The influence of secularism in free exercise jurisprudence
Contrasting US and Australian interpretations

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Abstract

The free exercise clauses in the First Amendment of the US Constitution and Section 116 of the Australian Constitution are almost identical textually. However, they have been interpreted very differently, with the United States providing broad protection for religious freedom and Australia very narrow protection. I suggest that secularism has influenced First Amendment jurisprudence to some extent but Section 116 jurisprudence more significantly, and that this influence may explain the difference in interpretations. Hence, more secularist approaches to the free exercise clauses appear to contribute to narrower interpretations that undermine religious freedom.

Keywords secularism, free exercise, religious freedom, United States, Australia.

1. Introduction

The constitutions of the United States and Australia both contain provisions protecting the free exercise of religion. The First Amendment to the US Constitution states in part that "Congress shall make no law … prohibiting the free exercise [of religion]." Section 116 of the Australian Constitution states, 'The Commonwealth shall not make any law for … prohibiting the free exercise of any religion." These provisions use quite similar language but have been interpreted in divergent fashions. On one hand, the First Amendment's free exercise clause has a long history of litigation that includes many wins for advocates of religious freedom. In the last decade, the US Supreme Court has consistently decided in favor of religious practice, including the exemption of ministers employed by religious institutions from the application of employment discrimination law.[2] However, Section 116 has been interpreted very narrowly in the few cases that have come before the High Court of Australia, and no religious freedom claims under this section have been successful.[3]

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2 John Witte, "Historical Foundations and Enduring Fundamentals of American Religious Freedom" (2020) 33 *Journal of the Society of Christian Ethics* 156-167.

3 See Alex Deagon, "Liberal Assumptions in Section 116 Cases and Implications for Religious Freedom" (2018) 46(1) *Federal Law Review* 113-136.

This stark contrast in outcomes might seem surprising. Some differences may result from the constitutional context. The United States has a greater emphasis on individual rights (dating back to the inclusion of its Bill of Rights in the Constitution), which requires balancing of rights and enforcement through the judiciary to protect citizens.[4] However, Australia has little emphasis on individual rights and instead relies on the democratic and parliamentary process to protect individual citizens.[5] One possible effect of this difference is that the US has adopted a more expansive interpretation of the First Amendment to protect citizens from government, whereas Australia has a more narrow interpretation of freedom of religion that tends to defer to government.

However, this article proposes that secularism may also have had a significant influence on the respective interpretations of the free exercise clauses in the United States and Australia. I suggest that Section 116 jurisprudence may be undergirded by secular, liberal assumptions that are often unfriendly to or ignorant of religion, contributing to narrow interpretations of religious freedom.[6] First Amendment jurisprudence is more mixed in this regard, and the variation in the results of free exercise cases may depend on the varying influence of secular assumptions in those cases. As Torfs notes, "A more narrow definition of religious freedom … leads to a weaker protection of religious freedom, without suppressing or even questioning the principle of protection as such."[7] Thus, secular approaches to free exercise clauses that entail more narrow interpretations of free exercise (used here as a proxy for religious freedom) may produce results that fail to protect religious freedom in particular circumstances.

The next section of this article defines secularism as a viewpoint that treats religion as private in nature and assumes that it should not influence the public sphere. The third section examines free exercise jurisprudence under the First Amendment, observing that the second half of the twentieth century saw a narrowing of religious freedom protection due to the impact of secularist assumptions. However, more recently the scope of religious freedom has been expanding as the US Supreme Court has adopted interpretations of free exercise that reject secularist assumptions and are friendlier to religion. Section 4 identifies a contrasting phenomenon in Australian free exercise jurisprudence, indicating that members of the High Court

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4 See, e.g., Jeffrey Rosen, *The Most Democratic Branch: How the Courts Serve America* (Oxford University Press, 2006).

5 Carolyn Evans, "Religion as Politics Not Law: The Religion Clauses in the Australian Constitution" (2008) 36(3) *Religion, State and Society* 283, 284.

6 Deagon, "Liberal Assumptions" (n 3).

7 Rik Torfs, "The Internal Crisis of Religious Freedom" (2011) 4(2) *International Journal for Religious Freedom* 17, 18.

have adopted secular, liberal assumptions about religion, thereby contributing to a narrow interpretation of free exercise. Hence, I conclude that more secularist approaches to free exercise may facilitate narrower interpretations that undermine religious freedom.

