FREEDOM OF RELIGION AS AN ASSOCIATIONAL RIGHT

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Religious liberty is not only individual ...[1]

I INTRODUCTION

Freedom of religion is commonly thought to be an individual right. Part of the reason for this is that Article 18 of the International Covenant on Civil and Political Rights[2] refers to the right of '*everyone*' to freedom of thought, conscience and religion, a right which is said to include the freedom of each person 'to have or to adopt a religion or belief of *his* choice, and freedom, *either individually or in community with others* and in public or private, to manifest *his* religion or belief in worship, observance, practice and teaching'.[3] On the face of it, a person may choose to manifest his or her religion in community with others, but it seems to be the individual who chooses whether or not to do so, and it is this choice which constitutes the freedom and establishes its parameters.[4]

Is this the understanding of freedom of religion that should be ascribed to s 116 of the Australian Constitution? Section 116 reads very differently to Article 18 in several respects.[5] It operates as a limitation on the legislative power of the Commonwealth. It refers simply to 'the free exercise of any religion' without any explicit indication of whether the freedom is that of individuals or communities or both. Moreover, the prohibition of the enactment of any law 'for establishing any religion' seems clearly to suggest a primarily institutional rather than individual meaning. And yet, so much of the commentary on s 116 proceeds as if the freedom of religion which it protects is in its essence an individual right. Joshua Puls, for example, refers to s 116 as guaranteeing and protecting 'individual rights', and says that the whole question is about '[t]he extent to which the state may legitimately interfere with a person's religious beliefs and practices'.[6] Stephen McLeish similarly insists that 'religion is a

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1 Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford University Press, 2010) 317-8.

2 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

3 Emphasis added.

4 In fact, international human rights law recognises and protects group religious rights: see Part V below.

5 *Human Rights Act 2004* (ACT) s 14 and *Charter of Human Rights and Responsibilities Act 2005* (Vic) s 14, adopt the language of Art 18 of the ICCPR. It is beyond the scope of this article to address the interpretation of these provisions, although aspects of the argument are relevant to their interpretation and application.

6 Joshua Puls, 'The Wall of Separation: Section 116, the First Amendment and Constitutional Religious Guarantees' (1998) 26 *Federal Law Review* 139, 139.

personal matter'. He says that the purpose of s 116 is 'to respect the right of individuals to maintain' their own 'deeply personal and fundamental beliefs or assumptions about the nature of reality and existence', and he argues that the free exercise clause means, in effect, that 'the state must not act to impede the autonomy of individuals making and pursuing religious (and quasi-religious) choices'.[7] Wojciech Sadurski likewise characterises the question posed by the free exercise clause as one of 'weighing of the individual's claim to free exercise against the cost to the state of non-compliance with the general governmental regulations'.[8] These authors recognise that freedom of religion is often manifested and expressed in community with others, but on their analysis the core of the freedom is that of the individual.

Much is at stake in the question whether freedom of religion is understood, in essence, to be an individual, associational or communal right. If it is solely an individual right to believe, with no right to practice one's belief, then it does not amount to very much at all.[9] If it is essentially an individual's right to believe and practice, then the freedom will indirectly protect the beliefs and practices of religious groups and organisations in so far as this is necessary to protect the rights of individuals to manifest and practice their religious beliefs. Depending on how it is understood, such a conception may go a great deal towards protecting religious organisations,[10] but it has the potential to do so at the expense of insisting that their formation, existence and conduct must be understood as resulting from the beliefs and practices of their individual adherents and members, conceived as an expression of their autonomy.[11] It also has the tendency to suggest that the rights of religious groups must *always* be subordinated to the rights, not only of their individual members, but the rights of individuals that do not belong to such groups but nonetheless make claims against them, such as through the universalising application of antidiscrimination and other regulatory laws.[12] However, if the freedom of religion that is protected by s 116 is, at base, a freedom of groups and organisations as well as individuals, then there is no necessity to trace the rights of a religious organisation or group to the rights of its individual members. The organisation or group is itself a bearer of rights. When this is acknowledged, a more balanced assessment of the interaction between those rights and the rights of others can then be undertaken.

In this article, I argue that there are several reasons why a narrowly individualist interpretation of s 116 is not warranted. First, the section is not framed in language that suggests that it must be limited in this way. Secondly, the case-law acknowledges, quite clearly and emphatically, a fundamental and ineradicable associational and communal dimension to religious freedom. Thirdly, when the Constitution was drafted, debated, ratified and enacted in the late 19th century, Australian religious practice included a widely accepted and legally recognised corporate and organisational aspect. Fourthly, the provisions of the US Constitution on which the Australian provision was

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7 Stephen McLeish, 'Making Sense of Religion and the Constitution: A Fresh Start for Section 116' (1992) 18 *Monash University Law Review* 207, 227, 233.

8 Wojciech Sadurski, 'Neutrality of Law Towards Religion' (1989-1990) 12 *Sydney Law Reveiw* 420, 425.

9 Gabriel Moens, 'The Action-Belief Dichotomy and Freedom of Religion' (1989-1990) 12 *Sydney Law Reveiw* 195.

10 See, e.g., Chandran Kukathas, *The Liberal Archipelago: A Theory of Diversity and Freedom* (Oxford University Press, 2003) ch 3.

11 The limitations of Will Kymlicka's liberal account of the 'group differentiated rights' held by members of groups, but not the groups themselves, is well analysed in Dwight Newman, *Community and Collective Rights: A Theoretical Framework for Rights Held by Groups* (Hart Publishing, 2011) 13-27. See, e.g., Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon Press, 1995).

12 For more detail, see Part VI below.

largely modelled had throughout the 19th century been interpreted to include a corporate dimension. Fifthly, international law further supports this conclusion in its explicit and extensive recognition of group rights, despite the apparently individualist language of Article 18.

The application of s 116 to any particular case depends, of course, on more than its conceptualisation in individual, associational or communal terms. Whether freedom of religion has these dimensions is nonetheless of fundamental and far-reaching importance because this determines the nature and breadth of the premises on which any argument about its application must be based. If freedom of religion is minimally and exclusively an individual right, then s 116 offers no protection at all to religious organisations. If it has an associational dimension, then s 116 at least applies to protect religious organisations as a by-product of its protection of their individual members and office-holders. If it also has a basically communal aspect as well, then s 116 may also operate to protect religious organisations per se, without any necessity to show that the rights of their individual members or office-holders are being affected. The question then becomes only whether an alleged interference with freedom of religion is for some reason constitutionally justified. Too often, however, arguments about whether the state's interference is justified are tangled up with the unexamined assumption that religious freedom is merely or basically an individual right. Because freedom of religion is best understood as including these associational and communal dimensions, the burden upon the state to justify its interferences should not be obscured by this false and often unarticulated assumption.

II THE TEXT

Section 116 of the Australian Constitution confers a guarantee of religious freedom in the following terms:

> 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.

There are several preliminary observations that can be made about the text itself. First, the prohibitions apply to the Commonwealth and, it seems, not to the States.[13] Accordingly, nothing in s 116 prevents a State from making a law that establishes any religion, imposes religious observance, prohibits the free exercise of religion, or imposes a religious test as a qualification for public office.[14] Second, s 116 prohibits the 'making of laws'. Thus, the provision directly restricts the exercise of legislative

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[13] This is based on the assumption that although the 'States' are defined in the *Commonwealth of Australia Constitution Act 1900* (UK) s 5 as 'parts of the Commonwealth', consistent with the way the Constitution as a whole is written, when the Commonwealth is referred to in s 116 what is meant is the Commonwealth and its governing institutions as distinct from the States and their governing institutions.

[14] *Grace Bible Church v Reedman* (1984) 36 SASR 376; *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399. Proposals to amend s 116 to make it applicable to the States were rejected at referendums held in 1944 and 1988. On the application of s 116 to the Territories, see *Kruger v Commonwealth* (1997) 190 CLR 1, 60 (Dawson J), 121-3 (Gaudron J), 162, 166-7 (Gummow J).

power,[15] but not executive or judicial power. The latter are only indirectly affected by virtue of the fact that s 116 limits the kinds of laws that the Parliament can enact, including laws which confer functions, powers or jurisdiction upon executive agencies and, most probably, the courts.[16] Third, the specific prohibitions in s 116 (e.g., against establishing any religion or prohibiting the free exercise of any religion) appear to be 'purposive' in the sense that a law will only be found to contravene s 116 if it was enacted *for* one of these prohibited purposes. This leaves open the possibility that laws which are enacted for a constitutionally legitimate purpose (or purposes) will not be struck down, even if in practical effect they establish a religion or prohibit the free exercise thereof.[17] Fourth, s 116 refers to 'religion', rather than 'belief', or 'conscience', or 'religious conviction'. While the term *religion* includes matters of personal belief and conviction, the natural meaning of the term extends to the idea of religion as a 'collection of beliefs', as a 'set of rituals', and as a 'code of conduct', all of which are participated in by a 'community of people' united around those beliefs, rituals and conduct. The ordinary meaning of the term *religion* thus immediately suggests intrinsically communal connotations which would not be so directly present if the terms *belief*, *conscience* or *conviction* had been used.

Lastly, s 116 is expressed as a prohibition on the exercise of (legislative) power, rather than as an individual right. The strictly logical implications of this can be spelt out in terms of the typology developed by W N Hohfeld.[18] In Hohfeld's terminology, s 116 provides that the Commonwealth has 'no power' to make a law for prohibiting the free exercise of any religion, which logically entails a correlative 'immunity' against any such law being enacted. Who, in effect, enjoys the benefit of this immunity? On a strictly Hohfeldian analysis, the protection is enjoyed by any juridical person who might otherwise be the subject of the imposition of legal rights or duties, whether a natural person or an artificial person such as a corporation possessing legal personality. Unless read down for some extraneous reason, the prohibition in s 116 seems therefore to protect both individuals and religious groups in so far as they have legal personality. It is only religious groups or communities which do not have corporate legal personality who will not enjoy the benefit of the immunity in any direct sense and will need to rely for protection in a derivative way on the immunities enjoyed by the individual members of the association. But even in such instances, precisely because such groups lack legal personality, they are beyond the direct reach of the law and therefore do not, qua community, need the protection of s 116. It is only the individual members and office holders of such entities who can be the subject of legal duties imposed by law,[19] and these individuals will in any case be entitled to enjoy the immunities secured by s 116, and there is no obvious reason why these immunities would not extend to protect them as members and officers of the

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15 Including laws to give effect to grants under s 96 or appropriations under s 81: *Attorney-General (Vic); Ex rel Black v Commonwealth (State Aid)* (1981) 146 CLR 559, 576 (Barwick CJ), 593 (Gibbs J), 618 (Mason J), 621 (Murphy J) and 651 (Wilson J).

16 *Minister for Immigration and Ethnic Affairs v Lebanese Moslem Association* (1987) 17 FCR 373, 378 (Jackson J); *Evers v Evers* (1972) 19 FLR 296, 302 (Carmichael J). There is, however, some doubt about its application to judicial orders: *New v New*, Unreported Special Leave Application, 5 March 1982, High Court of Australia.

17 The purposive nature of the provision is emphasised in several of the leading decisions on s 116, discussed below.

18 Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Yale University Press, 1946). I follow here the interpretation and terminology used by Glanville Williams, 'The Concept of Legal Liberty' (1956) 56(8) *Columbia Law Review* 1129 and John Finnis, 'Some Professorial Fallacies About Rights' (1972) 4(2) *Adelaide Law Review* 377.

19 See *Scandrett v Dowling* [1992] 27 NSWLR 483.

association, just as it would protect them in their personal capacities as well. The same also applies, in principle, to trusts for religious or charitable purposes: the settlors and trustees of such trusts must necessarily enjoy the benefit of s 116 directly, and those who are otherwise involved in their administration or enjoy the benefit of them are indirectly protected by s 116 as a result. The trustees of such trusts are sometimes themselves corporations, sometimes natural persons; in this respect also the difference does not matter as far as the protection of s 116 is concerned. Moreover, it needs to be noticed that many religious organisations are 'federal' in structure: they consist of local, regional or state-based organisations which have agreed to become part of a larger 'national' or 'federal' association, with the result that the 'members' of the federal organisation may, strictly speaking, themselves be regionally-located corporations, and not merely or only individuals.[20] The immunities established by s 116 of the Constitution appear to operate in principle to protect all of these kinds associations and corporations, as well as their individual members, at every level of organisation.

