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# SHOULD ‘PUBLIC REASON’ DEVELOPED UNDER US ESTABLISHMENT CLAUSE JURISPRUDENCE APPLY TO AUSTRALIA?

KEITH THOMPSON\*

## Abstract

John Rawls’ idea of public reason holds that comprehensive doctrines including religion should not be allowed a voice in the public square. Such ideas prevent society achieving that ‘overlapping consensus’ which is said to be a requirement for enduring peace and progress. However, the suggestion that some ideas should be excluded from public debate is anti-democratic. This article reviews Rawls’ idea of public reason’ against its US legal context and suggests it was a response to US Supreme Court decisions concerning their First Amendment. Though our framers copied most of that clause into the *Australian Constitution*, the High Court has interpreted it completely differently. The article concludes that Rawls’ idea of public reason does not fit in a Westminster democracy tied to parliamentary sovereignty rather than judicial review.

## I INTRODUCTION

My proposition in this article is that the idea of ‘public reason’, most famously articulated by John Rawls, is an American idea that does not wisely transfer to jurisdictions where the establishment clause jurisprudence of the United States’ (‘US’) Supreme Court does not apply. This article develops previous research which shows that the freedom to manifest or exercise one’s religious beliefs (including religious speech) does not require that the state be completely excluded from involvement in religion, as is the thrust of the US jurisprudence.<sup>1</sup> Even countries that respect and have been informed by the US prohibition on the establishment of religion by the state,<sup>2</sup> have not considered that the prohibition requires the exclusion of all religious involvement in the public square or that an impermeable wall of separation must be erected between church and state to prevent any reception of the ideas of one by the other. The rejection of the American ‘complete separation’ idea is most obvious in European countries with established churches which have implemented a version of free exercise that is consistent with the *European Convention on Human Rights* and other international human rights instruments. Australian jurisprudence also suggests that the prohibition of religious establishment in the US *Bill of Rights* need not prevent natural and respectful religious exercise and expression in the public square.

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\* Associate Professor and Associate Dean, University of Notre Dame Australia (Sydney campus). Many people have helped me develop this paper. I am sure I will not remember them all, but among others I thank Rex Ahdar, Nicholas Aroney, Iain Benson, Steve Chavura, Joel Harrison, Gabriel Moens, Patrick Parkinson, Hayden Ramsey and Michael Stokes. They have helped me hone my thinking, detected glaring omissions and inconsistencies, and clarified my thinking when I had not perfectly expressed what I felt. But as always, the errors that remain are my own.

<sup>1</sup> See for eg, Rex Ahdar and Ian Leigh, ‘Is Establishment Consistent with Religious Freedom?’ (2004) 49 *McGill Law Review* 635.

<sup>2</sup> Cole Durham and Brett Scharffs observe that ‘the US approach [to establishment] is not as unusual as some believe, since a number of countries, such as Japan, the Philippines, and Australia, have constitutional provisions that closely resemble the Establishment Clause of the US Constitution’. However, they observe (as will be discussed below in relation to Australia) that ‘these [provisions] are often interpreted in quite different ways’: W Cole Durham, Jr and Brett G Scharffs, *Law and Religion, National, International, and Comparative Perspectives* (Aspen Publishers, 2010) 370.

The reason for writing such an article in Australia is that there is an increasing demand from the secular left that religious worship and expression be confined to private space and that religious reasons for political decisions should be affirmatively excluded from debate in the public square. That suggestion was most strongly put by Anna Crabb as she asserted that during John Howard's term as Prime Minister 'the framing of the September 11 terrorist attacks and the subsequent "war on terror" as a religious conflict' had 'weakened adherence to Rawls' ... liberal consensus' that religious beliefs should be excluded from the public forum.<sup>3</sup> But Ms Crabb is not alone. Amanda Lohrey has written that Australia became less fair during John Howard's term as Prime Minister in part, because 'churches ha[d] been markedly successful ... in lobbying for an economic agenda that is straightforwardly about maximizing government funding of the churches' own infrastructure'.<sup>4</sup> Less scholarly contemporary examples of the thinly veiled idea that religious ideas have no place in the public square include Tim Dick's Sydney Morning Herald assertion that religious freedom is "bigotry disguised as belief",<sup>5</sup> parroting a New York Times editorial on March 31, 2015<sup>6</sup> and a writer in the same newspaper two weeks later opining that institutional religion is a sanctuary for homophobes who should not be allowed to preach against homosexual practices.<sup>7</sup>

I set out my proposition in two parts. In relation to the first part of my writing (set out under Part II below) I outline and discuss the development and current nature of US establishment clause jurisprudence. My intention is not to criticise North American jurisprudence, but rather to show that there are other versions of religious freedom which do not relegate religious expression and exercise to private space. As the Australian establishment clause is almost identical to the US establishment clause, I show that the form the words taken is not the problem. In relation to the second part of my writing (set out under Part III below) I explain how John Rawls' idea of public reason is a product of the US establishment clause jurisprudence's concern to separate church and state. I identify how the meaning of the US establishment clause has been developed in US Supreme Court cases. My reason for identifying that developing meaning is to show that what John Rawls wrote and when he wrote it was coloured by the changing US Supreme Court's religious freedom orthodoxy. Like the US Supreme Court, Rawls maintained that 'liberty of conscience' was sacred, even though he ultimately concluded that the expression of religious ideas should be 'voluntarily' confined to private places. I conclude that John Rawls' idea of public reason is flawed because it accepts as gospel, the US jurisprudential idea that true freedom of religion requires a version of state neutrality that excludes all religious expression from the public square. The exclusion of religious expression from the public square in US jurisprudence is dangerous because it suppresses religious freedom. The idea of Public Reason is dangerous because it sends a message that it is alright to suppress religious expression for reasons other than the risk of significant harm in society. Current US religious freedom jurisprudence is inconsistent with the religious freedom that is set out in international human rights instruments which better respects religious diversity and expression. The contemporary US version of religious freedom as limited by Rawls' doctrine of public reason is not acceptable in common law jurisdictions which hold that the legislature rather than the judges is sovereign. Nor is public reason convincing in civil law jurisdictions where the existence of an established church remains compatible with religious expression and manifestation in the public square. When the US

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<sup>3</sup> Anna Crabb, 'Invoking Religion in Australian Politics' (2009) 44(2) *Australian Journal of Political Science* 259, 260-61.

<sup>4</sup> Amanda Lohrey, 'Voting for Jesus: Christianity and Politics in Australia', *Quarterly Essay* 22 (2006) 60, 63.

<sup>5</sup> "Comment", *Sydney Morning Herald*, May 26, 2015.

<sup>6</sup> "Religion as a cover for bigotry", in Editorials/Letters, *The New York Times*, A22.

<sup>7</sup> "Same-sex sinners", Bruni F, *The New York Times Sunday Review*, April 5, 2015, 3.

establishment clause ideology is extracted from Rawls' idea of public reason, public reason can be identified as an anti-democratic Trojan horse with the potential to neuter the views of up to 4/5<sup>th</sup> of the world's population in favour of a non-believing elite. As the anti-democratic nature of Rawls' idea of public reason is exposed, its respectability and convincing power should fade.

## II US ESTABLISHMENT CLAUSE JURISPRUDENCE

The First Amendment to the *US Constitution* states:

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

The first two clauses deal what is now called freedom of religion. The first of those clauses is known as the establishment clause and the second as the free exercise clause. Both clauses have been the subject of considerable litigation since they were adopted in December 1791. Because both clauses limit US federal government action, most of that litigation has been brought by private individuals claiming that federal government legislation has unlawfully established religion or interfered with religious practice. After the Fourteenth Amendment was passed in 1868 following the Civil War, succeeding panels of the US Supreme Court have confirmed that the restrictions imposed by the First Amendment on government legislation applied also to the US state governments.<sup>8</sup>

There are many US cases about the establishment clause. Though I acknowledge the extensive debate about that Clause in the *Bill of Rights* that has been fought using the 'original intent' of the framers as a weapon, I will not engage in that debate. My purpose below is to identify what the US Supreme Court has said concerning what the establishment clause means in the past and in the present.

The first case that directly engaged the US establishment clause concerned whether federal funding to build an isolating ward or building at the Providence hospital in Rhode Island, breached the *Constitution*.<sup>9</sup> The Supreme Court observed that though the hospital was operated by the Catholic Church, it had been established by an Act of Congress and Congress retained authority to direct its staff regardless of their religious commitments. Two-thirds of the capacity of the proposed new building was reserved for the use of poor persons sent by the District and those patients would choose their own physicians and nurses at the cost of the District. As the hospital had a secular purpose, it did not conflict with the First Amendment.

Before the Civil War, it had been clear that the clauses of the First Amendment did not bind the states. They prohibited the US federal government from establishing religion or passing laws that interfered with citizens' free exercise, but did not stop the states establishing churches or proscribing free exercise. But the Fourteenth Amendment passed after the Civil War in 1868, extended the reach of the *Bill of Rights* into the states though the extent of that reach was not defined in respect of the religion clauses in the First Amendment until the decisions reached

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<sup>8</sup> In *Cantwell v Connecticut*, 310 US 296 (1940), the US Supreme Court held that by virtue of the due process clause of the Fourteenth Amendment, the US states were also bound by the free exercise clause. In *Everson v Board of Education*, 330 US 1 (1947), the Court similarly found that the establishment clause also applied to the states.

<sup>9</sup> *Bradfield v Roberts*, 175 US 291 (1899).

in 1940<sup>10</sup> and 1947.<sup>11</sup> In 1940, the Supreme Court found that the due process clause of the Fourteenth Amendment protected free exercise as a ‘quintessential individual right’.<sup>12</sup> But the establishment clause did not directly engage individual rights and had originally been drafted only to prevent the federal government from interfering with the state religious establishments that existed when the federal *Bill of Rights* was passed in 1789.

But in *Everson v Board of Education* in 1947 that limited view of the scope of the establishment clause was fundamentally changed. Though the Supreme Court upheld the New Jersey statute which funded student transportation to all schools whether they were religious or not, when he wrote the 5-4 majority judgment, Justice Hugo Black famously changed the establishment clause landscape by insisting that the establishment clause required the separation of church and state, invoking President Thomas Jefferson in aid of the proposition:

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. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between church and State’.<sup>13</sup>

The debate concerning the meaning and authority of Jefferson’s words has raged ever since. Critics have shown that Madison rather than Jefferson was the most prominent author of the final version of the First Amendment.<sup>14</sup> But it is clear that in other writings, Madison acknowledged at least, the need to separate the ecclesiastical and civil spheres to prevent their mutually corrupting influence.<sup>15</sup> The separation argument has antecedents dating back at least to the ‘two swords’ theory that Pope Gregory VII used in 12<sup>th</sup> century Europe to ‘settle’ the investiture controversy.<sup>16</sup> Whatever the rights or wrongs of the ‘separation is necessary’ argument, Justice Black’s words struck a chord that has continued to resonate in US jurisprudence. Arguably, Justice Black’s generous interpretation of the meaning of the

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<sup>10</sup> *Cantwell v Connecticut*, 310 US 296 (1940).

<sup>11</sup> *Everson v Board of Education*, 330 US 1 (1947).

<sup>12</sup> Michael W McConnell, John H Garvey and Thomas C Berg, *Religion and the Constitution* (Aspen Law and Business, 2002) 88.

<sup>13</sup> *Everson v Board of Education*, 330 US 1, 15-16 (1947).