2. Defining secularism

Many varieties of secularism exist across the world, and there is continuing contestation and change regarding the "secular."[8] The word is "notoriously shifty, sometimes used descriptively, sometimes predictively, sometimes prescriptively, sometimes ideologically, sometimes implying hostility to religion, sometimes carrying a neutral or positive connotation."[9] Hurd notes that "secularism refers to a public resettlement of the relationship between politics and religion" and that "the secular refers to the epistemic space carved out by the ideas and practices associated with such settlements."[10] Specifically, Norris and Inglehart consider secularism as entailing the "systematic erosion of religious practices, values and beliefs."[11] It includes the division of church and state in the form of the "modern secular democratic society."[12] Benson agrees, stating that the term "secular" has come to mean a realm that is "neutral" or "religion-free" and that "banishes religion from any practical place in culture."[13]

The traditional narrative of secularist theories in modern liberal Western democracies envisions a formal separation of church and state, whereby the secular identifies a sphere known as religious and distinguishes that (private) sphere from public institutions such as the state, politics, and law.[14] One version of this is the French "laicism," a separationist narrative that seeks to expel religion from politics.[15] The objective of laicism is to create a "neutral" public space in which religious beliefs and institutions lose their political significance and their voice in political debate, or exist purely in the private sphere. In this conception, "The mix-

[8] Elizabeth Shakman Hurd, *The Politics of Secularism in International Relations* (Princeton, 2007) 12.

[9] Daniel Philpott, "Has the Study of Global Politics found Religion?" (2009) 12 *Annual Review of Political Science* 183, 185.

[10] Hurd (n 8) 12-13.

[11] Pippa Norris and Ronald Inglehart, *Sacred and Secular: Religion and Politics Worldwide* (Cambridge, 2011) 5.

[12] Ibid 8, 10.

[13] Iain Benson, "Notes Towards a (Re)Definition of the 'Secular'" (2000) 33(3) *University of British Columbia Law Review* 519, 520.

[14] Hurd (n 8) 13-14; Carl Hallencreutz and David Westerlund, "Anti-Secularist Policies of Religion," in *Questioning the Secular State: The Worldwide Resurgence of Religion in Politics*, ed. David Westerlund (C. Hurst and Co, 1996), 3. See the account in Alex Deagon, "Secularism as a Religion? Questioning the Future of the 'Secular State'" (2017) 8 *Western Australian Jurist* 31, 46-49.

[15] Hurd (n 8) 5.

ing of religion and politics is regarded as irrational and dangerous."[16] This position entails two related assumptions: that religion is purely private in nature and that religion should be kept private and not have any influence in the public sphere.

For example, Thornton and Luker assert that religious belief is concerned only with interior life, "paradigmatically private and subjective," as opposed to law, which is "concerned only with the outward manifestation of a belief or prejudice."[17] Starting from these premises, Thornton and Luker lament, "Religious organisations have long held a relationship to the public sphere *qua* government through assertion of moral authority over issues of social significance."[18] Similarly, Audi contends that "just as we separate church and state institutionally, we should, in certain aspects of our thinking and public conduct, separate religion from law and public policy matters."[19]

This secular-liberal view involves, first, a strict distinction between the public and private realms. Second, and more importantly, if religion is separated from law and *public* policy, this by definition relegates religion solely to the *private* sphere. Sadurski explicitly adopts this conclusion, claiming that the "secular liberal state" should regard religion "as essentially a private matter."[20] Furthermore, "religious faith … can [only] coexist with a liberal order when kept in a private dimension of social interaction."[21]

Thus, the modern liberal state assumes that religion should be restricted to private belief and practice. The state should be secular in the sense that religion should not influence, support, or control public state power because religion is intrinsically private, thereby "separating the religious from the sphere of government action."[22] This claim reveals the limits on religious freedom that result from a secular approach. Under the liberal paradigm, religions are not free to advance their political views. An expanding regulatory state seeking to implement its vision of the good, combined with the assumption that religion is private or at least subservient to state interests, will lead to increasing state interference with religious belief or practice that conflicts with the state vision.[23] Steven Smith categorizes this narrow

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16 Ibid.

17 Margaret Thornton and Trish Luker, "The Spectral Ground: Religious Belief Discrimination" (2009) 9 *Macquarie Law Journal* 71, 72-73.

18 Ibid 73.

19 Robert Audi, "The Place of Religious Argument in a Free and Democratic Society" (1993) 30 *San Diego Law Review* 677, 691.

20 Wojciech Sadurski, "Neutrality of Law Towards Religion" (1990) 12 *Sydney Law Review* 420, 421.

21 Ibid 441-442.

22 Reid Mortensen, "The Establishment Clause: A Search for Meaning" (2014) 33 *University of Queensland Law Journal* 109, 124; Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press, 2013 2nd ed) 17-18.