If this analysis is correct, it follows that the immunity conferred by s 116 prevents the Commonwealth from making any law which creates rights, imposes duties or interferes with the liberties of individuals, associations (i.e., members and officers of an association) and corporations in such a way as to contravene the prohibitions contained in s 116. On a Hohfeldian analysis, these rights, duties and liberties have a necessary logical relationship. Thus, the existence of a particular liberty (e.g., the liberty to conduct public worship services) logically implies both the absence of any corresponding duty (i.e., there is no duty not to conduct such worship services) and the absence of any corresponding claim-right (i.e., others do not have any right that such worship services are not conducted). Because the immunity conferred by s 116 simply prevents the enactment of laws of a certain description, it necessarily protects individuals, associations and corporations from the enactment of such laws, and thus protects their liberties (e.g., to conduct or participate in public worship services), prohibits the imposition of any inconsistent duties (i.e., not to conduct or participate in such services) and prevents the conferral of any inconsistent rights upon others (i.e., that such services not be conducted or participated in). Of course, the content and scope of the rights protected by s 116 (such as the right to religious freedom) remain matters of interpretation, but the text of s 116 seems necessarily to provide that whatever the right to religious freedom means, it is a right that extends to and protects individuals, associations and corporations, equally and without discrimination. Thus, if the free exercise of religion protected by s 116 includes, for example, conducting religious services, disseminating religious teachings, determining religious doctrines, establishing standards of religious conduct, identifying conditions of membership, appointing officers, ordaining religious leaders and engaging employees, then these practices and manifestations are all protected, whether engaged in by individuals, associations or corporations. The protection of s 116 extends all sorts of associations, corporations and federations of such associations or corporations, that is, to the extent that their establishment and their activities fall within the meaning of 'the free exercise of any religion'. Such organisations may be formed for many various religiously-

[20] For example, the Presbyterian Church of Australia was formed in 1901 when the Presbyterian Churches of the six states agreed to unite on the basis of a Scheme of Union whereby there was constituted a body known as the Presbyterian Church of Australia, within which the six State churches continued to exist as part of a federal ecclesiastical structure, subject to their continued existence as its constituent members, an arrangement that was later confirmed by statute. See, e.g., *Scheme of Union of the Presbyterian Church of Australia* (1900), *Presbyterian Church of Australia Act 1900* (Qld), *Presbyterian Church of Australia Act 1971* (Qld).

oriented purposes: devotional, educational, charitable, social and even commercial.[21] Provided, it seems, that their establishment or their activities are relevantly an 'exercise of religious freedom', such associations, corporations and federations are in principle able to enjoy the protections of s 116 just as much as any individual.

III THE CASES

Judicial interpretation of s 116 confirms what an analytical reading of s 116 suggests: the protections and immunities secured by s 116 are enjoyed, in principle, just as much by associations and corporations as they are by individuals. Even though Australian courts and, especially, the High Court, have only considered or been asked to apply s 116 in a small handful of cases, the case-law that does exist unambiguously confirms the communal dimensions of the constitutional freedom. As will be seen, the issues the High Court has particularly addressed include: the meaning of 'religion' for determining whether an organisation is exempt from pay-roll tax, the meaning of 'establishing any religion' and whether s 116 prevents financial aid to religious schools, the meaning of the 'free exercise of any religion' and how much it protects actions rather than merely beliefs, and the meaning of 'religious tests' and whether s 116 prohibits federal financial aid to support chaplains in public schools. Even though in none of these cases has a law been held to contravene s 116, none of them turned on whether the party seeking to rely on s 116 was an association or a corporation. Indeed, in no case has the proposition that such associations or corporations should benefit from the protection of s 116 been questioned. Quite the contrary: it has frequently and clearly been asserted and affirmed.

The first case in which the High Court was asked to consider the application of s 116 was *Krygger v Williams*.[22] In that case, Mr Krygger appealed to the High Court against a conviction for failing on conscientious grounds to comply with provisions of the *Defence Act 1903* (Cth) which required him to participate in compulsory military training. His argument was that the law was contrary to s 116 because it prohibited him the free exercise of his religion.[23] He was unsuccessful. The exact grounds of the failure of his case are not entirely clear. Griffith CJ said that the *Defence Act* required the appellant to do something which simply had 'nothing at all to do with religion'.[24] As the Chief Justice put it, a law which requires a person to do something which his or her religion forbids may be morally objectionable, but this does not of itself come within the meaning of s 116.[25] The Act made allowance for persons who had conscientious objections to bearing arms to be given non-combatant duties, and the Chief Justice pointed out that accordingly the real objection taken by the appellant was against being trained to serve, for example, within the ambulance corps so that 'in time of war he may be competent to assist in saving life', and that to claim that he had a conscientious objection against this was simply 'absurd'.[26] Barton J reasoned similarly:

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21 *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Ltd* (2008) 236 CLR 204. Ian Murray, 'Charity Means Business – Commissioner of Taxation v Word Investments Ltd' (2009) 31 *Sydney Law Review* 309, 328, suggests that as a result of this case, 'there is no strict dichotomy between a charitable purpose and the carrying out of "commercial" activities'.

22 *Krygger v Williams* (1912) 15 CLR 366.

23 (1912) 15 CLR 366, 369 (Mitchell KC).

24 Ibid.

25 Ibid.

26 Ibid 370-71.

he too considered the appellant's argument 'absurd', indeed 'as thin as anything of the kind that has come before us'.[27]

Whatever may be thought of the reasoning in *Krygger*,[28] it is clear that the case only concerned the religious convictions of an individual, and did not raise any questions about whether the free exercise clause extends to protect religious groups or communities. The proposition that the clause can indeed protect groups such as corporations formed for religious purposes was, however, one of the most fundamental questions that the Court had to consider in *Adelaide Company of Jehovah's Witnesses Incorporated v Commonwealth*, decided in 1943.[29] This is because the case arose when the Commonwealth purported to dissolve and take possession of the assets of the Adelaide Company of Jehovah's Witnesses Incorporated, a body incorporated under the *Associations Incorporation Act 1929* (SA). The Commonwealth considered that the Jehovah's Witnesses were promulgating doctrines that were prejudicial to the defence of the Commonwealth and the efficient prosecution of the war. It took action against the Adelaide Company under the *National Security (Subversive Associations) Regulations*, which had been made pursuant to the *National Security Act 1939* (Cth). Aspects of the Regulations were very far-reaching. They provided for the dissolution of any declared body and the forfeiture of its assets and they imposed a blanket prohibition on the dissemination of any doctrines or principles which at some time had been advocated by a body the existence of which was declared to be prejudicial to the defence of the Commonwealth or the efficient prosecution of the war. As members of the Court pointed out, this last prohibition applied to any person or body, whether declared under the Regulations or not, provided some of the doctrines or principles which they promulgated happened to coincide with some of the doctrines or principles promulgated by a declared body – whether the dissemination of the particular doctrines or principles were inimical to the war effort or not.[30]

Several questions were set out in the case stated formulated by Starke J, turning substantially on the question whether the Act, the Regulations and the action taken by the Executive in relation to the Jehovah's Witnesses were contrary to s 116, were authorised by the defence power (s 51(vi)) or unconstitutionally conferred judicial power contrary to s 71 of the Constitution. On these questions, all of the members of the Court held that in various respects important aspects of the Regulations – particularly the most far-reaching of them – were not authorised by the defence power or by the enabling Act. However, a majority of the Court declined to find that the Regulations were contrary to s 116. Only one judge, Williams J, held that the Regulation that made it illegal to print, publish or promote 'unlawful doctrines' was contrary to s 116.[31]

Even though the case concerned the dissolution of an incorporated religious body, the fact that only one judge found the Regulations to be contrary to s 116 did not mean that s 116 could not protect incorporated and unincorporated religious associations in principle. Rather, the majority of the Court declined to find that the Regulations were contrary to s 116 on the basis that freedom of religion is not an absolute right, and that the free exercise clause does not prevent the Commonwealth from making laws which authorise controls being placed on bodies which engage in activities which are prejudicial to the continued existence of the Commonwealth itself. Thus, the case left

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27 Ibid 371-3.

28 Cf. *Judd v McKeon* (1926) 38 CLR 380, 387 (Higgins J), suggesting that an objection to voting on religious grounds would be a valid and sufficient reason for failing to vote on the basis of s 116.

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

30 Ibid 143-4 (Latham CJ), 165 (Williams J).

31 Ibid 165.

open the proposition that both individuals and groups (including corporations) can, in principle, enjoy the benefit of the free exercise clause. Indeed, the reasoning of the majority tended to confirm that this positively is the case.

The first question put to the Court in the case stated, frequently overlooked,[32] was whether the Adelaide Company was a party competent to maintain in an action before the High Court that the Regulations and Executive acts contravened s 116. On this preliminary but fundamental question, a majority of Rich, Starke and Williams JJ held that the Company *did* have the requisite competence to maintain the action, while Latham CJ and McTiernan J thought not. For Latham CJ (with whom McTiernan J agreed), the simple reason was that the Company had been validly dissolved and was therefore no longer a competent plaintiff,[33] whereas the majority considered that the Regulation that purported to authorise the dissolution of the Company was invalid, either because it was not authorised by the defence power or not authorised by the Act.[34] Curiously and significantly, however, Latham CJ also flatly said that '[i]t is obvious that a company cannot exercise a religion', noting that in the United States the privileges and immunities of speech and assembly attach only to natural, and not artificial, persons.[35] Despite disagreeing with the Chief Justice in relation to the plaintiff's competence, Rich J seemed to reason similarly when he said that he did not consider that the 'suppression of the plaintiff corporation prohibits the free exercise of any part of the religious faith ascribed … to the individual corporators'.[36] However, the case stated by Starke J was phrased in a way that drew attention to both the Adelaide Company as an 'incorporated association' and the 'association of persons' commonly known as Jehovah's Witnesses.[37] Williams J, who noted this,[38] repeatedly referred in his judgment to the rights of 'individuals', 'bodies of individuals' and 'corporations' as if the distinction between these did not make a difference to the application of the relevant constitutional principles.[39] Drawing attention to the 'easy toleration' which permits 'bodies' with all kinds of beliefs to flourish, especially in times of peace,[40] he held that aspects of the Regulations both exceeded the defence power and were contrary to s 116 on the ground that they potentially made it illegal to advocate quite 'innocent' doctrines and they could have the effect of turning an ordinary 'church service' into an 'unlawful assembly'.[41] Thus, although a majority in *Jehovah's Witnesses* did not hold that the Regulations were contrary to s 116, this was because it

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32 Somewhat understandably so, for the judgments focussed on the other issues and either assumed or gave a positive answer in very brief terms – that is, as a matter of course.

33 *Jehovah's Witnesses* (1943) 67 CLR 116, 136-9, 147 (Latham CJ), 156-7 (McTiernan J).

34 Ibid 150 (Rich J, agreeing with Williams J), 154 (Starke J), 167 (Williams J).

35 Ibid 147. The Chief Justice relied on *Hague v Committee for Industrial Organization* 307 US 496 (1939), 514 (Roberts J); see also 527 (Stone J). In that case, the US Supreme Court considered that only natural persons are entitled to the privileges and immunities which the Fourteenth Amendment secures to 'citizens of the United States'. The US Supreme Court, however, recognises that First Amendment protections extend to associations and corporations: *Citizens United v Federal Election Commission*, 558 US 310 (2010) (in relation to freedom of speech); *Kedroff v Saint Nicholas Cathedral of Russian Orthodox Church in North America,* 344 US 94, 116 (1952) and *Hosanna-Tabor Evangelical Lutheran Church and School v U.S. Equal Employment Opportunity Commission*, 132 S Ct 694 (2011) (in relation to freedom of religion). See Mark E Chopko and Michael F Moses, 'Freedom to Be a Church: Confronting Challenges to the Right of Church Autonomy' (2005) 3 *Georgetown Journal of Law & Public Policy* 387, 407-411.

36 *Jehovah's Witnesses* (1943) 67 CLR 116, 149.

37 Ibid 119 (paragraph 15).

38 Ibid 159.

39 Ibid 161-3.

40 Ibid 160.

41 Ibid 165.

was held that supressing the dissemination of doctrines contrary to the war effort was not contrary to the free exercise clause. On the question of whether freedom of religion is an immunity enjoyed by both individuals and corporations, Latham CJ's blunt denial was met by Williams J's equally clear affirmation, in circumstances where a majority also agreed with Williams J that the Adelaide Company of Jehovah's Witnesses Incorporated was competent to maintain the action.

It was some time before the High Court was again asked to consider the application of s 116. In the unreported decision of *Crittenden v Anderson*, decided in 1977,[42] a petitioner challenged the election of a candidate for the House of Representatives on the ground that, contrary to s 44(i) of the Constitution, the candidate, because he was a Roman Catholic, owed allegiance to a foreign power, namely the Pope and the Vatican State in Rome. Fullagar J dismissed the petition on the ground that '[e]ffect could not be given to the petitioner's contention without the imposition of a "religious test,"' contrary to s 116.[43] On Fullagar J's reasoning, the candidate's membership of the Roman Catholic Church and his resulting 'allegiance' to the Pope and the Vatican State constituted a legitimate expression of religious freedom protected by s 116. The religious test clause was thus interpreted to protect one's membership of a religious organisation, even one that is recognised as having international personality as an independent state.

