in fact, better when it is kept private. The American courts have not gone quite this far,<sup>206</sup> but the neutrality principle could certainly provide a reasonable basis for such a course.<sup>207</sup> Stanford Law

<sup>201</sup> For an overview and critique of this use of “neutrality,” see Lael Daniel Weinberger, *Religion Undefined*, 86 U. DET. MERCY L. REV. 735 (2009). See also Rex Ahdar & Ian Leigh, *Is Establishment Consistent with Religious Freedom?*, 49 MCGILL L.J. 635, 677–680 (2004); Anita Y. Woudenberg, *Propagating a Lemon*, 7 FIRST AMEND. L. REV. 307, 330–344 (2009).

<sup>202</sup> Richard S. Myers, *The Supreme Court and the Privatization of Religion*, 41 CATH. U. L. REV. 19 (1991); HORWITZ, *supra* note 188, at 62–63.

<sup>203</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971).

<sup>204</sup> Many of the Supreme Court’s decisions that have upheld public religious expression in the face of establishment clause arguments have been based not primarily on a narrow reading of the establishment clause, but rather on the First Amendment’s Free Speech Clause. See *Widmar v. Vincent*, 454 U.S. 263 (1981); *Lamb’s Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); *Rosenberger v. Rector*, 515 U.S. 819 (1995), *Good News Club v. Milford Central School*, 533 U.S. 98 (2001). But see *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290 (2000) (public school prohibited by the establishment clause from having prayer at a school function, since the prayer would be “public” speech actually or apparently endorsed by the school); Ralph D. Mawdsley & Charles J. Russo, *Commentary: Hostility Toward Religion and the Rise and Decline of Constitutionally Protected Religious Speech*, 240 ED. LAW REP. 524 (2009) (arguing that the scope of the free speech clause’s protections for religious speech is being reduced).

<sup>205</sup> *Rosenberger v. Rector*, 515 U.S. 819, 839–840, 845–846 (1995). See also *Lee v. Weisman*, 505 U.S. 577, 598 (1992) (an “all-pervasive attempt to exclude religion . . . could itself become inconsistent with the Constitution”).

<sup>206</sup> Although they have gone far. See Gerard V. Bradley, *Dogmatomachy: A “Privatization” Theory of the Religion Clause Cases*, 30 ST. LOUIS U.L.J. 275 (1986) (“The Court is now clearly committed to articulating and enforcing a normative scheme of ‘private’ religion”); Gedicks, *supra* note 183, at 681–682 (“The privileging of secular knowledge in public life as objective and the marginalizing of religious belief in private life as subjective has been a foundational premise of American jurisprudence under the Religion Clause of the First Amendment. Most of the Supreme Court’s Religion Clause decisions reflect this elevation of the objective/secular over the subjective/religious”); Richard W. Garnett, *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. REV. 771, 796–799 (2001) (discussing an “exemption-and-restriction scheme” for church taxation, inviting “line drawing” and reflecting “assumptions” that might be “profitably understood” as part of a “normative scheme of ‘private’ religion”).

<sup>207</sup> Myers, *supra* note 202; McConnell, *Crossroads*, *supra* note 3, at 120, 122, 125–126 (for many years, the Supreme Court seemed to “view religion as an unreasoned, aggressive, exclusionary, and divisive force that must be confined to the private sphere”).

School's Dean Kathleen Sullivan suggested precisely such an extension of the establishment clause:

Just as the affirmative right to practice a specific religion implies the negative right to practice none, so the negative bar against establishment of religion implies the affirmative "establishment" of a civil order for the resolution of public moral disputes. . . . Establishment of a civil public order was the social contract produced by religious truce. Religious teachings as expressed in public debate may influence the civil public order but public moral disputes may be resolved only on grounds articulable in secular terms. Religious grounds for resolving public moral disputes would rekindle inter-denominational strife that the Establishment Clause extinguished.<sup>208</sup>

[T]he ban on establishment of religion establishes a civil public order, which ends the war of all sects against all. The price of this truce is the banishment of religion from the public square. . . .<sup>209</sup>

Professor Gerard Bradley has criticized this view, but has nonetheless argued that the trend of modern establishment clause jurisprudence is toward privatization:

The Justices suffocate religious factions not by assigning them all (in the first instance) the same religious beliefs, but rather by assigning the same estimate of the political relevance of those beliefs: none. The Court is now clearly committed to articulating and enforcing a normative scheme of "private" religion, a scheme implicit in the cases since the opening of the modern era in *Everson v. Board of Education*. "Privatization" accounts for what the Court has wrought in its church-state opus, and it is neither more nor less than a war of attrition upon "religious consciousness." Privatization is the Court's "final solution" to the problem of religious faction.<sup>210</sup>

The Court over the past two decades may not have turned out to be quite as hostile to religion as Bradley believed it was when he wrote in the mid-1980s,<sup>211</sup> but the precedents that Bradley surveyed are still in place. Willing judges can still take them in precisely the direction that Bradley warned of in his study—privatization.

