SECULARISM AS A RELIGION: QUESTIONING THE FUTURE OF THE 'SECULAR' STATE

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ABSTRACT:

Section 116 of the Australian Constitution states that the Commonwealth shall not make a law establishing any religion. This is commonly understood in the literature as equivalent to the establishment of a secular state. However, the implicit dichotomy between religion and the secular is questionable when neither term is clearly defined in an establishment context. Some constitutional jurisprudence appears to explicitly or implicitly view the 'secular' as a type of religion. This understanding has important implications for High Court jurisprudence surrounding non-establishment. In particular, this article argues that if the secular is a kind of religion, like all other religions it is conceivably subject to the prohibition against state establishment. It follows that the 'secular state' is not a constitutionally coherent approach to the relationship between religion and the state.

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I INTRODUCTION: DEFINITIONS, DISTINCTIONS, DICHOTOMIES

> A… thing I want to know about a work on the establishment clause is how the author distinguishes religion from nonreligion. Is Marxism a religion? Transcendental meditation? What are the necessary and sufficient conditions for something's being a religion, and how do these conditions relate to the clause's original meaning and to doctrine?[1]

Though this question relating to criteria for identifying a religion is posed by Alexander from the US perspective of establishment, it is equally relevant in the Australian constitutional milieu. Australia too has experienced issues with defining religion in the context of a dichotomy between religion and nonreligion, or 'secularism'. Despite some differences, both Australia and the US have an 'establishment clause' which prohibits the establishment of a religion as part of the state.[2] A fundamental problem is there are no clearly accepted general criteria for distinguishing religion from secularism. If no such criteria exist or they are underdeveloped, this leads to another problem. Where it is difficult to determine when a particular perspective is religious, it is unclear whether that perspective is illegitimately made part of the state apparatus.[3] This article questions whether the

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[1] Larry Alexander, 'Kent Greenawalt and the Difficulty (Impossibility?) of Religion Clause Theory' (2008) 25 *Constitutional Commentary* 243, 243.

[2] The High Court has articulated the differences in *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120. See also Gabriel Moens, 'Church and State Relations in Australia and the United States: The Purpose and Effect Approaches and the Neutrality Principle' (1996) (4) *Brigham Young University Law Review* 787.

[3] See e.g. John Knechtle, 'If we don't know what it is, how do we know if it's established?' (2003) 41 *Brandeis Law Journal* 521; Mary Mitchell, 'Secularism in Public Education: The Constitutional Issues' (1987) 67(4) *Boston University Law Review* 603; Derek Davis, 'Is Atheism a Religion? Recent Judicial Perspectives on the Constitutional Meaning of "Religion"' (2005) 47 *Journal of Church and State* 707; Dmitry Feofanov, 'Defining Religion: An Immodest Proposal' (1995) 23 *Hofstra Law Review* 309.

'secular state' is an appropriate framework for regulating the relationship between religion and the state in the Australian context. The basis for this questioning is the literature which indicates that secularism has some characteristics of religion, or is even a type of religion.

If this understanding is accepted, it has significant implications for jurisprudence on the establishment clause contained in s 116 of the Australian Constitution, because many commentators and judges view the establishment clause as operating to, in effect, establish a secular state. In particular, this article argues that if secularism can be viewed as a type of religion, like all other religions it is conceivable that the secular is subject to the constitutional prohibition against state establishment. The notion of a 'secular state' would involve state establishment of religion – namely, the 'religion' of secularism. It follows that state secularism is not a coherent approach to regulating the relationship between religion and the state in Australia, because such an approach would be in conflict with s 116.

Part II of the article outlines traditional notions of secularism as involving the separation of religion from other 'nonreligious' (secular) areas of life and compares it with the idea of secular humanism, providing the contextual framework for understanding what it means to be a 'secular state'. Part III examines the typical structure of the secular state and challenges the idea that it is a genuinely 'neutral' approach. It explains how a secular state may intentionally or unintentionally undermine the influence of traditional religions, even where such religions have argued for the secular state. Such a process indicates that rather than secularism being a neutral 'nonreligion', it may actually be a kind of religion in competition with traditional religions. Part III proceeds to consider the specifically Australian iteration of the secular state in terms of the establishment clause, which is a necessary

component to the argument that a secularist approach to religion and state conflicts with s 116.