<sup>14</sup> For example, when former US Chief Justice William H Rehnquist was first an Associate Justice, he delivered a dissenting opinion in *Wallace v Jaffree* 472 US 38, 91 (1985) where he rewrote the *Everson* interpretation of the establishment clause written 38 years previously. He began his criticism with the statement that ‘[i]t is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson’s misleading metaphor [‘a wall of separation between church and state’] for nearly forty years’: at 92.

<sup>15</sup> Koppelman has detailed Madison’s concern that religion should not be promoted simply because it conduces to good citizenship and that ‘to employ Religion as an engine of Civil policy’ was ‘an unhallowed perversion of the means of salvation’: Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, Northwestern University School of Law Public Law and Legal Theory No 08-32, 4, 25-26, 66 <<http://ssrn.com/abstract=1268406>>.

<sup>16</sup> Berman says the terms ‘Investiture Struggle’ to describe the contests between the Church and States in the 11<sup>th</sup> and 12<sup>th</sup> centuries is something of an understatement. The transformation involved was much more revolutionary than that term implies and sought the complete ‘disengagement of the sacred and profane spheres’: Harold J Berman, *Law and Revolution* (Harvard University Press, 1983) 87-88. Brian Tierney dates the idea of the ‘two swords’ to Bernard of Clairvaux in the middle of the 12<sup>th</sup> century: Brian Tierney, *The Crisis of Church and State 1050-1300* (Prentice-Hall, 1964) 87-88.

establishment clause in 1947 was the watershed from which the constitutional invalidity of public school prayer began to flow in 1962. That jurisprudence is note-worthy. Since 1962,<sup>17</sup> public school prayer and anything similar<sup>18</sup> or substituted for it<sup>19</sup> has been unconstitutional. And although the jurisprudence surrounding official sponsorship of Christmas nativity<sup>20</sup> and other public displays is more equivocal,<sup>21</sup> it was a public display case that led to Justice O'Connor's ruling that any government endorsement of a practice or event which led a participant to feel a sense of otherness or exclusion, would offend the establishment clause prohibition.<sup>22</sup>

In 1971, Justice Black's interpretation of the establishment clause morphed into the 'excessive entanglement' test that came out of the decision in *Lemon v Kurtzman*.<sup>23</sup> The idea that secular government laws which were 'excessively entangled' in religion were constitutionally invalid, and the related ideas that no law was valid which had neither a secular purpose nor a primary secular effect, have become the touchstones to which most US judges refer when deciding what the establishment clause means.

Attempts to moderate the rigour of those judicial tests have not been completely unsuccessful. Justice O'Connor's compromise idea in *Lynch v Donnelly*<sup>24</sup> that it was state endorsement of religion that made non-religious believers feel like outsiders that constitutionally invalidated state laws, has appealed to some judges because it is not as unyielding as the idea that any religious idea in a law should invalidate it. But the suggestion that a scintilla of state endorsement of a religious idea in any law should invalidate it, still operates as a veto in the hands of a judge trained to believe that the establishment clause requires absolute separation of church and state. The competing judgments handed down on June 27, 2005<sup>25</sup> suggest the Supreme Court Justices do not want the establishment clause to work as a black and white veto on the constitutionality of a law that has even the whiff of anything religious about it. But the argument that only a public display that has more than fifty years standing will survive judicial review said by some commentators to explain the difference in these two 2005 decisions,<sup>26</sup> is

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<sup>17</sup> *Engel v Vitale*, 370 US 421 (1962).

<sup>18</sup> For example, the mandatory reading of the Lord's Prayer was struck down in *Abington School District v Schempp*, 374 US 203 (1963).

<sup>19</sup> In *Wallace v Jaffree*, 472 US 38 (1985), the Supreme Court struck down an Alabama law enabling a daily period of silence in schools which students could use for private prayers.

<sup>20</sup> A nativity display or crèche was held not to breach the establishment clause in *Lynch v Donnelly*, 465 US 668 (1984), but a similar display breached the establishment prohibition in the clause in *Allegheny County v Greater Pittsburgh, ACLU* 492 US 573 (1989).

<sup>21</sup> Two Ten Commandments cases decided by the Supreme Court on the same day were similarly decided differently in 2005. In *Van Orden v Perry*, 545 US 677 (2005), the display at the Texas state capitol was upheld because it had a secular purpose. But in *McCreary County v ACLU or Kentucky*, 545 US 844 (2005), displays in several Kentucky county courthouses were unconstitutional because they were not integrated into an overall secular purpose.

<sup>22</sup> *Lynch v Donnelly*, 465 US 668 (1984).

<sup>23</sup> 403 US 602 (1971).

<sup>24</sup> 465 US 668 (1984).

<sup>25</sup> *Van Orden v Perry*, 545 US 677 (2005) and *McCreary County v ACLU or Kentucky*, 545 US 844 (2005). For a brief summary of their findings, see above n 15.

<sup>26</sup> Some have suggested that the two decisions may be reconciled by the Supreme Court's earlier finding in *Marsh v Chambers*, 463 US 783, 786 (1983) that some government practices are permissible 'because they are deeply imbedded in the history and tradition of this country'. See for eg, John Witte Jr and Joel A Nichols, *Religion and the American Constitutional Experiment* (Westview Press, 3<sup>rd</sup> ed, 2011) 229-31. See also Matthew J Morrison, 'The Van Orden and McCreary County Cases: Closing the Gaps Remaining between the Established Lines of Ten Commandments Jurisprudence', (2007) 13 *Washington and Lee Journal of Civil Rights and Social Justice* 435, noting the 'history and tradition' reconciliation of the two decisions but suggesting that Justice Kennedy's

not philosophically satisfying. Nor is the logic of those two decisions consistent with international free exercise norms though they may explain why some overtly religious practices and symbols have thus far survived judicial scrutiny under the First Amendment.<sup>27</sup>

What is most unsatisfying about the current state of US First Amendment jurisprudence is that it seems internally inconsistent to those familiar with freedom of religion under international human rights instruments. That is because the establishment clause jurisprudence seems to compete with the idea of free exercise expressed in the immediately following sister clause. The free exercise clause is also expressed as a prohibition – ‘Congress ... shall make no law prohibiting the free exercise [of religion]’ – so that US legislatures are not obliged to protect freedom of religion in the manner set out in modern international human rights instruments. The US free exercise clause only prevents US legislatures passing laws which would interfere with the free exercise of religion. But if the interpretation of the two religion clauses was even-handed, one would expect indirect legislative interference with free exercise to be as proscribed as indirect legislative establishment. That is, just as legislation that indirectly endorses a religious practice or idea is routinely struck down, one would expect even-handed judges to strike down a law that indirectly interferes with some manifestation of religion that does not hurt anyone. But that is not the way the US jurisprudence works. It is not that American lawyers have missed this inconsistency. It took centre stage in *Walz v Tax Commission* in 1970<sup>28</sup> when the Court decided 7:1 that religious tax exemptions did not breach the establishment clause. Chief Justice Burger wrote that ‘absolutely straight line ... rigidity could defeat the basic purpose’<sup>29</sup> of the two religion clauses. The general principle that he ‘deduc[ed] from the First Amendment’<sup>30</sup> was that the Court would ‘not tolerate either governmentally established religion or governmental interference with religion. Short of th[e]se expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.’<sup>31</sup>

That Chief Justice Burger’s ‘play in the joints’ metaphor identified that the two religion clauses are ‘frequently in tension’<sup>32</sup> and need to be balanced, is manifest in Chief Justice Rehnquist’s more recent understanding that ‘room for play in the joints between [the clauses meant that] ... there are some state actions permitted by the establishment clause but not required by the free exercise clause’.<sup>33</sup> But this formulation of the tension also manifests that free exercise considerations are likely to come off second best in such a balancing exercise since the Court has not developed inviolable *Lemon* tests to determine Free Exercise constitutional validity. If either Chief Justice Burger or Chief Justice Rehnquist had seen the two religion clauses as in any way equal in this balance, then government interference in religious practice that was

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‘coercion test’ expounded in *Lee v Weisman*, 505 US 577 (1992) is a more philosophically satisfying way to reconcile the two decisions. But others have suggested these transparently divergent decisions manifest a rupture in the uneasy détente between the conservative and liberal blocks in the Supreme Court which had been respected for many years (for eg, Laura S Underkuffler, ‘Through a Glass Darkly: *Van Orden*, *McCreary*, and the Dangers of Transparency in Establishment Clause Jurisprudence’, (2006) 5 *First Amendment Law Review* 5).

<sup>27</sup> The US Pledge of Allegiance has survived so far despite the decision in *Elk Grove Unified School District v Newdow*, 542 US 1 (2004). The religious inscriptions chiseled into Supreme Court stone, the religious prayers which open legislative sittings in many US jurisdictions, and the ‘In God we trust’ words on US currency are also alive and well as at this writing.

<sup>28</sup> 397 US 664 (1970).

<sup>29</sup> *Ibid* 669.

<sup>30</sup> *Ibid*.

<sup>31</sup> *Ibid*.

<sup>32</sup> *Locke v Davey*, 540 US 712, 718-719 (2004).

<sup>33</sup> *Ibid*.

privately motivated would have been a larger constitutional problem. And it certainly was not a problem when student initiated prayer was struck down under the establishment clause in *Santa Fe Independent School District v Doe*.<sup>34</sup> Absent such equality between the clauses, the benevolent neutrality to which Chief Justice Burger said the Court aspires, presents as an illusory tease.<sup>35</sup>

#### A *The Establishment of Religion Does Not Offend International Religious Freedom Norms*

The first point to be made in this discussion is that the US idea that the establishment of religion is inconsistent with human rights norms, does not appear in any international human rights instrument.<sup>36</sup> Indeed, as John Witte Jr has observed, '[i]nternational law and many domestic laws regard the material and moral cooperation of church and state as conducive, and sometimes essential, to the achievement of religious liberty'.<sup>37</sup> Rex Ahdar and Ian Leigh develop John Witte's insight further by observing that '[i]nternational treaties and covenants are worded in free exercise terms only'<sup>38</sup> and that 'the more radical demands for separationism reified in the American "wall of separation" metaphor'<sup>39</sup> are 'conspicuous[ly] absent'<sup>40</sup> from international norms. They continue that the classic Krishnaswami Report 'concluded that it was impossible to recommend a particular form of judicial relationship between the state and religion'.<sup>41</sup>

Durham and Scharffs have similarly concluded that there is no one correct or safe structural model that provides optimum religious freedom in any society.<sup>42</sup> There are many countries with established churches that do very well in supporting the religious freedom of all their subjects even when there is an established state church.<sup>43</sup> For Ahdar and Leigh, 'neither establishment of religion, nor formal separation of state and religion, would in themselves constitute religious intolerance or discrimination'<sup>44</sup> under either the *International Covenant on Civil and Political Rights 1996 ('ICCPR')* or the 1981 *Declaration on the Elimination of All*

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<sup>34</sup> 530 US 290 (2000).

<sup>35</sup> In Canada, Justice L'Heureux-Dubé of that country's Supreme Court has warned that leaving questions about the bounds of freedom of religious practice to judicial discretion and case-by-case analysis – 'balancing' in the US First Amendment jurisprudence above - has a 'chilling effect' on religious freedom generally. She said that religion and spirituality prosper best when the legal rules are certain and predictable: *R v Gruenke* (1991) 3 SCR 263,

<sup>36</sup> Ahdar and Leigh, above n 1, 658.

<sup>37</sup> John Witte Jr, 'Essential Rights and Liberties of Religion in the American Constitutional Experiment' (1996) 71 *Notre Dame Law Review* 371, 440.