Current Australian law is not heading in this direction, and it does not seem to have the potential to do so when its establishment clause is merely interpreted to prohibit the federal government from taking actions that would set up a national church. So the neutrality principle is seen as a possibility for creating a legal environment that is neutral in the sense that no one can tell that religion has any consequences. Religious freedom may be preserved, so long as the religion is a personal, private one.<sup>212</sup> This is why advocates of a secular Australia would look to the U.S. for inspiration and sources of law. The principles of the U.S. court cases are appealing to the believers in a secular society because they are viewed as the basis for reorienting Australian law toward a neutrality principle and a corresponding privatization of religion.

Personal beliefs kept to one's self and devotions done in private do not disturb the public square. Religion's communal aspects can also be kept private if they are kept

<sup>208</sup> Sullivan, *supra* note 8, at 197–198. Sullivan, to her credit, notes that her conception of a secular "liberal democracy" is not really neutral—it is openly and unabashedly nonreligious. *Id.* at 199.

<sup>209</sup> Sullivan, *supra* note 8, at 222.

<sup>210</sup> Bradley, *supra* note 206, at 276–277.

<sup>211</sup> Richard S. Myers, *The Supreme Court and the Privatization of Religion*, 41 *CATH. U. L. REV.* 19 (1991).

<sup>212</sup> Sullivan, *supra* note 8, at 198; and see critique by McConnell, *Crossroads*, *supra* note 3, at 126.

within the four walls of a church.<sup>213</sup> Indeed, the fact that “separation of church and state” is now so often used as a synonym for separation of religion from government is itself an indication of how widely this privatization of religion is accepted. The usage of the phrase implies that religion is that which is, or ought, to be done within the confines of a designated religious institution (a church). To intrude these religious beliefs or practices into the civil arena is then to violate the separation of church and state.

The privatization of religion, however, has troubling implications for society. The neutrality principle that leads to the privatization of religion is only workable if religion is an isolated component of life.<sup>214</sup> It is not.<sup>215</sup> Religion has broad, holistic implications for the lives of its adherents, as a world and life view that shapes the way one thinks and acts.<sup>216</sup> In fact, everyone possesses a “religion” in this sense.<sup>217</sup> It is thus impossible to truly implement a religion-neutral public square.<sup>218</sup> To the contrary, the pursuit of such a religion-free zone is, in fact, highly intolerant.<sup>219</sup>

### 4.3. Why it matters

The strong form of secularism that we have been discussing constitutes a radical attempt to redefine what it means to live in a democratic society.<sup>220</sup> Dean Sullivan was more upfront than most about the implications of secular liberalism when she explained, “The correct baseline . . . is not unfettered religious liberty, but rather religious liberty insofar as it is consistent with the establishment of the secular public moral order.”<sup>221</sup>

Behind the secularist approach and the desire for a neutral, secular public square lies the assumption that traditional religious beliefs are fundamentally subjective, divisive, and irrational.<sup>222</sup> This association of religion with radicalism and bigotry tends to be reinforced by the (unfair) association of religion, in general, with the worldwide rise of radical religious nationalistic groups, particularly in the so-called third world, with the corresponding violence that has often occurred.<sup>223</sup> In large measure, these assumptions explain the secularist support for an “impregnable” wall of separation between church and state.<sup>224</sup> Since traditional religions are deemed “divisive” and “irrational,” radical secularists demand that these religions be limited

<sup>213</sup> Or any other paradigmatically religious institution (e.g., monastery, synagogue, or mosque).

<sup>214</sup> Galston, *supra* note 192, at 819.

<sup>215</sup> See the discussion in CARTER, *supra* note 1, at 34–43; see also Carter’s discussions of religious autonomy, *id.* at 133–135, 141–142, and compare McConnell, *Crossroads*, *supra* note 3, at 176–178.

<sup>216</sup> The status of religion as “worldview,” and what this means for establishment clause jurisprudence, is discussed in Weinberger, *supra* note 201.