In *Church of the New Faith v Commissioner of Pay-Roll Tax (Victoria)*,[44] the Court had to determine whether the Church of the New Faith (i.e. the Church of Scientology), incorporated under the *Associations Incorporation Act 1956* (SA) and registered as a 'foreign company' in Victoria, was a 'religious institution' and therefore entitled to an exemption from pay-roll tax under the *Pay-roll Tax Act 1971* (Vic). The very question before the Court, therefore, concerned the legal status of an incorporated body. However, although this was the question before the Court, the parties approached the case by arguing whether Scientology is a 'religion', rather than whether the corporation was itself a 'religious institution'. While the Court largely accepted the parties' construction of the issues, Mason ACJ and Brennan J pointed out that these were distinguishable questions, for the religion of a particular group does not stamp an institution 'founded, maintained or staffed' by members of that group as necessarily 'religious'.[45] For Mason ACJ and Brennan J, the question at issue concerned the purposes and activities of the corporation itself, rather than the religious convictions of its members. (Certainly, it seems highly unlikely that the adherents of a particular religion will create an organisation for purposes that are unrelated to their common religious convictions, but one can imagine circumstances in which the distinction might hold.[46]) On this account, it is a meaningful question to ask whether a particular corporation is religious, a question that is distinguishable from the question whether the individual members of the corporation are themselves religious. The religious

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42 (1977) 51 ALJ 167 at 171 (unreported judgment, 23 August 1950).

43 Ibid. He said: '[T]he root of the matter, to my mind, lies in the fact that the petitioner really seeks to revive a point of view which was abandoned in England in 1829'.

44 *Church of the New Faith v Commissioner of Pay-Roll Tax (Victoria)* (1983) 154 CLR 120.

45 Ibid 128-9.

46 Much will depend on the specific religious convictions that are involved: some people who regard themselves as religious nonetheless tend to regard their religion as one aspect of their lives among many; others see their religion as definitive of their whole lives, so that even the most mundane activities are seen in religious terms. Such people frequently gather together, not only for narrowly 'religious' activities such as prayer or scriptural study, but also for what might be described as social and cultural activities, such participation in games and sports, or the provision of educational, medical or charitable services. For many such people, such activities are deeply religious.

character of a corporation is not simply reducible to the religious character of its individual members.

Although the case was technically concerned with the meaning and application of the *Pay-roll Tax Act*, it raised the wider and more significant question of the legal definition of religion generally. As Mason ACJ and Brennan J pointed out, this was an especially important question. As they put it:

> Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society. The chief function in the law of a definition of religion is to mark out an area within which a person subject to the law is free to believe and to act in accordance with his belief without legal restraint. Such a definition affects the scope and operation of s. 116 of the Constitution and identifies the subject matters which other laws are presumed not to intend to affect.[47]

It was thus understood that the definition of religion adopted by the Court in the *Scientology* case would apply generally within Australian law, including in relation to s 116. With this in mind, Mason ACJ and Brennan J defined 'religion' as follows:

> [T]he criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief, though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion. Those criteria may vary in their comparative importance, and there may be a different intensity of belief or of acceptance of canons of conduct among religions or among the adherents to a religion. The tenets of a religion may give primacy to one particular belief or to one particular canon of conduct. Variations in emphasis may distinguish one religion from other religions, but they are irrelevant to the determination of an individual's or a group's freedom to profess and exercise the religion of his, or their, choice.[48]

Mason ACJ and Brennan J very plainly affirmed the freedom of both individuals and groups to profess and exercise the religion of their choice. Beliefs and canons of conduct are, necessarily, things that individuals adhere to and accept, but they are also, it seems, things that 'religions' themselves may also adopt; indeed, such beliefs and canons of conduct may constitute the very substance of a religion. Of course, religions do not exist in abstraction from people. For Mason ACJ and Brennan J to refer, then, to 'religions' as adopting certain beliefs and practices – as distinct from individual 'adherents' doing so – is to imply the existence of a community or association of believers in and through whom the religion is constituted. In putting it this way, Mason ACJ and Brennan J seem to have been careful not to assert that either individuals or groups are necessarily prior to the other; but they do seem to be affirming that religious belief and practice is characteristically and concurrently an attribute of both individuals and groups.

Unlike Mason ACJ and Brennan J, Wilson and Deane JJ thought that there can be no 'formularized legal criterion' for determining what constitutes a religion. Rather, they considered that the answer lies in 'empirical observation of accepted religions', and the identification of indicia that emerge from such observation. They put it this way:

> One of the most important indicia of "a religion" is that the particular collection of ideas and/or practices involves belief in the supernatural, that is to say, belief that

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47 *Church of the New Faith v Commissioner of Pay-Roll Tax (Victoria)* (1983) 154 CLR 120, 130.

48 Ibid 136.

> reality extends beyond that which is capable of perception by the senses. If that be absent, it is unlikely that one has "a religion". Another is that the ideas relate to man's nature and place in the universe and his relation to things supernatural. A third is that the ideas are accepted by adherents as requiring or encouraging them to observe particular standards or codes of conduct or to participate in specific practices having supernatural significance. A fourth is that, however loosely knit and varying in beliefs and practices adherents may be, they constitute an identifiable group or identifiable groups. A fifth, and perhaps more controversial, indicium … is that the adherents themselves see the collection of ideas and/or practices as constituting a religion.[49]

Despite their differences in methodology, Wilson and Deane JJ, like Mason ACJ and Brennan J, were explicit about the group character of religion. Indeed, Wilson and Deane JJ went so far as to say that the existence of an identifiable group or groups is in itself an important indication of a religion's very existence. Group identity may not be an essential defining element, but it is a strong indicator of the existence of a religion. And the threshold seems to be quite low: the adherents may be 'loosely knit' and 'varying in beliefs and practices', so long as there is a group or groups that can be identified. Even the clearly 'individual' element – the existence of 'adherents' (the use of the plural is itself significant) – is consistent with and, indeed, tends to imply the communal dimension as well. For not only individuals but also groups are able to adhere to 'particular collection[s] of ideas and/or practices', and the image of a person observing certain standards and 'participating' in specific practices ordinarily suggests a communal context.

A similarly communal element was also very explicit in the judgment of Murphy J. Having adopted Latham CJ's dictum that 'each person chooses the content of his own religion',[50] Murphy J went on to say:

> [A]ny body which claims to be religious, whose beliefs or practices are a revival of, or resemble, earlier cults, is religious. Any body which claims to be religious and to believe in a supernatural Being or Beings, whether physical and visible, such as the sun or the stars, or a physical invisible God or spirit, or an abstract God or entity, is religious. For example, if a few followers of astrology were to found an institution based on the belief that their destinies were influenced or controlled by the stars, and that astrologers can, by reading the stars, divine those destinies, and if it claimed to be religious, it would be a religious institution. Any body which claims to be religious, and offers a way to find meaning and purpose in life, is religious. The Aboriginal religion of Australia and of other countries must be included. The list is not exhaustive; the categories of religion are not closed.[51]

Even though it may be that every individual must choose the religion to which he or she will adhere, Murphy J plainly contemplated that a corporate body, like the Church of the New Faith, could be religious. Indeed, wishing to adopt the strict separationist view 'that it is not within the judicial sphere to determine matters of religious doctrine and practice' in any respect whatsoever,[52] Murphy J found himself having to affirm that a body or group which simply claims to be religious must be deemed to be so. Not only does Murphy J's formula maintain that a 'body' can be religious, but that the law will recognise the capacity of such bodies to 'make' such 'claims'. Moreover, although the Church of the New Faith was incorporated, Murphy J's formula does not seem to depend on formal incorporation, for it extends to

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49 Ibid 173-4.

50 *Jehovah's Witnesses* (1943) 67 CLR 116, 124.

51 *Church of the New Faith* (1983) 154 CLR 120, 151.

52 Ibid 150, citing *Attorney-General (NSW) v Grant* (1976) 135 CLR 587 and *Attorney-General (Qld); Ex rel Nye v Cathedral Church of Brisbane* (1977) 136 CLR 353, 377.

ancient Indigenous religions which have existed in Australia and in other countries long before to the introduction of the Western idea of incorporation. While the *Scientology* case did not, strictly speaking, involve s 116, it gave strong support for the idea that both individuals and groups (including both unincorporated and incorporated associations) could, in principle, enjoy the benefit of the immunities guaranteed by s 116 of the Constitution.

In the discussion so far, emphasis has been placed upon the free exercise clause. However, the interpretation of the other clauses of s 116 are also of relevance to the question whether groups, as well as individuals, enjoy the benefit of s 116. One reason for this is that, as has been noted, each of the prohibitions in s 116 are in the form of a Hohfeldian 'no power', which necessarily implies the existence of an 'immunity' enjoyed by all persons who would otherwise be potential subjects of the law – whether these persons are natural or artificial. It follows that both individuals and corporations should, given the usual conditions for standing, have the capacity to engage in legal proceedings in which the application of the other prohibitions in s 116 are put in issue. A second reason why the case-law concerning the other clauses of s 116 is relevant concerns the non-establishment clause in particular. This derives from the fact that s 116 uses the term 'religion' in relation to both the free exercise and the non-establishment clauses. This suggests that essentially the same definition of religion should to be used in relation to both clauses, as indeed the reasoning in the *Scientology* case seems to suggest. But if the meaning of 'religion' as used in connection with the prohibition on 'establishment' must be taken to include a communal, group or corporate sense, this strongly implies that the same sense must also be incorporated into the meaning of the free exercise clause. The High Court's only major decision on the non-establishment clause suggests precisely this.

In *Attorney-General (Victoria); Ex rel Black v the Commonwealth*,[53] the Court had to determine whether government funding of religious schools breached the non-establishment clause. In addressing this question, the Court considered, among other things, how the term 'establishing a religion' was understood at the time the Constitution was enacted. Barwick CJ said that it involves the 'identification of the religion with the civil authority' in a way that involves 'the citizen in a duty to maintain it' and an obligation on the civil government 'to patronize, protect and promote the established religion'.[54] Gibbs J considered that in 1900 the term 'establishing any religion' meant 'to constitute a particular religion or religious body as a state religion or state church'.[55] Wilson J, with whom Mason J agreed, thought that the establishment of religion required 'statutory recognition of a religion as a national institution.'[56] Similarly, Stephen J held that an established religion meant the establishment of a 'state church', such as the special status that had been afforded to the Church of England in England.[57] On the basis of these views, a majority of the Court (Murphy J dissenting) held that the Commonwealth can fund religious schools, at least on a non-discriminatory basis, as this does not in and of itself amount to a law which has as its purpose the establishment of a state church or a state religion.

Notably, on the approach of the majority in the *State Aid* case, the core meaning of establishment is institutional, not personal. Religion is something can be established in institutional terms – in the form, for example, of a state church or other religious

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53 (1981) 146 CLR 559 ('*State Aid'*).
54 Ibid 582.
55 Ibid 597.
56 Ibid 653.
57 Ibid 606-609.

body that is given special privileges which associate it closely with the state itself.[58] Consistent with this conception of the establishment of religion, there was discussion in the case of the question whether s 116, especially the non-establishment clause, should be understood as protecting 'individual rights'. Stephen J observed that s 116 is 'not, in form, a constitutional guarantee of the rights of individuals', but rather 'an express restriction upon the exercise of Commonwealth legislative power'.[59] Wilson J similarly said that s 116 'is a denial of legislative power … and no more'; it does not form part of a 'bill of rights' and does not constitute a 'personal guarantee of religious freedom'.[60] While the Chief Justice did not go quite so far, he sharply distinguished s 116 from the First Amendment contained in the United States 'Bill of Rights', thus implying a similar view.[61] Gibbs J, having also distinguished s 116 from the First Amendment, commented that the non-establishment clause was only a 'fetter on legislative power' and, unlike the free exercise clause, does not exist to protect 'a fundamental human right'.[62] Mason J, on the other hand, cited with approval the observation of Latham CJ in the *Jehovah's Witnesses* case that s 116 protects 'the right of a man to have no religion', and added that the section is directed to 'the preservation of religious equality, freedom of religion'.[63] Murphy J, who dissented,[64] took it even further, referring to s 116 as a 'great constitutional guarantee of freedom of and from religion', which specifically contains 'guarantees of personal freedom against the imposition of any religious observance and the prohibition of free exercise of any religion and the requirement of any religious test'.[65]

How are these varying statements to be understood? Certainly, s 116 does not refer explicitly to personal rights but operates as a restriction on legislative power, as Stephen and Wilson JJ pointed out. However, as has been noted, a restriction on power necessarily implies a corresponding immunity. The benefit of the immunity differs in relation to the various clauses in s 116: the non-establishment clause provides what might be regarded as a rather diffuse corresponding benefit, whereas the benefit of the free exercise clause is more specific to particular persons who would otherwise be liable to the enactment of laws that prohibit the free exercise of any religion. In these two senses it is accurate enough to say, with Mason and Murphy JJ, that s 116 confers certain rights, in the nature of immunities, to the benefit of individual citizens. That said, however, the bare existence of such immunity rights does not of itself necessarily imply the existence of additional personal rights in the nature of Hohfeldian 'claims' or 'powers', such as standing to bring an action seeking a declaration of the invalidity of a law said to be contrary to s 116, or an entitlement to damages for injury sustained as a result of the implementation of the law. These additional rights must rest on additional premises – they are not necessarily implied, but there may be independent legal

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58 Reid Mortensen, 'A Christian State? A Comment' (1998-1999) 13(2) *Journal of Law and Religion* 509, 511-512: 'Establishment ... require[s] that the established religious group be identified as part of the national political structure and puts some obligation on the government to patronize, protect and promote its beliefs and practices. Thus, when we speak of an established church, we generally mean a religious group to which the state concedes a clear political preference.'