<sup>38</sup> Ahdar and Leigh, above n 1, 657.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.* Ahdar and Leigh attribute this description of Krishnaswami Report to Brice Dickson ('The United Nations and Freedom of Religion' (1995) 44 *International Comparative Law Quarterly* 327, 344). These opinions of the Krishnaswami Report are shared by Bahiyih G Tahzib in her book, *Freedom of Religion or Belief: Ensuring Effective International Legal Protection* (Martinus Nijhoff Publishers, 1996) 131-32, where she cites various commentators who have described the Report as 'careful and comprehensive' and a 'landmark' in the United Nations' 'efforts ... to eradicate prejudice and discrimination based on religion or belief'.

<sup>42</sup> Durham and Scharffs, above n 2, 112-62.

<sup>43</sup> *Ibid.*

<sup>44</sup> Ahdar and Leigh, above n 1, 659 citing Donna J Sullivan, 'Advancing the Freedom of Religion or Belief through the UN Declaration on the Elimination of Religious Intolerance and Discrimination' (1988) 82 *American Journal of International Law* 487, 490. See also, Ahdar and Leigh, above n 1, 658-59.



*Forms of Intolerance and Discrimination Based on Religion or Belief ('Elimination of Religious Intolerance Declaration')*.<sup>45</sup>

The bottom line is that the US First Amendment prohibition on the federal establishment of religion was required in 1789 to protect the *US Bill of Rights* from a veto by the six US states that then did have established churches. This clause in the First Amendment was intended to protect American pluralism perhaps on the basis of Voltaire's popular insight that:

If there were only one religion in England there would be danger of despotism, if there were two, they would cut each other's throats, but there are thirty, and they live in peace and happiness.<sup>46</sup>

Certainly the 21<sup>st</sup> century US understanding of the First Amendment is different, but international practice and American history confirm that the separation of church and state are not essential to the satisfactory settlement of religious freedom in any society. Australian experience makes this insight even more clear since the Australian framers copied the American religion clauses almost word for word into their 1901 *Constitution*.<sup>47</sup>

Section 116 of the *Australian Constitution* reads:

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.

Even though the two clauses are very similar, the High Court of Australia has found that the replacement of the US word 'respecting' with the word 'for' by the Australian framers, means that the Australian clause is significantly narrower than its American template. The facts in *Attorney-General (Vic); Ex rel Black v Commonwealth ('DOGS case')*<sup>48</sup> which elicited this stark difference in approach concerned school funding in the State of Victoria. In a relator action, the applicants argued that the federal government's funding of religious schools was a breach of the establishment clause of the *Australian Constitution* quoted above using logic lifted straight out of the US cases.<sup>49</sup> They lost 6:1 with only Murphy J accepting that the US jurisprudence should be followed.<sup>50</sup> The majority did not accept Murphy J's proposition that the different interpretation of the changed wording in the Australian Constitution was 'hair-

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<sup>45</sup> *ICCPR*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *Elimination of Religious Intolerance Declaration*, GA Res 36/55, 36 UN GAOR Supp (No 51), 36th sess, 73rd plen mtg, arts 1–8, UN Doc A/36/684 (1981). See also *Universal Declaration on Human Rights ('UDHR')*, GA Res 217A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/810 (10 December 1948).

<sup>46</sup> Voltaire, *6<sup>th</sup> Philosophical Letter*, 1734.

<sup>47</sup> Durham and Scharffs, above n 2, 370 where they note that Japan and the Philippines have also followed US establishment clause ideology for their constitutions.

<sup>48</sup> (1981) 146 CLR 559. Note however, that the Australian approach is very close to that which Associate Justice Rehnquist wished to take in his dissenting judgment in *Wallace v Jaffree*, 472 US 38, 91 (1985).

<sup>49</sup> *DOGS case* (1981) 146 CLR 559, 578.

<sup>50</sup> Murphy J was emphatic - 'The United States' decision on the establishment clause should be followed. The arguments for departing from them (based on trifles of differences in wording between the United States and Australian establishment clauses) are hair-splitting, and not consistent with the broad general approach which should be taken to constitutional guarantees of freedom': *ibid* 632). But his brethren steadfastly rejected his argument that the Australian jurisprudence should be followed by what the US Supreme Court had already decided. Barwick CJ said simply that the Australian constitutional language was always controlling: *ibid* 578. Wilson J was stronger, citing Gibbs J (in the earlier case of *Australian Conservation Foundation Inc v The Commonwealth of Australia* (1980) 28 ALR 257, 270) where he had said that 'although we regard the decisions of the Supreme Court with the greatest respect, it must never be forgotten that they are often give against a different constitutional, legal and social background from that which exists in Australia': *ibid* 652.

splitting'.<sup>51</sup> Chief Justice Barwick said that the Australian words prohibited 'the making of a law for establishing a religion'.<sup>52</sup> Despite the contrary interpretation of the US First Amendment words, there was no ambiguity<sup>53</sup> in the purposive Australian language.<sup>54</sup> Gibbs J said that it was 'impossible to say ... that the challenged legislation has the purpose or effect of setting up any religion or religious body as a state religion or a state church'.<sup>55</sup> Stephen J said that he thought "establishing" mean[t] the constituting of a religion as an officially recognized State religion'.<sup>56</sup> Gibbs and Stephen JJ both rejected Murphy J's propositions that the US First Amendment forbade the funding of religious education by the time that the *Australian Constitution* was enacted<sup>57</sup> and that s 116 of the *Australian Constitution* must therefore have been intended to enact the same prohibition.<sup>58</sup> Stephen and Wilson JJ also rejected Murphy J's acceptance of the plaintiffs' argument that section 116 constituted a rights guarantee of some kind.<sup>59</sup> They said it only operated as a prohibition on Commonwealth legislative power.<sup>60</sup> In consequence of the fact that section 116 was not a rights guarantee, Wilson J also rejected Murphy J's assertion that because section 116 involved a constitutional guarantee of the rights of the states and the citizens, it should be interpreted in broad general terms.<sup>61</sup> Wilson J said that while it was true that 'constitutional grant[s] of plenary power should be construed with all the generality which the words used will admit ... the same [wa]s not true of a provision which proscribes power'.<sup>62</sup>

Wilson J read s 116 as 'forbidding any law for establishing any religion or any form of any religion'.<sup>63</sup> But Mason J's interpretation of the Australian establishment clause was the narrowest of all. He agreed with Wilson J, but qualified further and added:

[T]o constitute 'establishment' of a 'religion' the concession to one church of favours, titles and advantages 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>64</sup>

The lowest common denominator of these five separate majority judgments (including one by the serving Chief Justice of Australia and two from future Chief Justices of Australia), is that the words 'shall not make any law for establishing any religion' do not prevent anything other than the establishment of a national church or religion. This reasoning stands in sharp contrast to the equivalent authority of Justice Hugo Black's assertion in the United States that very similar words mean a lot more than that in the US,<sup>65</sup> suggesting at least that Australia and the US are another two countries 'separated' by a common language.<sup>66</sup>

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<sup>51</sup> *DOGS case* (1981) 146 CLR 559, 632.

<sup>52</sup> *Ibid* 583.

<sup>53</sup> *Ibid* 578.

<sup>54</sup> *Ibid* 579.

<sup>55</sup> *Ibid* 604.

<sup>56</sup> *Ibid* 605.

<sup>57</sup> *Ibid* 624-627.

<sup>58</sup> *Ibid* 599-600 (Gibbs J); 609-610 (Stephen J).

<sup>59</sup> *Ibid* 622-624, 632-634.

<sup>60</sup> *Ibid* 604 (Stephen J); 648, 652 (Wilson J).

<sup>61</sup> *Ibid* 622 and 632.

<sup>62</sup> *Ibid* 653.

<sup>63</sup> *Ibid* 655.

<sup>64</sup> *Ibid* 612.

<sup>65</sup> Above n 13 and supporting text.

<sup>66</sup> A witticism variously attributed to Oscar Wilde, George Bernard Shaw and Winston Churchill.

Two of the Australian High Court judges also considered that the Australian establishment clause could not represent a mandate for state-church separation since that broad general reading of the clause would have made the third and fourth clauses of s 116 of the *Australian Constitution* redundant.<sup>67</sup> While the US First Amendment does not contain similar clauses prohibiting the enforcement of any religious observance or the imposition of religious tests for public offices or trusts, similar prohibitions do exist elsewhere in the US *Bill of Rights*<sup>68</sup> – meaning that these Australian High Court judges seem to deny that even the broader words of the US First Amendment required the separationist meaning given them in US Supreme Court jurisprudence.<sup>69</sup>

However, a comparison of the US and Australian establishment clause language is incomplete if we just look at the judgments. There also has to be an understanding that the jurisprudential differences between the two countries are not just about the words the different framers chose to express their restrictions on federal government involvement in religion in the future. There are cultural overlays that are beyond the scope of this paper, but there are also different judicial conventions which are not accounted for in the foregoing comparison.

Foremost among those is the different approach that judges in the US and Australia take to judicial review. Ever since *Marbury v Madison*<sup>70</sup> was decided in the US, US judges have been authorised to strike down federal (and later state) legislation that offended the *Constitution* including the *Bill of Rights* which became a part of that *Constitution* by virtue of the first Ten Amendments. Australian judges cannot do that. For one thing, Australia has no federal constitutional bill of rights so that the ambit of the High Court's power to review legislation for consistency with the *Constitution* is more limited than it is for the US Supreme Court. And secondly, there is the doctrine of parliamentary sovereignty, which holds that Parliament, rather than the courts, have the final say as to what the law shall be by virtue of their electoral mandate. Certainly the High Court of Australia can declare federal legislation invalid if it is beyond the power of the Commonwealth Parliament to enact it, but no Australian court can strike down legislation because it is incompatible with human rights values unless a plaintiff or appellant can point to those values in the express words or necessary implications of the *Australian Constitution* itself.<sup>71</sup> And referenda results are much more difficult if not impossible to unsettle because they are the ultimate primary evidence of popular intent.

Though this international discussion demonstrates that the US Establishment Clause jurisprudence is unique, it also shows that jurisdictions outside the US do not accept that the prohibition of religious establishment and the separation of church and state are a requirement for religious freedom in any nation. This insight serves as an appropriate introduction to the philosophical thought of John Rawls about religious freedom that follows. It is a premise of

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<sup>67</sup> *DOGS case* (1981) 146 CLR 559, 616 (Stephen J); 654-55 (Wilson J).

<sup>68</sup> Art VI, para 3 of the *US Constitution* itself provides that 'no religious test shall ever be required as a qualification to any office or public trust under the United States'.

<sup>69</sup> Note however, that the US First Amendment is arguably broader than s 116 of the *Australian Constitution* because it not only uses the word 'respecting' rather than 'for', but also because it omits the word 'any' to qualify 'religion'.

<sup>70</sup> 5 US 137 (1803).

<sup>71</sup> Even ratification of international human rights by the Australian Executive does not enable the federal courts in Australia to declare Commonwealth domestic legislation invalid because it is inconsistent with international norms. That is because it is well settled that international instruments including treaties are only binding when they have been implemented into Australian domestic law by follow on legislation. See for example, *Chow Hung Ching v The King* (1948) 77 CLR 449.

this article, that John Rawls was raised in a legal and philosophical environment that accepted without question, that church and state must be separated and religious establishment forbidden if religious liberty was to prosper. Rawls does not anywhere overtly state his acceptance or belief in that proposition. But it is the premise of this article that Rawls accepted it as 'the gospel' without critical analysis. Part II of this article will therefore outline Rawls' thought, drawing attention to this 'assumption proposition' only when necessary to identify and test it.