<sup>217</sup> See generally ROY A. CLOUSER, *THE MYTH OF RELIGIOUS NEUTRALITY* (2nd ed. 2005).

<sup>218</sup> See also Weinberger, *supra* note 201.

<sup>219</sup> McConnell, *Crossroads*, *supra* note 3, at 188–192.

<sup>220</sup> For a popular discussion, see R. ALBERT MOHLER, *CULTURE SHIFT* 18 (2008).

<sup>221</sup> Sullivan, *supra* note 8, at 198.

<sup>222</sup> See CARTER, *supra* note 1, at 54–55; Gedicks, *supra* note 183, at 693–696; Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 *Geo. L.J.* 1667 (2006); HORWITZ, *supra* note 188, at 62.

<sup>223</sup> Mark Juergensmeyer, *The New Religious State*, 27 *Comp. Pol.* 379 (1995).

<sup>224</sup> DAVID T. KOYZIS, *POLITICAL VISIONS AND ILLUSIONS* 65–68 (2003).

exclusively to the realm of private conviction.<sup>225</sup> Consequently, a citizen's religious conviction should be completely "privatised" and excluded from public debate.<sup>226</sup> Cardinal George Pell has commented that the foundations for such "secular democracy" appear to rest upon "the invention of a wholly artificial human being who has never existed, pretending that we are all instances of this species."<sup>227</sup> As Tonti-Fillipini points out:

It seems . . . that we are witnessing in Australia . . . a very aggressive exclusionist form of secularism, which views religious belief and practice with arrogant intolerance and dismissiveness. . . . Notwithstanding the legal position, many politicians and others have behaved in a way that does not respect the Australian Constitution by demanding that bishops, priests, ministers, churches, and other religious bodies stop "meddling" in politics. Such *ad hominem* attacks represent an egregious appeal to prejudice and unjust discrimination against certain people or institutions. It is also hypocritical in the strict sense because such advice is usually given by, but not expected to apply to, those whose religion is variously described as secular, "humanist", atheistic, or agnostic.<sup>228</sup>

Although radical secularists are intent upon eliminating Judeo-Christian traditions, their rejection of religion does not necessarily mean that they have rejected all types of faith. Ever since the coming of the Enlightenment, Western elites have normally adhered to a variety of humanistic faiths. As Cardinal Pell commented in his 2009 inaugural term lecture at Oxford Divinity School, the limited scope that secularists are prepared to concede to traditional beliefs is actually based on their own religious assumption that human beings have created God, and not that God has created human beings.<sup>229</sup> Thus, even when secularists presume to have banished "religion" from the public square, they have done no more than to infuse it with their own religious worldview. They have privatized all religions except their own, which they have actually privileged above all others.<sup>230</sup>

If religion is defined as that which posits a transcendent deity, secular humanism is not a religion. But if religion is defined a bit more broadly, in a way that includes nontheistic worldviews like Buddhism and Confucianism, then this concept certainly applies to secular humanism.<sup>231</sup> Broadly understood, secular humanism, as Brendan Sweetman points out,

is the view that all reality is physical, consisting of some configuration of matter and energy, and that everything that exists either currently has a scientific explanation or will have a scientific explanation in the future. The universe is regarded as a random occurrence, as is the

<sup>225</sup> See CARTER, *supra* note 1, at 54–55; Bradley, *supra* note 206, at 277. See also McConnell, *Crossroads*, *supra* note 3, at 122–125.

<sup>226</sup> For a synopsis of recent criticisms of this position, see HORWITZ, *supra* note 188, at 22–38.

<sup>227</sup> Cardinal George Pell, *Is There Only Secular Democracy?*, 48 QUADRANT 12 (2004). See also CARTER, *supra* note 1, at 56.

<sup>228</sup> Tonti-Fillipini, *supra* note 178, at 82–84.

<sup>229</sup> Cardinal George Pell, *Varieties of Intolerance: Religious and Secular*, Inaugural Hilary Term Lecture, Oxford University Newman Society, The Divinity School, Oxford University 7 (March 6, 2008).

<sup>230</sup> See Ahdar & Leigh, *supra* note 201, at 677–680.