59 *State Aid* case (1981) 146 CLR 559, 605.

60 Ibid 652.

61 Ibid 578-9.

62 Ibid 559, 583, 598, 603. See, similarly, *Kruger v Commonwealth* (1997) 190 CLR 1, 124-5 (Gaudron J).

63 Ibid 559, 616, citing *Jehovah's Witnesses* (1943) 67 CLR 116, 123 (Latham CJ)

64 He considered that the non-establishment clause prevents any 'recognition and assistance to religion': *State Aid* case (1981) 146 CLR 559, 625. This entailed, for Murphy J, a strict 'separation' interpretation: ibid.

65 Ibid 623.

grounds for them to be recognised in particular circumstances. For example, standing may properly exist because a person's interests are directly affected by the purported law, and an action for damages may lie because the Executive has acted in a manner that, in the absence of legal warrant, would constitute a trespass or a breach of duty arising at common law. But these additional rights, both to bring an action and to obtain a remedy depend on premises of the law that are separate from the immunity-rights conferred by s 116. And yet, they are rights which all legal persons – both natural and artificial – can possess and enforce.

The *Lebanese Moslem Association* case illustrates another way in which a religious group may have standing to invoke s 116.[66] The case involved an application before the Federal Court of Australia to review a decision of the Minister for Immigration to deport a particular individual who had been invited to Australia by the Australian Federation of Islamic Councils and had been appointed Imam of the Lakemba Mosque by the Lebanese Moslem Association. The evidence before the Court suggested that, at the least, opinions within the Australian Lebanese community about the suitability of the Imam to hold office differed considerably. At first instance, Pincus J considered that the Minister was relevantly bound by s 116 in the exercise of his powers under the *Migration Act 1958* (Cth), that it was inconsistent with freedom of religion for the government to determine the suitability of an individual as a religious leader, and that the Minister had failed to take into consideration the constitutional rights of the members of the Lebanese Moslem Association under s 116 to determine their own leadership.[67] On appeal, the Full Court reversed Pincus J's decision. Fox J and Jackson J held that there had not been any prohibition of the free exercise of any religion, either in the intention, purpose or effect of the Minister's decision.[68] Burchett J similarly considered that it was open to the Minister to deport the Imam on the ground that his presence in Australia was a 'catalyst for conflict in a divided community', and that this did not involve any clash with s 116.[69] In coming to this conclusion, Jackson J emphasised that s 116 operates as a limitation on legislative power and that its application to executive acts is upon the basis that the relevant authorising legislation cannot constitutionally permit an executive decision which amounts to a prohibition upon the free exercise of any religion.[70] However, in none of the reasoning was there any challenge to the standing of the Lebanese Moslem Association to bring the action in the first place, or to the proposition that s 116 operates to protect its rights, as an association, to make decisions about the appointment of its religious leaders. All of this was taken for granted.

The scope of the free exercise clause was again considered in *Kruger v Commonwealth,* decided in 1997.[71] In that case, the Court had to consider, among other things, whether the *Aboriginal Ordinance 1918* (NT), which provided for the removal of aboriginal children from their families and their communities, contravened the plaintiffs' freedom of religion. The argument ultimately failed: for some judges on the ground that s 116 is inapplicable to Territory legislation,[72] for others on the ground that

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66 *Lebanese Moslem Association v Minister for Immigration & Ethnic Affairs* (1986) 11 FCR 543; 67 ALR 195; *Minister for Immigration & Ethnic Affairs v Lebanese Moslem Association* (1987) 17 FCR 373; 71 ALR 578.

67 *Lebanese Moslem Association* (1986) 11 FCR 543, 559-61. His Honour cited *Kedroff v Saint Nicholas Cathedral*, 344 US 94 (1952) and *Serbian Eastern Orthodox Diocese v Milivojevich*, 426 US 696 (1975) in support of the principle that freedom of religion 'inhibit[s] the right of legislatures to intervene in questions of control of churches' (at 559).

68 *Lebanese Moslem Association* (1987) 17 FCR 373, 374 (Fox J), 379, 388-9 (Jackson J).

69 Ibid 374-5.

70 Ibid 378-9.

71 *Kruger v Commonwealth (1997) 190 CLR 1.*

72 Ibid 60 (Dawson J), 160 (Gummow J).

the Ordinance could not be characterised as a law that had the purpose of prohibiting the free exercise of religion, not least because on the face of the law the removal of the children was meant to be for their own good.[73] But while the argument was ultimately unsuccessful, there was no suggestion that there was any problem with the proposition that the plaintiffs' freedom of religion might be constituted in and through their families and communities. Indeed, the judges very clearly accepted the 'group' orientation of Aboriginal religion. Gummow J stated that the kinds of religion protected by s 116 plainly include 'the systems of faith and worship of Aboriginal people', and he seemed to acknowledge that one important aspect of this would be the rearing and instruction of Aboriginal children in the 'religious beliefs of their community'.[74] Toohey J similarly framed the question as being whether one of purposes of the Ordinance was to 'impair [or] prohibit the spiritual beliefs and practices of the aboriginal people'.[75] While Gaudron J considered that it was a question of fact whether the law prevented the exercise of religion,[76] she also clearly contemplated that s 116 would in principle apply to beliefs and practices carried out in association with other members of one's community:

> [I]f aboriginal people had practices and beliefs which are properly characterised as a religion for the purposes of s 116, and if, as would seem likely, those practices were carried out in association with other members of the aboriginal community to which they belonged or at sacred sites or other places on which their traditional lands, removal from their communities and their traditional lands would, necessarily, have prevented the free exercise of their religion.[77]

As her Honour further observed:

> [I]t may might well be concluded that one purpose of the … Ordinance was to remove Aboriginal and half-caste children from their communities and, thus, prevent their participation in community practices. And if those practices included religious practices, that purpose necessarily extended to prohibiting the free exercise of religion.[78]

It is difficult to imagine a clearer statement that the kind of religious practices that are protected by s 116 may be pervasively communal.

The most recent High Court decision to consider s 116 was *Williams v Commonwealth*.[79] The case involved a challenge to the Commonwealth's National School Chaplaincy Program. One of the constitutional challenges to the program was that the arrangements made with Scripture Union to provide chaplaincy services to schools was contrary to the 'religious test' clause of s 116. That aspect of s 116 provides that 'no religious test shall be required as a qualification for any office or public trust under the Commonwealth'. While this argument was disposed of shortly by the Court on the ground that the Chaplaincy Program did not involve the establishment of any such public office,[80] the reasoning serves to underscore the institutional orientation of s 116, already seen in relation to the non-establishment clause, but a prime characteristic of the religious test clause as well. As Heydon J

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73 Ibid 40 (Brennan CJ), 60-61 (Dawson J, with whom McHugh J agreed at 141-2), 86 (Toohey J), 161 (Gummow J).
74 Ibid 160-61.
75 *Ibid 86.*
76 *Ibid 132.*
77 *Ibid.*
78 *Ibid 133.*
79 *Williams v Commonwealth* [2012] HCA 23.
80 Ibid [9] (French CJ), [109]-[110] (Gummow and Bell JJ), [597] (Kiefel J).

pointed out, an 'office' is a position under constituted authority to which duties are attached, and an 'officer' therefore is a person who 'holds an office which is in direct relationship with the Commonwealth'.[81] For his Honour, it was significant that under the Chaplaincy Program the Commonwealth had no direct legal relationship with the chaplains: it could not 'appoint, select, approve or dismiss them' and it could not 'direct them'.[82] As Gummow and Bell JJ put it, it was necessary for there to be closer connection between the Commonwealth and the Chaplains for there to be a requisite 'office'.[83] While this reasoning plainly turned on the meaning of an office under the Commonwealth, it shows how religion, in the form of religious tests, might be established as a condition for appointment to public office. The clause plainly prohibits this, but the Court's reasoning again suggests how both sides of s 116 – the clauses prohibiting the state-sanctioned 'imposition' of religion in the form of observances, religious tests and established churches, and the clause protecting the free exercise of religion – each imply a conception of religion that has an ineradicable institutional or organisational dimension. The prohibitions on its 'imposition' serve to prevent the institutional or organisational establishment of religion, while the free exercise clause protects the practice of religion in its many dimensions: personal, associational, communal, organisational and institutional.

IV THE HISTORY

The proposition that s 116 should be understood to protect both individual and communal expressions of religious freedom is further supported by the Constitution's enactment history. The High Court has frequently affirmed that the Constitution is to be interpreted by reference to the connotation that its words had at the time of its enactment.[84] Consistent with this, in the *State Aid* case the High Court identified the meaning of an 'establishment of religion' by reference to understandings and practices as they existed in the late nineteenth century when the Constitution came into being.[85] By parity of reasoning, the free exercise clause should also be interpreted in a manner that coheres with the way in which freedom of religion was then understood and practiced.

There are several sources of evidence to be considered in this respect. In the first place, the Federal Conventions at which the Australian Constitution was drafted provide evidence about how the framers of the Constitution themselves understood the free exercise of religion. Second, the framers were aware that the words used in s 116 drew upon provisions of the US Constitution, and they were also aware of the interpretations that had been placed on those provisions by the US Supreme Court. The laws of the Australian colonies also provide further evidence about how religion was publicly understood and regulated. In addition, Julian Rivers has shown that in the United Kingdom during the second half of the nineteenth century a reasonably stable constitutional settlement concerning the relationship between church and state had been reached.[86] The evidence suggests that a very similar settlement had been arrived at in Australia as well around this time.

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81 Ibid [444].
82 Ibid [445].
83 Ibid [110].
84 Eg, *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Professional Engineers' Association* (1959) 107 CLR 208, 267 (Windeyer J).
85 *State Aid* case (1981) 146 CLR 559, 578 (Barwick CJ), cf. 653 (Wilson J).
86 Rivers, above n 1, 316.

A *Convention debates*

Section 116 is not the only place in the Australian Constitution in which there is an overt reference to religious matters. The preamble to the *Commonwealth of Australia Constitution Act 1900* (UK), in reciting the agreement of the people of the Australian colonies to unite in a federal commonwealth, states that they did so 'humbly relying on the blessing of Almighty God'. The recognition of God and the invocation of divine blessing is not uncommon in modern constitutions.[87] Those who support such statements characteristically regard religion as an important source of social cohesion, and during the time that the Constitution was being drafted the New South Wales Council of Churches, along with several other religious groups, advocated for the recognition of God in the Constitution.[88] Patrick Glynn, an Irish-Catholic delegate from South Australia who supported the proposed reference to God in the Australian Constitution as 'simple and unsectarian' and as a 'pledge of religious toleration',[89] put the case for divine acknowledgment in this way:

> The stamp of religion is fixed upon the front of our institutions, its letter is impressed upon the book of our lives, and… its spirit, weakened though it may be by the opposing forces of the world, still lifts the pulse of the social organism. It is this, not the iron hand of the law, that is the bond of society; it is this that gives unity and tone to the texture of the whole; it is this, that by subduing the domineering impulses and the reckless passions of the heart, turns discord to harmony, and evolves the law of moral progress out of the clashing purposes of life ...' [90]

A majority of the framers came eventually to support the recognition of God in the preamble. However, several were also concerned that this might be taken to imply that the Commonwealth had the authority to impose particular religious observances on those who did not adhere to them.[91] Henry Bournes Higgins, the leading exponent of this view, was especially concerned lest the Commonwealth assume the power to impose Sunday observance laws. If God were 'recognized', he argued, 'a large number of good people' would need to be reassured that 'their rights with respect to religion [would] not be interfered with'.[92] Higgins' specific concern about the effect of the preamble was probably exaggerated, as Edmund Barton and John Quick pointed out,[93] but the possibility that the Commonwealth would nonetheless have the power to make laws under its various heads of legislative power which could incidentally affect religious faith and practice was a real one. Other delegates, who were not as secularist

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87 The preamble to the German Basic Law of 1949 recites that the German people adopt the Basic Law 'conscious of their responsibility before God and man'. The preamble to the Canadian Charter of Rights and Freedoms, enacted in 1982, recites that 'Canada is founded upon principles that recognize the supremacy of God and the rule of law'. The preamble to the Constitution of South Africa of 1996 invokes divine blessing in four languages. The revised Swiss Constitution of 1999 recites the popular adoption of the Constitution '[i]n the name of Almighty God'.

