**Intersecting Freedoms in Australian Society: Exercise of Religion and Political Communication**

**I FREEDOM OF RELIGIOUS COMMUNICATION?**

This submission seeks to establish that the free exercise of religion and the freedom of political communication are interdependent and mutually reinforced freedoms essential for a properly functioning Australian democracy. To this end I argue that adopting a ‘progressive’ interpretive approach which incorporates the text and context of the Constitution in conjunction with consideration of how it is applied in the contemporary political space yields a framework which privileges priority for democracy, or the pluralistic encounter of different perspectives. In particular, this initially involves the proposition that the clause providing for free exercise of religion in s 116 includes freedom to express religious perspectives in the public sphere. If the promulgation of religious arguments in the public marketplace of policy ideas is so protected, it would seem to follow that the implied freedom of political communication could be invoked to bolster and extend this protection. This is because the free public expression of religious perspectives involves the communication of perspectives which may be relevantly political and a factor in the formation of political opinions as a function of the democratic process, attracting the protection of the implied freedom.

Interpretation becomes critical in this context of religion in the public sphere, raising the vexed issue of the constitutional relationship between church and state in Australia generally. A common approach proposed in regard to the relationship between church and state is secularism.[[1]](#footnote-1) However, I will argue for an interpretation of s 116 which endorses a priority for democracy, in contrast to a certain kind of extreme secularism which entails the prohibition of religion from the public square and the marketplace of policy ideas. Furthermore, interpretive issues arise when considering the scope of the implied freedom of communication, and I will similarly argue that the scope of the implied freedom is broad, capturing and protecting all manner of free communication, including religious communication. An interpretive framework which advocates for these respective freedoms as mutually reinforced is especially pertinent where contemporary social values are not conducive to public communication of religious perspectives; for example, where the implied freedom might not operate to protect the public expression of certain religious perspectives deemed to be politically unpopular, the free exercise clause may operate to remove that restriction. It is in this sense I contend that the constitutional free exercise of religion and freedom of political communication operate together to allow a priority for democracy – rather than the state seeking to promote a particular religion or to exclude all religion, it facilitates the engaged encounter of various religious and non-religious views and practices to inform public discourse and policy.

Part II of the submission overviews the salient concepts associated with the free exercise clause in s 116 and the implied freedom of political communication, before Part III emphasises the importance of the progressive interpretive framework in approaching a proposed intersection between free exercise of religion and free political communication. In particular, Part III introduces the social value of priority for democracy which, it is argued, forms the foundational space where the two freedoms intersect. Part IV addresses the problem of state ‘secularism’ in this context of religious perspectives informing public policy, contending that s 116 does not implement a strict separation of religion and politics. Indeed, as Part V suggests, free exercise of religion as involving the public expression of religious perspectives is mutually reinforced by the freedom of political communication, since political communication can include religious communication which assists in the formation of political opinions conducive to the democratic process. Therefore, Part VI concludes that the free exercise of religion and the implied freedom of political communication are intersecting freedoms which strengthen each other in the pursuit of a priority for democracy. At least as far as the Constitution may be understood, an Australian society which envisages the pluralistic encounter of differing perspectives comprising a healthy democracy requires the furthering of these related and intersecting freedoms.

**II SECTION 116 AND THE IMPLIED FREEDOM OF POLITICAL COMMUNICATION**

A *Section 116 and the Free Exercise Clause*

Section 116 of the Constitution states that:

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.[[2]](#footnote-2)

Chief Justice Latham in the seminal *Jehovah’s Witnesses* case begins by observing that s 116 is an express prohibition of any law that contravenes its terms, and does not confer any power on the Commonwealth to make laws with respect to religion.[[3]](#footnote-3) Instead, it is an ‘overriding provision’ which ‘prevails over and limits all provisions which give power to make laws’.[[4]](#footnote-4) Chief Justice Latham proceeds to argue from the phrase ‘free exercise of any religion’ that the clause refers ‘to all religions, and not merely in relation to some one particular religion’, and that this is regardless of the perceived truth or goodness of whatever religion is in issue.[[5]](#footnote-5) He argues that since the ‘free exercise’ of religion is protected, this includes but extends beyond the mere holding of religious opinion; the protection ‘from the operation of any Commonwealth laws’ covers ‘acts which are done in the exercise of religion’ or ‘acts done in pursuance of religious belief as part of religion’:

It is sometimes suggested in discussions on the subject of freedom of religion that, though the civil government should not interfere with religious *opinions,* it nevertheless may deal as it pleases with any *acts* which are done in pursuance of religious belief, without infringing the principle of freedom of religion. It appears to me to be difficult to maintain this distinction as relevant to the interpretation of s 116. The section refers in express terms to the *exercise* of religion, and therefore it is intended to protect from the operation of any Commonwealth laws acts which are done in the exercise of religion. Thus the section goes far beyond protecting liberty of opinion. It protects also acts done in pursuance of religious belief as part of religion.[[6]](#footnote-6)

The High Court has also more generally indicated that s 116 not only protects religious opinion or the private holding of faith, but also, according to Griffith CJ in the 1912 case of *Krygger v Williams*, it protects ‘the practice of religion – the doing of acts which are done in the practice of religion’.[[7]](#footnote-7)

So not only does s 116 protect freedom of religious opinion, as Latham CJ also concedes, it protects acts done in pursuance of religious belief, including the public expression of a religious belief.[[8]](#footnote-8) In the more recent case of *Church of the New Faith v Commissioner of Pay-Roll Tax*, Mason ACJ and Brennan J agreed, stating that ‘conduct in which a person engages in giving effect to his [sic] faith in the supernatural is religious’, and consequently is included under the protection of s 116.[[9]](#footnote-9) If there is no counter-consideration, it follows that protected religious belief and action includes utterance and consideration of religious opinions in public discourse, since this is an action which may follow from religious belief.[[10]](#footnote-10)

B *The Implied Freedom of Political Communication*

The implied freedom of political communication was developed by the High Court in response to two cases heard simultaneously: *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 and *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.[[11]](#footnote-11) In *Nationwide News*, Deane and Toohey JJ argued as part of the majority that the doctrine of representative government (government by representatives elected by and responsible to the Australian people) implicitly undergirds the Constitution.[[12]](#footnote-12) The justices proceeded to contend that:

… the people of the Commonwealth would be unable responsibly to discharge and exercise the powers of governmental control which the Constitution reserves to them if each person was an island, unable to communicate with any other person… the ability to cast a fully informed vote in an election of members of the Parliament depends upon the ability to acquire information about the background, qualifications and policies of the candidates for election and about the countless number of other circumstances and considerations, both factual and theoretical, which are relevant to the consideration of what is in the interests of the nation as a whole or of particular localities, communities or individuals within it.[[13]](#footnote-13)

Consequently, Deane and Toohey JJ concluded that in the doctrine of representative government incorporated in the Constitution there exists an implication of free communication of information relating to the government of the Commonwealth.[[14]](#footnote-14) More concisely, the Court established that since the Constitution operates based on a system of responsible government and responsible government requires free communication to properly function, it follows that the Constitution implies a guarantee of free political communication so that responsible government can successfully occur.[[15]](#footnote-15)

Chief Justice Mason for the majority in *ACTV* expressed himself similarly to Deane and Toohey JJ in *Nationwide News*, accepting the plaintiffs’ argument that since the Constitution assumes and effectively prescribes the doctrine of representative government, free political communication is necessarily implied by the Constitution as an essential corollary of that system.[[16]](#footnote-16) It is only by exercising this freedom that the citizen can communicate their views ‘on the wide range of matters that may call for, or are relevant to, political action or decision’, and ‘criticise government actions’ and ‘call for change’, in this way influencing the policies and decisions of the elected representatives.[[17]](#footnote-17) For Mason CJ, the scope of communication covered and the freedom of various communicators is necessarily broad:

The efficacy of representative government depends also upon free communication on such matters between all persons, groups and other bodies in the community. That is because individual judgment, whether that of the elector, the representative or the candidate, on so many issues turns upon free public discussion in the media of the views of all interested persons, groups and bodies and on public participation in, and access to, that discussion. In truth, in a representative democracy, public participation in political discussion is a central element of the political process.… [and] there are no limits to the range of matters that may be relevant to debate in the Commonwealth Parliament or to its workings. The consequence is that the implied freedom of communication extends to all matters of public affairs and political discussion…[[18]](#footnote-18)

However, Mason CJ distinguishes between restrictions on communication which target content (ideas and information) and restrictions on communication which target modes by which that content is transmitted.[[19]](#footnote-19) ‘In the first class of case, only a compelling justification will warrant the imposition of a burden on free communication… and the restriction must be no more than is reasonably necessary to achieve the protection of the competing public interest which is invoked to justify the burden on communication’.[[20]](#footnote-20) He goes on to add that it will be ‘extremely difficult’ to justify this class of restrictions, and they will ‘ordinarily amount to an unacceptable form of political censorship’.[[21]](#footnote-21) However, restrictions imposed on the activity or mode of communication are more likely to be justified, taking into account the public interest in free communication and balancing it with whether the restriction is reasonably necessary to achieve the competing public interest in favour of restriction.[[22]](#footnote-22)

Justice McHugh argued that in order for the electors to cast an effective vote, ‘they must have access to the information, ideas and arguments which are necessary to make an informed judgment as to how they have been governed and as to what policies are in the interests of themselves, their communities and the nation…’[[23]](#footnote-23) It follows that they must be able to communicate between each other and the candidates arguments and opinions concerning election issues.[[24]](#footnote-24) Justice McHugh continued:

The process includes all those steps which are directed towards people electing their representatives – nominating, campaigning, advertising, debating, criticizing and voting. In respect of such steps, the people possess the right to participate, the right to associate and the right to communicate. That means… the people have a constitutional right to convey and receive opinions, arguments and information concerning matter intended or likely to affect voting…[[25]](#footnote-25)

Similarly, Brennan J contended that freedom of political discussion is essential for the democratic process, because it encourages respectable performance in public office and allows the flow of information ‘needed or desired for the formation of political opinions’.[[26]](#footnote-26) In other words, the implied freedom of political communication is primarily directed to the free dissemination, apprehension and production of information relevant to the formation of political opinions essential for voting on the almost limitless range of topics addressed as part of democratic governance. In the later case of *Theophanous v Herald & Weekly Times Ltd*, Mason CJ, Toohey and Gaudron JJ for the majority took the opportunity to more precisely define the scope of political communication, in particular what is covered by ‘political discussion’:

The concept also includes discussion of the political views and public conduct of persons who are engaged in activities that have become the subject of political debate… indeed, in our view, the concept is not exhausted by political publications and addresses which are calculated to influence choices… “political speech” refers to all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about…[[27]](#footnote-27)

In other words, the implied freedom of political communication protects communication in relation to virtually any issue.