### III THE POLITICAL THOUGHT OF JOHN RAWLS: A THEORY OF JUSTICE (1971)

Rawls' *Theory of Justice* grew out of his concern that utilitarian ideas could not produce a just society.<sup>72</sup> He believed that because all competent human beings share an innate sense of justice,<sup>73</sup> it was possible to conceive and create a truly just society.<sup>74</sup> The utilitarian aspiration to create a system that provided 'the greatest good to the greatest number' suppressed minority interests completely and that does not feel naturally just to anyone. Rawls suggested that most of us would come to the same conclusions about what constitutes a just society, if we made those decisions behind a 'veil of ignorance' from an 'original position'.<sup>75</sup> Those conclusions would not be utilitarian.<sup>76</sup> Rawls says that the political and legal system we would choose from the neutral vantage point of his 'original position' would be just and fair. We would choose the best option if we did not know even generally what our particular circumstances would be when we had our turn on earth.<sup>77</sup> An enlightened theoretical self-interest would displace the practical self-interest that drives existing human societies in the present.<sup>78</sup> Rawls believed that the systems we would all innately choose from behind his veil of ignorance in the original position, would yield fairness to all and not just to the majority, as in utilitarian philosophy, or to oligarchical power elites as feared in marxist philosophy.<sup>79</sup> If the answers human beings seek to questions of law and practice were worked out from the perspective of the original position, we could edge our way towards a truly just society in the present.

Rawls did not think religious groups were any more trustworthy than other majoritarian or elite groups wielding power in human society.<sup>80</sup> History was full of examples where religious

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<sup>72</sup> John Rawls, *A Theory of Justice* (Harvard University Press, 1999) xi-xii (preface), 19-24. In the preface to the original 1971 edition, Rawls said he was seeking to construct a 'systematic moral conception' to oppose the utilitarian by 'carry[ing] to a higher level of abstraction the traditional theory of the social contract as represented by Locke, Rousseau and Kant': at xvii-xviii.

<sup>73</sup> Note, however, that Rawls distinguishes his theory of justice from what he calls 'intuitionism': *ibid* 20, 30-36. His theory of justice 'is a theory of moral sentiments ... setting out the principles governing our moral powers, or, more specifically, our sense of justice': *ibid* 44. Contract doctrine 'fill[s the] gap' between intuitionism and perfectionism: *ibid* 46. But Rawls still accepts that his reasoning 'is highly intuitive throughout': *ibid* 105.

<sup>74</sup> *Ibid* 8 where Rawls states 'that the nature and aims of a perfectly just society is the fundamental part of the theory of justice'.

<sup>75</sup> *Ibid* 11.

<sup>76</sup> *Ibid* 13.

<sup>77</sup> While Rawls' theory of justice was developed to explain justice as fairness in an entirely neutral way, his undergirding idea of 'the original position' has clear theological history. See for eg. Terryl Givens, *When Souls had Wings: Pre-Mortal Existence in Western Thought* (Oxford University Press, 2010) 1-8.

<sup>78</sup> Rawls describes his theory as a theory of 'rational choice': John Rawls, *A Theory of Justice* (Harvard University Press, 1999) 15.

<sup>79</sup> Marx famously theorised that the 'the history of all hitherto existing society is the history of class struggles' and that the various classes clash when their self-interests collide: Karl Marx and Friedrich Engels, *The Communist Manifesto* (1848).

<sup>80</sup> See for eg. John Rawls, 'The Idea of Public Reason Revisited' in John Rawls, *The Law of Peoples* (Harvard University Press, 1999) 149 where he notes that 'Catholics and Protestants in the sixteenth and seventeenth

groups suppressed others as soon as they acquired the reins of power despite their 'golden rule' pretensions. That concern with human self-interest saw Rawls discuss the place of tolerance in connection with freedom of conscience and speech in *A Theory of Justice*, long before he articulated his idea of public reason.

Since people in the original position, 'do not know ... what their religious or moral convictions are ... [t]he question they are to decide is which principle they should adopt to regulate the liberties of citizens in regard to their fundamental religious, moral and philosophical interests.'<sup>81</sup> He concluded quite simply that

equal liberty of conscience is the only principle that the persons in the original position can acknowledge. They cannot take their chances with their liberty by permitting the dominant religious or moral doctrine to persecute or to suppress others if it wishes.<sup>82</sup>

Rawls discussed whether it is just for parents or other ancestors to choose equal liberty of conscience on behalf of their descendants, and concluded that since persons in the original position know no 'more about their descendants than they know about themselves',<sup>83</sup> their decisions are just even if they bind all generations. But equal liberty of conscience is not absolute. It 'is limited...by the common interest in public order and security'<sup>84</sup> since from the original position, each would recognize 'that the disruption of [public order and security] is a danger for the liberty of all'.<sup>85</sup> He also denied 'the notion of the omniscient laicist state, since from the principles of justice it follows that government has neither the right nor the duty to do what it or a majority ... wants to do in questions of morals and religion.'<sup>86</sup> Even though 'an intolerant sect has no title to complain when it is denied an equal liberty'<sup>87</sup> since it cannot claim reciprocal treatment<sup>88</sup> if it would not accord such treatment, '[w]e still cannot say that tolerant sects have the right to suppress the [intolerant]'.<sup>89</sup> That someone is 'intolerant of another is [not] grounds for limiting someone's liberty'.<sup>90</sup> While '[j]ustice does not require that men stand idly by while others destroy the basis of their existence', 'when the constitution itself is secure, there is no reason to deny freedom to the intolerant'.<sup>91</sup> The only reason why the denial of such freedom could be justified was if 'this is necessary for the sake of equal liberty itself'<sup>92</sup> as for example when the constitution was not secure.<sup>93</sup> The need to preserve equal liberty itself was the only principle which could justly limit equal liberty of conscience. Rawls

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centuries [honored] ... the principle of toleration ... only as a *modus vivendi*. This meant that should either party fully gain its way it would impose its own religious doctrine as the sole admissible faith.'

<sup>81</sup> Rawls, above n 72, 181.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid* 183.

<sup>84</sup> *Ibid* 186.

<sup>85</sup> *Ibid* 187.

<sup>86</sup> *Ibid* 186-87.

<sup>87</sup> *Ibid* 190.

<sup>88</sup> Rawls' 'reciprocity principle' may be simply understood as the golden rule of Christianity. Accordingly, in this example, an intolerant sect cannot expect tolerance from other sects. Note that Professor Durham has documented the existence of a principle equivalent to the golden rule of Christianity (and thus to Rawls' reciprocity principle) in every major religion in the world: W Cole Durham Jr, 'The Doctrine of Religious Freedom' (Speech delivered on 3 April 2001) n 18 *Speeches* <<http://speeches.byu.edu/reader/reader.php?id=880>>.

<sup>89</sup> Rawls, above n 72, 191.

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid* 192.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid* 192-94.

believed that all would agree to this limiting principle from the standpoint of the original position.<sup>94</sup>

In Rawls' *Theory of Justice*, there is no obvious US establishment clause paradigm of thought evident.<sup>95</sup> What he wrote there about equal liberty of conscience is consistent with both the conception of freedom of religion in US First and Fourteenth Amendment jurisprudence and in international human rights instruments including the *UDHR*, the *ICCPR* and the *Elimination of Religious Intolerance Declaration* though he did not mention any of those documents.

How did Rawls get from such a generally acceptable expression of the idea of freedom of conscience and belief to the idea that some expressions of belief were inappropriate in the public square even though they represented no threat to equal liberty itself? How did he justify the abrogation of freedom of conscience and belief that seems implicit to so many in his idea of 'public reason'?

Rawls' idea of 'public reason' was developed in his theoretical quest for an overlapping consensus such as might stabilise and strengthen all liberal democracies. It was first proposed in his 1993 book entitled *Political Liberalism*<sup>96</sup> and further developed in his 1999 article entitled 'The Idea of Public Reason Revisited'.<sup>97</sup> He saw these new works as a continuation of what he had written in *A Theory of Justice*. 'In a nearly just society there is a public acceptance of the same principles of justice'.<sup>98</sup> But there does not need to be complete agreement. There can even be 'considerable differences in citizen's conceptions of justice provided that these conceptions all lead to similar political judgments'.<sup>99</sup> '[D]ifferent premises can yield the same conclusion'<sup>100</sup> and therefore groups with different perspectives can accept the same judgment in a dispute though for different reasons. However, 'there comes a point beyond which the requisite agreement in judgment breaks down and society splits...on fundamental questions'.<sup>101</sup> Responsible citizens will not then do as they please. While they may act conscientiously and disobey law, yet they will be held responsible for what they do.<sup>102</sup> Citizens responding to such differences should sacrifice their comprehensive doctrines in the interests of preserving the overlapping consensus necessary to preserve society when viewed from the original position. To use Rawls' own words:

Citizens realize that they cannot reach agreement or even approach mutual understanding on the basis of their irreconcilable comprehensive doctrines. In view of this, they need to consider what kinds of reasons they may reasonably give one another when fundamental political questions are at stake. I propose that in Public Reason comprehensive doctrines of truth or right be replaced by an idea of the politically reasonable addressed to citizens as citizens.<sup>103</sup>

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<sup>94</sup> Ibid 193-94.

<sup>95</sup> However, note that Professor Thomas Pogge at Yale University, who wrote his doctoral dissertation under Rawls' supervision at Harvard, has observed that Rawls was 'fundamentally focused on domestic [America]' in all his work. While he believed the US should play a leading role in the world as the repository of justice in accord with the 'city on a hill' metaphor, Rawls was not really concerned with foreign policy <<http://www.patheos.com/blogs/approachingjustice/2013/04/26/thomas-pogge-on-studying-under-john-rawls/>>.

<sup>96</sup> John Rawls, *Political Liberalism* (Columbia University Press, 1993).

<sup>97</sup> Rawls, above n 80.

<sup>98</sup> Rawls, above n 72, 340.

<sup>99</sup> Ibid.

<sup>100</sup> Ibid.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid 341.

<sup>103</sup> Rawls, above n 80, 131-32.

For Rawls, equal liberty of conscience was not compromised by this citizen sacrifice of those parts of their comprehensive doctrines which lie outside the overlapping consensus, because it was a voluntary sacrifice made in the interests of the peaceful and secure continuation of their society. It was also justified because it was a reciprocal sacrifice made by all citizens in the interests of the greater good.<sup>104</sup> This sacrifice or mutual forbearance,<sup>105</sup> was a citizen ‘duty of civility’<sup>106</sup> but for Rawls, it was a moral duty rather than a legal duty.<sup>107</sup> Comprehensive doctrines, including religious doctrines, may only enter political debate, if they are ‘proper political reasons’<sup>108</sup> and manifest ‘commitment to constitutional democracy’.<sup>109</sup> In demonstration of the neutrality of his concept of Public Reason, Rawls says that secular arguments premised in ‘a worthy idea of full human good’ are no more acceptable in the public square than religious arguments. Thus statutes forbidding homosexual relations may only be discussed in terms of the relevant civil rights rather than whether they are good, or bad or sinful<sup>110</sup> – though it is unclear from Rawls’ text why the moral quality of homosexual relations is not something upon which one could have an opinion in the original position.<sup>111</sup>

Some colleagues have suggested that my characterisation of Rawls’ understanding of liberty of conscience is unjust because I infer that he abandoned liberty of conscience as a sacrificial lamb on an altar of overlapping consensus. I do not think Rawls believed he was sacrificing liberty of conscience at all. Rawls believed that all he wrote preserved liberty of conscience. My point is that his US context blinded him, at least in part, to an understanding that his ‘proviso’ in ‘The Idea of Public Reason Revisited’ substantially undermined liberty of conscience as understood in international human rights instruments. In his own words:

[R]easonable comprehensive doctrines, religious or nonreligious, may be introduced in public political discussion at any time, provided that in due course proper political reasons – and not reasons given solely by comprehensive doctrines – are presented that are sufficient to support whatever the comprehensive doctrines are said to support.<sup>112</sup>

Rawls’ belief that there is a need to justify comprehensive doctrines including religious comprehensive religious doctrines with “proper political reasons” misunderstands and diminishes freedom of speech including freedom of religious speech, as well as liberty of conscience. It misunderstands both freedoms because it infers that they are not self-evident. It diminishes them because it requires them to justify themselves in a better language even though true freedom is allowed to speak for itself. I elaborate upon these and other objections to Rawls’ idea of public reason in the next two sections of this article.