88 Richard Ely, *Unto God and Caesar: Religious Issues in the Emerging Commonwealth 1891-1906* (Melbourne University Press, 1976) ch 3.

89 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne, 1898) 1732-3.

90 Ibid 1733.

91 Andrew Inglis Clark, for example, considered religion to be a personal affair, and was deeply suspicious of organised religion: Richard Ely, 'Andrew Inglis Clark and Church-State Separation' (1975) 8 *Journal of Religious History* 271, 273-4.

92 *Federal Convention* (Melbourne, 1898) 654.

93 Ibid 660-661 (Barton), 1736 (Quick). See also John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus and Robertson, 1901) 952.

as Higgins, had similar concerns. Josiah Symon considered it important to 'protect every citizen in the absolute and free exercise of his own faith' and 'to take care that his religious belief shall in no way be interfered with.'[94] Similarly, Bernhard Wise thought that 'every one [should be free to] follow his own religious observances', and not be permitted to 'impose his will on anybody else.'[95]

While Symon and Wise emphasised the need to protect individual expressions of religious freedom, Higgins drew attention to the impact that Sunday observance laws would have on minority religious groups such as the Seventh-day Adventists, a protestant Christian denomination which observes a religious day of rest on Saturday rather than Sunday. The right to religious freedom was of particular importance to this group because an Act of Charles II from 1677,[96] which prohibited Sunday 'desecration', remained in force in the Australian colonies and had been used to convict some members of the denomination.[97] The Adventists themselves had been campaigning vigorously against the recognition of God in the preamble and advocated for a constitutional prohibition on religious laws.[98] Higgins, who became their 'agent and ally in the Convention', argued that a clause that would give adequate protection to the Seventh-day Adventists was necessary.[99] Despite setbacks, Higgins' proposed clause, which went through several iterations, was eventually enacted in the current terms of s 116.[100]

The religious freedom of the Seventh-day Adventists is emblematic of what s 116 seems to have been intended to secure on behalf of the people of all religions. Sabbath observance is an essential element of the beliefs and practices of Seventh-day Adventists as a religious group. They believe that Saturday is to be set aside as a shared day of rest and worship, not only for individual believers, but also for Adventist families, congregations, schools and businesses.[101] The exercise of their religious freedom is thus intrinsically communal in character, for it is together that they, like people of most religions, engage in corporate worship and other religiously-inspired practices, including the provision of welfare, education and, in the case of the Adventist Sanitarium group of companies, the provision of goods and services. It was to protect religious freedom in all of these dimensions that s 116 seems to have been directed. Sunday observance laws apply a standard of conduct that applies to all persons within the community as a whole. As Higgins' use of the Adventist example suggests, s 116 was intended to prevent the Commonwealth from laying down a uniform Sunday observance law – not to prevent people of religious conviction from observing their particular holy days, but to enable them to do so freely, as communities of believers.[102]

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94 Ibid 659.
95 Ibid 1774.
96 29 Charles II, c 7 (1677).
97 Milton Hook, *The Avondale School and the Adventist Educational Goals, 1894-1900* (Andrews University, Michigan, 1978) 25.
98 Ibid 24-25; Ely, above n 88, chs 3 and 6.
99 *Federal Convention* (Melbourne, 1898) 656.
100 Ibid 1779, 2463.
101 Seventh-day Adventist Church, *Guidelines for Sabbath Observance* (2014) <http://www.adventist.org/beliefs/other-documents/other-doc6.html>.
102 Indeed, the Federal Convention itself, partly on account of the religious convictions of some of its members, determined ordinarily not to meet on either Saturdays or Sundays: *Federal Convention* (Adelaide, 1897) 6, 467-9, 638-41.

B *American precedents*

The framers of the Australian Constitution deliberately modelled many of its provisions on aspects of the American Constitution, including its clauses relating to freedom of religion.[103] The Australians were also aware of several decisions of the US Supreme Court in which those religion clauses had been interpreted. Article VI and the First Amendment of the US Constitution relevantly provide:

> no religious test shall ever be required as a qualification to any office or public trust under the United 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 the redress of grievances.

The similarities to s 116 are by no means accidental. In their influential commentary on the Australian Constitution, John Quick and Robert Garran consistently demonstrated how particular sections were modelled on the provisions of other Constitutions, including the US Constitution and the religion clauses of the First Amendment in particular.[104] During the course of the debate on the clause that became s 116, Higgins had alluded to the US Supreme Court decision in *Church of the Holy Trinity v United States*,[105] in which it was held that a federal law which prohibited the immigration of workers from overseas did not apply to an arrangement whereby a church had contracted with a resident and citizen of another country to enter into service as an ordained minister. Although the case turned on a question of statutory interpretation, the case had a constitutional element, and the First Amendment was cited in the judgment.[106] Higgins' concern was that during the course of its reasoning the Supreme Court had considered the United States to be a 'Christian nation', and that this idea had provided support for a decision by Congress to impose the requirement that the Chicago World's Fair not be opened on Sundays.[107] Higgins did not discuss the case in much detail, but Quick and Garran explained that the plaintiff in the case, the Church of the Holy Trinity, was an incorporated religious society under the law of the State of New York.[108] Notably, it went without saying that the Church had standing as a corporate body to initiate the matter in the Supreme Court.

Another relevant Supreme Court decision from the time was *Vidal v Girard's Executors*.[109] In this case, as Quick and Garran observed, the US Supreme Court had considered that in developing the common law it was relevant to take notice of the prevalence of the Christian religion within the nation.[110] What Quick and Garran did not mention, however, is that the case specifically concerned the capacity of the City of Philadelphia to hold property on trust for the establishment of charitable colleges, schools and seminaries for the education of orphans and the poor. The testamentary trust in question excluded the appointment or involvement of ecclesiastics, missionaries and ministers in the colleges, and the Court was asked whether this was 'so derogatory and hostile to the Christian religion' as to make the devise void under

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103 *Federal Convention* (Melbourne, 1898) 654 (Higgins); Quick and Garran, above n 93, 951.
104 Quick and Garran, above n 93, 953.
105 143 US 457 (1892).
106 143 US 457 (1892) 470
107 *Federal Convention* (Melbourne, 1898) 1734-5.
108 Quick and Garran, above n 93, 289.
109 43 US 127 (1844).
110 Quick and Garran, above n 93, 951.

the laws of the State of Pennsylvania. The Court held that although the Christian religion might be said to be part of the common law of the State, that principle had to be considered in the light of the freedom of religious conscience protected by the Pennsylvania Constitution of 1790. Because the freedom extended to 'every variety of religious opinion' and to 'all sects, whether they believed in Christianity or not', it could not be argued that the terms of the trust were void or unlawful.[111] The validity of the trust was accordingly upheld on the view that the freedom of religious conscience guaranteed by the State Constitution extended to the freedom of the testator to settle a trust upon the City of Philadelphia in order to establish charitable educational institutions of various kinds. The reasoning thus proceeded on the basis that freedom of religion includes the liberty to establish institutions to pursue not only religious goals narrowly conceived, but also wider educational and charitable purposes as well.

Two other important American cases, also known to the Australians,[112] were *Reynolds v United States*[113] and *Davis v Beason*.[114] These cases involved members of the Church of Jesus Christ of Latter-day Saints claiming that anti-bigamy or anti-polygamy laws breached their First Amendment right to the free exercise of religion.[115] They were accompanied by the Supreme Court's decision in *Mormon Church v United States*,[116] which upheld federal laws that repealed the charter under which the Mormon Church had been incorporated, dissolved the church and forfeited its property.[117] While *Reynolds* and *Davis* thus primarily concerned the application of the law to individuals,[118] the *Mormon Church* case involved the associational and communal dimensions of religious freedom. Indeed, the Utah law under which the church was initially incorporated had affirmed that the church as such was entitled to religious freedom as a 'constitutional and original right, in common with all civil and religious communities', and that this right included 'power and authority, in and of itself' to make internal rules and regulations 'for the good order, safety, government, conveniences, comfort and control' of the church and 'for the punishment or forgiveness of all offenses relative to fellowship according to church covenants'.[119]

As in the Australian *Jehovah's Witnesses* case, the reasoning in *Reynolds*, *Davis* and *Mormon Church* was deeply influenced by the questionable proposition that freedom of religion only protects beliefs and not practices.[120] In *Reynolds*, the Supreme Court affirmed that the religion clauses in the First Amendment had been inserted to prevent Congress from enacting laws which would establish a particular "sect" as the official religion of the United States, such as by enforcing its doctrines and codes of

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111 43 US 127 (1844) 198.

112 Quick and Garran, above n 93, 953; W Harrison Moore, *The Constitution of the Commonwealth of Australia* (John Murray, 1st ed, 1902) 308; Andrew Inglis Clark, *Studies in Australian Constitutional Law* (Charles F Maxwell, 1901) 44.

113 98 US 145 (1879) ('*Reynolds*').

114 133 US 333 (1890).

115 *Reynolds* concerned the application of a US law prohibiting polygamy in the then Territory of Utah. *Davis* concerned the application of an Idaho test oath requiring individual voters to swear they were not polygamists.

116 *The Late Corporation of the Church of Jesus Christ of Latter-Day Saints v United States*, 136 US 1 (1890) ('*Mormon Church'*).

117 The federal laws also provided for the forfeiture of property exceeding $50,000 in value held by any religious association or corporation within a US territory, but affirmed the right of 'religious societies, sects, and congregations' to hold property for the establishment of houses of worship, parsonages and burial grounds: *Mormon Church* 136 US 1, 6, 8 (1890).

118 The test oath in *Davis* did, however, require voters to swear that they were not members of any organisation that teaches polygamy.

119 *Mormon Church* 136 US 1, 4 (1890).

120 *Reynolds* 98 US 145, 166-7 (1879); *Davis* 133 US 333, 342-3 (1890); *Mormon Church* 136 US 1, 49-50 (1890).

conduct and making provision for the support of its personnel and institutions.[121] On this reasoning it followed that, while the United States could not establish a particular religion as a public institution,[122] the various religious groups would remain free to establish their own private organisations and institutions.[123] The general objective of the First Amendment was thus understood to require a separation of church and state at a federal level understood in this institutional sense.[124] In *Mormon Church*, likewise, the Court did not deny the rights of religious groups to have corporate existence and a capacity of internal self-governance, nor even that freedom of religion necessarily entails such a right, but rather merely affirmed the authority of the Congress to prohibit polygamy and to provide for the dissolution and forfeiture of the assets of an organisation which promoted it.[125] Indeed, the Court went to great length in recounting the law's long history of enforcement of charitable trusts for a great a variety of purposes, including the support of religious institutions of many different kinds.[126]

Consistent with this general view of the law's recognition of religious organisations, in *Watson v Jones*,[127] the Circuit Court for the District of Kentucky declined to intervene in a dispute within the Presbyterian Church in Louisville on the ground that the Court must respect the determinations of the ecclesiastical system of government within the church, which made provision for the authoritative resolution of disputes through a graded system of representative courts, the highest authority of which was the Church's General Assembly.[128] On appeal the US Supreme Court upheld the decision of the Circuit Court, observing that such an approach was consistent with the 'broad and sound view of the relations of church and state' and the 'full, entire, and practical freedom for all forms of religious belief and practice' that had been adopted in the United States.[129] Among these rights, the Court continued, was

> [t]he right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association and for the ecclesiastical government of all the individual members, congregations, and officers within the general association.[130]

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121 98 US 145, 162-3 (1879).

122 For example, the State would be unable to pass 'a bill establishing provision for teachers of the Christian religion', as had been proposed by the House of Delegates of the State of Virginia in 1784: *Reynolds* 98 US 145, 163 (1879). See, similarly, *Bradfield v Roberts* 175 US 291 (1899), in which the Supreme Court entertained the argument that a federal appropriation to provide funding to an incorporated 'religious society' running a hospital amounted to an unconstitutional establishment of religion. The argument failed, but not due to the corporate nature of the religious society. See Moore, above n 112, 308.

123 For, as James Madison had argued in the *Memorial and Remonstrance Against Religious Assessments* (1785), '"religion, or the duty we owe the Creator", was not within the cognizance of civil government': *Reynolds* 98 US 145, 163.

124 On Thomas Jefferson's Letter to the Danbury Baptist Association (1802), also cited in *Reynolds* 98 US 145, 164, which called for 'a wall of separation between Church and State, see James H. Hutson, 'Thomas Jefferson's Letter to the Danbury Baptists: A Controversy Rejoined' (1999) 56(4) *William and Mary Quarterly* 775.

125 *Mormon Church* 136 US 1, 50 (1890).

126 Ibid 50-62 (1890).

127 80 US 697 (1872) ('*Watson*'). The case is discussed in William Bassett, 'Religious organizations and the state: a law of ecclesiastical polity and the civil courts' in John Witte and Frank S. Alexander (eds), *Christianity and Law: An Introduction* (Cambridge University Press, 2008).