<sup>231</sup> As philosopher Roy Clouser has argued in his study of the definition of religion. See CLOUSER, *supra* note 217.

appearance and nature of life on earth. Thus, secularism is not simply the negative claim that there is no God and that there is no soul; rather, these claims are supposed to follow from its positive theses. Like other worldviews, especially religious ones, secularism contains beliefs about the nature of reality, the nature of the human person and the nature of morality. And many of these beliefs have political implications. . . . Indeed most of the discussion of religion and politics in recent years, especially in the United States, suffers from a failure to appreciate the significance of the fact that secularism too is a worldview.<sup>232</sup>

In this sense, for purposes of protecting the free exercise of religion, the U.S. Supreme Court has recognized as “religious” various belief systems that do not include the existence of God. In a famous footnote in *Torcaso v. Watkins*, the Court listed a number of “religions . . . which do not teach what would generally be considered a belief in the existence of God,” including “Buddhism, Taoism, Ethical Culture, Secular Humanism, and others.”<sup>233</sup> Similarly, the Australian High Court has considered that the definition of religion must not be confined only to theistic religions, but that such definition should also include nontheistic religions.<sup>234</sup>

The bottom line is that it is impossible to create a religiously neutral public square unless religion is defined in such a way as to exclude certain groups.<sup>235</sup> However, as Brendan Sweetman points out, “[n]o democratic society . . . can seek to exclude from the public debate over the momentous issues of the day any worldview that is a major player in the lives of many who live in that society.”<sup>236</sup> There is nothing in the constitutions of Australia and the U.S. to justify the denial of equal rights to free speech on religious grounds. Those who view the moral duty of Christians to act according to their own religious convictions as something that disqualifies them from political life appear to actually be promoting an intolerant form of secularism.<sup>237</sup>

## 5. Conclusion

The English legal system from which the American and Australian legal systems derived owes much to the influence of Christian theology on its development. The common law possesses a rich and highly Christian heritage. The United States inherited many of these aspects of the English common law, including its religious tradition. Christianity was central to the lives of the New World colonists, and their faith dominated their society and formed the foundations of their legal traditions. The Constitution of the United States, though not religious on its face, was heavily influenced by the religious experiences of its framers. This is nowhere more evident than in the First

<sup>232</sup> BRENDAN SWEETMAN, *WHY POLITICS NEEDS RELIGION: THE PLACE OF RELIGIOUS ARGUMENTS IN THE PUBLIC SPHERE* 17–18 (2006).

<sup>233</sup> *Torcaso v. Watkins*, 367 U.S. 488, 495 n. 11 (1961); and compare *United States v. Seeger*, 380 U.S. 163 (1965) (the test for religious belief is whether the belief occupies a place “parallel” to a belief in God).

<sup>234</sup> *Church of the New Faith v. Commissioner for Payroll Tax* (1983) 154 C.L.R. 120. See also Clements, *supra* note 108, at 244–245.

<sup>235</sup> For a philosophical critique of the idea of “religious neutrality,” see CLOUSER, *supra* note 217.

<sup>236</sup> SWEETMAN, *supra* note 232, at 13. See also Ahdar & Leigh, *supra* note 201, at 677–680.

<sup>237</sup> See, e.g., Joseph Ratzinger (Pope Benedict XVI), *On the Participation of Catholics in Political Life* 13 (2003).

Amendment. It is against this legal and historical background that the First Amendment of the American Constitution must be interpreted.

Against this history, there is the view that the U.S. Constitution is an entirely secular document, intended to create a secular public square. Recent Supreme Court interpretations that have taken a broad view of the establishment clause have tended to encourage the privatization of religious discourse. Such an approach would have been astonishing in the founding period. The primary historical understanding of establishment was that Congress would neither set up a state religion nor interfere with the practice of religion.

The Australian legal tradition was built on foundations derived from the common law and Christian theology. As with their American counterparts, Christianity was embedded in Australian society during the major moments of legal reform (namely, federation), and religious ideas permeate the legal and governmental customs that were developed. Many of these traditions have endured to the present.

In contrast with contemporary judicial decisions in the United States, Australia's establishment clause has received a more narrow application. As mentioned in this article, while a nondiscriminatory law directed toward assisting religion may contravene the First Amendment, only a law that promotes the interest of one religion above others would appear to contravene section 116.

It is therefore erroneous, although increasingly popular, to assert that the anti-establishment clauses in the U.S. and Australian constitutions were aimed at ensuring a secular public square. Both the context behind the drafting of the clauses, and the Christian roots of the concept of a separation of church and state, combine to negate the proposition that either the Australian or American constitutions were intended to do any such thing. It would be a mistake for Australia to follow contemporary American establishment clause jurisprudence in the direction of a secular public square.