In *Lange v Australian Broadcasting Corporation* it was found that the choice undergirding representative government must be ‘free and informed’, enabling the electors the ‘opportunity to gain an appreciation of the available alternatives’; as such, there can be no absolute denial of access to information regarding governance and policy of political parties and candidates.[[28]](#footnote-28) In addition, the freedom was construed broadly in the sense that it was held to operate at all times, not merely during election periods, since that restriction would deprive the electors of the majority of information necessary to make a free and informed choice at an election.[[29]](#footnote-29)

Accordingly, this Court should now declare that each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia. The duty to disseminate information is simply the correlative of the interest in receiving it. The common convenience and welfare of Australian society are advanced by discussion – the giving and receiving of information – about government and political matters.[[30]](#footnote-30)

Thus, the Court settled to articulate a view of free political communication which entails the unfettered exchange of information concerning government and political matters which affect the Australian people, and ultimately contributes to the convenience and welfare of Australian society. In addition, the Court finally articulated the precise test to determine whether the implied freedom operates to invalidate legislative power:

First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfillment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government… if the first question is answered “yes” and the second is answered “no”, the law is invalid.[[31]](#footnote-31)

In *Coleman v Power* (2004) 220 CLR 1 a majority of the High Court recast the second limb of this test to state that the question is whether the impugned law is ‘reasonably appropriate and adapted to serve a legitimate end *in a manner which* is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government…’ Having overviewed the development of the implied freedom, I will turn to an indication of the interpretive assumptions which frame it, and aim to connect these with similar assumptions motivating the understanding of the free exercise of religion clause in s 116 as including the public expression of religious perspectives and arguments as part of the democratic process.

**III A MATTER OF INTERPRETATION**

A *Text, Context, Society: The Implied Freedom and Progressivism*

In regard to the implied freedom of political communication, Aroney argues that the Court’s finding in *ACTV* was carefully reasoned in order to provide a direct or ‘necessary’ implication of the freedom from ‘the application of traditional methods of legal reasoning’ to the text or structure of the instrument, consistent with the *Engineers* case, rather than an ephemeral appeal to external conditions or social values.[[32]](#footnote-32) For example, Mason CJ cautioned that any implication through structure must be ‘securely based’ and ‘logically or practically necessary for the preservation of the integrity of that structure’.[[33]](#footnote-33)

This was assisted through the Court giving theoretical content to the idea of representative government, where the legislators are chosen by the people.[[34]](#footnote-34) The Court consequently argued that representative government implies full and free communication of policies, ideas and opinions between electors to function effectively. It should be noted that interpretation of representative government as involving effective function through free communication is itself a value-laden approach. It is possible to conceive of an ineffective representative government, and the Constitution makes no comment on the necessary quality of the representative government.[[35]](#footnote-35) So even though the freedom of political communication is arguably a textual and contextual implication necessary for the proper functioning of the instrument, it also seems that this implication involves particular external assumptions about the nature of representative government. Indeed, Aroney works to construct the position that implying the freedom of political communication amounts to ‘incorporating extraneous ideas into Australian Constitutional law’.[[36]](#footnote-36)

Effectively then, the implied freedom of political communication is enabled by a combination of the textual and contextual elements referred to by Mason CJ, and elements of contemporary value judgments regarding the proper functioning of the Constitution under an assumption of representative government. As Kirk observes, the decisions in *Nationwide News* and *ACTV* ‘are perhaps best understood as an example of… a “progressivist” approach to interpretation, where the Constitution is interpreted in light of the perceived needs and values of the time, with less emphasis placed on the literal meaning of the text’.[[37]](#footnote-37) This progressive approach similarly received support in the later political communication case of *Theophanous*, where Deane and McHugh JJ alluded to the fact that the present meaning of the Constitution is not necessarily the same as in the past, and the constitution is in fact a ‘living force’ not constrained by the ‘dead hands of the past’.[[38]](#footnote-38) Thus, a necessary aspect of all constitutional interpretation is not only understanding the meaning of the text in its constitutional context, but simultaneously considering how the text in its context may be understood and applied in contemporary society.[[39]](#footnote-39)

When considering the scope of the implied freedom to invalidate Commonwealth legislation, in a characterisation approach where the impugned law is placed into a particular category to be evaluated (for example, the law may target content and ideas rather than the means of transmission), ‘at some stage of its analysis the Court will be forced beyond the text… to consider and weigh broader social concerns… and to evaluate directly the various social interests involved’.[[40]](#footnote-40) This is not to undermine the importance of the text, but to emphasise the concurrent importance of evaluating how the meaning of the text and its implementation in the contemporary social environment accords with the concerns and values of that environment.

B *A Progressive Approach to Free Exercise of Religion*

I propose that a similar approach be adopted in relation to the free exercise of religion in s 116. Both freedom of religion and freedom of political communication can be approached textually and contextually. In particular, the scope of both freedoms is also arguably influenced by consideration of the contemporary social value of promoting a robust exchange of ideas as part of prioritising the democratic process. The freedom of political communication is implied on the basis that representative government (which undergirds the Constitution) necessarily entails the unrestricted flow of ideas which enables the formation of political opinions for the purpose of elections. Similarly, as I will substantiate in Parts IV and V, I contend that the free exercise of religion includes the public expression of religious perspectives and arguments, which may then be debated, contested or accepted; this too will inform political opinions which are exercised as part of the democratic process.

Indeed, Australia being a free and democratic society is of paramount community value. Bearing this in mind is central when considering a progressive approach to the free exercise clause, because the progressive method incorporates social and community values as important sources of information for interpretation. As I will explore in more detail, such an approach to s 116 will uphold free exercise by allowing public religious dialogue without establishing any particular religion. It will allow the freedom for religious and non-religious alike to express their views in a public space, leading to a pluralistic encounter of perspectives which will combine and contribute to policy-making and allow true liberal democracy – the freedom to express and decide between a full array of perspectives, with the state promoting and excluding none.

In a statement conducive to this end, Gaudron J in the case of *Kruger v Commonwealth* argues at length:

There are two matters, one textual, the other contextual, which… tell against construing s 116 as applying only to laws which, in terms, ban religious practices or otherwise prohibit the free exercise of religion. First, s 116 speaks of the exercise of religion, and it follows, as Latham CJ pointed out in *Adelaide Company of Jehovah's Witnesses Inc*, that “it is intended to protect from the operation of any Commonwealth laws acts which are done in the exercise of religion.” The contextual consideration is that… the Commonwealth has no power to legislate with respect to religion, and, thus, a law which, in terms, prohibits religious practice would, ordinarily, not be a law on a subject-matter with respect to which the Commonwealth has any power to legislate. These considerations provide powerful support for the view that s 116 was intended to extend to laws which operate to prevent the free exercise of religion, not merely those which, in terms, ban it. Another matter which points in favour of construing s 116 as extending to laws which prevent the free exercise of religion… is the need to construe constitutional guarantees liberally, even limited guarantees of the kind effected by s 116… The matters to which reference has been made compel the conclusion that s 116 extends to laws which prevent the free exercise of religion. And the need to construe guarantees so that they are not circumvented by allowing to be done indirectly what cannot be done directly has the consequence that s 116 extends to provisions which authorise acts which prevent the free exercise of religion, not merely provisions which operate of their own force to prevent that exercise.[[41]](#footnote-41)

In other words, consideration of s 116 incorporating the social effect or value of the provision demands the interpretation that the free exercise of religion operates as a fetter on Commonwealth legislative power which would seek to indirectly prevent free exercise, not just explicitly or directly ban religious practices. Based on the idea that free exercise of religion entails the freedom to publicly express a religious view, it follows that if a law were to be made which promoted strict secularism, and this kind of secularism indirectly operated to prevent the free exercise of religion by precluding individual religious expression in public discourse, such a law must therefore be incompatible with s 116.