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<sup>104</sup> Ibid 135-36, 138. I note that this use of partially utilitarian language may have galled Rawls who wrote his theory of justice to avoid the need to resort to utilitarianism as a philosophical explanation for political liberalism. But here ‘the greater good’ is not really utilitarian because it is ‘the greater good as viewed from the original position’ rather than ‘the greater good of the majority’.

<sup>105</sup> ‘Sacrifice’ and ‘mutual forbearance’ are my words, not Rawls’. Rawls never speaks of a sacrifice though he does expect that those who hold comprehensive doctrines which are either incompatible with the possibility of an overlapping consensus (and thus, long term, the peaceful continuation of the state), should not express them unless they can articulate them in a manner comprehensible to all: Rawls, above n 80, 144, 152-56.

<sup>106</sup> Rawls, above n 80, 135, 154.

<sup>107</sup> Ibid 136-37.

<sup>108</sup> Ibid 152.

<sup>109</sup> Ibid 153-54.

<sup>110</sup> Ibid 148.

<sup>111</sup> I note, however, that an essential part of the argument that takes the morality of homosexual relations outside the scope of discussion in the public square, is that gay people do not choose their sexual orientation or were ‘born that way’. Given this perspective, it is arguable that no one would have chosen laws which discriminate against gay people from the original position since anyone could then have been born gay.

<sup>112</sup> Rawls, above n 80, 152.

### A *Some Criticism that Suggests Rawlsian Public Reason Does Not Respect Free Religious Speech*

When Rawls revisited his idea of public reason in 1997, he did not believe it compromised the equal liberty of conscience that he had outlined in his *Theory of Justice* in 1971. Before I review Rawls' belief that his idea of public reason is consistent with his own 1971 explanation of what is meant by equal liberty of conscience, I outline some of the general criticisms to which Rawls' idea of public reason has been subject. Thereafter, I seek to unpack the question of whether his idea of public reason demonstrates that his conception of equal liberty of conscience has been tainted by US establishment clause jurisprudence.

Rawls' idea of public reason has been the subject of significant criticism because many consider that it does not adequately respect free religious speech. Jeremy Waldron has said that most representations of religious arguments in the public square are crude caricatures and are unfavourably compared with the elegant complexity of the philosophical theories of Rawls and Dworkin.<sup>113</sup> But these characterisations are mostly a travesty<sup>114</sup> and understanding those arguments can and should deepen and enrich our understanding of equality as well as 'our sense of what it is like to make a religious argument in politics'.<sup>115</sup> Indeed, 'it may be impossible to articulate certain important egalitarian commitments without appealing to what one takes to be their religious grounds. If so the Rawlsian exclusion seems unreasonable'.<sup>116</sup> And this writer adds, unreasonable not only on the ground that it excludes important contributions from the debate, but unreasonable because it unjustly excludes some citizens from contributing their expertise to the debate at all.<sup>117</sup> Waldron is also concerned in consequence that 'basic equality is now under attack by sophisticated bodies of theory, which have as their aim the establishment of political power on an inequalitarian basis'.<sup>118</sup>

John Finnis is vaguely charitable when he attributes Rawls' exclusion of 'certain kinds of true and philosophically warranted propositions ... from the processes of public deliberation ... on the grounds that they are not sufficiently widely accepted'.<sup>119</sup> Finnis says Rawls' arguments are equivocal, arbitrary, clumsy and ramshackle.<sup>120</sup> He continues, citing Eisgruber and Sager's book, *Religious Freedom and the Constitution*:<sup>121</sup>

They have no time for Rawlsian proposals to expel from the public domain all religious arguments or grounds for decision-making; they share ... Dworkin's (and Joseph Raz's) healthy skepticism about that ramshackle Rawlsian project – he calls it 'political liberalism' – which in all really important decisions about human rights and the common good would banish concern for truth and in its place put an imaginary overlapping consensus of the 'reasonable' views of all 'reasonable' people (views supposedly

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<sup>113</sup> Jeremy Waldron, *God, Locke and Equality: Christian Foundations in Locke's Political Thought* (Cambridge University Press, 2002) 20.

<sup>114</sup> Ibid.

<sup>115</sup> Ibid.

<sup>116</sup> Ibid 237.

<sup>117</sup> Here I refer to the exclusion of those religious thinkers who do not feel competent with the language of public reason. This idea is discussed in more detail below.

<sup>118</sup> Waldron, n 113, 238.

<sup>119</sup> John Finnis, *Religion and Public Reasons: Collected Essays Volume V* (Oxford University Press, 2011) 4.

<sup>120</sup> Ibid 4, 6, 18.

<sup>121</sup> Christopher L Eisgruber and Larry G Sager, *Religious Freedom and the Constitution* (Harvard University Press, 2007).



identifiable as reasonable without reflection on their truth). They hold – rightly, I think – that in these matters neutrality is not an option.<sup>122</sup>

Steven Smith criticises what he calls ‘the secular government position’<sup>123</sup> espoused by Rawls among others, which he says would interpret the *US Constitution* to render ‘religious’ interests illegitimate.<sup>124</sup> Smith’s concern is that it is frequently impossible in practice to distinguish between what is and is not supposed to be illegitimate because religious ideas and reasons are laced through so many issues in American politics. His hypothetical example from Kent Greenawalt, which he says ‘blends a bit of Noah and a whiff of Nostradamus’,<sup>125</sup> suggests this reasoning would make it illegitimate for government to make secular preparations for a flood if lobbied to do so by religionists, but not if that view were expressed by climate change specialists with scientific evidence to back it up.<sup>126</sup> He then discusses three different kinds of ‘goods’ to try and work out whether it would be illegitimate for a politically liberal government to promote them.<sup>127</sup> Two are unmistakably religious – the ‘Christian idea that it is good to be saved’, and the ‘idea that obedience to God’ is good<sup>128</sup> - and a third more secular idea that a life focused on family is better than a life spent guzzling beer on the couch watching NASCAR or cage wrestling.<sup>129</sup> But even the first two overtly religious ideas have their ethical counterparts when non-religious people express what Professor Edward Rubin calls a ‘morality of self-fulfillment’ as distinct from the older religious ‘morality of higher purpose’,<sup>130</sup> or when they agree that any instruction which encourages obedience to law is good for society.

Professor Smith's questions are – ‘is [there] a set of “interests” – end, or *goods* – that are off limits to government because the goods themselves are “religious” in nature[?]’<sup>131</sup> - and how do you tell and who tells the difference? His conclusion is that making judgments of this kind seems to involve government decisions of ‘exactly the kind ... that the American adoption of religious freedom was meant to repudiate.’<sup>132</sup> While

prominent thinkers like John Rawls and Ronald Dworkin sometimes suggest that government must be neutral with respect to ‘the good’ or ‘the good life ... neither American constitutional law nor American political practice embrace this sort of restriction. On the contrary ... a good deal of political and governmental activity is devoted precisely to the effort to express, ascertain and implement the citizens’ views about what makes for a good life (or good lives) and a good society.’<sup>133</sup>

These three writers are not satisfied that limiting public debate to the language of Public Reason does not abrogate or limit freedom of speech, conscience and belief. But theirs are not the only concerns. Other concerns include the idea that Public Reason discriminates against the uneducated in society; is coercive or intolerant of ideas which are not programmed with its

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<sup>122</sup> Finnis, above n 119, 18.

<sup>123</sup> Steven D Smith, *The Constitution and the Goods of Religion*, University of San Diego School of Law Research Paper Series, Research Paper No 10-059 <<http://ssrn.com/abstract=1879398>> 7.

<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid* 8. Note also that the Smith/Greenawalt example is the idea behind the plot in the Hollywood blockbuster movie, ‘2012’.

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid* 9-12.

<sup>128</sup> *Ibid* 9-10.

<sup>129</sup> *Ibid* 11.

<sup>130</sup> *Ibid* 9, quoting Edward L Rubin, ‘Sex, Politics and Morality’ (2005) 47 *William and Mary Law Review* 1. Note from Smith that Professor Rubin says that ‘for political and legal purposes the First Amendment’s Establishment Clause prohibits coercive laws based on the morality of higher purpose’: Smith, above n 123, 3, citing Rubin, 34.

<sup>131</sup> *Ibid* 8.

<sup>132</sup> *Ibid* 14.

<sup>133</sup> *Ibid* 15.

paradigm; and that the voluntary limitation of the language of public debate is not justified by equal liberty itself. This last unanswered concern is ironic since in *A Theory of Justice* in 1971, Rawls restated seven times between pages 186 and 188<sup>134</sup> that the only justification for the abrogation of any freedom was the risk that the exercise of that freedom might place freedom itself in clear and present danger.

Briefly stated, the discrimination criticism is that the less educated in society are unlikely to have the confidence and vocabulary to express themselves in the language of public reason and so will be marginalised in a society where debate is limited in any way. Uneducated religious believers may be even more marginalised by public reason since they have the double hurdles of vocabulary and translation to surmount before their views will be considered in the public square. That result is surprising since Rawls went to such trouble in *A Theory of Justice* to explain why the intolerant should still be tolerated except when the constitution was under threat.<sup>135</sup>

The coercion criticism is that equal liberty of conscience as expressed in *A Theory of Justice*, cannot coexist with the voluntary and self-disciplined limitation of speech which Rawls called for in his idea of Public Reason. That is because, in the original position, no one would 'take chances with their liberty by permitting the dominant religious or moral doctrine to persecute or to suppress [it]'.<sup>136</sup> The difficulty in avoiding the dominance of any single religious or moral doctrine, acknowledged in *A Theory of Justice*,<sup>137</sup> counsels that we not narrow the quest for overlapping consensus so much that we would 'ask [religious believers] to recognize us as the proper interpreter of their religious duties or moral obligations'.<sup>138</sup>

Rawls' idea of public reason creates the sense that he grew less patient as he grew older. The hope that good or best theory would triumph in the marketplace of ideas as the invisible hand worked its magic à la Milton<sup>139</sup> and Adam Smith,<sup>140</sup> was replaced with an agenda that insisted on an overlapping consensus come what may, though Rawls himself never used the language of coercion or revolution. Though Rawls never admitted it, many commentators since<sup>141</sup> have observed that coercion was latent in *Political Liberalism*<sup>142</sup> and 'The Idea of Public Reason Revisited'.<sup>143</sup>

Though Rawls believed that his idea of Public Reason did not compromise the equal liberty of conscience that he had outlined in his *Theory of Justice* in 1971, the discussion above suggests there are inconsistencies. These inconsistencies and the question whether they are attributable in any measure to US establishment clause jurisprudence is discussed below.

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<sup>134</sup> Rawls, above n 72.