23 This type of state interference already occurs; see Joshua J. Craddock, "The Case for Complicity-Based

view of religious freedom as private and subservient to the state as operating within a secular framework.[24]

This kind of liberal ideology also has implications for how courts interpret constitutional and legislative provisions concerning freedom of religion. For example, when interpreting the free exercise clause in Section 116 of the Australian Constitution, the High Court has unwittingly or uncritically adopted secularist assumptions that religion is merely private and cannot be protected in a public context. This stance has had the effect of expanding government power in relation to religion and virtually eliminating the capacity of Section 116 to protect religious freedom. As mentioned earlier, Section 116 has never been successfully litigated.[25] Conversely, free exercise jurisprudence in the US has granted many victories to religious freedom advocates. This contrast raises the question of the extent to which secularist principles have informed each country's jurisprudence.

3. Secularism and free exercise jurisprudence in the United States

The free exercise clause of the First Amendment applies to the US Congress, as well as states and to executive action.[26] Early jurisprudence took a strict approach under which religious autonomy was protected, but this did not prevent the passage of neutral laws that incidentally impacted religious practice.[27] This scope of protection of religion expanded in *Sherbert v. Verner*, in which the Supreme Court adopted the "strict scrutiny" test. The court stated that religious conduct must be accommodated except where government can show a compelling interest and no less burdensome means to achieve that interest.[28] For example, a member of the Seventh-Day Adventist Church could not be denied employment benefits after she was sacked for refusing to work Saturdays against the dictates of her conscience, when the employer could have easily accommodated her religious practice.

However, the Court narrowed this view again in *Employment Division v. Smith*, upholding a law against the use of peyote despite its importance as part of

Religious Accommodations" (2018) 12 *Tennessee Journal of Law and Public Policy* 233, 266.

[24] Steven Smith, "The Rise and Fall of Religious Freedom in Constitutional Discourse" (1991) 140(1) *University of Pennsylvania Law Review* 149, 149-150; Steven Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom* (Oxford University Press, 1995) 36.

[25] See Deagon, "Liberal Assumptions" (n 3). Of course, Section 116 may have had an impact on legislators' development of subsequent laws, or even on how government programs have been administered. This is difficult to prove, but similar factors do not seem to have impacted the US jurisprudence.

[26] *Cantwell v. Connecticut* 20.310 U.S. 296, 303-304, 310 (1940); *Everson v. Board of Education* 21.330 U.S. 1, 16 (1947).

[27] See Ian Huyett, "How to Overturn Employment Division v. Smith: A Historical Approach" (2020) 32 *Regent University Law Review* 295, 298-312.

[28] 374 U.S. 398 (1963).

a religious ritual.[29] Leading up to this seminal case, the Court had already started demonstrating a tendency to use secularism to privatize religion protection in the First Amendment.[30] For example, Bradley argued prior to *Smith* that the Court was committed to articulating and enforcing a normative scheme that uses secularism to privatize religion.[31] After *Smith*, Gedicks affirmed, "The privileging of secular knowledge in public life as objective and the marginalizing of religious belief in private life as subjective has [sic] 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."[32]

In *Employment Division v. Smith*, the Court concluded that a neutral law of general applicability cannot be invalidated by the free exercise clause, although the Court was clear that the government cannot discriminate specifically on the basis of religion or otherwise be hostile toward religion.[33] Individuals' religious beliefs do not excuse them from compliance with such a "neutral" law. The Court acknowledged that "leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in," but this is the "unavoidable consequence of democratic government" and "must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs."[34] The Court went even further, characterizing strict scrutiny of laws that constrain religious freedom as a "luxury" and refusing even to consider whether the prohibited conduct was central to the individual's religion in the context of assessing a compelling interest.[35] Hence, *Smith* "effectively announced the complete nullification of substantive free exercise rights," because as long as a law does not

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29 494 U.S. 872 (1990).

30 See Augusto Zimmermann and Daniel Weinberger, "Secularization by Law? The Establishment Clauses and Religion in the Public Square in Australia and the United States" (2012) 10 *International Journal of Constitutional Law* 208; Richard S. Myers, "The Supreme Court and the Privatization of Religion" (1991) 41 *Catholic University Law Review* 19.

31 Gerard V. Bradley, "Dogmatomachy: A 'Privatization' Theory of the Religion Clause Cases" (1986) 30 *St Louis University Law Journal* 275, 276-277.

32 Frederick Mark Gedicks, "Public Life and Hostility to Religion" (1992) 78 *Virginia Law Review* 671, 681-682.

33 494 U.S. 872 (1990).