Justice Gaudron’s judgment also becomes relevant for this purpose when we explore counter-considerations or objections to the scope of s 116’s operation which is advocated here. Specifically, if the public expression of religious views is in some way incompatible with contemporary social values, it could well be argued that the scope of s 116 ought to be narrowed. For example, it might be objected that this freedom of opinion, expression and action would allow the public promotion of repugnant views and actions. However, it is important to note with Latham CJ and Rich J in the *Jehovah’s Witnesses* case that the free exercise clause only operates to the extent that such exercise does not conflict with civil law and/or is not a danger or menace to society, and that generally the free exercise clause was designed to protect the free exercise of minority or unpopular religions.[[42]](#footnote-42) The framers were also conscious of this in their drafting process, acknowledging that the free exercise clause should not extend to protect those religious beliefs which include particular religious rites involving murder and sacrifice.[[43]](#footnote-43) Hence, the free exercise of religion is only limited where it is dangerous to society and/or conflicts with already established law.

In *Kruger*, Gaudron J specifically articulates the test to be adopted when stating ‘the criterion of invalidity selected by s 116’.[[44]](#footnote-44) It is not the dissemination of subversive principles or inconsistency with the maintenance of civil government or the existence of the community.[[45]](#footnote-45) Rather, legislative ‘purpose… is the only matter to be taken into account in determining whether a law infringes s 116’.[[46]](#footnote-46) Gaudron continues:

…a law will not be a law for “prohibiting the free exercise of any religion”, notwithstanding that, in terms, it does just that or that it operates directly with that consequence, if it is necessary to attain some overriding public purpose or to satisfy some pressing social need… whether the interference with religious freedom, if any, effected… was appropriate and adapted or, which is the same thing, proportionate to the protection and preservation of those people. And as the purpose of a law is to be determined by reference to “the facts with which it deals”, that question would necessarily have to be answered by reference to the conditions of the time in which it operated. However, the answer to the question depends on an analysis of the law's operation, not on subjective views and perceptions.[[47]](#footnote-47)

In other words, the High Court has here adopted a balance of proportionality incorporating external social factors and values with which to consider the issue – where a law by the Commonwealth actually operates to restrict the free exercise of religion, and it is reasonably capable of being considered appropriate and adapted to achieving some legitimate overriding public purpose, that law will be valid.[[48]](#footnote-48) Although Gaudron J cautions that any analysis of purpose must be conducted in the context of the specific case, a broader issue is whether objections can be raised that the expression of religious arguments to influence public policy is in this way disproportional or otherwise contrary to some decisive, legitimate public purpose.

**IV LEGITIMATE PURPOSE AND STATE SECULARISM**

A *Framing Section 116: Free Exercise with Non-Establishment*

In particular, a pertinent issue in relation to the argument that free exercise entails free public expression in a political context is how the free exercise clause is intended to operate contiguously with the establishment clause; in other words, the extent to which s 116 is intended to separate church from state, implementing secularism. In its most extreme form, secularism can be defined as the complete separation of church and state in constitutional, legal, political, administrative and even cultural contexts. This entails the complete removal of religion from public affairs, and the preclusion of religious discussion in public discourse.[[49]](#footnote-49) Ultimately, the secularist strategy is to ‘purify public reason from religious arguments’.[[50]](#footnote-50) Secularist thinkers in American liberal jurisprudence such as Dworkin, Ackerman, Rawls, Macedo, and Audi believe (to differing extents) that values of freedom and toleration are preserved through this Berlin-wall of separation.[[51]](#footnote-51) Closer to home in the Australian context, Thornton and Luker bemoan what they term to be the ‘intimate liason’ between religion and government in the sense that Christianity in particular is allowed to have an influence on public affairs and discourse, which ‘compromise[s] the commitment to state secularism’.[[52]](#footnote-52)

However, I argue that if expressed directly or indirectly in a law, this form of secularism actually contravenes s 116, for it entails the exclusion of religion and religious dialogue from the public square and the marketplace of ideas, breaching the free exercise of religion clause. The emphasis in the pre-federation debates surrounding s 116 was on the protection of the free exercise of religion from impedance by the state, juxtaposed with the community expectation that the state would not privilege one religion over another.[[53]](#footnote-53) For example, both Higgins and Barton in the pre-federation constitutional debates were careful to emphasise that the mention of God in the preamble on one hand did not mean that people’s rights with respect to religion would be interfered with on the other, and that there would be ‘no infraction of religious liberty’ by the Commonwealth.[[54]](#footnote-54)

For the framers, rather than a strict insistence on the state as a secular entity, what was important was the state avoiding the promotion of religion which would cause sectarian division in the community.[[55]](#footnote-55) It was actually felt that the community as a whole should have a religious character, but this religious character would be hindered by explicit state involvement.[[56]](#footnote-56) Hence, there should be a state impartiality towards religion, reflected both in the avoidance of religious preference and protection of individual and group autonomy in matters of religion as participants in the wider community.[[57]](#footnote-57) Religious identities are not treated impartially by declaring that religion is a private matter or by excluding religious arguments from political and constitutional debates.[[58]](#footnote-58) For example, it seems inconsistent with established democratic principles that those who adhere to a secular worldview may be able to publicly express themselves in policy debate in terms of their secularism, but those who adhere to a religious worldview may not be able to so express themselves in terms of their religion. If the issue is reduced to the claim that the proclamation of religious opinions in policy debate is in some way detrimental to the public good (for reasons of ‘irrationality’ or otherwise), the same could easily said for debate between any range of religiously neutral policies (the virtues of state intervention versus state passivity in the market economy, for instance). If public expression of opinion on the latter content is permitted, there seems to be no reason in principle to prevent public expression of opinion on the former.

According to a secularism which advocates the strict separation of church and state, it is conceivable that a member of clergy would not be able to hold public office, at least in their capacity as a member of clergy. Such a situation would represent the blending of church authority and political authority, and can plausibly be extended to a member of clergy not being allowed to express a religious opinion in the context of a public office. If the issue here is the content expressed (as it appears to be, since there would be no problem with the blending of church office and state office if not for the content represented by the church office), the same principle may apply to any person with a religious opinion expressing that opinion in a public context. After all, there are many extra-political factors which influence public policy, such as economics, morality and culture. Any denial of religious discourse without addressing other external influences would seem to constitute hostility toward religion specifically, undermining its free exercise.[[59]](#footnote-59) True ‘impartiality’ toward religion therefore includes the state not acting to impede the autonomy of individuals or groups making and pursuing religious choices, and this would include allowing policy debate in a democratic process influenced by a variety of worldviews and ideologies.[[60]](#footnote-60)

These notions are reflected in the intention of at least one framer; Symon states that through s 116, the framers are ‘giving… assertion… to the principle that religion or no religion is not to be a bar in any way to the full rights of citizenship, and that everybody is to be free to profess and hold any faith he likes’.[[61]](#footnote-61) To profess a faith presumably includes public expression of that faith, otherwise the distinction made between holding a faith and professing a faith is superfluous. Professing a faith may then be relevant in terms of decision-making in regard to public policy.

Indeed, allowing pluralistic public debate between all religions and non-religions for the purpose of prioritising democracy is arguably the proper fulfilment of s 116. As mentioned previously, many of the framers did not desire a secular society which rejected the public display and discourse of religion. The historical and cultural context of the development of s 116 was a general endorsement of religion and a climate of tolerance based on a concern for the advancement of religion.[[62]](#footnote-62) Consequently, the purpose undergirding s 116 was ‘the preservation of neutrality in the federal government’s relations with religion so that full membership of a pluralistic community is not dependent on religious positions’.[[63]](#footnote-63) This is reflected in Symon’s statement that ‘what we want in these times is to protect every citizen in the absolute and free exercise of his own faith, to take care that his religious belief shall in no way be interfered with’.[[64]](#footnote-64) Thus, a strict secularist separation of religious discourse and public policy discourse seems to contravene the free exercise of religion under s 116 in principle by preventing the free profession of religious faith and the consideration of various religious positions in public dialogue, and there seems to be no reason in principle to exclude the public expression of religious opinion for the purposes of policy debate as conceived under s 116.

B *‘Religious Reasons’ and Political Life*

Nevertheless, there remain arguments to the effect that public expression of religious reasons in political life is detrimental to democracy or otherwise incompatible with a legitimate public purpose. Robert Audi, for example, claims that the expression of religious opinions by citizens (particularly if that happens to be the majority) can constrain those who assume political office to the extent that it restricts the candidates for major political office to those who are religiously committed, discriminating against others.[[65]](#footnote-65) This may well be so. However, Audi is here expressing a personal preference for the election of those who have no religious commitment, and this is no more or less valid than the preference for an elected official with a religious commitment. It would seem that the very nature of the democratic process allows the possibility that people will be elected who possess opinions with which we disagree, including those to do with religion.

From a different angle, in arguing for the separation of church and state, Audi envisions the possibility of a form of government where ‘the clergy are not faced with secular concerns that may dilute their spiritual commitments or obscure their religious vision’.[[66]](#footnote-66) This position contains at least two questionable assumptions. It firstly seems to assume that only the clergy have spiritual commitments or a religious vision. However, it is entirely possible (even likely) that a person who is not a member of the clergy and is elected to public office may have spiritual commitments or a religious vision, and short of preventing such people from entering politics at all, the problem Audi perceives remains unresolved. The second assumption is that these spiritual commitments or religious visions are fully distinct from secular concerns or the political life. As I shall indicate in a moment, such a distinction does not exist; if this is accepted, the basis for a strict separation of church and state evaporates.