<sup>135</sup> Ibid 190-94.

<sup>136</sup> Ibid 181.

<sup>137</sup> Ibid 182.

<sup>138</sup> Ibid 183.

<sup>139</sup> John Milton, *Areopagitica* (1644).

<sup>140</sup> Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Harriman House Ltd, 1776) (reprinted in 2007).

<sup>141</sup> Jeremy Waldron (above n 113) notes Robert Audi, 'Separation of Church and State and the Obligations of Citizenship', *Philosophy and Public Affairs*, 18 (1989) 259-296; Kent Greenawalt, *Religious Convictions and Political Choice*, Oxford University Press (1988) and Thomas Nagel, 'Moral Conflict and Political Legitimacy', 11 *Philosophy and Public Affairs* (1980) 215-240 'in support of something like the Rawlsian position', 237.

<sup>142</sup> Rawls, above n 96.

<sup>143</sup> Rawls, above n 80.

## B *Inconsistencies between Rawlsian Public Reason and Equal Liberty of Conscience*

The foregoing discussion suggests that public reason is inconsistent with Rawls' own conception of equal liberty of conscience for at least, the following six reasons. First, in taking up Jeremy Waldron's point, that because Rawls does not understand religious reasons his descriptions of those reasons are caricatures of them.<sup>144</sup> When a person is committed to religious values, she lives those values in every aspect of her life. Her values are part of her human character and dignity. Her religious beliefs explain every decision she makes. Every time she encounters a legal or a political issue in the public square, she understands and responds to that issue in an integrated holistic way which includes her religious experience, values and commitments. Rawls' idea of Public Reason expects that she will be able to and will agree to set the religious part of her identity to one side if she chooses to respond to legal and political issues in the public square. But if she even agrees that such division of her nature is possible, she will feel that she would lack integrity to do so. To ask her to consider dividing her nature in this Rawlsian way, is to denigrate her dignity and to dictate another set of values on top of those she has chosen to live and has woven through her nature.

Steven Smith makes the same point when he says it is impossible to distinguish between what is and is not supposed to be legitimate because religious ideas and reasons are laced through so many issues in American politics.<sup>145</sup> While Jeremy Waldron points to the devaluation of individual human dignity that is implicit in public reason,<sup>146</sup> Steven Smith says, neither the individual nor society could ever be completely sure that we had satisfactorily excluded religious reasons from our decision making if we were minded to try.<sup>147</sup> It can thus be concluded that Public Reason is inconsistent with equal liberty of conscience, because the devaluation of human dignity is anathema to that liberty and secondly, because it is futile to try and exclude religious reasons from public discussion and decision-making. Hereafter in this article, I shall refer to these as the 'devaluation of human dignity' and 'futility' reasons why public reason is inconsistent with equal liberty of conscience.

Finnis, Eisgruber and Sagar record a third reason why Rawlsian public reason is inconsistent with equal liberty of conscience. They say that Rawlsian public reason would banish concern for objective truth from all discussion in the public square.<sup>148</sup> Their concern is that unless overlapping consensus accidentally coincides with what was objectively the right and true response in any public square discussion, the need for overlapping consensus would trump the quest for the truth or the right no matter how bad the resulting compromise.<sup>149</sup> Because this is a concern born of the postmodern debate about whether there is any such thing as absolute truth, I shall call this objection or inconsistency between Rawlsian public reason and equal liberty of conscience, the 'relativist' inconsistency.

I have already labeled (in earlier discussions) three further inconsistencies between Rawlsian public reason and equal liberty of conscience, representing: fourth, the 'discrimination' reason, fifth, the 'coercion' reason and sixth, the 'inequality' reason. Rawlsian public reason is inconsistent with equal liberty of conscience because it discriminates against people in society

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<sup>144</sup> See Waldron, above nn 113-118 and supporting text.

<sup>145</sup> Smith, above nn 125-130 and supporting text.

<sup>146</sup> Waldron, above n 113.

<sup>147</sup> Smith, above nn 131-133 and supporting text.

<sup>148</sup> Finnis, above n 122 and supporting text.

<sup>149</sup> *Ibid.*

who are not educated, competent and confident enough to use the language of public reason when legal and political matters arise for discussion in the public square. Rawlsian public reason is inconsistent with equal liberty of conscience because it coerces people to leave their religious values and beliefs behind them when they discuss anything in the public square and Rawlsian public reason would put religious believers at an unequal disadvantage in public square discussion and debate since it prevents religious believers from expressing themselves in the language most familiar to them.

If equal liberty of conscience rather than public reason were the standard governing citizen involvement in public square debate, there would be no exclusion for any of these six reasons. That is, equal liberty of conscience would not devalue human dignity because it would allow all citizens to participate in public square debate with and without religious reasons. There would be no need for a futile effort to exclude religious reasons from public discussion. All those participating in such discussion could express their vision of the good, true and right regardless of any predetermined necessity for overlapping consensus, and in consequence, there would be no institutionalised discrimination against any debate participants, no coercive exclusion of any words they might choose when expressing themselves, and there would be an overriding sense that they all had equal access to the microphone.

Where then did this anti-libertarian Rawlsian idea of public reason come from, and how could John Rawls possibly have considered that his idea was consistent with equal liberty of conscience? The answer is not obvious and cannot be proven beyond doubt since John Rawls did not concede that his idea of public reason was inconsistent with equal liberty of conscience, and he did not write anything that confessed he had changed his mind about the essential elements of equal liberty of conscience. However, the fact that his idea of public reason is consistent with US establishment clause jurisprudence and that the US establishment clause jurisprudence of his 'public reason' years has come to constitute American orthodoxy on the nature of equal liberty of conscience, is no small coincidence. John Rawls was steeped in American jurisprudential orthodoxy throughout his life. Even his magnum opus, *A Theory of Justice* in 1971, makes no reference to conceptions of religious liberty beyond the US. I shall therefore conclude this part by arguing that John Rawls' idea of public reason is inconsistent with equal liberty of conscience precisely to the extent that his idea of public reason accords with US establishment clause jurisprudence.

### C *Rawlsian Public Reason, US Establishment Clause Jurisprudence and Equal Liberty of Conscience*

Rawls did not isolate a definition of equal liberty of conscience that he accepted as his foundation. In *A Theory of Justice*, he simply wrote that 'the question of equal liberty of conscience was settled'<sup>150</sup> and that '[i]t is one of the fixed points of our considered judgments of justice.'<sup>151</sup> As earlier quoted he also wrote that

equal liberty of conscience is the only principle that the persons in the original position can acknowledge. They cannot take their chances with their liberty by permitting the dominant religious or moral doctrine to persecute or to suppress others if it wishes.<sup>152</sup>

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<sup>150</sup> Above n 80, 181.

<sup>151</sup> Ibid.

<sup>152</sup> Ibid 181.

But equal liberty of conscience was not absolute. It 'is limited ... by the common interest in public order and security'<sup>153</sup> since from the original position, each would recognize 'that the disruption of [public order and security] is a danger for the liberty of all'.<sup>154</sup>

While these statements accord with those expressed in art 18 of both the *UDHR* and *ICCPR*, Rawls' US focus and understanding is given away in his statements above<sup>155</sup> that the question of equal liberty of conscience is both 'settled' and a 'fixed point' in 'our considered judgments of justice'. Though Rawls does not attribute the 'fixed point metaphor', it is a reasonably obvious reference to the same metaphor used by Justice Robert H Jackson in his majority opinion in *West Virginia State Board of Education v Barnette* in 1943 as appears in the passage below:

If there is any fixed star in our constitutional constellation, it is that not official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they not now occur to us.<sup>156</sup>

The 'fixed point' referred to in the Justice Jackson metaphor was the meaning of the US First Amendment and particularly the meaning of the free exercise clause. In that case, the Supreme Court decided that Jehovah's Witness school children could not be forced to salute the American flag even though the country was deeply involved in World War II.

If Rawls' allusion in his 'settled' definition of equal liberty of conscience was to Justice Jackson's majority opinion in *West Virginia State Board of Education v Barnette*, then it is ironical for Rawls on a number of fronts. First, though the case was argued under both the free exercise and free speech clauses of the First Amendment, it was decided under the free speech clause. The decision was that the choice of the Jehovah's Witness school children not to salute the flag was a matter of free speech and they were free to state their religious beliefs, in the public square, by not saluting the flag. Second, Rawls chose to allude to the pro-free speech majority judgment of Justice Jackson rather than the minority judgment of Justice Frankfurter who said that freedom of religion did not allow these children to breach this West Virginia law just because it offended their consciences. And finally, the allusion in his 1971 book is ironic since that was the year the Supreme Court established its 'excessive entanglement' test in *Lemon v Kurtman*, a test which further unsettled the constellation of US establishment clause jurisprudence.

The point is that Rawls' opinion seems to have tracked the opinion of the US Supreme Court. For in 1971 when he published *A Theory of Justice*, freedom of religious speech was ascendant. But from the year when his proofs of *A Theory of Justice* went to the publishers, the fixed points began to change. Certainly Justice Hugo Black had signaled change where the establishment clause was concerned in *Everson v Board of Education* in 1947, but Justice Black's establishment clause jurisprudence did not fully bite until *Lemon v Kurtman* in 1971 after *A Theory of Justice* went to press. Save for the school prayer cases, the eye-catching First Amendment cases of the previous decade concerned the free exercise and free speech clauses and liberty of the subject had been the focus of the Supreme Court's attention.

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<sup>153</sup> Ibid186.

<sup>154</sup> Ibid 187.

<sup>155</sup> See above nn 150, 151.

<sup>156</sup> 319 US 624, 642 (1943).

Perhaps the case that set Rawls to thinking about public reason was *Employment Division v Smith* in 1991.<sup>157</sup> In a sense, that case homogenised all the First Amendment clause jurisprudence. For if government could not pass laws that dictated any measure of religion to society, then citizens should not be granted religious exemptions from laws that did not single them out. The Supreme Court's decision not to allow Al Smith a religious exemption from generally applicable drug laws so that he could smoke the hallucinogenic drug peyote in his native American religion, was philosophically consistent with the idea that freedom of conscience did not justify citizens breaking the law as Justice Frankfurter had said in his dissent in *West Virginia State Board of Education v Barnette* in 1943. In the *Employment Division v Smith* decision, the Supreme Court adopted the same version of neutrality towards religion that it had developed in Establishment Clause cases since 1971, but this time, in a Free Exercise case. This was close to a sea change for US Free Exercise jurisprudence since, beginning with *Sherbert v Verner* in 1963, the Supreme Court had used the general civil rights 'strict scrutiny' standard to insist that government laws which burdened the free exercise of religion were invalid unless there was no other way for government to achieve an otherwise legitimate objective.<sup>158</sup> *Employment Division v Smith* wound back the clock so that government had the benefit of the doubt and the philosophy governing its decisions under both religion clauses became the same. After *Employment Division v Smith*, the same separationist philosophy which forbade any US government endorsement of a religious message in its administration or legislation, required that religious practice be subject to generally applicable law unless it had been singled out in a non-neutral manner.

Post 1971 US Supreme Court jurisprudence on the First Amendment thus turned Rawls' 1971 understanding of equal liberty of conscience on its head. The post 1991 blended First Amendment jurisprudence held that complete separation of church and state was an essential part of neutral religious freedom. Even when the Supreme Court recalled Justice Burger's 1970 statement that there should be 'play in the joints' between the religion clauses in 2005,<sup>159</sup> there was the subliminal message that the neutrality required under Establishment Clause would trump equal liberty of conscience under the Free Exercise clause since 'there [we]re some actions permitted by the Establishment Clause but not required by the Free Exercise Clause'.<sup>160</sup> The 'play in the joints' between the clauses was no longer a suggestion that the two clauses had separate work to do in protecting religious freedom generally. It was a metaphor to remind legislators, administrators and judges that they did not need to exclude every religious symbol or utterance from the public square – the well established historical iconic examples could remain because they had lost their religious message and did not prejudice the 'American is a neutral secular state' orthodoxy.