128 *Watson* 80 US 697, 681-3 (1872).

129 Ibid 727-8.

130 Ibid 728-9.

All who voluntarily unite themselves to such bodies do so with an implied consent to its system of government, the Court continued, for it is 'of the essence of these religious unions' that their decisions should bind their members, and to allow any exception to this would 'lead to the total subversion of such religious bodies'.[131] Each such religious group, the Court said, has its own 'body of constitutional and ecclesiastical law' which is most appropriately determined by its own internal systems and procedures.[132]

The view that religious freedom has ineradicable corporate and institutional dimensions was taken for granted in these and several other nineteenth century American cases,[133] for such an outlook was fundamental to American values at the time.[134] As historians have shown, the early European settlements in New England and elsewhere were premised on strongly communal and corporate values which were only much later challenged by more individualist ideas and practices.[135] A kind of 'Protestant covenantalism' characterised most of the early colonies, pursuant to which binding commitments to a shared identity were seen as the very foundations of communal life, in both church and state.[136] John Witte argues that the diversity of religious settlements across the various American colonies encouraged the development of a general consensus around six general principles which New England jurist and theologian Elisha Williams called 'the essential rights and liberties of [religion]'.[137] According to Witte, these principles of liberty of conscience, free exercise of religion, religious pluralism, religious equality, separation of church and state and disestablishment of religion never quite won universal assent, but they did secure widespread support. And the free exercise of religion, he points out, was specifically understood at the time to include –

> [the] right of the individual to join with like-minded believers in religious societies, which were free to devise their own modes of worship, articles of faith, standards of discipline, and patterns of ritual.[138]

While the modern language of 'religious group rights' and 'corporate free exercise rights' was not used, contemporary expressions such as 'ecclesiastical liberty', 'the equal liberty of one sect … with another', and the right 'to have the full enjoyment and free exercise of those purely spiritual powers' were often referred to, and

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131 Ibid 697, 729.

132 Ibid 697, 729. Although the Court did not refer specifically to the First Amendment, the principle in the case has subsequently been understood as being a constitutional one: *Kedroff v Saint Nicholas Cathedral* 344 US 94 (1952).

133 Eg, *Bradfield v Roberts* 175 US 291 (1899), which concerned the application of the non-establishment clause to a congressionally chartered hospital corporation run by a Catholic religious order. The interpretation of this case in Ely, above n 88, 96-7, as 'strict separationist' is not borne out by a close analysis of its reasoning.

134 For a recent confirmation of the rights of religious groups under the First Amendment, see *Hosanna-Tabor Evangelical Lutheran Church and School v U.S. Equal Employment Opportunity Commission*, 132 SCt 694 (2012).

135 Barry Alan Shain, *The Myth of American Individualism: The Protestant Origins of American Political Thought* (Princeton University Press, 1994).

136 John Witte, 'Blest Be the Ties That Bind: Covenant and Community in Puritan Thought' (1987) 36 *Emory Law Journal* 579. Many of these founding compacts are collected in Donald Lutz, *Colonial Origins of the American Constitution: A Documentary History* (Liberty Fund, 1998).

137 John Witte, *Religion and the American Constitutional Experiment* (Westview Press, 2nd ed, 2005) 41.

138 Ibid 46.

amounted to much the same thing.[139] Similarly, the non-establishment principle was understood not only to protect the state from the church, but also to protect the church from the state, meaning the protection of 'church affairs from state intrusion, the clergy from the magistracy, church properties from state encroachment [and] ecclesiastical rules and rites from political coercion and control'.[140] Consistent with this outlook, Michael McConnell has pointed out that the State constitutions generally enabled religious institutions to 'define their own doctrine, membership, organisation, and internal requirements without state interference'.[141] This solicitude for corporate religious freedom was based, McConnell shows, on the widespread belief that local religious communities were the essential means by which society was held together.[142] As McConnell further argues, the term 'free exercise of religion' was deliberately used in preference to alternatives such as 'freedom of conscience' and 'toleration of religion', reflecting an intention to extend protections to corporate and institutional expressions of religious freedom.[143]

As both Witte and McConnell point out, there were some American political leaders who, influenced by Enlightenment individualism, were sceptical about organised religion and understood religious freedom to be fundamentally individualist in character. Influenced by these views, some American states placed close restrictions on corporate religious rights, including a Virginia law which outlawed the formation of religious corporations.[144] A similar view of the Supreme Court's interpretation of the First Amendment, expressed by American constitutional lawyer and political scientist John Burgess, was cited by Quick and Garran in their commentary on the Australian Constitution:

> The court declared that by this constitutional restriction Congress is deprived of legislative power over opinion merely, but is left free to reach actions which it may regard as violations of social duties or as subversive of good order. The free exercise of religion secured by the Constitution to the individual against the power of the government is, therefore, confined to the realm of purely spiritual worship; i.e. to relations between the individual and an extra-mundane being. So soon as religion seeks to regulate relations between two or more individuals, it becomes subject to the powers of the government and to the supremacy of the law; *i.e.,* the individual has in this case no constitutional immunity against governmental interference.[145]

Notably, although Quick and Garran often elsewhere expressed agreement with Burgess's views, in this instance they quoted from him without comment. Burgess's approach to constitutional law and political theory generally was highly individualist and nationalist. But although he was cited occasionally by Quick and Garran, as well

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139 Ibid 46.
140 Ibid 53.
141 Michael McConnell, 'The Origins and Historical Understanding of Free Exercise of Religion' (1990) 103 *Harvard Law Review* 1409.
142 Ibid 1443.
143 Ibid 1490. McConnell writes: '[An] important difference between the terms "conscience" and "religion" is that "conscience" emphasizes individual judgment, while "religion" also encompasses the corporate or institutional aspects of religious belief. In the great battle cry of the Protestant Reformation – "God alone is the Lord of the conscience" – the individual conscience was used in contradistinction to the teaching of the institutional church. "Religion", by contrast, connotes a community of believers …'.
144 Witte, above n 137, 32-33.
145 Quick and Garran, above n 93, 953, quoting John W. Burgess, *Political Science and Comparative Constitutional Law* (Ginn and Co, 1890) I:194.

as by HB Higgins and Isaac Isaacs, his views were not widely accepted by other Australian framers.[146]

C *Australian colonial practices*

Although shaped by different histories, British and Australian legal principle and practice in the second half of the nineteenth century similarly affirmed the associational and corporate dimensions of religious freedom. By about 1870, as Julian Rivers has shown, the United Kingdom had reached a reasonably stable constitutional settlement under which organised religious denominations were entitled to independent legal personality and identity and jurisdictional autonomy in matters of doctrine, worship, government and internal discipline.[147] Indeed, Rivers argues that much of British law can only be understood by recognising the collective orientation of religious belief and practice.[148] Several features of late nineteenth century Australian law and practice suggest that the same was also true here.

Firstly, it is important to note that Australia – like North America – was for some European religious communities a refuge from religious persecution. Many Lutherans, in particular, migrated to Australia during the 1830s to mid-1840s as religious refugees.[149] The fact that the Lutherans were received into the Australian colonies, given land and permitted to establish their own churches, schools and missions, reflects the extent to which the communal aspects of religious freedom were recognised. While Jews, Muslims, Buddhists, Hindus and Catholics certainly encountered a less welcoming environment, many of these groups also maintained very strong ethnic and religious communal bonds and sought to establish their own communities and institutions.[150] While the Jewish community, for example, did not receive the same privileges as mainstream Christian denominations, they were nonetheless free to worship collectively, and eventually to build their own synagogues and benevolent institutions.[151] The same was true of Muslim communities, who have been a presence in Australia since the 1860s, during which time mosques were built.[152] In fact, one mosque built in Broken Hill in 1891 still stands today, and the first city mosque to be built in Adelaide between 1889 and 1891 served not only as a place of worship, but also of charity and religious festivities.[153] The freedom and capacity to establish and operate places of worship was more pronounced for Christian churches which, following the passage of the *NSW Church Building Act 1836*, were eligible to receive government assistance. This assistance included stipends for the employment of clergy and subsidies for the construction of church buildings.[154] By extending the funding to

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146 This was particularly so in relation to federalism issues: see Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009) 96-100, 121-35, 218-22, 316, 324-6.

147 Rivers, above n 1, 316. Legal personality was often secured through special legislation e.g. the *Irish Church Act 1869*, *Irish Presbyterian Church Act 1871*, *Primitive Wesleyan Methodist Society of Ireland Act 1871*, *Charitable Trusts Act 1869*, *Jewish United Synagogues Act 1870*, *United Methodist Church Act 1907*, and *Church of Scotland Act 1921* (see ibid 23, 28-29, 83-84).

148 Ibid 31-2.

149 Lyall Kupke, '1838 - a year to remember' *The Lutheran* (March 2013) 19.

150 For a general survey, see Hilary M. Carey 'A historical outline of religion in Australia', in James Jupp (ed), *The Encyclopedia of Religion in Australia* (Cambridge University Press, 2009) 8.

151 John Levi, 'Jews of Colonial Australia 1788-1850', in Jupp, above n 150, 345-7.

152 Anna Kenny, 'Inland Australia's First Muslims' in Jupp, above n 150, 436-7.

153 Ibid.

154 An Act to promote the building of Churches and Chapels and to provide for the maintenance of Ministers of Religion in New South Wales, 7 Will IV No 3 (1836) ss 1-2.

all Christian denominations,[155] the Act both confirmed that there was to be no established church in Australia and strengthened the developing religious pluralism within the colony.[156] While state aid was eventually abandoned,[157] the religious freedom to establish and operate churches continued to be recognised.

The corporate aspect of religious freedom was especially recognised through the granting of legal personality as a result of particular statutes or letters patent.[158] Specific legal instruments such as these were necessary in order to overcome the fact that, despite arguments to the contrary,[159] the common law did not recognise the corporate identity of a church or religious community as such; an authorising statute or an executive act was necessary.[160] Nonetheless, Australian colonial statutes recognised the capacities for 'self-constitution' and 'self-government' to which religious and other groups aspired. The preamble to the *Anglican Church of Australia Act 1895* (Qld), for example, contained a recital recording the consensual compact by which the church had constituted itself:

> Whereas by a consensual compact made by and between the bishop, clergy, and laity of the Anglican Church of Australia (then called the United Church of England and Ireland) in the Diocese of Brisbane, on 18 June 1868, a constitution was agreed to for the management and good government of the said church in the said diocese.

The *Religious Educational and Charitable Institutions Act 1861* (Qld) similarly empowered the Governor to issue Letters Patent to declare any person or persons a body corporate, provided they were 'duly called or appointed' to that role 'in accordance with the rights law rules or usages' of a religious or secular 'community or institution'. This process of incorporation gave religious bodies the right of perpetual succession and a common seal and most of the legal capacities of a natural person. Even more fundamentally, it recognised the prior existence of the 'community or institution' in question, as well as its capacity to have its own rules and usages quite apart from the state's grant of legal personality through formal juristic incorporation.

Alongside the specific churches and denominations a whole variety of religious orders, missions, and other charitable organisations were established and recognised,

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155 Tom Frame, *Church and State: Australia's Imaginary Wall* (University of NSW Press, 2006) 55: 'The Anglicans, Presbyterians, Roman Catholics and later the Wesleyans as the larger denominations were the chief beneficiaries. The Baptists declined assistance, to avoid any hint of worldly compromise or government control.' This reversed the disabilities imposed upon Roman Catholic convicts during the early years of settlement. Frank Brennan, 'Religion, multiculturalism and legal pluralism' in Nadirsyah Hosen and Richard Mohr (eds), *Law and Religion in Public Life* (Routledge, 2011), 70, observes that 'The first Australian Catholics were convicts, mostly Irish. For the first 15 years of settlement, they were denied sacraments in their own Church. It was a Church of laity. The first public mass was not celebrated until 15 May 1803 by James Dixon who was also a convict, having been deported for providing assistance to Irish rebels. Military officers were in attendance at that first mass to ensure that the Irish did not use the sacrament as a foil for seditious conversations. In March 1804, 300 Irish convicts rebelled at Castle Hill on the outskirts of Sydney. Convinced that the Mass was being used as a cover for seditious gatherings, the authorities restricted Dixon's freedom to minister to his fellow Catholics.'

156 Ibid.

157 Carey, above n 150, 9.

158 Eg, *Anglican Church of Australia Act 1895* (Qld).

159 David Runciman, *Pluralism and the Personality of the State* (Cambridge University Press, 1997); Frederic William Maitland, 'Translator's Introduction' in Otto Gierke, *Political Theories of the Middle Age* (Cambridge University Press, 1900 [1922]); Harold J. Laski, 'The Personality of Associations' (1915-1916) 29 *Harvard Law Review* 404.