34 110 S.Ct. 1600, 1606 (1990). See Michael McConnell, "Free Exercise Revisionism and the *Smith* Decision" (1990) 57 *University of Chicago Law Review* 1109, 1110.

35 110 S.Ct. 1604-1606 (1990). This was in the face of strong dissent by Justices O'Connor and Blackmun, who argued that religious liberty was an essential element of a free and pluralistic society rather than a "luxury."

specifically target a religious group, the free exercise clause places no restriction on what the government can do.[36]

The reasoning undergirding *Smith* was influenced by secular assumptions that religion is a purely private matter and not appropriate for protection in a public context. For example, Justice Scalia argued that the idea of religious liberty protects only "belief and opinions," i.e., private thoughts, rather than external practices.[37] The refusal to assess religious claims on their merits or to consider that they might justify an exemption to a public law also indicates an assumption that religion is purely private and subjective.[38] The *Smith* jurisprudence therefore creates an assumption of a stark contrast between private religion and public secularity that simply does not exist for many religious people.[39] This decision demonstrably resulted in a narrowing of religious freedom, most significantly because the state no longer needed to give reasons or demonstrate a compelling interest to justify a substantial burden.[40]

The Court has been expanding the doctrine again since *Smith*. In fact, since 2011, the last ten Supreme Court cases on religious freedom have been wins for religion.[41] For example, in *Trinity Lutheran* the Court held that there must be a compelling state interest to discriminate on the basis of religious status in the granting of generally available funding. Therefore, a state program that provided funding to secular schools for playground resurfacing but not to religious schools violated the clause.[42]

By stating that the denial of generally available benefits to religious entities on the basis of their religious character violates the free exercise clause, the Supreme Court has "eroded the liberal strict separation of church and state … and replaced it with greater tolerance for church-state cooperation."[43] This was a movement

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[36] Huyett (n 27) 295-296.

[37] *Smith*, 494 U.S. 872, 879 (1990); Huyett (n 27), 300.

[38] McConnell, "Free Exercise Revisionism" (n 34) 1110-1111. See also Alex Deagon, "The 'Religious Questions' Doctrine: Addressing (Secular) Judicial Incompetence" (2021) 47(1) *Monash University Law Review* (forthcoming), arguing that this secular "hands-off" approach can actually burden religious freedom.

[39] Angela Carmella, "A Theological Critique of Free Exercise Jurisprudence" (1992) 60 *George Washington Law Review* 782, 794-798.

[40] Ibid 782-783. This situation was ameliorated by the Religious Freedom Restoration Act, passed in response to *Smith* so as to restore the old *Sherbert* standard: Caroline Corbin, "US Religion Clause Jurisprudence" in Phil Zuckerman and John Shook, *The Oxford Handbook of Secularism* (Oxford University Press, 2017) 470.

[41] Witte (n 2) 156, 165. Witte counted eight cases at the time of his writing, and my number includes two more recent decisions, *Espinoza v. Montana Department of Revenue*, 140 S.Ct. 2246 (2020) and *Our Lady of Guadalupe School v. Agnes Morrissey-Berru*, 140 S.Ct. 2049 (2020).

[42] *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012 (2017).

[43] Angela Carmella, "Progressive Religion and Free Exercise Exemptions" (2020) 68 *Kansas Law Review* 535, 565-566.

from the secular "wall of separation" doctrine to a more religion-friendly "equal treatment" doctrine.[44] Similarly, a state scholarship program that provides public funds to allow students to attend private schools cannot discriminate against religious schools.[45] In other words, whereas a secularist approach to free exercise narrows religious freedom, a less secularist, more religion-friendly approach has the effect of expanding religious freedom in particular circumstances.

Furthermore, First Amendment protection for religious freedom is also significantly enhanced by the "ministerial exception." As explained by Carmella and Laycock, the ministerial exception provides a "sphere of autonomy" to protect religious decisions relating to ministers, doctrine, and management of institutions.[46] *Hosanna-Tabor* directly addressed the question of whether employment discrimination laws may constitutionally be applied to the employment of ministers.[47] The Court held that they could not, effectively granting decisions on ministerial employment an immunity or exception from the application of anti-discrimination laws:

> We agree that there is such a ministerial exception. The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs.[48]

The establishment clause prevents the government from appointing ministers, and the free exercise clause prevents the government from interfering with the freedom of religious groups to select their own leaders.[49] Specifically, in *Hosanna-Tabor*, a church fired an employee for pursuing a legal claim against that church in contravention of 1 Corinthians 6, which prohibits Christians from pursuing secular legal action against one another. The church's decision to terminate the employee violated a law against

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[44] Richard Garnett and Jackson Blais, "Religious Freedom and Recycled Tires: The Meaning and Implications of Trinity Lutheran" (2016) *Cato Supreme Court Review* 105, 107.