Ultimately, Audi objects that religious people should only argue or advocate for laws which restrict human conduct according to secular (nonreligous) reasons and according to a secular motivation, and should only do that if they themselves find those reasons rationally (not religiously) persuasive.[[67]](#footnote-67) He contends that only secular reason can be universally deployed and apprehended, and only in this way can people be rationally persuaded. In a free society or liberal democracy, people should only be restricted in their conduct for reasons which they can rationally comprehend (secular reasons). Therefore, religious reasons or arguments should not form the basis for political decisions resulting in legal coercion in a free society.[[68]](#footnote-68) Audi’s reasoning here makes two mistaken assumptions. Firstly, he apparently assumes that there is an intrinsic distinction or separation between (secular) reason and (religious) faith. At least in the Christian context, this assumption is in error. The Christian religion has almost universally seen itself as simultaneously faithful and reasonable, and this implies that the distinction between secular and religious arguments is by no means so clear.[[69]](#footnote-69) In other words, reason is equally adopted by the secular and the religious. Secondly, Audi assumes that there is no place for religious faith to influence policy in the ‘secular’ public political space. This assumption is at odds with significant scholarly literature on political theology, which considers how (for example) the articulation of an orthodox Christian theology may shape the modern polity, and this literature is not addressed.[[70]](#footnote-70) In this sense, religion could be viewed as political. At the very least, the presence of this literature implies the case is not closed on the strict separation of church and state as a basis for rejecting religious arguments in the public space, and so Audi’s objections are not final.[[71]](#footnote-71)

In this context it is also worth noting that secularism is a limited framework in the sense that it overlooks ways in which the dominant religion in a culture can be integrated into government operations. In other words, the political space is not characterised by a strict separation of secular and non-secular, but instead is imbued with religiously informed processes, culture and social values.[[72]](#footnote-72) For example, Australian parliament is opened with Christian prayer and senators and members of parliament are generally sworn in on the Bible; this is not to mention intrinsic ideas of human value, rights and welfare stemming from Christian beliefs.[[73]](#footnote-73) This submission explicitly acknowledges this within the context of s 116, and therefore seeks the free expression of religious opinions in the public sphere, to be considered and critiqued in the marketplace of ideas in conjunction with the secular worldview. What is required in this sense is a sensible balancing of the different claims, taking into account minority religions, majority religions, and no religion.[[74]](#footnote-74) This points the way to a system where the state allows all views, religious and non-religious, to be freely proposed and considered.

So there appears to be no compelling legitimate overriding public purpose for excluding the mere expression of religious opinion in public dialogue, and generally the effort to do so is not reasonably capable of being seen as appropriate and adapted to achieving such a purpose. The mere expression of a religious opinion in public dialogue is not dangerous to society and does not conflict with already established law. Indeed, as will be argued in the next part, it appears more likely that given the implied freedom of political communication and acknowledging with Latham CJ in the case of *Jehovah’s Witnesses* the extent that faith can affect politics, an arguably more constitutionally consistent model is this priority for democracy model which allows the free expression of religious opinion for the purposes of public debate in a democracy.[[75]](#footnote-75)

Free exercise of religion includes expression of a religious viewpoint, just as it also includes refusal to express a religious viewpoint, or expression of a non-religious viewpoint.[[76]](#footnote-76) Similarly, the fact that the statement of a religious viewpoint may be disagreed with by another is arguably insufficient to curtail one’s freedom to express such a viewpoint under s 116, just as a blasphemy law probably contravenes s 116.[[77]](#footnote-77) Blasphemy laws arguably burden the free exercise of religion by ‘protecting’ religious people from apparently offensive statements against their religion; these are generally statements which contradict established religious doctrine. It is plausible that the purposes of such laws are not reasonably and appropriately adapted to the protection and preservation of the affected people, particularly since they generally only protect members of the Christian religion.[[78]](#footnote-78) For example, one considers Roman Catholics criticising Protestants and vice versa, or Jehovah’s Witnesses calling other religions false, or even governments calling certain manifestations of religion ‘evil’ (as Prime Minister Tony Abbott refers to Islamic State); these would not be considered as contravening s 116.[[79]](#footnote-79) There are certainly valid limits to expression and unnecessarily offensive material, as well as restrictions on insolent modes of expressing these. However, to effectively equate disagreement with offense worthy of censorship is a grave mistake, particularly in a robust democracy where disagreement on all manner of deeply held beliefs (not limited to religion) is ubiquitous.

In other words, according to a progressive interpretation of the free exercise clause aimed at prioritising the social value of democracy, one is entitled to express one’s own religious or non-religious view which may offend the other, just as the other is entitled to express their alternative religious or non-religious view which may offend oneself. What is required is a ‘priority for democracy’, where all religious, philosophical and scientific voices (like votes) are considered equally when it comes to decision-making.[[80]](#footnote-80) As Bader contends:

Instead of trying to limit the content of discourse by keeping all contested comprehensive doctrines and truth-claims out, one has to develop the duties of civility, such as the duty to explain positions in publicly understandable language, the willingness to listen to others, fair-mindedness, and readiness to accept reasonable accommodations or alterations in one’s own view.[[81]](#footnote-81)

One may of course disagree with what is expressed, but such is the nature of democratic discourse. Another side of involving the consideration of contemporary social values as part of the process of constitutional interpretation in this respect is the problem of the current social/political climate not allowing particular ideas to gain traction, especially religious ideas which may be viewed with controversy or even disapproval. In the following part, I therefore seek to substantiate and expand these contentions, illustrating them through a number of case studies which indicate that freedom of political communication and freedom of religion are intersecting and mutually reinforcing freedoms in Australian society. This implies that priority for democracy as the proper fulfilment of s 116 should not only be free of a strict separation between church and state in public life, but also explicitly allow for all religious or non-religious arguments compatible with the democratic process.[[82]](#footnote-82)

**V FREEDOM OF POLITICAL COMMUNICATION STRENGTHENS FREEDOM OF RELIGION, AND VICE VERSA**

A *Articulating the Position*

1 *Free Exercise as Free Public Expression*

Even prior to the High Court finding the implied freedom of communication, there are shadows of this protection in the express clause in s 116 allowing the free exercise of religion. For example, speaking of Griffith CJ’s construction of s 116 in *Krygger v Williams* (1912) 15 CLR 366, which distinguished between protected religious beliefs involving private acts, and unprotected public acts consequent on those beliefs, Hogan states that ‘such an interpretation, which would make “religion” apply only to the internal forum, with no relevance to public acts, would make s 116 a complete mockery. This extremely narrow interpretation was rejected by the High Court [in *Jehovah’s Witnesses*]’.[[83]](#footnote-83) Despite Latham CJ’s efforts to show that s 116 protects acts done in pursuant of religion as well as the possessing of religious opinion, he also observes that

Section 116, however, is based upon the principle that religion should, for political purposes, be regarded as irrelevant. It assumes that citizens of all religions can be good citizens, and that accordingly there is no justification in the interests of the community for prohibiting the free exercise of any religion.[[84]](#footnote-84)

This could be read as Latham CJ essentially espousing the separation of religion and politics, but that understanding seems incongruent with the rest of his judgment. He has just furnished a number of different religious examples illustrating the opposing contention that faith is not completely separate from politics. Rather, Latham CJ can be understood as arguing for a true state impartiality – not the strict separation of religion and politics, but the equal promotion (or at least, the equal lack of prohibition) of the free exercise of any religion.[[85]](#footnote-85) His reasoning is that since all citizens of any religion or non-religion can be good citizens, there is no basis for restricting the free exercise of religion in general, or the free exercise of any religion in particular. These principles are reiterated by Mason ACJ and Brennan J in *Church of the New Faith v Commissioner of Pay-Roll Tax*, where they approvingly quote from McTiernan J in *Jehovah’s Witnesses*: ‘the word religion extends to faith and worship, to the teaching *and propagation* of religion, and to the practices and observances of religion’.[[86]](#footnote-86) However, they do caution that such conduct must occur in the context of ‘giving effect’ to a person’s ‘particular faith in the supernatural’ (it must have a religious motivation), and that such conduct is not unrestricted (it will not be protected if it offends against the ordinary laws which do not discriminate against religion).[[87]](#footnote-87)

Pannam therefore concludes that ‘section 116 guarantees the right to disbelief. It does not allow a non-believer to force his disbelief on others… His voice may be raised in the legislature against the merits of governmental assistance, it cannot be heard in the courts to prevent it’.[[88]](#footnote-88) In other words, it is only through advocating public policy that government actions in relation to religious belief and action can be influenced; the public expression of religious views cannot be stymied on the basis of s 116. It is worthwhile noting that the pieces by Hogan and Pannam were both written before the High Court found the implied freedom of political communication, and therefore they cannot be taken as explicitly advocating a relationship between the two freedoms. However, they at least anticipate a willingness to accept freedom of religion as extending to external actions based on belief if these actions are compatible with Commonwealth laws and community values. More precisely, the freedom of religion extends to protect such external actions which are legal and not dangerous to society, even if those views or actions are deemed unpopular according to community values.[[89]](#footnote-89) As Latham CJ observes, ‘section 116 is required to protect the religion (or absence of religion) of minorities, and in particular, of unpopular minorities’.[[90]](#footnote-90) This protection of external expression or action of unpopular views is perfectly consistent with the implied freedom in principle.[[91]](#footnote-91)

2 *Free Public Expression as Free Communication*

Other commentators have explicitly linked the right to freedom of religion in section 116 with the implied right of freedom of political communication in the context of the way in which constitutional rights are applied.[[92]](#footnote-92) In particular, Glass notes the common approach that ‘if religious freedom is to be protected by law the state must continue to exist. Restricting conduct that is inconsistent with the maintenance of civil government, it follows, is not a breach of s 116’.[[93]](#footnote-93) However, by understanding freedom of religion as necessarily including unfettered public policy debate informed by expression of religious discourse, this tension need not arise. Indeed, protecting freedom of religion could arguably be seen as contributing to the maintenance of civil government and representative democracy.