160 R.D. Lumb, 'Corporate Personality' (1961-1964) 4 *University of Queensland Law Journal* 418.

each operating in accordance with its own doctrines, customs and traditions.[161] Nineteenth century Australian society also saw the development of friendly societies, voluntary associations established for financial and social purposes, which had their 'own criteria for membership and benefits, based on a person's religion, occupation and birthplace'.[162] These and many other kinds of religious associations flourished through the second half of the nineteenth century, so much so that Anthony Trollope, when visiting Australia at the time, observed that 'wherever there is a community there arises a church, or more commonly churches … [for] the people are fond of building churches'.[163]

The Australian colonies were places where religious communities thrived. This was not only a consequence of the fact that these groups enjoyed the freedom to worship, but also because they were free to engage in other communal expressions of faith such as the establishment of charities and religious associations and corporations. Moreover, they enjoyed the freedom to do such things autonomously, in accordance with their own governance structures and their deeply held religious beliefs. Section 116 of the Constitution was enacted in this context. It would be extraordinary to deny that it was intended to protect both the individual and the collective dimensions of religious freedom.

V INTERNATIONAL LAW

It was observed at the outset of this article that Article 18 of the International Covenant on Civil and Political Rights (ICCPR) appears to enshrine a basically individualist conception of freedom of religion. The statement in Article 18 that religious freedom may be exercised 'either individually or in community with others and in public or private' suggests that there is a communal and public dimension to religious expression, but it is the individual whose religious 'choice[s]' seem both to constitute and determine the parameters of the freedom for each individual. International human rights law is, however, more attuned to the communal dimensions of religious freedom than this might suggest. As Carolyn Evans has shown freedom of religion as protected under international human rights law has both an individual and a collective aspect, and the right to manifest religious freedom collectively necessarily implies that it has an organisational dimension.[164] The UN Human Rights Committee's General Comment No 22(4), for example, makes clear that the freedom to manifest, practice and teach religion includes 'acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, [and] the freedom to establish seminaries or religious schools'. As Evans explains:

> [w]hile individuals choose to exercise their religion within an organised religious group, the state must respect the autonomy of this group with respect to decisions 'such as the freedom to choose their religious leaders, priests and teachers, the freedom

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[161] For example: Good Samaritan Sisters (1857), Sisters of St Joseph (1866), Sisters of Charity (1858), Sydney City Mission (1862), Josephites (1871), The Salvation Army (1880), St Vincent de Paul (1881). See Stephen Judd, Anne Robinson and Felicity Errington, *Driven by Purpose: Charities that make a difference* (Hammond Press, 2012) 47-57.

[162] Ibid 51.

[163] Stuart Piggin and Allan Davidson, 'Christianity in Australasia and the Pacific' in Sheridan Gilley and Brian Stanley (eds), *The Cambridge History of Christianity. Volume 8: World Christianities C.1815 – C.1914* (Cambridge University Press, 2006) 542, 546.

[164] Carolyn Evans, *Legal Protection of Religious Freedom in Australia* (Federation Press, 2012) 35.

> to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.' That does not mean that these elements of religious freedom can never be limited in compliance with the limitations provisions in the ICCPR, but rather is a recognition that the communal aspects of religious practice are important and can only be limited where necessary in a democratic society for one of the reasons set out in the ICCPR. Interference by the state in issues such as the selection of clergy and other central aspects of religious practice would require significant justification. Religious autonomy does not mean, however, that religious organisations are 'above the law' or that any restrictions or requirements on religious organisations are illegitimate.[165]

The communal and associational aspects of religious freedom are further supported by Articles 22 and 27 of the ICCPR. Article 22 protects the 'right to freedom of association with other people.' Manfred Nowak has explained that this right includes the right to found an association with like-minded people; the right of a group of people to a legal framework making possible the creation of juridical persons; the collective right of an existing association to represent the common interests of its members; the individual negative freedom to leave freely, or not to join an association; and the collective negative freedom of an association to expel a member who has breached the terms of association.[166] Article 27 of the ICCPR even more specifically and directly protects the rights of religious minority groups to practice and profess their religion in community with other members of their group.

Article 6 of the *UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (1981)[167] further affirms that the right to freedom of thought, conscience, religion or belief include a whole range of freedoms that are unavoidably communal in their expression, such as the freedom to:

> (a) To worship or assemble in connexion with a religion or belief, and to establish and maintain places for these purposes;
> (b) To establish and maintain appropriate charitable or humanitarian institutions;
> (c) To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;
> (d) To write, issue and disseminate relevant publications in these areas;
> (e) To teach a religion or belief in places suitable for these purposes;
> (f) To solicit and receive voluntary financial and other contributions from individuals and institutions;
> (g) To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief;
> (h) To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief;
> (i) To establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.[168]

An earlier draft of the 1981 Declaration went even further, proposing that these rights inhere not only in 'every person' but in 'every group or community'.[169] The Concluding Document of the Vienna Meeting of Representatives of the Participating States of the Conference on Security and Co-operation in Europe (1989) was similarly

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[165] Ibid 35.

[166] Manfred Nowak, *CCPR Commentary* (Kehl am Rhein: Engel, 1993), 386–9, cited in Rivers, above n 1, 39.

[167] GA Res 36/55, UN GAOR, 36th sess, UN Doc A/36/684 (25 November 1981).

[168] See the discussion in Paul Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge University Press, 2005) 235-92.

[169] Malcom Evans, *Religious Liberty and International Law in Europe* (Cambridge University Press, 1997) 240

explicit about the rights of 'religious communities' and 'religious faiths, institutions and organizations', affirming that the rights of religious communities extend to the right to establish and maintain freely accessible places of worship or assembly, to 'organize themselves according their own hierarchical and institutional structure' and to 'select, appoint and replace their personnel in accordance with their respective requirements and standards'.[170] In his 1956 report on religious discrimination, Special Rapporteur Arcot Krishnaswami highlighted the 'particular importance' of the 'collective' aspects of the right to manifest religion or belief, which he suggested would imply such rights as 'freedom of assembly', 'freedom of association' and 'the right to organize'.[171] Having noted that 'the followers of most religions and beliefs are members of some form of organization, such as a church or a community', and that any compulsion to join or remain a member was contrary to the freedom, he also observed that matters of 'structure' and 'management' of religious organizations are often determined by religious doctrine, and that as a matter of general principle 'every religion should be accorded the greatest possible freedom in the management of its religious affairs'.[172]

Several other international and regional instruments provide similarly. The *UN Declaration on the Rights of Indigenous Peoples* (2007) recognises the rights of indigenous 'peoples', 'communities' and 'families', including rights to self-determination (Art 3), autonomy or self-government in matters relating to their internal and local affairs (Art 4), maintenance of distinct social and cultural institutions (Art 5), practice of cultural traditions and customs (Art 11), manifestation, practice, development and teaching of spiritual and religious traditions, customs and ceremonies (Art 12), and development and maintenance of institutional structures and distinctive customs, spirituality, traditions, procedures and practices, including juridical systems (Art 34). As Johanna Gibson has pointed out, group rights to cultural and religious expression permeate the Declaration.[173] Article 8 of the *European Framework Convention for the Protection of National Minorities* (1995) similarly protects the rights of religious minority groups 'to establish religious institutions, organisations and associations.' Consistent with this, the European Court on Human Rights, in *Hasan & Chaush v Bulgaria*, noted that 'religious communities traditionally and universally exist in the form of organised structures', and that 'participation in the life of [such communities] is a manifestation of one's religion'.[174] The Court also went on to speak about the importance of these communities, commenting that 'the autonomous existence of religious communities is indispensable for pluralism in a democratic society.'[175]

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[170] Concluding Document of the Vienna Meeting of Representatives of the Participating States of the Conference on Security and Co-operation in Europe (1989), Principle 16.

[171] Arcot Krishnaswami, *Study of Discrimination in the matter of Religious Rights and Practices* (United Nations, 1960) (UN Document E/CN.4/Sub.2/200/Rev.1) 21. Krishnaswami was appointed as Special Rapporteur by the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

[172] Ibid 16, 21, 51. For an analysis of the tension between the individual and the collective in the report, see Rivers, above n 1, 37-8.

[173] Johanna Gibson, 'Community Rights to Culture: The UN Declaration on the Rights of Indigenous Peoples' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011) 433.

[174] (2002) 34 EHRR 554, para [62].

[175] Ibid. See Taylor, above n 168, 273-5. See also *Kokkinakis v Greece* (1993) 17 EHRR 397, para [31]; *Moscow Branch of the Salvation Army v Russia* (2006) 44 EHRR 912, paras [58] and [61] and *Metropolitan Church of Bessarabia v Moldova* (2002) 35 EHRR 13, para [117], discussed in Christopher McCrudden, 'Multiculturalism, Freedom of Religion, Equality, and the British Constitution: The *JFS* Case Considered' (2011) 9(1) (2011) *International Journal of Constitutional Law* 200, 217-8.

Principles of freedom of association and self-governance are also echoed in the law of domestic states within Europe, such as Germany and the United Kingdom. Article 19(3) of the German Basic Law affirms that 'basic rights shall also apply to domestic artificial persons' and Article 140 recognises the right of individuals to form religious associations, providing that '[r]eligious societies shall regulate and administer their affairs independently within the limits of the law that applies to all'.[176] The UK *Human Rights Act 1998* also recognises the collective aspect of religious freedom in s 13(1), which reads:

> If a court's determination of any question arising under this Act might affect the exercise by a *religious organisation* (*itself or its members collectively*) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right.[177]

VI CONCLUSIONS

While some Australian scholars have cast discussion about the free exercise of religion under s 116 in terms of individual rights, there is a general consensus among specialist scholars in the field that the right must necessarily have individual, associational and communal dimensions. David Little, for example, says that religious liberty as currently understood is 'the condition in which individuals or groups are permitted without restraint to assent to and, within limits, to express and act upon religious convictions and identity free of coercive interference or penalty imposed by outsiders, including the state'.[178] Carolyn Evans and Leilani Ujvari have likewise maintained that freedom of religion under Article 18 of the ICCPR has 'both an individual and a collective aspect'.[179] Rex Ahdar and Ian Leigh similarly draw attention to the 'ineradicable collective or communal dimension' of religious freedom.[180] For religious believers, religious faith and practice usually involves goods that are intrinsically communal in character, whereas, as Robert George has pointed out, a reductively individualistic account of human rights –

> overlooks the intrinsic value of human sociability and tends mistakenly to view human beings atomistically. It fails to account for the intrinsic value of friendship and other aspects of human sociability, reducing all relationships to means by which the partners collaborate with a view to more fully or efficiently achieving their individual goals and objectives.[181]

Cole Durham similarly observes:

> Protection of the right of religious communities to autonomy in structuring their religious affairs lies at the very core of protecting religious freedom. We often think of religious freedom as an individual right rooted in individual conscience, but in fact,

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[176] Article 140 adopts the provisions of the Weimar Constitution of 1919.

[177] Emphasis added. On the weakness of s 13, see Russell Sandberg, *Law and Religion* (Cambridge University Press, 2011) 68-9.

[178] David Litttle, 'Religious Liberty' in John Witte and Frank S. Alexander (eds), *Christianity and Law: An Introduction* (Cambridge University Press, 2008) 249.

[179] Carolyn Evans and Leilani Ujvari, 'Non-Discrimination Laws and Religious Schools in Australia' (2009) 30 *Adelaide Law Review* 31, 37.

[180] Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press, 2005) 325.

[181] Robert George, *Conscience and Its Enemies: Confronting the Dogmas of Liberal Secularism* (Intercollegiate Studies Institute, 2013) 76.

> religion virtually always has a communal dimension, and religious freedom can be negated as effectively by coercing or interfering with a religious group as by coercing one of its individual members.[182]

Johan van der Vyver specifically affirms the rights of religious communities 'to establish institutions as a means of uniting their number and to facilitate the execution of their calling; to decide upon and organize the internal structures of such institutions; and to contrive and to proclaim rules of behaviour and exercise authority for the sake of order within their own ranks'.[183] When the state intervenes into the internal affairs of religious groups, even to enforce what are said to be the human rights of individual members it runs the risk, William Johnson Everett notes, of 'reduc[ing] religious freedom solely to the beliefs and actions of individuals'.[184] The capacity of religious groups to secure legal personality for their organisations and institutions is also vital for, as Paul Taylor points out, its absence 'threatens the very existence of religious groups'.[185] And these associational, communal and corporate religious rights, John Witte argues, extend not only to religious associations narrowly conceived, but also to the rights of parents, schools and other religious institutions to pursue their religious goals.[186]

Julian Rivers draws attention, however, to recent erosion of the proper autonomy of religious groups in various ways, including the reduced willingness of courts to track the internal doctrine and government of religious bodies and the extension of employment and antidiscrimination law to religious organisations.[187] Questions about the exact lines to be drawn between secular norms and religious beliefs and practices raise issues that lie beyond the scope of this article, but it remains relevant and important to observe that too frequently it is assumed that religious freedom is a right that is only individual and private, and that any communal, corporate or public manifestations of religious conviction exist only at the sufferance of the state. However, submissions to the Australian Human Rights Commission's recent *Freedom of Religion and Belief in 21st Century* inquiry, from as diverse a variety of religious groups as the Anglican Diocese of Sydney, the Baha'i Community, the Church of Jesus Christ of Latter-day Saints, the Salvation Army and several others, emphasised the ineradicable communal dimensions of religious freedom as they understood it, and questioned efforts to define religious freedom as purely an individual right.[188]

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[182] W. Cole Durham, 'The Right to Autonomy in Religious Affairs: A Comparative View' in Gerhard Robbers (ed), *Church Autonomy: A Comparative Survey* (Peter Lang, 2001) 1. This monumental comparative study of church autonomy edited by Professor Robbers demonstrates conclusively how widely the communal and corporate dimensions of religious freedom are acknowledged throughout the world.