[45] *Espinoza v. Montana Department of Revenue*, 140 S.Ct. 2246 (2020).

[46] Carmella, "Theological Critique" (n 39) 804. See also Douglas Laycock, "Towards a General Theory of the Religion Clauses: The Case of Church-Labor Relations and the Right to Church Autonomy" (1981) 81 *Columbia Law Review* 1373 (1981); Helen Alvare, "Beyond Moralism: A Critique and a Proposal for Catholic Institutional Religious Freedom" (2019) 19(1) *Connecticut Public Interest Law Journal* 149-198.

[47] *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S.Ct. 694 (2012). See Michael McConnell, "Reflections on *Hosanna-Tabor*" (2012) 35 *Harvard Journal of Law and Public Policy* 821, 822.

[48] *Hosanna-Tabor* at 705-706.

[49] Huyett (n 27), 332.

firing an employee for pursuing a legal action. Hence, this law was neutral and generally applicable, and yet the Court held that it violated the free exercise clause and so was invalid. "*Hosanna-Tabor* is therefore … direct in its contravention of *Smith*."[50]

Hosanna-Tabor demonstrates religion-friendly assumptions that are contrary to the secular assumptions in *Smith* in two senses. First, the Court considered the internal actions of churches to be not merely outward physical acts, but decisions essential to the faith and mission of the church, and thus part of free exercise and beyond challenge by supposedly neutral laws such as those governing employment discrimination. Second, in doing so, the Court engaged deeply with the theological implications of church governance, resulting in a broad interpretation of actions that are essential to the free exercise of religion for religious institutions.[51] McConnell finds in this decision a shift in free exercise jurisprudence from a focus on individual believers to an emphasis on the autonomy of organized religious institutions. Rather than a restrictive secular-liberal (private) view of religion as "essentially a matter between individuals and their God," *Hosanna-Tabor* endorsed "the idea that religious exercise must be rooted in the teachings of a faith community."[52] This move adopts a broadly community-focused and associational view of religion, accepting the substantive theological view that the religious group itself, not the state, should determine who is a minister and the scope of that role.[53]

Hence, the most recent decision on the ministerial exception affirmed the doctrine and clarified that the determination of a minister must be based on an evaluation of the religious function the position serves in the organization as explained by the organization, a question of fact rather than the application of strict rules.[54] As a result of these religion-friendly assumptions undergirding free exercise jurisprudence, the Court has endorsed a broad and generous protection of religious freedom, rather than the narrower protection of religious freedom that resulted from the secular assumptions undergirding the *Smith*-era decisions.

4. Secularism and free exercise jurisprudence in Australia

However, the free exercise clause in Section 116 of the Australian Constitution has been interpreted narrowly on a consistent basis. Section 116 is subject to a number of intrinsic limitations.[55] First, it applies only to laws rather than to general execu-

[50] Ibid 329.

[51] Ibid 332-333, 340; McConnell, "Reflections" (n 47) 834; Alvare (n 46) 192. See also generally Douglas Laycock, "*Hosanna-Tabor* and the Ministerial Exception" (2012) 35 *Harvard Journal of Law and Public Policy* 839.

[52] McConnell, "Reflections" (n 47) 836-837.

[53] See Alvare (n 46).

[54] *Our Lady of Guadalupe School v. Agnes Morrissey-Berru*, 140 S.Ct. 2049 (2020).

[55] See Nicholas Aroney, "Freedom of Religion as an Associational Right" (2014) 33 *University of Queens-*

tive or personal action.[56] This means that Section 116 is not an individual right but a limit on legislative power.[57] Second, it governs only Commonwealth laws and does not apply to the states.[58] Finally, the High Court of Australia has interpreted Section 116 in a very strict and limited manner. Its definition of the scope of religious freedom has been very narrow, as documented in a number of cases involving Section 116.[59] This narrow interpretation is undergirded by a stark distinction between private religious practice, which is seen as free exercise of religion, and public practice, which is not considered as falling within the free exercise of religion. This distinction is based on the liberal assumption that religion is a purely personal matter belonging in the private sphere.[60]

Notably, the High Court has not consistently adopted such secular-liberal assumptions in other contexts. For example, it has held that the establishment clause does not prevent public funding of religious schools, and that Section 116 does not prevent the public funding of school chaplains.[61] The High Court has also held that

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land Law Journal 153, 155-156.