Before substantiating this contention, I should briefly revisit the objection that religious arguments and perspectives are irrational or are not in accordance with the canons of public secular rationality. The argument is that since religious perspectives do not coalesce with normative and publicly comprehensible standards of rationality, their utility in public policy debate is at best limited, and at worst deleterious to the maintenance of civil government and representative democracy.[[94]](#footnote-94) I have addressed the underlying assumptions of this sort of objection in Part IV and do not think the argument is plausible. However, for the sake of my purpose here, let us grant the contention that religious perspectives and arguments are irrational or not in accordance with normal secular rationality. Does this at all affect the protection of such statements under the implied freedom of political communication?

The High Court seems to answer this question with a resounding negative.[[95]](#footnote-95) In *ACTV*, Chief Justice Mason framed the issue as involving a distinction between content and method of communication. The restriction of ideas, as opposed to the mode of communicating those ideas, is more likely to breach the implied freedom.[[96]](#footnote-96) The particular problem of restricting ideas impugned as irrational is addressed in subsequent cases. In *Levy v State of Victoria*, McHugh J contended:

…the constitutional implication does more than protect rational argument and peaceful conduct that conveys political or government messages. It also protects false, unreasoned and emotional communications as well as true, reasoned and detached communications. To many people, appeals to emotions in political and government matters are deplorable or worse. That people should take this view is understandable, for history, ancient and modern, is full of examples of the use of appeals to the emotions to achieve evil ends. However, the use of such appeals to achieve political and government goals has been so widespread for so long in Western history that such appeals cannot be outside the protection of the constitutional implication.[[97]](#footnote-97)

Similarly, in *Roberts v Bass*, Gaudron, McHugh and Gummow JJ stated that ‘Roberts’ reasoning process is open to serious criticism and led him to an unfair conclusion… but no matter how irrational his reasoning might seem to a judge, it is unfortunately typical of “reasoning” that is often found in political discussions’.[[98]](#footnote-98) In other words, the content or arguments contained in political discussion do not need to meet some external standard of reasonable or rational in order to attract the constitutional protection of the implied freedom. More precisely, even if it were conceded or proved that religious perspectives publicly expressed for the purpose of policy debate are irrational, they nevertheless would retain protection by the implied freedom of political communication. The critical point therefore becomes whether the communication of religious views can indeed be classed as relevantly ‘political’, and consequently necessary for the maintenance of civil government and representative democracy.

3 *Free Communication as Political Communication*

As their justification for implying the freedom of political communication, the judges in the leading cases rely on the ‘principle that free speech will facilitate the discovery of truth and the influencing of values and will thus assist the voters to make a meaningful choice’.[[99]](#footnote-99) This much is expressed by Mason CJ, Gaudron and McHugh JJ in *ACTV*, as well as Brennan, Deane and Toohey JJ in *Nationwide News*.[[100]](#footnote-100) In other words, allowing unfettered communication provides a broad scope of opinions on an even broader range of topics, all of which enable voters to discover truth and implement their associated values in the political context: electing members of particular parties advocating particular policies.

Kirk puts it this way:

The judges accept in the principal cases that attempts by third parties to influence the public directly can be political communications. People may be influenced to vote one way or another because of such communications. The values and beliefs of the public can also be influenced by ideas implicit in communications that are not overtly aimed at their political views. Thus any public communication is potentially a political matter, at least when it involves the communication of ideas. As every area of human activity is potentially subject to government intervention, communication on any subject could be covered.[[101]](#footnote-101)

The fundamental point here is that since communication on any subject matter may influence voting on that subject matter, and every subject matter is potentially able to become involved in political processes, communication on any subject may be considered relevantly political and therefore covered by the implied freedom. Stone agrees, arguing that the definition of ‘political’ communication should extend to

…communication about issues that could become matters of federal law or policy or, in some way, the subject of federal governmental action… The federal Parliament considers a wide array of issues, and the breadth of federal government involvement in modern life… means that it is almost impossible to be sure that any matter will not become the subject of federal political debate.[[102]](#footnote-102)

Stone goes even further, proposing that the implied freedom should cover all communication that influences a person’s attitude toward any public issue:

In these debates, questions of religion, moral philosophy, history, medical science and sociology all arise. Voters' understanding of and attitudes to these matters can affect their attitudes on questions of public policy, their attitudes to the… government, and ultimately their vote at a federal election.[[103]](#footnote-103)

Ultimately, it is the substance of these communications which enables a voter to assess a government and determine their vote. ‘For example, people may form their political opinions by discussion of matters not on the political agenda, including matters like religion and philosophy that develop more fundamental commitments’.[[104]](#footnote-104) This is the moment where the intersection between the free exercise of religion and the implied freedom of political communication surfaces. Just as the free exercise clause in s 116 protects religiously motivated public speech, so the implied freedom of political communication protects political public speech. Since voters’ political predilections may be fundamentally influenced by their religious convictions and the public expression of religious perspectives, it would seem to follow that the implied freedom of political communication would operate to protect religious speech.

Stone concludes:

…the concept of political communication covers a far broader range of communication than the Australian courts currently recognise. Indeed, in this respect the courts would do well to return to the pre-*Lange* position. In *Theophanous*, Mason CJ, Toohey and Gaudron JJ recognised that “what is ordinarily private speech may develop into speech on a matter of public concern with a change in content, emphasis or context”’.[[105]](#footnote-105)

In addition, Aroney reasons that just as commercial and entertainment speech may possess a relevantly political dimension attracting the constitutional protection, so may religious speech.[[106]](#footnote-106) Importantly, Aroney also deals with the objection that the s 116 clause prohibiting the Commonwealth from making a law establishing religion automatically excludes the operation of the implied freedom of political communication, demonstrating that this is inconsistent with the High Court’s understanding of s 116 and the implied freedom.[[107]](#footnote-107) Instead, as has been indicated in this submission, it is perfectly consistent for the High Court to allow the implied freedom of communication to intersect with s 116. Aroney contends that ‘the free exercise clause in s 116 undoubtedly protects at least some (if not most) forms of religiously motivated speech, and may also protect communication about religion even if such speech is not religiously motivated’.[[108]](#footnote-108) Combining this with the proposition that political communication includes communication about religion and religiously motivated speech, the conclusion is that the free exercise of religion and the freedom of political communication are intersecting freedoms which mutually reinforce one another.

The fundamental argument is that religious exercise in s 116, though explicit rather than implicit, is a freedom which is similarly essential to representative democracy and therefore ought to be similarly protected. People may have regard to all manner of intellectual disciplines and resources in their political formation, including religion, and the freedom of political communication should enable the free dispensation of this information as contributing to representative democracy. In the final analysis,

There is no *a priori* reason, then, why speech that happens to be about religious

matters cannot simultaneously be characterised as political communication for the purposes of the implied freedom. The High Court has made clear that, even on the narrowest view, a communication will be relevantly political so long as it is intended or is likely to influence voting choices at federal elections.[[109]](#footnote-109)

I thus propose that the free exercise of religion clause under s 116 and the implied freedom of political communication are intersecting freedoms which mutually reinforce each other as necessary components of fostering the maintenance of civil government and representative democracy.

B *Illustrating the Position*

1. *Controversial Social Issues*

The analysis so far has been mainly in the context of abstractly connecting the free exercise of religion with the freedom of political communication, both in principle and through considering the position of the High Court. To strengthen the plausibility of this proposition I will consider how it may apply in a given political situation while addressing particular policy issues. One situation where religious positions and arguments are prevalent in a public policy context is in regard to controversial social issues. Two popular issues at the moment are the legalisation of same-sex marriage and the Abbott Government’s asylum seeker policy.

Former Prime Minister Kevin Rudd made same-sex marriage a policy issue during a leaders’ debate prior to the election of current Prime Minister Tony Abbott, and has written publicly regarding how his Christian views (in conjunction with other perspectives) have informed his policy stance. In explaining his transition to the view that same-sex marriage ought to be legalised, Rudd stated:

First, given that I profess to be a Christian… and given that this belief informs a number of my basic views; and given that I am given a conscience vote on these issues; then what constitutes for me a credible Christian view of same sex marriage, and is such a view amenable to change?... For me, this change in position has come about as a result of a lot of reflection, over a long period of time, including conversations with good people grappling with deep questions of life, sexuality and faith.[[110]](#footnote-110)

This is an example of different religious and non-religious perspectives forming the viewpoint of one particular person influencing government policy. Rudd in this statement has reference to his own Christian faith and interpretation of the Bible, as well as scientific and sociological research regarding sexual orientation and family dynamics, and this informs his public policy view that same-sex marriage should be legalised.[[111]](#footnote-111) Rudd also acknowledges that ‘many Christians will disagree with the reasoning… put forward as the basis for changing my position on the secular state having a broader definition of marriage than the church. I respect their views as those of good and considered conscience. I trust they respect mine as being of the same’.[[112]](#footnote-112)

What this means is that different religious and non-religious organisations and persons have varying opinions on whether same-sex marriage should be legalised. Rudd has proposed his view based on his faith, which has informed his policy; there seems to be no reason to prevent others from the same privilege, even if their views are different. To simply silence religious views in favour of merely secular considerations in policy debate would be to prevent public profession of religious faith and perspectives, and, as I have argued, this contravenes the free exercise clause under s 116 as well as the implied freedom of political communication. Indeed, a view of either s 116 or the implied freedom which would involve the effective public censoring of religious perspectives would appear to be so extreme that Kevin Rudd himself would have contravened these in the way he came to his conclusion on same-sex marriage policy, since it incorporated religious perspectives.