In Part IV, the High Court's views on the relationship between the secular and the religious and its definition of religion is outlined. These perspectives are contrasted with literature which indicates that secularism has attributes similar to that of the typical religions and therefore should be considered as a type of religion. This claim is supported in the Australian context by considering establishment clause jurisprudence and applying the High Court's definition of religion to secularism, with the result that secularism may be considered as a religion for constitutional purposes. It follows that if the secular can be viewed as a type of religion, the secular would be subject to the prohibition against establishment. The corollary is that state secularism is not a coherent constitutional conception of non-establishment due to its conflict with s 116. Finally, Part V briefly considers legal and political implications of saying that secularism is a religion and cannot be established, suggesting an alternative approach is required.

II DEFINING THE SECULAR

A *Traditional and Contemporary Notions of the Secular*

Proposing the more controversial conception of the secular as a religion entails an outline of the traditional and contemporary notions of the secular. There are many varieties of secularism which exist in the world and continuing contestation and change regarding the secular.[4] The word is 'notoriously shifty, sometimes used descriptively, sometimes predictively, sometimes prescriptively, sometimes

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

ideologically, sometimes implying hostility to religion, sometimes carrying a neutral or positive connotation'.[5] Hurd claims that 'secularism refers to a public resettlement of the relationship between politics and religion', and 'the secular refers to the epistemic space carved out by the ideas and practices associated with such settlements'.[6]

Specifically, Norris and Inglehart consider the secular to be the 'systematic erosion of religious practices, values and beliefs'.[7] A secular society is one which lacks belief or faith in the supernatural, mysterious or magical.[8] It includes the division of church and state in the form of the 'modern secular democratic society'.[9] Somerville observes some of the different meanings of the term, including 'the separation of religious activities, groups or ideas from others characteristic of the society', a focus on 'proximate' or 'worldly' concerns rather than 'ultimate' or 'religious' concerns, and 'the [non-religious] rules under which a society operates'.[10] Benson agrees, stating that the term 'secular' has come to mean a realm that is 'neutral' or 'religion-free'; it 'banishes religion from any practical place in culture'.[11]

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

[6] Hurd, above n 4, 12-13.

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

[8] Ibid 7.

[9] Ibid 8, 10.

[10] John Somerville, 'Secular Society/Religious Population: Our Tacit Rules for using the term "Secularisation"' (1998) 37(2) *Journal for the Scientific Study of Religion* 249, 250-251.

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

Kosmin argues that secularity may refer to individuals and their social characteristics while secularism refers to the realm of social institutions. In particular, secularism covers organisations and legal constructs which reflect institutional expressions of the secular in a nation's political realm and public life. Forms of secularism may vary depending on the religious context of a state, but in all cases the secular refers to a distancing from the sacred, eternal or otherworldly.[12] Kosmin provides a typology of secularism based on a binary model of 'hard' and 'soft' secularism. The softer secularisms of the Western liberal democracies which formally (or conventionally in the case of the UK) separate religious and political power but do not explicitly regulate (particularly private) religion are contrasted with the harder secularisms of more 'authoritarian' regimes such as Russia and China, which tightly regulate both public and private religion and are specifically non-religious societies.[13] A 'soft' secularism could then be defined as 'legal recognition of individual liberty and autonomy, freedom of thought and religion, peaceful coexistence of social groups, aspiration for consensus in much of the public space, respect for the civil contract, and a general acceptance that religious laws should not take precedence over civil ones'.[14] This also entails the rejection of 'hard' secularist regimes which demand that individuals and social institutions be anti-religious and promote atheism.[15]

[12] Barry Kosmin, 'Contemporary Secularity and Secularism' in Barry Kosmin and Ariela Keysar (eds), *Secularism and Secularity: Contemporary International Perspectives* (ISSSC, 2007) 1-2.

[13] Ibid 3, 5-7.

[14] Ibid 12.

[15] Ibid.