[56] *Minister for Immigration and Ethnic Affairs v Lebanese Moslem Association* (1987) 17 FCR 373.

[57] *Attorney-General (Vic); Ex rel Black v Commonwealth (DOGS Case)* (1981) 146 CLR 559, 605 (Stephen J).

[58] *Grace Bible Church v Reedman* (1984) 36 SASR 376.

[59] For the case law, see in particular *Krygger v Williams* (1912) 15 CLR 366, 369; *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 149-150; *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 135-136. See also Carolyn Evans, "Religion as Politics not Law: the Religion Clauses in the Australian Constitution" (2008) 36(3) *Religion, State and Society* 283, 284; Reid Mortensen, "The Unfinished Experiment: A Report on Religious Freedom in Australia" (2007) 21 *Emory International Law Review* 167, 170-171; Alex Deagon, "Defining the Interface of Freedom and Discrimination: Exercising Religion, Democracy and Same-Sex Marriage" (2017) 20 *International Trade and Business Law Review* 239; Paul Babie, "National Security and the Free Exercise Guarantee of Section 116: Time for a Judicial Interpretive Update" (2017) 45(3) *Federal Law Review* 351; Renae Barker, *State and Religion: The Australian Story* (Routledge, 2018); Luke Beck, *Religious Freedom and the Australian Constitution: Origins and Future* (Routledge, 2018); Alex Deagon and Benjamin Saunders, "Principles, Pragmatism and Power: Another Look at the Historical Context of Section 116" (2020) 43(3) *Melbourne University Law Review* 1033; Nicholas Aroney and Paul Taylor, "The Politics of Freedom of Religion in Australia: Can International Human Rights Standards Point the Way Forward?" (2020) 47(1) *UWA Law Review* 42, 45; Neil Foster, "Protection of Religious Freedom under Australia's Amended Marriage Law: Constitutional and Other Issues," in Brett Scharffs, Paul Babie and Neville Rochow (eds.), *Freedom of Religion or Belief: Creating the Constitutional Space for Fundamental Freedoms* (Edward Elgar, 2020).

[60] See Deagon, "Liberal Assumptions" (n 3).

[61] See *Attorney-General (Vic); Ex rel Black v Commonwealth* (1981) 146 CLR 559 ('*DOGS*'); *Williams v Commonwealth (No. 1)* (2012) 248 CLR 156. In *DOGS*, Justice Murphy (in dissent) would have given both the free exercise and establishment clauses broad interpretations in line with US First Amendment jurisprudence (see 622-632). Elsewhere, I show how Justice Murphy's interpretation is still grounded in secular-liberal assumptions and suggest that it could facilitate a more expansive state that regulates public religion more aggressively, actually undermining religious freedom. See Deagon, "Liberal Assumptions" (n 3) 133-135.

religious speech can be political communication in some contexts.[62] However, this article merely proposes a theory in relation to the free exercise clause specifically. Comprehensive examination of the applicability of this theory more broadly, incorporating a detailed analysis of judicial attitudes and what the High Court has done in these different religion-related areas, is a larger project beyond the scope of this short article. I will turn, then, to the substance of my theory.

In the first case considering the free exercise clause, the High Court glibly dismissed a claim that Commonwealth legislation infringed upon free exercise of religion by compelling a person who was a pacifist for religious reasons to engage in military training. According to Chief Justice Griffith in the 1912 case of *Krygger v Williams*, Section 116 protects religious opinion or the private holding of faith, and it also protects "the practice of religion – the doing of acts which are done in the practice of religion."[63] However, "to require a man to do a thing which has nothing at all to do with religion is not prohibiting him from a free exercise of religion."[64] On this view, Section 116 protects private, overtly religious conduct such as prayer or attending church, but not the performance of or abstention from public and political acts that are ostensibly separate from religious beliefs. Chief Justice Griffith effectively assumed that publicly expressed action based on religious belief has "nothing at all to do with religion," thereby enforcing a divide between the public and private realms. Religion in his view falls strictly within the private realm, and where the public manifestation of religion conflicts with Commonwealth law, it is not protected by Section 116.[65]

In *Jehovah's Witnesses*, Chief Justice Latham stated that since the free exercise of religion is protected, this includes but extends beyond the mere holding of religious opinion; the protection "from the operation of any Commonwealth laws" covers "acts which are done in the exercise of religion" or "acts done in pursuance of religious belief as part of religion."[66] This view, at least, acknowledges that the free exercise of religion is not restricted to belief, but also includes some external action. A potential corollary would be a broader interpretation of free exercise

62 See, e.g., *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1, 20-25 (French CJ).

63 (1912) 15 CLR 366, 369.