In regard to asylum seekers, when articulating the Coalition’s policy on *Q and A* in 2010, then Opposition Leader Tony Abbott was asked what Jesus would do in regard to asylum seekers. His response included the statement ‘I mean Jesus knew that there was a place for everything and it is not necessarily everyone’s place to come to Australia’.[[113]](#footnote-113) This situation is perhaps more forced, as Abbott’s statement was prompted by a question rather than proclaimed as an unsolicited principle, but it nevertheless illustrates that religious perspectives comprise subject matter which involves the articulation of public policy. In the case of Abbott’s interpretation, it seems there would be differences of opinion as to whether this interpretation is accurate, and therefore whether the policy truly reflects ‘what Jesus would do’. However, to commence debate about this point in a public policy context requires both free exercise of religion and freedom of political communication. Free exercise of religion would allow those with different (or similar) religious perspectives to publicly express their views, and this would inform voters as to whether they wish to choose such a policy bearing in mind the religious assumptions and ramifications. Freedom of political communication allows public debate on a religious topic (an interpretation of how Jesus would treat asylum seekers) which will assist voters in the formation of a political opinion on asylum seeker policy which they will exercise in an election.

At this point, one might object that if there are any restrictions on the communication of religious perspectives in public policy discourse, these restrictions are not constitutional issues. Rather, they are symptomatic of the contemporary political climate which may not view religious arguments as relevant. In other words, there is no law (constitutional or otherwise) which is operating to silence religious views, and the corresponding issue raised is therefore artificial and contrived. It is true that there does not appear to be any explicitly constitutional restriction on the discussion of religious opinions in public policy debate. Nevertheless, what we might call the ‘political’ or ‘social’ restriction on the discussion of religious opinions in public policy debate becomes a relevant constitutional issue once we bear in mind the following problem. According to the progressive approach to constitutional interpretation adopted in the articulation of the implied freedom of political communication as discussed above, reference to contemporary social values informs the understanding of the scope and nature of the freedom.

In other words, the arguments by Audi and others cited in this submission to the effect that religious arguments should be excluded from political policy debate may well be reflected by contemporary social and political values.[[114]](#footnote-114) In that case, if the Commonwealth Parliament and the High Court refer to these values in the process of promulgating laws, it is possible that the Constitution could be effectively operating to restrict the contribution of religious perspectives in public policy debate in terms of how the scope of the implied freedom of political communication is interpreted. More specifically, religious perspectives may be viewed as irrelevant to political debate according to contemporary social and political standards, and on this basis they would not attract the protection of the implied freedom. Even though it may seem fanciful, this kind of scenario exemplifies the importance of public religious speech attracting the additional protection of the free exercise of religion clause in s 116. As discussed above, s 116 protects not only popular majority religions, but also minority religions or generally unpopular religions, the tenets of which do not accord with contemporary social or political values (which are naturally transient and determined by a majority at the time). In this way, s 116 has the effect of protecting the public expression of unpopular religious perspectives which may nevertheless assist in the formation of political opinions in fact, even if those opinions are not deemed relevantly political because they do not accord with the prevailing social or political culture.

These issues illustrate that the freedom of religion and the freedom of political communication are intersecting freedoms necessary for the full function of the democratic process in Australia. Framing the issue in this way provides for the free and pluralistic interaction of all perspectives in public policy debate, such that the Government and the people can then make up their own policy mind with all information, and the people can vote according to their own preference. This is not only the practical implementation of the free exercise of religion clause in s 116, but in this context it also furthers the freedom of political communication and fosters a pluralistic, interactional and democratic community.

2 *The Street Preachers Case*

The recent case of *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 295 ALR 197 provides further evidence of religious communication being included as political communication for the purposes of the implied freedom. In this situation, a group known as ‘Street Church’ sought to publicly proclaim their religion, hold prayer meetings, and distribute religious literature in Rundle Mall. A council by-law stated that this was not allowed without a permit. Street Church refused to apply for the permit, so the council prosecuted. Chief Justice French considered whether the council by-law infringed the implied freedom of political communication by applying the two-limb test outlined in *Lange* and *Coleman*. The other justices agreed with him on these points and Heydon J did not address the issue.[[115]](#footnote-115)

Chief Justice French stated that whether the communication was political

…was not in dispute. The appellant accepted … that paras 2.3 and 2.8 of By-law No 4 are capable of effectively burdening communications about political matters in certain circumstances. He accepted that some “religious” speech may also be characterised as “political” communication for the purposes of the freedom. The concession was proper. Plainly enough, preaching, canvassing, haranguing and the distribution of literature are all activities which may be undertaken in order to communicate to members of the public matters which may be directly or indirectly relevant to politics or government at the Commonwealth level. The class of communication protected by the implied freedom in practical terms is wide.[[116]](#footnote-116)

Chief Justice French proceeded to argue that the law was nevertheless reasonably appropriate and adapted and therefore valid, since it addressed the mode of delivery rather than the content of the delivery and a permit could have been obtained to grant permission.[[117]](#footnote-117) The decision is understandable in the circumstances, particularly considering that similar organisations have obtained permits.[[118]](#footnote-118) However, for the purposes of this submission, the critical point remains: it is uncontroversial that religious speech may also be characterised as political speech for the purposes of the implied freedom. I have argued that a consequence of considering this accepted position, in conjunction with the claim that the free exercise of religion involves the public proclamation of religious perspectives, is that free exercise of religion under s 116 and the implied freedom of political communication are intersecting freedoms which are subject to a double protection under the Constitution.

**VI TOWARDS ‘PRIORITY FOR DEMOCRACY’: FREE COMMUNICATION AS FREE EXERCISE**

The High Court has stated that a law burdening political communication will not be rendered invalid by the implied freedom if it is ‘reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative… government’.[[119]](#footnote-119) In the final analysis, this submission contends that the free exercise of religion serves exactly this end, providing for the public expression of specifically religious perspectives which may be considered and exercised during elections as a function of a robust representative democracy. Moreover, I argued from a progressive approach to the free exercise clause that upholding the social value of a robust democracy necessarily involves public debate on all manner of controversial issues, including those which concern or are expressed by virtue of religious perspectives.

In particular, the free exercise clause operates as a limit on Commonwealth legislative power which directly and/or indirectly constrains the free exercise of religion, and the purpose of the impugned legislation is central to making this determination. Section 116 was not intended to implement a strict separation of church and state (secularism), but rather genuine state impartiality towards religion; that is, the state as an entity does not explicitly promote or constrain particular religious or secular views. This implies that all religious and non-religious perspectives are able to be raised and considered in the context of public policy without contravening s 116.

I also outlined the doctrine of the implied freedom of political communication, tracing its development and clarification as well as considering its interpretive framework. I then aimed to connect free exercise of religion and the freedom of political communication, addressing objections and providing practical examples. Fundamentally, allowing free communication of all perspectives, including religious perspectives, intrinsically contributes to the maintenance of the constitutionally prescribed system of representative government, and therefore it seems that to limit such communication would require satisfaction of a stringent threshold. Thus, freedom of religion and freedom of political communication are constitutional bastions of expressive freedom in Australian society, and together foster a pluralistic, robust democracy where spirited debate can freely occur.