Accordingly, John Rawls may have been confused. There was no reference to any 'fixed points' in our 'considered judgments of justice'<sup>161</sup> in either *Political Liberalism* in 1993 or 'The Idea of Public Reason Revisited' in 1997. That is because there were no fixed points any longer. Equal liberty of conscience was in a state of flux in America. And so, in his effort to make sense of equal liberty of conscience, John Rawls proposed Public Reason. When the development of his reasoning is reviewed in its US political and jurisprudential context, it is obvious that he was trying to shore up his theory so that it would continue to have explanatory power in the future since his 1971 concept of equal liberty of conscience did not explain what

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<sup>157</sup> 494 US 872 (1990).

<sup>158</sup> For example, *Sherbert v Verner*, 374 US 398 (1963); *Wisconsin v Yoder*, 406 US 205 (1972).

<sup>159</sup> *Locke v Davey*, 540 US 712, 718-719 (2004) referring to *Walz v Tax Commission*, 397 US 664, 669 (1970).

<sup>160</sup> *Locke v Davey* 540 US 712, 718-19 (2004).

<sup>161</sup> Rawls, above n 72, 181.

was happening in the jurisprudence any more. The reason why he denied that his concepts of ‘equal liberty of conscience’ and Public Reason, were inconsistent, was because the US Supreme Court still paid lip service to ‘free exercise’ which was the phrase from which Rawls had extracted his 1971 concept of ‘equal liberty of conscience’. But even in 1971 Rawls knew that the two phrases did not quite match which is why he preferred ‘equal liberty of conscience’. But after *Employment Division v Smith*<sup>162</sup> in 1991, his ‘theory of justice’ had begun to feel like a farce and he tried to repair it. That is why he wrote *Political Liberalism* and ‘The Idea of Public Reason Revisited’.<sup>163</sup> They were makeshift repairs to *A Theory of Justice*, necessary because the US Supreme Court’s gradual abandonment of true ‘equal liberty of conscience’ had messed up the foundations of Rawls’ original philosophical work. ‘Public reason’ was the best idea he could find to explain what had happened. Perhaps it could also provide western society with a tool to use to solve disagreements about ‘comprehensive doctrines’ in the future since commitment to the old solution, ‘equal liberty of conscience’, had dissolved.

‘Public reason’ does explain contemporary American religious freedom jurisprudence. It may not be true to the historical vision variously expressed as ‘equal liberty of conscience’, ‘free exercise of religion’, ‘freedom of thought and conscience’, ‘freedom of religion and belief’. But public reason does explain why religious symbols are no longer acceptable in the US public square and why legislation that interfere with the free exercise of religion no longer need to pass a ‘strict scrutiny’ test to be constitutionally valid.

An example of how Rawls’ idea of public reason explains the contemporary interface between liberty of conscience and ‘pure political reasoning’, may be seen in the US Federal District Court decision in *Perry v Schwarzenegger*.<sup>164</sup> The case followed a long running political dispute between church groups defending traditional heterosexual marriage and gay rights activists who believed gay couples were entitled to ‘marriage status’ on equal rights grounds. The political argument had been running for more than a decade before the case came on for trial.

In a March 2000 voting initiative (popularly known as Proposition 22), a 61/39 majority of California voters had authorised the enactment of a new section 308.5 in the California Family Law Code which stated that ‘[o]nly marriage between a man and a woman is recognized in California’. That statutory amendment was held invalid under the *California State Constitution* by a 4-3 majority of the California Supreme Court on May 15, 2008.<sup>165</sup> But that result in its turn was overturned by a constitutional ballot proposition (Proposition 8) which amended the *California State Constitution* with the same words – ‘[o]nly marriage between a man and a woman is recognized in California’. That proposition had passed by a 52.2/47.8 majority after an extensive campaign supported by the Catholic and LDS Churches which characterized the issue as one of religious liberty.

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<sup>162</sup> 494 US 872 (1990).

<sup>163</sup> When Rawls gave the lectures that formed the basis for *Political Liberalism* (1993), he also responded to criticism of his earlier work by Herbert Hart, Jurgen Habermas and others. Rawls specifically acknowledged the influence of both Hart and Habermas in those lectures. He wrote that when he prepared chapter VIII of *Political Liberalism*, he had revised his account of the basic liberties he had outlined in *A Theory of Justice* (1971) ‘in view of HLA Hart’s criticisms’: Rawls, *Political Liberalism* (Columbia University Press, 1993) xlvi, 20. He similarly acknowledged Jurgen Habermas in Lecture IX of that same work, observing that the only real difference between them was between their ‘original position’ and ‘ideal discourse’ rhetorical devices and the fact that Habermas had aspired to create a comprehensive philosophical doctrine while Rawls suggested he had only tried to explain how justice works in the political sphere: at 372-374.

<sup>164</sup> Case No. C 09-2292 VRW (US District Court for the Northern District of California, 4 August 2010).

<sup>165</sup> *Re Marriage Cases* (2008) 43 Cal 4th 757 (76 Cal Rptr 3d 683, 183 P 3d 384) (2008).

That matter came before the US Federal District Court as *Perry v Schwarzenegger*. Chief Justice Vaughan Walker ruled that Proposition 8 was invalid because it violated the Due Process and Equal Protections clauses of the 14<sup>th</sup> Amendment to the United States Constitution since there was no valid secular justification for this law. He wrote:

The court defers to legislative (or in this case, popular) judgment if there is at least a debatable question whether the underlying basis for the classification is rational ... Most laws subject to rational basis easily survive equal protection review because a legitimate reason can nearly always be found for treating different groups in an unequal manner ... [But] excluding same-sex couples from marriage is simply not rationally related to a legitimate state interest ... In the absence of a rational basis, what remains of proponents' case is an inference, amply supported by evidence in the record, that Proposition 8 was premised on the belief that same-sex couples are simply not as good as opposite-sex couples ... Whether that belief is based on moral disapproval of homosexuality, animus towards gays and lesbians or simply a belief that a relationship between a man and a woman is inherently better than a relationship between two men or two women, this belief is not a proper basis to legislate.<sup>166</sup>

Justice Walker's decision was upheld by the Ninth Circuit Court of Appeals, but a further appeal to the United States Supreme Court under the name *Hollingsworth v Perry*<sup>167</sup> was declined 5-4 on the basis that the appellants did not have standing to bring suit because they could not demonstrate a real and tangible harm.<sup>168</sup> The Supreme Court's standing decision in the final appeal has technical credibility, but the underlying message in the US is that even a majority of voters cannot vote their consciences in an election any more if religion presents as the only rational explanation for their choice. If Justice Robert H Jackson were to continue his 1943 astronomical metaphor in the present, he might say simply that 'the stars have changed'.

So what now for the concept of freedom of conscience, belief and religion under international human rights instruments and particularly the *UDHR* and the *ICCPR*? Is the US Supreme Court correct? Is Rawls' idea of public reason, the way of the future? Has equal liberty of conscience passed its use by date?

#### D *Public Reason Beyond the US?*

At the heart of the reasoning of Judge Walker in *Perry v Schwarzenegger* is an acceptance of the idea that public officials including judges can or should deduce and then judge the intent of citizens and groups of citizens when they participate in the public square. US religious liberty scholars Kent Greenawalt and Michael Perry have expressed similar views. Kent Greenawalt has said that a court would be justified in striking down a law for which the 'ascertainable dominant reason ... was a view that acts are immoral, based on a religious point of view detached from any perspective about harm in this life'.<sup>169</sup> Michael Perry has said that courts are justified in banning laws 'for which the only discernible rationale is an offending

<sup>166</sup> *Perry v Schwarzenegger* Case No. C 09-2292 VRW (US District Court for the Northern District of California, 4 August 2010), 118, 119, 123, 132.

<sup>167</sup> 570 US\_\_\_(2013).

<sup>168</sup> Though the State of California could have claimed that it suffered tangible harm, it had not appealed and these appellants did not have standing to assert its interests before the Court. At first instance, Judge Walker essentially reasoned that California had no rational basis for even considering this amendment to the State Constitution since he considered that only religious reasons had been tendered in its favour.

<sup>169</sup> Kent Greenawalt, *Religion and the Constitution: Volume 2, Establishment and Fairness* (Princeton University Press, 2008) 535, quoting Arnold H Loewy, 'Morals Legislation and the Establishment Clause' (2003) 55 *Alabama Law Review* 159, 166.



religious rationale'.<sup>170</sup> Judge Walker drew 'inference[s], amply supported by evidence'<sup>171</sup> and 'uncloaked the most likely reason for [the] passage'<sup>172</sup> of Proposition 8 before he decided it was fair and just to strike it down.

It may be that this reviewable intent logic is and will remain a uniquely American phenomenon. In countries like Australia where the doctrine of judicial review is more limited, it is difficult to imagine that a single judge would strike down any law on moral grounds. That is because Australian laws are protected by the doctrine of parliamentary sovereignty from judicial invalidation unless they offend constitutional power. Referenda results are theoretically more difficult to unsettle because they are the ultimate primary evidence of popular intent.

Is it possible that the occasional influence of US constitutional ideology<sup>173</sup> in Australia might lead to the invalidation of Australian laws on moral grounds since human rights and freedoms can conflict with the anti-discrimination norms that have been legislated into domestic law in accordance with Australia's international treaty obligations?<sup>174</sup> It is submitted that Australia's steadfast refusal to implement any form of Bill of Rights,<sup>175</sup> her well established pluralism and her track record of egalitarian thinking, do not readily comport with the idea that a majority religious group would be able to dictate to a minority of any kind because a theoretical religious majority believe that minority to be of less worth.

Is it conceivable that Australian courts might be required in the future, to find the reason behind laws requiring differential treatment? Is it likely that Australian or other courts deeply committed to the Westminster tradition including parliamentary sovereignty might try and identify the intentions of those who framed particular laws so as to then be justified in striking them down if they did not comport with Rawlsian Public Reason? And how would such an attempt to identify parliamentary intent square with the idea of freedom of religious intent and conscience?

While the High Court of Australia has often said that it does not respect the intention of the legislature when it measures Commonwealth statutes against their constitutional enabling

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<sup>170</sup> Michael J Perry, *The Political Morality of Liberal Democracy* (Cambridge University Press, 2010) 116.

<sup>171</sup> *Perry v Schwarzenegger* Case No. C 09-2292 VRW (US District Court for the Northern District of California, 4 August 2010), 132.

<sup>172</sup> *Ibid* 133.

<sup>173</sup> While the *United States Constitution* exercised structural and philosophical influence on the Australian framers, Australia has mostly cut its own cloth since. For example, the American influenced reserved state powers and implied immunities doctrines were rejected early in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers Case)* (1920) 28 CLR 129. But more significantly in this freedom of religion context, the Australian High Court decisively rejected the Establishment Clause jurisprudence of the Supreme Court of the United States in *DOGS case* (1981) 146 CLR 559.