64 *Krygger* (1912) 15 CLR 366, 369.

65 See also Joshua Puls, "The Wall of Separation: Section 116, the First Amendment and Constitutional Religious Guarantees" (1998) 26 *Federal Law Review* 139, 142: "Religion began and ended at the church door."

66 *Adelaide Company of Jehovah's Witnesses v Commonwealth* (1943) 67 CLR 116, 124-125 (Latham CJ). For further discussion and questions regarding the current applicability of this "action-belief dichotomy," see Gabriel Moens, "Action-Belief Dichotomy and Freedom of Religion" (1989) 12 *Sydney Law Review* 195.

according to which, if a law has the effect of restricting external religious action (even if it does not directly target such action), the law could breach the clause.[67] However, the interpretation was clarified by Acting Chief Justice Mason and Justice Brennan in *Church of the New Faith v Commissioner of Pay-Roll Tax*, where they approvingly quoted from Justice McTiernan in *Jehovah's Witnesses*: "The word religion extends to faith and worship, to the teaching and propagation of religion, and to the practices and observances of religion."[68] This includes conduct which is or is the equivalent of worship, prayer, church attendance and proselytization. They cautioned that such conduct must occur in the context of "giving effect" to a person's "particular faith in the supernatural" (it must have a religious motivation), and that such conduct is not unrestricted (it will not be protected if it offends against "neutral" laws, or ordinary laws that do not discriminate against religion). This assumes a narrow definition that restricts free exercise to those acts or conduct that are overtly religious and normally considered private in nature, such as prayer and church attendance. As noted above, if this conduct is public and conflicts with ordinary Commonwealth law, it will not be protected by Section 116.[69]

For example, in *Jehovah's Witnesses*, although Chief Justice Latham acknowledged that religion and politics can and do interact (which could in principle form the basis for an interpretation of free exercise that would extend to the protection of public and political acts), he observed that "Section 116 … is based upon the principle that religion should, for political purposes, be regarded as irrelevant" to matters of public policy.[70] This apparent separation between politics and religion mirrors the liberal idea that religion is a purely private matter. Indeed, Mortensen contends that this specific statement by Chief Justice Latham "reflects, of course, the central idea of a secular commonwealth" and that Latham was "deeply influenced by liberal political philosophy."[71] Blackshield agrees, stating that Latham's decision in *Jehovah's Witnesses* was "a reflection of the curious personal characteristics which had shaped his political career: a combination of intellectual liberalism with political authoritarianism."[72] In *Jehovah's Witnesses*, on the basis of Section 116 alone, even though the group's right to meet was recognized, the organization

[67] See, e.g., Luke Beck, "The Case against Improper Purpose as the Touchstone for Invalidity under Section 116 of the Australian Constitution" (2016) 44(3) *Federal Law Review* 505-529; Deagon, "Defining the Interface" (n 59); Deagon, "Liberal Assumptions" (n 3).

[68] (1983) 154 CLR 120, 135-136.

[69] Deagon, "Defining the Interface" (n 59) 246.

[70] *Jehovah's Witnesses* (1943) 67 CLR 116, 126.

[71] Reid Mortensen, *The Secular Commonwealth: Constitutional Government, Law and Religion* (PhD Thesis, University of Queensland, 1995) 194.

[72] Tony Blackshield, "Religion and Australian Constitutional Law" in Peter Radan et al. (eds), *Law and Religion* (Routledge, 2005) 89.

would still have been dissolved and its meetings prevented because the organization and its doctrines were viewed as subversive, according to the determination of the Commonwealth government. Though the factual circumstances of the case are fairly extreme (alleged subversion of the war effort during a world war), the principle underlying the decision is that religious freedom may be limited to preserve social order, and that furthermore the government is entitled to determine what is required to preserve social order.[73] The decision therefore evinces a narrow approach based on assumptions that prioritize the public Commonwealth agenda over the private exercise of religion, particularly if that exercise spills over to the public domain and is deemed to be in some way subversive of the authority of the state. The approach clearly expresses a narrow interpretation of religion with a preference for permitting only domesticated or "civil" religion that remains strictly within the control of the state.[74] Thus, Chief Justice Latham's adherence to secular-liberal assumptions that separate religion from politics (in conjunction with the concomitant, politically liberal, authoritarian view that religion is a private matter subject to state restriction) may have influenced his decision that the regulations did not breach the free exercise clause.