The traditional 'secularisation thesis' of the 1960s refers to the process by which religious influence through institutions and symbols is removed from culture. Instead, secular understandings 'become authoritative, legitimated and embedded in and through individuals, the law, state institutions, and other social relationships'.[16] This process is both descriptive in terms of outlining the process and normative in the sense that secularisation was thought to produce democracy and tolerance. The tension between the descriptive and normative elements has become more problematic with the recent resurgence of religion.[17] This has resulted in the principle of secular power, which refers not to the privatization of religion and its exclusion from power in the sense of distinguishing the religious and political spheres, but rather to the state's right to determine and manage the boundaries of religion in politics.[18]

Felderhof similarly claims secularisation refers to the process where society and institutions gain increasing autonomy and independence apart from ecclesial control or influence. More extreme secularisation involves actively seeking to limit or prevent religious contributions to public life or policy, relegating religious belief and practice to a purely private sphere. Therefore, the 'secular' might refer (as it did historically) to a civil society which operates independently of a church or monastic

[16] Hurd, above n 4, 12-13.

[17] Peter Berger, *The Sacred Canopy: Elements of a Sociological Theory of Religion* (Doubleday, 1967) 107; Peter Berger, *The Desecularisation of the World: Resurgent Religion and World Politics* (William B. Eerdmans, 1999). See also Philip Gorski and Ates Altinordu, 'After Secularization?' (2008) 34 *Annual Review of Sociology* 55.

[18] Rachel Scott, 'Managing Religion and Renegotiating the Secular: The Muslim Brotherhood and Defining the Religious Sphere' (2014) 7 *Politics and Religion* 51, 54; c.f. Hussein Ali Agrama, 'Secularism, Sovereignty, Indeterminacy: Is Egypt a Secular or a Religious State' (2010) 52(3) *Society for the Comparative Study of Society and History* 495.

community, or to a world may people can live their lives free of church control while religion maintains important social presence and influence, or it might 'refer to a situation where the state has devised an independent value system that impinges on religious life so that individuals and institutions are constrained, or straightforwardly prevented, from operating according to their own standards and purposes in the public square'.[19]

Other commentators have re-examined traditional positions on secularity and secularisation. Talal Asad argues that in the sense of the modern 'secular' nation-state, the secular can be considered as the 'lowest common denominator among the doctrines of competing religious sects', and 'the attempt to define a political ethic independent of any religious convictions altogether'.[20] For the modern state (or legal community) then, secularism is a method of uniting people of different class, gender and religion through common human experience.

In his seminal work *A Secular Age*, Charles Taylor examines the question of this age as 'secular' in terms of 'conditions of belief'.[21] He argues that 'the shift to secularity in this sense consists… of a move from a society where belief in God is unchallenged and… unproblematic, to one in which it is understood to be one option among others, and frequently not the easiest to embrace'.[22] It is a change which 'takes us from a society in which it was virtually impossible not to believe in God, to one in which faith, even for the staunchest believer, is one human possibility among others'.[23]

[19] Marius Felderhof, 'Secular Humanism' in L. Phillip Barnes (ed), *Debates in Religious Education* (Routledge, 2011) 146-147.

[20] Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford, 2003) 2.

[21] Charles Taylor, *A Secular Age* (Harvard University Press, 2007) 2-3. For an excellent series of commentaries with various perspectives on this imposing work, see Michael Warner 'et al' (eds), *Varieties of Secularism in a Secular Age* (Harvard, 2010).

[22] Taylor, above n 21, 3.

[23] Ibid.

Taylor proceeds to identify this problem of faith and reason in a secular culture, stating that where there is the identity of a reason without faith and the passions, an 'autonomous' or 'disengaged' reason – 'disenchantment and instrumental control go together… this disengaged, disciplined stance to self and society has become part of the essential defining repertory of the modern identity' and is a 'central feature' of secularity.[24]

John Milbank, commenting on Taylor, expands and states that the 'secularised space' is the space

> … that allows no sacramental mediation, that renders the divine will remote and inscrutable, that sharply divides nature from supernature, itself engenders an impermeable, drained, meaningless immanence that can readily be cut off from any transcendent relation whatsoever.[25]

Milbank argues that 'secularisation is not inevitable', but has occurred as 'the result of a self-distortion of Christianity' (in the sense of Christianity embracing a disengaged governing reason through the Middle Ages and Enlightenment).[26] This 'self-distortion' or 'shift' presumes a separation of faith and the sacramental from reasonable belief in God.[27] The agents who engage in this 'acquire knowledge by exploring impersonal orders with the aid of disengaged reason', which is 'the massive shift in horizon' that has been 'identified as the rise of modernity'.[28] 'The development of the disciplined, instrumentally rational order of mutual benefit has

[24] Ibid 136. Taylor defines disenchantment as a 'denial of the sacred' (77), a secular position which stands 'in contrast to a divine foundation for society' (192).