[183] Johan D van der Vyver, 'Sphere Sovereignty of Religious Institutions: A Contemporary Calvinistic Theory of Church-State Relations' in Robbers, above n 182, text to note 47. See also Paul Horwitz, 'Churches as First Amendment Institutions: Of Sovereignty and Spheres' (2009) 44 *Harvard Civil Rights-Civil Liberties Law Review* 79.

[184] William Johnson Everett, 'Human Rights in the Church' in John Witte and Johan D. van der Vyver (eds), *Religious Human Rights in Global Perspective* (Martinus Nijhoff, 1996) 121, 128.

[185] Taylor, above n 168, 291.

[186] John Witte, 'Introduction' in John Witte and Johan D. van der Vyver (eds), *Religious Human Rights in Global Perspective* (Martinus Nijhoff, 1996) xvii, xxvi.

[187] Rivers, above n 1, 338-9. Carolyn Evans predicts that this trend is likely to continue: Evans, above n 164. On the relevance of s 116 to such questions, see Reid Mortensen, 'Rendering to God and Caesar: Religion in Australia Discrimination Law' (1994-1995) 18 *University of Queensland Law Journal* 208, 219, 225-6, 231-2.

[188] Australian Human Rights Commission, *Freedom of Religion and Belief in 21st Century* (2011) 30-31. For example, the Anglican Diocese of Sydney was reported to have 'queried

Efforts to impose an individualistic view of human rights nonetheless continue to be made by groups such as the Discrimination Law Experts Group, who argue that the rights of religious organisations engaging in 'public sphere activities' should simply be trumped by the rights of individuals 'to be treated in a non-discriminatory way.'[189] The Public Interest Law Clearing House and the Human Rights Law Resource Centre have argued similarly, maintaining that permanent religious exceptions to anti-discrimination laws facilitate and condone discrimination by protecting 'traditional social structures and hierarchies'.[190] Although the context is that anti-discrimination laws apply only in certain 'public' contexts, the reasoning is not so limited. These arguments are not unlike that of Stephen Macedo, who advocates that modern liberalism must 'constitute the private realm in its image' by forcing citizens 'to observe its limits' and 'pursue its aspirations'.[191] Such persons are to be actively coerced, Macedo candidly asserts, 'to help ensure that freedom is what they want', even in 'their most "private beliefs"'.[192]

The underlying individualism of this line of argument has been made clear by Margaret Thornton, who has argued that although the ICCPR protects the right to exercise freedom of religion 'in association with others', this right not only has to be balanced against the competing rights to equal treatment and non-discrimination, but all such rights need to be understood, fundamentally, as the rights of human beings – not of corporations – and so it is a 'logical fallacy to extrapolate from an individual's private beliefs to an impersonal for-profit corporation'.[193] Thornton's argument shows the weakness of religious freedom rights if they are conceptualised in reductively individualistic terms. This is because one would have to show, first, that certain individuals have particular religious convictions that are legally protected and, second, that these same individual rights are being expressed through the religious corporation's rules or practices. If religious rights are conceptualised as inherently 'private' in this sense, it will be that much more difficult to establish that such rights are really being exercised *as private rights* in various domains of 'public' or 'quasi-public' life.[194] But on the contrary, as has been seen, international human rights principles, while certainly premised on the rights of the 'human person', are not exclusively concerned to protect only individual rights or only private expressions of religious conviction.

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the presentation of "religion primarily as a matter for individual choice rather than communal affair" and argued that "religious people often meet together in organised groups, and traditionally 'freedom of religion' has also been a defence of the life and identity of these groups"'.

189 Discrimination Law Experts' Group, Submission: Consolidation of Commonwealth Anti-Discrimination Laws, 13 December 2011, 16.

190 Public Interest Law Clearing House and Human Rights Law Resource Centre, 'Joint Submission to the Scrutiny of Acts and Regulations Committee on Its Inquiry into the Exceptions and Exemptions in the Equal Opportunity Act 1995 (Vic)' (2009) paras [4], [45], [79].

191 Stephen Macedo, 'Transformative Constitutionalism and the Case of Religion: Defending the Moderate Hegemony of Liberalism' (1998) 26(1) *Political Theory* 56, 58. See the discussion in Leigh and Ahdar, above n 180, 334-5.

192 Macedo, ibid, 58, 72. The result, however, as Paul Marshall puts it, is that '[religious] communities are not free: rather they are constrained to become liberal associations': Paul Marshall, 'Liberalism, Pluralism and Christianity: A Reconceptualization' (1989) 21 *Fides et Historia* 4, 9, quoted in Leigh and Ahdar, above n 180, 334.

193 Margaret Thornton, 'Christianity "Privileged" in Laws Protecting Fairness' (2011) 5 (February) *Viewpoint: Perspectives on Public Policy* 41, 45. Thornton's reference to *for-profit* corporations is curious, as it is usually *not*-for-profit corporations that seek the benefit of religious freedom exemptions from anti-discrimination laws.

194 Ibid 42.

Another problem with individualised conceptions of human rights in this domain is that such rights, although originally conceived as rights against the state, can nonetheless 'double up as rights against everyone'.[195] Accordingly, as Julian Rivers has shown, there are some for whom it is not sufficient that an individual has a right of 'exit' from his or her religious community.[196] Rather, there is evidence 'of a growing assumption that everyone who wishes should be able to join any religious body' and that 'membership tests are suspect'.[197] The underlying assumption, in other words, is that 'the preservation of religious identity on the part of civil society groups needs justification *against* the individual who does not share that identity', even though to adopt such an approach 'is potentially destructive of the identity of [all] non-State collectivities'.[198] For if any individual can decide whether he or she qualifies for membership of an organisation, no organisation will be able to maintain its distinctive identity.[199]

This *reductio ad absurdum* suggests that a radical individualist conception of religious liberty is simply incompatible with the existence of religious associations and communities as distinguishable groups within a society. Against such a view, William Galston has observed:

> It is not obvious as an empirical matter that civil society organisations within liberal democracies must be organised along liberal democratic lines… A liberal policy guided … by a commitment to moral and political pluralism will be parsimonious in specifying binding public principles and cautious about employing such principles to intervene in the internal affairs of civil associations. It will rather pursue a policy of *maximum feasible accommodation*, limited only by the core requirements of individual security and civic unity. That there are costs to such a policy cannot reasonably be denied. It will permit internal associational practices (e.g. patriarchal gender relations) of which many disapprove. It will allow many associations to define their membership in ways that may be viewed as restraints on individual liberty … Unless liberty – individual and associational – is to be narrowed dramatically, however, we must accept these costs.[200]

A reductively individualist conception of religious freedom is obviously opposed to the capacity of such groups to determine their own conditions of membership, but an excessively narrow associational conception may also have this effect, for there are many social groupings and traditional communities, including religions, in which

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[195] Rivers, above n 1, 321.

[196] See John Rawls, *A Theory of Justice* (Clarendon Press, 1972) 211-12: '[P]articular associations may be freely organized as their members wish, and they may have their own internal life and discipline subject to the restriction that the members have a real choice of whether to continue their affiliation.'

[197] Ibid. See, similarly, McCrudden, above n 175, 220-23, 229.

[198] Ibid 322.

[199] As Reid Mortensen has pointed out in relation to Australia, '[t]o a large extent … religious freedom only takes on real meaning in the extent to which it is lawful for religious groups to discriminate.' See Reid Mortensen, 'A Reconstruction of Religious Freedom and Equality - Gay, Lesbian and De Facto Rights and the Religious Schools in Queensland' (2003) 3(2) *Queensland University of Technology Law and Justice Journal* 320, 323.

[200] William Galston, 'Value Pluralism and Political Liberalism' (1996) 16(2) *Report from the Institute for Philosophy and Public Policy* 7, 7. See also Malcolm Evans, 'Freedom of Religion and the European Convention on Human Rights: Approaches, Trends and Tensions' in Peter Cane, Carolyn Evans and Zoë Robinson (eds), *Law and Religion in Theoretical and Historical Context* (Cambridge University Press, 2008) 291, 315: 'there appears to be a danger that it is the interests of the state which are now assuming a clear priority as against the religious rights of individuals and communities – and this is not what human rights protections are meant to be about'.

membership does not initially arise by deliberate choice but by birth and circumstance. Whether voluntaristic or otherwise, unless such associations and communities are going to be understood, following Thomas Hobbes, as 'worms in the entrails' of the body politic,[201] we need to recognise, as Harold Laski argued, that they are 'as real, as primary, and self-sufficing as the whole [society]'.[202] This does not mean of course that communal religious rights must always prevail. But it does mean that they ought to be treated with the same respect as the rights of individuals. As such, from a liberal point of view, what is most crucial in order to protect individuals is not the right to join (or remain) within a group, but the right to exit it.[203] On this approach, the question of the legitimacy of a law which regulates a religious association becomes one of determining what conditions, if any, must accompany an *effective* exit right, understood to include the rights to associate, disassociate or not associate with a particular religious community on terms offered by that community.[204] Alternatively, from a more communitarian point of view, what matters is that a religious group genuinely benefits its members and does not inappropriately interfere with the legitimate interests of those outside the group.[205] These are large questions, of course, which lie beyond the scope of this article, the point of which has been to establish the associational and communal dimensions of religious freedom as a matter of principle.

Section 116 of the Australian Constitution, although it only applies to the Commonwealth, undeniably protects both individual and communal expressions of religious conviction. As this article has sought to show, this follows from an analysis of its text, a consideration of its original understanding and context, and a survey of the decided cases. Such a conclusion is also supported by international human rights law. Recognising that freedom of religion has an ineradicable communal, collective or corporate dimension does not of itself resolve difficult questions about exactly what legal regulation of religious practices might be justifiable under s 116.[206] What it does suggest, however, is that reasoning about the proper scope of freedom of religion ought not to begin from narrow and reductively individualist presuppositions about its nature, foundations and scope. Such assumptions are not true to the underlying social reality of religious faith and practice and they risk capture by interests that would subject all of civil society to secularist values in a manner that is quite contrary to the importance of religious freedom as a fundamental human right.[207]

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[201] Hobbes, *Leviathan*, II:XIX. See DB Robertson, 'Hobbes's Theory of Associations in the Seventeenth-Century Milieu' in *Voluntary Association: A Study of Groups in Free Societies* (Richmond, VA: John Knox Press, 1966).

[202] Laski, above n 159, 425.

[203] Kukathas, above n 10, 97.

[204] Compare Galston, above n 200, 13; Kukathas, above n 10, 103-17.

[205] Newman, above n 11, chs 5 and 6. Newman discusses the contextual role of 'exit' and 'voice' in ch 7, and questions of principled 'deference' and 'interference' in ch 9.

[206] Cf. McCrudden, above n 175, 223-9. It has been suggested, for example, that religious autonomy should not entail an immunity from liability for victimisation and abuse within religious organisations: see Horwitz, above n 183, 122-4. Notably, Australian antidiscrimination laws recognise the rights of religious groups and institutions, as well as other voluntary associations, to discriminate in specifically defined circumstances. See, eg, *Sex Discrimination Act 1984* (Cth) ss 37-39. See also *Scandrett v Dowling* (1992) 27 NSWLR 483, discussed in Mortensen, above n 187, 223-4. As Mortensen's analysis shows, it is not the associational or corporate nature of the religious body that matters, but rather the justifiability of the regulation. See also Cass Sunstein, 'On the Tension between Sex Equality and Religious Freedom' in Debra Satz and Rob Reich (eds), *Toward a Humanist Justice: The Political Philosophy of Susan Moller Okin* (Oxford University Press, 2009) .

[207] Rivers, above n 1, 322, thus concludes: 'individual rights to religious liberty and equality, important though they undoubtedly are, do not represent an adequate grounding of principle for the law of organized religions. They fail to capture central parts of the subject-matter,

they distort the underlying social reality, they are inherently weak, and they risk capture by a statist agenda that subjects all of civil society to its own ethos. As candidates for constitutional principle underlying the law of organized religions, they are descriptively inadequate and prescriptively unappealing.'