The last time the High Court considered the free exercise clause was the 1997 case of *Kruger v Commonwealth*.[75] In *Kruger*, the plaintiffs argued that a Northern Territory ordinance that authorized the forced removal of Indigenous children from their tribal culture and heritage was invalid because this law prohibited the free exercise of religion. The majority held that the impugned law did not mention the term "religion" and was not for the purpose of prohibiting the free exercise of religion, so the law was upheld. Only laws could breach Section 116, not the administration of laws. Chief Justice Brennan and Justices Gummow and McHugh (in separate majority judgments) reinforced the prevailing narrow approach, stating that to be invalid under Section 116 the impugned law "must have the purpose of achieving an object which s 116 forbids," and upholding the law on the basis that "no conduct of a religious nature was proscribed or sought to be regulated in any way."[76]

Thus, according to the High Court, legislation that in effect prevented Indigenous Australians from practicing the culture and values related to their religion did not violate Section 116.[77] Only Justice Gaudron was prepared to grant that the empowering

73 See Deagon, Liberal Assumptions (n 3) 118-119.
74 Ahdar and Leigh, (n 22) 17-18.
75 (1997) 190 CLR 1.
76 *Kruger* (1997) 190 CLR 1, 40, 161.
77 Valerie Kerruish, "Responding to *Kruger*: The Constitutionality of Genocide" (1998) 11(1) *Australian Feminist Law Journal* 65, 67-68.

legislation "prevented certain people from freely exercising their aboriginal religious practices in association with other members of their community."[78] The majority rejected this claim on the basis that the legislation did not explicitly or purposefully target the free exercise of religion, even if they acknowledged (as Justice Gummow did) that a potential effect of the legislation was to deny "instruction in the religious beliefs of their community."[79] The law did not address the explicit infringement of religion in the private realm, but rather was an incidental outcome of public policy. More precisely, in the majority's view, because the law did not specifically target the private practice of religion and any restriction on religious freedom was instead an effect of a religiously neutral public policy, the law by its nature could not infringe the free exercise clause. This view assumes the earlier public-private divide adopted by Chief Justice Griffith, according to which free exercise is protected only in the private realm and any conflict between free exercise and Commonwealth public policy is resolved in favour of the Commonwealth. In essence, the High Court has posited a sharp distinction between private activity that is religious in nature and public exercise (which is never religious in nature), and this assumption may have informed their interpretation of the cases considering the free exercise clause. Section 116 only protects private exercise, not public acts in conflict with Commonwealth policy.

In *Church of the New Faith*, Justices Mason and Brennan stated that "general laws to preserve and protect society are not defeated by a plea of religious obligation to breach them."[80] That is, religiously neutral laws that pursue a public policy to preserve the community will not be subject to the free exercise clause, even though they might restrict religious freedom. Based on these liberal assumptions, the current High Court position is that the enforcement of generally applicable laws intended for the maintenance of society cannot be blocked by the free exercise clause unless the laws have the specific objective of restricting the free exercise of religion in the private realm. This approach has resulted in a narrow view of free exercise and substantial restriction of religious freedom.

5. Conclusion: Secularism and religious freedom in free exercise jurisprudence

This article has proposed that secularism has influenced free exercise jurisprudence in different ways in the United States and Australia. In particular, where a

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[78] Sarah Joseph, "*Kruger v Commonwealth*: Constitutional Rights and Stolen Generations" (1998) 24 *Monash University Law Review* 486, 496.

[79] *Kruger* (1997) 190 CLR 1, 161.

[80] *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 136. Though it should be noted that this case was not centrally concerned with the free exercise clause and the remarks were *obiter*.

strict secularist approach that views religion as private in nature and separate from the public sphere has prevailed, the scope of free exercise has been interpreted narrowly. As a result, religious freedom has been significantly limited in particular circumstances. This consequence is apparent in Australia, where a narrow approach to free exercise is relevant to the fact that the clause has never been successfully litigated, and was seen in the United States during the *Smith* era, when a law was valid as long as it did not specifically target religion, even if its effect imposed a substantial burden on religion. Conversely, free exercise decisions in the United States during the past decade have relied on assumptions more amenable to religion, resulting in consistent success for religious freedom advocates. Therefore, more secularist approaches to the free exercise clauses may contribute to narrower interpretations that undermine religious freedom, whereas more religion-friendly approaches may lead to broader interpretations which bolster religious freedom. Advocates for religious freedom may wish to concentrate on persuading courts to reject secularist approaches that categorize religion as merely private and instead to support a broader approach to free exercise that recognizes the public and holistic nature of religion.

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