1. For a comprehensive discussion of the approaches and their nuances, see W Durham, ‘Perspectives on Religious Liberty: A Comparative Framework’ in J Witte and J Van der Vyver (eds), *Religious Human Rights in Global Perspective: Legal Perspectives* (William B. Eerdmans Publishing Company, 1996). [↑](#footnote-ref-1)
2. For an overview and consideration of the legal and historical context of s 116, see e.g. T Blackshield, ‘Religion and Australian Constitutional Law’ in P Radan et al (eds), *Law and Religion* (Routledge, 2005). [↑](#footnote-ref-2)
3. *Adelaide Company of Jehovah’s Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 122-123. [↑](#footnote-ref-3)
4. *Jehovah’s Witnesses* (1943) 67 CLR 116, 122-123. [↑](#footnote-ref-4)
5. *Jehovah’s Witnesses* (1943) 67 CLR 116, 122-123. [↑](#footnote-ref-5)
6. *Jehovah’s Witnesses* (1943) 67 CLR 116, 124-125. [↑](#footnote-ref-6)
7. (1912) 15 CLR 366, 369. [↑](#footnote-ref-7)
8. For further discussion regarding this ‘action-belief dichotomy’, see G Moens, ‘Action-Belief Dichotomy and Freedom of Religion’ (1989) 12 *Sydney Law Review* 195. [↑](#footnote-ref-8)
9. *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 136. [↑](#footnote-ref-9)
10. For examples of relevant ‘counter-considerations’, see Parts III-V. [↑](#footnote-ref-10)
11. For analyses of the more nuanced elements of the judgments going beyond the summary provided here, see Nicholas Aroney, ‘A Seductive Plausibility: Freedom of Speech in the Constitution’ (1994) 18 *University of Queensland Law Journal* 249, 249-251; Arthur Glass, ‘Freedom of Speech and the Constitution: *Australian Capital Television* and the Application of Constitutional Rights’ (1995) 17 *Sydney Law Review* 29, 32-35; Jeremy Kirk, ‘Constitutional Implications from Representative Democracy’ (1995) 23 *Federal Law Review* 37, 38-41. [↑](#footnote-ref-11)
12. *Nationwide News* (1992) 177 CLR 1, 70. [↑](#footnote-ref-12)
13. *Nationwide News* (1992) 177 CLR 1, 72. [↑](#footnote-ref-13)
14. *Nationwide News* (1992) 177 CLR 1, 72-73. [↑](#footnote-ref-14)
15. Aroney, A Seductive Plausibility, above n 11, 249. [↑](#footnote-ref-15)
16. *ACTV* (1992) 177 CLR 106, 136. [↑](#footnote-ref-16)
17. *ACTV* (1992) 177 CLR 106, 138. [↑](#footnote-ref-17)
18. *ACTV* (1992) 177 CLR 106, 139, 142. [↑](#footnote-ref-18)
19. *ACTV* (1992) 177 CLR 106, 143. [↑](#footnote-ref-19)
20. *ACTV* (1992) 177 CLR 106, 143. [↑](#footnote-ref-20)
21. *ACTV* (1992) 177 CLR 106, 143. [↑](#footnote-ref-21)
22. *ACTV* (1992) 177 CLR 106, 143. [↑](#footnote-ref-22)
23. *ACTV* (1992) 177 CLR 106, 231. [↑](#footnote-ref-23)
24. *ACTV* (1992) 177 CLR 106, 231. [↑](#footnote-ref-24)
25. *ACTV* (1992) 177 CLR 106, 232. [↑](#footnote-ref-25)
26. *ACTV* (1992) 177 CLR 106, 159. [↑](#footnote-ref-26)
27. *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 124. [↑](#footnote-ref-27)
28. *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 559. [↑](#footnote-ref-28)
29. *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561. [↑](#footnote-ref-29)
30. *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 571. [↑](#footnote-ref-30)
31. *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567-568. [↑](#footnote-ref-31)
32. Aroney, A Seductive Plausibility, above n 11, 256; c.f. *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 29, 152. [↑](#footnote-ref-32)
33. *ACTV* (1992) 177 CLR 106, 134-135. [↑](#footnote-ref-33)
34. Aroney, A Seductive Plausibility, above n 11, 257-258. [↑](#footnote-ref-34)
35. Ibid 259. [↑](#footnote-ref-35)
36. Ibid 264-167. [↑](#footnote-ref-36)
37. Kirk, Constitutional Implications, above n 11, 69. [↑](#footnote-ref-37)
38. (1994) 182 CLR 104 at 173, 197. [↑](#footnote-ref-38)
39. It should be noted that the progressive approach is not uncontroversial; however, that debate will not be entered into here. Suffice it to say that this article adopts a progressive approach of the type undertaken by Mason CJ – one which incorporates both text and social context. For views on both sides of the debate in addition to what has already been cited, see e.g. Justice Kirby in *Re Wakim* (1999) 73 ALJR 839, 878 and *Brownlee v The Queen* (2001) 207 CLR 278, 321-322; Justice Michael Kirby, ‘Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?’ (2000) 24 *Melbourne University Law Review* 1; Greg Craven, *Conversations with the Constitution* (University of New South Wales Press, 2004) 162-163; Justice John Heydon, ‘Judicial Activism and the Death of the Rule of Law’ (2004) 10(4) *Otago Law Review* 493. [↑](#footnote-ref-39)
40. Glass, Freedom of Speech, above n 11, 37. [↑](#footnote-ref-40)
41. (1997) 190 CLR 1, 131-132. Importantly, in this context Gaudron J also discusses the question of proportionality, and this is addressed subsequently. [↑](#footnote-ref-41)
42. *Adelaide Company of Jehovah’s Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 126, 149-150. [↑](#footnote-ref-42)
43. Braddon, *1898 Australasian Federation Conference*, Tuesday 8th February 1898, accessed online 20th August 2013 <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;db=CONSTITUTION;id=constitution%2Fconventions%2F1898-1104;orderBy=customrank;page=0;query=religion%20section%20116%20Dataset%3Aconventions;rec=0;resCount=Default>, at p 656. [↑](#footnote-ref-43)
44. (1997) 190 CLR 1, 132. [↑](#footnote-ref-44)
45. (1997) 190 CLR 1, 132-133. [↑](#footnote-ref-45)
46. (1997) 190 CLR 1, 132. [↑](#footnote-ref-46)
47. (1997) 190 CLR 1, 133-134. [↑](#footnote-ref-47)
48. Luke Beck, ‘Clear and Emphatic: The Separation of Church and State Under the Australian Constitution’ (2008) 27 *University of Tasmania Law Review* 161, 184-185. [↑](#footnote-ref-48)
49. V Bader, ‘Religious Pluralism: Secularism or Priority for Democracy?’ (1999) 27 *Political Theory* 597, 598. [↑](#footnote-ref-49)
50. Ibid 602. [↑](#footnote-ref-50)
51. Ibid 598. See e.g. Ronald Dworkin, *Life’s Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* (Vintage, 1994); Bruce Ackerman, *Social Justice in the Liberal State* (Yale, 1980); John Rawls, *Political Liberalism* (New York, 1993); Stephen Macedo, *Liberal Virtues: Citizenship, Virtue, and Community in Liberal Constitutionalism* (Oxford, 1991); Robert Audi, *Religious Commitment and Secular Reason* (Cambridge, 2000). C.f. Kent Greenawalt, *Private Consciences and Public Reasons* (Oxford, 1995). [↑](#footnote-ref-51)
52. M Thornton and T Luker, ‘The Spectral Ground: Religious Belief Discrimination’ (2009) 9 *Macquarie Law Journal* 71, 74. [↑](#footnote-ref-52)
53. S McLeish, ‘Making Sense of Religion and the Constitution: A Fresh Start for Section 116’ (1992) 18 *Monash University Law Review* 207, 219. [↑](#footnote-ref-53)
54. Higgins, *1898 Australasian Federation Conference*, Tuesday 8th February 1898, accessed online 20th August 2013 <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;db=CONSTITUTION;id=constitution%2Fconventions%2F1898-1104;orderBy=customrank;page=0;query=religion%20section%20116%20Dataset%3Aconventions;rec=0;resCount=Default>, 654; Barton, *1898 Australasian Federation Conference*, Thursday 17th March 1898, accessed online 20th August 2013 <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;db=CONSTITUTION;id=constitution%2Fconventions%2F1898-1130;orderBy=customrank;page=0;query=religion%20section%20116%20Dataset%3Aconventions;rec=0;resCount=Default>, 2474. [↑](#footnote-ref-54)
55. McLeish, above n 53, 221-222. [↑](#footnote-ref-55)
56. Ibid 222. [↑](#footnote-ref-56)
57. Ibid 223. [↑](#footnote-ref-57)
58. See Nicholas Wolterstorff, ‘Why we would reject what liberalism tells us etc.?’ in P Weithman (ed), *Religion and Contemporary Liberalism* (Notre Dame, 1997) 162-181. Also see the discussion on Robert Audi below for an example of this kind of position. [↑](#footnote-ref-58)
59. McLeish, above n 53, 228. [↑](#footnote-ref-59)
60. Ibid 233. [↑](#footnote-ref-60)
61. Symon, *1898 Australasian Federation Conference*, Tuesday 8th February 1898, accessed online 20th August 2013 <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;db=CONSTITUTION;id=constitution%2Fconventions%2F1898-1104;orderBy=customrank;page=0;query=religion%20section%20116%20Dataset%3Aconventions;rec=0;resCount=Default>, 660. [↑](#footnote-ref-61)
62. J Puls, ‘Wall of Separation: Section 116, the First Amendment and Constitutional Religious Guarantees’ (1998) 26 *Federal Law Review* 139, 140. [↑](#footnote-ref-62)
63. Ibid 151. [↑](#footnote-ref-63)
64. Symon, *1898 Australasian Federation Conference*, Tuesday 8th February 1898, accessed online 20th August 2013 <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;db=CONSTITUTION;id=constitution%2Fconventions%2F1898-1104;orderBy=customrank;page=0;query=religion%20section%20116%20Dataset%3Aconventions;rec=0;resCount=Default>, 657. [↑](#footnote-ref-64)