<sup>174</sup> For example, the *Racial Discrimination Act 1975* and the *Sexual Discrimination Act 1984*, both Commonwealth statutes, were passed into Australian domestic law to accord with Australia's obligations under respectively, the *International Convention on the Elimination of All Forms of Racial Discrimination* (ratified by the General Assembly of the United Nations on the 21<sup>st</sup> December 1965; entered into force on the 4<sup>th</sup> January 1969, and ratified by Australia on the 30<sup>th</sup> September 1975) and the *Convention on the Elimination of All Forms of Discrimination against Women* (adopted by the General Assembly of the United Nations in 1979; entered into force on the 3<sup>rd</sup> of September 1981, and ratified by Australia on the 17<sup>th</sup> of August 1983).

<sup>175</sup> The most recent referendum which considered whether Australia should adopt a Bill of Rights failed in 1988. The Brennan Committee further considered the possibility and recommended the adoption of a federal Human Rights Act in Australia in 2009, but ultimately the Rudd government rejected that recommendation because the proposal generated substantial opposition.

power,<sup>176</sup> in accordance with a tradition that stretches at least to *Heydon's case* in 1584<sup>177</sup> and reinforced in the *Acts Interpretation Act 1901* (Cth), 'the purpose of a statute is an essential guide to its construction'.<sup>178</sup> But while an Australian court may use legislative intent as a guide in the construction of a statute enacted by a sovereign parliament, since Australia has steadfastly set its face against the enactment of any form of Bill of Rights<sup>179</sup> which might enable judicial review of legislation against human rights norms, it is unlikely that any statute enacted for comprehensive doctrinal reasons would be struck down on those grounds.

Rex Ahdar and Ian Leigh have shown that 'religious freedom is consistent with [religious] establishment' and certainly with 'establishment in its modern, diluted, symbolic form'.<sup>180</sup> They agree with the author that the idea that establishment is inconsistent with religious freedom is primarily an 'American understanding'.<sup>181</sup> They observe that 'any argument that establishment is discriminatory rests primarily on the symbolic effect of the link with state institutions';<sup>182</sup> 'that there is no reason to take the ... words of US First Amendment, nor the way the [US] courts have interpreted them, as embodying either necessary or universal truths about the nature of establishment',<sup>183</sup> and they are certain that '[t]he ICCPR ... does not ... prohibit a state religion that acts noncoercively'.<sup>184</sup>

They further state that 'the [UN] Human Rights Committee has acknowledged that [establishment] arrangements that do not restrict religious liberty are possible'<sup>185</sup> and that 'mild forms of state preference for one religion over another do not violate the [European] Convention [on Human Rights]'.<sup>186</sup> They have also found that an establishment of religion does not inherently alienate those who do not belong to the established church,<sup>187</sup> or that an establishment of religion almost always leads to inequality between religions.<sup>188</sup> But they are at their most emphatic when they state that the claim that a liberal state must be neutral if religious freedom is to be respected, is a mirage.<sup>189</sup> That is because there is always some established orthodoxy in a liberal state<sup>190</sup> and the idea of neutrality is dangerous because it masks that reality. They quote Robert George for the proposition that 'secularism is itself ...

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<sup>176</sup> For eg, see *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers Case)* (1920) 28 CLR 129, [151] (Isaacs J); *Bank of New South Wales v Commonwealth (Bank Nationalisation Case)* (1948) 76 CLR 1, [186] (Latham CJ); and *Australian National Airways Pty Ltd v Commonwealth (ANA Case)* (1945) 71 CLR 29, [70] (Rich J).

<sup>177</sup> *Heydon's Case* (1584) 3 Co Rep 7a; 76 ER 637.

<sup>178</sup> George Williams, Sean Brennan and Andrew Lynch, *Australian Constitutional Law and Theory* (6<sup>th</sup> ed, Federation Press, 2014) [17.59].

<sup>179</sup> See above n 175.

<sup>180</sup> Ahdar and Leigh, above n 1, 654. See also generally 651-63.

<sup>181</sup> *Ibid* 651-54.

<sup>182</sup> *Ibid* 655.

<sup>183</sup> *Ibid* 657.

<sup>184</sup> *Ibid* 658.

<sup>185</sup> *Ibid* 659.

<sup>186</sup> *Ibid* 660.

<sup>187</sup> *Ibid* 663-71.

<sup>188</sup> *Ibid* 671-77.

<sup>189</sup> *Ibid* 677-80.

<sup>190</sup> *Ibid* 677, ironically citing John Rawls, *Political Liberalism*, 193-95 because he says that 'The principles of any reasonable political conception must impose restrictions on permissible comprehensive views, and the basic institutions those principles require inevitably encourage some ways of life and discourage others, or even exclude them altogether'. Ahdar and Leigh also state that '[a] secular, liberal state is not "neutral". It tolerates religions on its own terms. Religious liberty is always exercised in the shadow of establishments whether conventionally religious or not': at 637.

[a] competing worldview ... [or] sectarian doctrine'<sup>191</sup> and affirm that 'believers may feel equally alienated by a secular, political regime that extirpates religious symbolism and practice from the public square'.<sup>192</sup>

Ahdar and Leigh conclude that 'US First Amendment caselaw and doctrine'<sup>193</sup> have distorted a correct or proper understanding of religious freedom. '[O]ther countries, ... international law, and ... the *ECHR* cases demonstrate ... that establishment'<sup>194</sup> does not necessarily limit religious liberty and the disestablishment of religion is no sure guarantee that religious liberty has been maximized through neutrality.

The bottom line is then that religious establishment is not a devil to be exorcised from every liberal state.

#### IV CONCLUSION

US establishment clause jurisprudence has been through a number of changes. While there is debate about whether the clause was originally intended to protect the state religious establishments which existed at the time of federation or to erect an impregnable wall between religion generally and the state, the establishment clause has come to mean that government cannot do anything which would endorse any religious idea or suggest that a non-religious-believer was an outsider. That idea of religious freedom is inconsistent with the nature of religious freedom expressed in international human rights instruments including the *UDHR*, the *ICCPR* and the *European Convention on Human Rights*, all of which proceed from the premise that an establishment of religion is not inconsistent with religious freedom.

John Rawls' idea of public reason presents as a generally applicable insight into the nature of liberal democracy, but when its evolution is tracked against the First Amendment jurisprudence of the US Supreme Court, it becomes apparent that Rawls developed his idea of public reason to explain US Supreme Court First Amendment orthodoxy post 1991. Originally, John Rawls was committed to a vision of equal liberty of conscience which was constitutionally fixed in terms consistent with international freedom of religion norms. As the US Supreme Court moved away from their civil rights era strict scrutiny protection of human rights, Rawls adapted his ideal vision of justice to explain what the US Supreme Court said worked best in liberal democratic practice.

Neither US Supreme Court establishment clause jurisprudence nor Rawlsian public reason ideally protects equal liberty of conscience. That is a problem since the US holds itself out as the world's instructor when it comes to the protection of human rights generally and religious freedom in particular.<sup>195</sup> Legislators, administrators and law and religion scholars need to

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<sup>191</sup> Ibid 678 quoting Robert P George, 'A Clash of Orthodoxies' (August-September 1999) *First Things* 33, 34-35.

<sup>192</sup> Ibid quoting Steven D Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom* (Oxford University Press, 1995) 114.

<sup>193</sup> Ibid 680.

<sup>194</sup> Ibid.

<sup>195</sup> The US Commission on International Religious Freedom is an independent bi-partisan Commission which was established by the *International Religious Freedom Act 1998*. It is charged with researching, identifying and reviewing the circumstances of violations of religious freedom in other countries and to make recommendations to the US Executive and Congress on what steps the US should take to protect the religious freedom of religious believers and particularly Christians around the world. It is required to identify the most serious violations of religious freedom and 'Countries of Particular Concern' (CPC). India has been placed on the CPC list and has

recognise the qualitative differences in religious freedom models that are on offer because they have a large impact on the long term economic strength of their economies<sup>196</sup> and the quality of life of their religious minorities. Rex Ahdar and Ian Leigh have also demonstrated that when it comes to constitutional freedom of religion, the neutrality used to justify separation is a mirage.<sup>197</sup> There is always an established orthodoxy which alienates someone. State transparency that recognizes its own agenda but strives for inclusion is more likely to accord with international religious freedom norms.

The existence of established orthodoxies raises larger philosophical problems if public reason is to be the new gold standard for public discourse in modern liberal democracies. Public reason is anti-democratic to the extent that it suppresses freedom of conscience and speech. To insist that all discourse in the public square be conducted in the language of public reason is to suppress the freedom of speech of anyone that could not speak that way. Public reason thus stands to subvert the freedom of speech of the less educated and religious in a liberal democratic society.<sup>198</sup> To the extent that public reason would dilute or remove anyone's entitlement to speak in the marketplace, it is discriminatory and coercive.<sup>199</sup> Public reason may assist some members of society to articulate their views, but it should not directly or indirectly deny that right to others for that would deny those members of our society their human dignity.<sup>200</sup>

Finnis, Eisgruber and Sagar and Smith have demonstrated that public reason would banish all concern for the existence of objective truth from the public square since the suggestion that it exists amounts to the assertion of an inadmissible comprehensive doctrine.<sup>201</sup> Steven D Smith has agreed<sup>202</sup> and observed additionally that such theoretical banishment is ironical and futile; ironical since the US framers were obsessed about and committed to objective truth when they debated the US Constitution,<sup>203</sup> and futile because it is almost impossible to detect a 'truth concern' in a human being,<sup>204</sup> though Judge Vaughan Walker apparently succeeded in the *Schwartzenegger* case.<sup>205</sup>

In concluding, I submit that John Rawls' 'idea of public reason' was fashioned and developed in the context of the US Supreme Court's Establishment Clause jurisprudence. I have suggested that the evolution of his thought closely tracks that jurisprudence and shows no significant influence from other analyses of religious freedom. Though he responded to Hart and Habermas in his later work, he was responding not to their concern about his dilution of religious liberty, but to his general account of basic liberties and to the different rhetorical devices that they had used.<sup>206</sup> I submit that Rawls' ideology is subversive of freedom of conscience and speech as established in international human rights instruments and as accepted

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responded to that US categorisation with disappointment <<http://www.uscirf.gov/news-room/press-releases/uscirf-places-india-watch-list>>.

<sup>196</sup> There is a growing literature which demonstrates that religious freedom is good for a nation's economy. See for eg, Brian J Grim, 'Religious Freedom: Good for What Ails Us?' (2008) 6(2) *The Review of Faith & International Affairs* 3; Brian J Grim, 'The Modern Chinese Secret to Sustainable Economic Growth' (2015) 13(2) *The Review of Faith & International Affairs* 1.

<sup>197</sup> Ahdar and Leigh, above n1, 677-80.

<sup>198</sup> See above nn 134 and 135 and supporting text.

<sup>199</sup> See above nn 113 – 143 and supporting text.

<sup>200</sup> See above nn 144 and 145.

<sup>201</sup> See above nn 122 and 148 and supporting text.

<sup>202</sup> See above nn 123-133 and supporting text.

<sup>203</sup> Ibid.

<sup>204</sup> See above nn 145-147 and supporting text.

<sup>205</sup> See above nn 168-172 and supporting text.

<sup>206</sup> See above n 163.

outside the US. I further submit that the understanding of freedoms of conscience and speech that western society has achieved following centuries of bloodshed are worth retaining and protecting. This article was written to draw out what appear to be inconsistencies between these essential human freedoms and Rawls' public reason ideology. Freedom of conscience and speech provide a safer standard for human discourse in the public square than public reason. That is because the overlapping consensus we achieve when we consider all the competing views and their supporting ideologies is a much more durable and worthwhile consensus than the pretended consensus which results following the suppression of the views of large sections of our communities.