65. Audi, Religious Commitment and Secular Reason, above n 51, 23. [↑](#footnote-ref-65)
66. Ibid. [↑](#footnote-ref-66)
67. Robert Audi, ‘The Place of Religious Argument in a Free and Democratic Society’ (1993) 30 *San Diego Law Review* 677, 691-692. [↑](#footnote-ref-67)
68. Ibid 690. [↑](#footnote-ref-68)
69. See e.g. Augustine, *Concerning the City of God Against the Pagans* (Penguin, 2008) 298, 430; Anselm, ‘Proslogion’ in P Helm, *Faith and Reason* (Oxford University Press, 1999) 88; Thomas Aquinas, *Summa Theologica* (William Benton, 1952 vol 1) 54-55; R Sokolowski, *The God of Faith and Reason: Foundations of Christian Theology* (Catholic University of America Press, 1982) 5-6; E Mascall, ‘Faith and Reason: Anselm and Aquinas’ (1963) 14 *Journal of Theological Studies* 67, 72-73; John Calvin, *Institutes of the Christian Religion* (Hendrickson Publishers, 2008), 42, 376-377; John Calvin, ‘The Sensus Divinitatis’, in P Helm, *Faith and Reason* (Oxford University Press, 1999) 143-145; Alvin Plantinga, *Warranted Christian Belief* (Oxford University Press, 2000); John Milbank, *Theology and Social Theory: Beyond Secular Reason* (Blackwell, 1990); John Milbank, ‘The grandeur of reason and the perversity of rationalism: Radical Orthodoxy’s first decade’, in John Milbank and Simon Oliver (eds), *The Radical Orthodoxy Reader* (Routledge, 2009) 393. [↑](#footnote-ref-69)
70. See e.g. John Milbank, *Theology and Social Theory: Beyond Secular Reason* (Blackwell, 1990); Graham Ward (ed), *The Postmodern God: A Theological Reader* (Blackwell Publishers, 1997); John Milbank et al (eds), *Radical Orthodoxy: A New Theology* (Routledge, 1999); John Milbank and Simon Oliver (eds), *The Radical Orthodoxy Reader* (Routledge, 2009) [↑](#footnote-ref-70)
71. See also Greenawalt’s critique of Audi and others in Greenawalt, Private Consciences and Public Reasons, above n 51, 66-71. [↑](#footnote-ref-71)
72. H Randell-Moon, ‘Section 116: The Politics of Secularism in Australian Legal and Political Discourse’ in B Spalek and A Imtoual (eds), *Religion, Spirituality and the Social Sciences* (Policy Press, 2008) 52. [↑](#footnote-ref-72)
73. Ibid 59-60. [↑](#footnote-ref-73)
74. Bader, above n 49, 608. [↑](#footnote-ref-74)
75. (1943) 67 CLR 116, 125-126; C.f. Mason CJ in *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 138-139. See e.g. D Meagher, ‘What is “Political Communication”? The Rationale and Scope of the Implied Freedom of Political Communication’ (2004) 28 *Melbourne University Law Review* 438; D Bogen, ‘The Religion Clauses and Freedom of Speech in Australia and the United States: Incidental Restrictions and Generally Applicable Laws’ (1997) 46 *Drake Law Review* 53; Nicholas Aroney, ‘The Constitutional (In)Validity of Religious Vilification Laws: Implications for their Interpretation’ (2006) 34 *Federal Law Review* 287. In relation to the action-belief dichotomy mentioned above, expressive conduct as well as speech has been held to attract the protection of the implied freedom of political communication in *Levy v State of Victoria* (1997) 189 CLR 579. [↑](#footnote-ref-75)
76. Beck, above n 48, 163; Justice Stephen in *Attorney-General (Vic); Ex rel Black v Commonwealth* 33 ALR 321 at 350. [↑](#footnote-ref-76)
77. Beck, above n 48, 187, 190. See Reid Mortenson, ‘Blasphemy in a Secular State: A Pardonable Sin’ (1994) 17(1) *UNSW Law Journal* 409, 428. [↑](#footnote-ref-77)
78. Mortenson, above n 78, 422. [↑](#footnote-ref-78)
79. Ibid 422. See Tony Abbott, *Statement to Parliament on National Security* (22 September 2014) Prime Minister of Australia <<https://www.pm.gov.au/media/2014-09-22/statement-parliament-national-security>>. [↑](#footnote-ref-79)
80. Bader, above n 49, 612-613. C.f. for example Jeremy Waldron, *Law and Disagreement* (Oxford, 1999). [↑](#footnote-ref-80)
81. Bader, above n 49, 614. [↑](#footnote-ref-81)
82. Ibid 617. [↑](#footnote-ref-82)
83. Michael Hogan, ‘Separation of Church and State: Section 116 of the Australian Constitution’ (1981) 53(2) *The Australian Quarterly* 214 at 219-220; *Adelaide Company of Jehovah’s Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 124-125. See also the agreement expressed by Clifford Pannam, ‘Travelling Section 116 with a US Road Map’ (1963) 4 *Melbourne University Law Review* 41, 65-67. [↑](#footnote-ref-83)
84. *Jehovah’s Witnesses* (1943) 67 CLR 116, 126. [↑](#footnote-ref-84)
85. See *Jehovah’s Witnesses* (1943) 67 CLR 116, 125-126; C.f. Aroney’s implicit agreement and clarification of Latham CJ’s position in Nicholas Aroney, ‘The Constitutional (In)Validity of Religious Vilification Laws: Implications for their Interpretation’ (2006) 34 *Federal Law Review* 287, 301-302. [↑](#footnote-ref-85)
86. (1983) 154 CLR 120, 135-136, my emphasis. [↑](#footnote-ref-86)
87. (1983) 154 CLR 120, 135-136. [↑](#footnote-ref-87)
88. Pannam, above n 83, 86. [↑](#footnote-ref-88)
89. See *Jehovah’s Witnesses* (1943) 67 CLR 116, 149-150. [↑](#footnote-ref-89)
90. *Jehovah’s Witnesses* (1943) 67 CLR 116, 124. [↑](#footnote-ref-90)
91. C.f. *Coleman v Power* (2004) 220 CLR 1; *Monis v The Queen* [2013] HCA 4. [↑](#footnote-ref-91)
92. See e.g. Glass, Freedom of Speech, above n 11, 30-31. [↑](#footnote-ref-92)
93. Ibid 30. See the majority view in *Jehovah’s Witnesses* (1943) 67 CLR 116, 131-132, 149-150, 155, 160. [↑](#footnote-ref-93)
94. See e.g. Robert Audi, *Religious Commitment and Secular Reason* (Cambridge, 2000) 23; Robert Audi, ‘The Place of Religious Argument in a Free and Democratic Society’ (1993) 30 *San Diego Law Review* 677, 691-692. [↑](#footnote-ref-94)
95. Glass, Freedom of Speech, above n 11, 32. [↑](#footnote-ref-95)
96. *ACTV* (1992) 177 CLR 106, 143. [↑](#footnote-ref-96)
97. (1997) 189 CLR 579, 622-623. [↑](#footnote-ref-97)
98. (2002) 212 CLR 1, 44. [↑](#footnote-ref-98)
99. Kirk, Constitutional Implications, above n 11, 52. [↑](#footnote-ref-99)
100. See *ACTV* (1992) 177 CLR 106, 138-140, 211-212, 230-232; *Nationwide News* (1992) 177 CLR 1, 47-50, 72. [↑](#footnote-ref-100)
101. Kirk, Constitutional Implications, above n 11, 53. [↑](#footnote-ref-101)
102. Adrienne Stone, ‘Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication’ (2001) 25 *Melbourne University Law Review* 374, 385. [↑](#footnote-ref-102)
103. Ibid 386-387. [↑](#footnote-ref-103)
104. Ibid 389-390. [↑](#footnote-ref-104)
105. Ibid 390. [↑](#footnote-ref-105)
106. Aroney, Religious Vilification Laws, above n 85, 297. [↑](#footnote-ref-106)
107. Ibid 297-302. [↑](#footnote-ref-107)
108. Ibid 303. [↑](#footnote-ref-108)
109. Ibid. [↑](#footnote-ref-109)
110. Kevin Rudd, *Church and State are able to have different positions on same sex marriage* (20th May 2013) Kevin Rudd MP < <http://www.kevinruddmp.com/2013/05/church-and-state-are-able-to-have.html>>. [↑](#footnote-ref-110)
111. Kevin Rudd, *Church and State are able to have different positions on same sex marriage* (20th May 2013) Kevin Rudd MP < <http://www.kevinruddmp.com/2013/05/church-and-state-are-able-to-have.html>>. [↑](#footnote-ref-111)
112. Kevin Rudd, *Church and State are able to have different positions on same sex marriage* (20th May 2013) Kevin Rudd MP < <http://www.kevinruddmp.com/2013/05/church-and-state-are-able-to-have.html>>. [↑](#footnote-ref-112)
113. Tony Abbott, *Tony Abbott on Q and A* (5th April 2010) Q&A <<http://www.abc.net.au/tv/qanda/txt/s2859473.htm>>. [↑](#footnote-ref-113)
114. See e.g. M Thornton and T Luker, ‘The Spectral Ground: Religious Belief Discrimination’ (2009) 9 *Macquarie Law Journal* 71. There is probably a need for some sort of empirical study to confirm this claim, and my research aims to follow that path in this regard. This would correlate with an Australian Research Council grant obtained by John Gascoigne, Ian Tragenza and Stephen Chavura entitled:  ‘A Secular State? Reason, Religion, and the Australian Polity, 1788-1945’.  Nicholas Aroney and Patrick Parkinson and have also put in a grant application to investigate the role of ‘religious’ and ‘secular’ ideas in Australian law. [↑](#footnote-ref-114)
115. *Street Preachers Case* (2013) 295 ALR 197. [↑](#footnote-ref-115)
116. *Street Preachers Case* (2013) 295 ALR 197, 221-222. [↑](#footnote-ref-116)
117. *Street Preachers Case* (2013) 295 ALR 197, 222. [↑](#footnote-ref-117)
118. I am aware of a street preaching group that has obtained permission to preach in Brisbane’s Queen Street Mall as an ‘authorized public assembly’ through the *Peaceful Assembly Act 1992* (Qld). This makes for an interesting contrast with the Street Preachers case, where the street preaching group did not obtain such permission and was in breach of a (valid) prohibitory by-law which the High Court decided did not contravene the implied freedom. [↑](#footnote-ref-118)
119. *Coleman v Power* (2004) 220 CLR 1. [↑](#footnote-ref-119)