[25] John Milbank, 'A Closer Walk on the Wild Side: Some Comments on Charles Taylor's *A Secular Age*' (2009) 22 *Studies in Christian Ethics* 89, 94.

[26] Ibid 90.

[27] Taylor, above n 21, 294.

[28] Ibid.

been the matrix within which the shift could take place. This shift is the heartland and origin of modern "secularization"' – and the contingency of this shift implies that it can be critiqued.[29]

Asad consequently concludes that one can no longer assume that secular and religion are fixed categories which can be easily defined. Secular and religious frameworks are superimposed to an extent, particularly in non-Western contexts.[30] But in Western contexts, the secular proclaims itself as neutral and distinguishes between the neutral public sphere of reason and the private sphere of faith, placing religion in the latter category.[31] In short, secularity and secularism are highly contested and complex terms. For the purposes of this article, we can propose an orthodox understanding of the secular as a separation between the religious and non-religious, with some versions imposing a uniquely 'secular' set of allegedly neutral values in the place of religious values. Secularisation is the process of society and culture separating religious values from 'secular' values and shifting from a foundation in religious values to a foundation in secular values.

A *Secularism and Secular Humanism*

Adding to the difficulty of definition is an existing literature on the issue of US establishment which considers the possibility of defining the secular or 'secular humanism' as a religion for establishment purposes.[32] According to Greenawalt and

[29] Ibid 295.

[30] See e.g. Maia Hallward, 'Situating the "Secular": Negotiating the Boundary Between Religion and Politics' (2008) 2(1) *International Political Sociology* 1.

[31] Asad, above n 20, 8, 25.

[32] See e.g. Craig Mason, '"Secular Humanism" and the Definition of Religion: Extending a Modified "Ultimate Concern" Test to *Mozert v Hawkins County Public Schools* and *Smith v Board of School Commissioners* (1988) 63 *Washington Law Review* 445; Steven Lee, '*Smith v Board of School Commissioners*: The Religion of Secular Humanism in Public Education' (1988) 3 *Notre Dame Journal of Law, Ethics and Public Policy* 591.

Freeman, there is no settled definition of what constitutes religion, and no single characteristic or essential feature of religion. Instead, an impugned religion should be compared with the indisputably religious in light of the particular legal problem in order to decide whether an entity is a religion.[33] For example, Greenawalt notes that the US Supreme Court has held that Buddhism, Taoism, Ethical Culture and Secular Humanism can be classified as (non-theistic) religions for the purposes of the US establishment clause, and state preference for theistic over non-theistic religions constitutes a breach of that clause.[34]

Potentially classifying secular humanism as a non-theistic religion requires that it be defined and related to our definitions of secularity and secularisation stated above. Defining secular humanism in this context is not straightforward.[35] Many (but not all) prominent accounts of secular humanism originate from those who oppose it, and there is bound to be disagreement due to diverse and entrenched views.[36] This section outlines the common themes and attempts a working definition for the purposes of this article. Secular humanism has its historical roots in the 'alienated clergyman' or 'disaffected church members', who rejected ecclesiastical authority and emphasis on faith in God and the transcendent to focus on the immanent power of human reason. They sought a more 'rational' approach to life while maintaining

[33] Kent Greenawalt, 'Religion as a Concept in Constitutional Law' (1984) 72(5) *California Law Review* 753,

753; George Freeman, 'The Misguided Search for the Constitutional Definition of Religion' (1983) 71 *Georgetown Law Journal* 1519. See also Ian Ellis-Jones (2008) 'What is Religion?' 13(3) *LGLJ* 168.

[34] Greenawalt, above n 33, 759. See *Torcaso v Watkins* 367 US 488 (1961).

[35] See e.g. Joseph Blankhom, 'Secularism, Humanism, and Secular Humanism: Terms and Institutions' in *The Oxford Handbook of Secularism* (UC, 2016).

[36] See e.g. Martha McCarthy, 'Secular Humanism and Education' (1990) 19(4) *Journal of Law and Education* 467, 467-471.

a religious veneer including worshipping communities, rewritten liturgies and hymns, and christening, marriage and funeral ceremonies.[37]

'Humanism' refers to a philosophy which regards the rational individual as the highest value and the ultimate source of value, and is 'dedicated to fostering the individual's creative and moral development in a meaningful and rational way without reference to concepts of the supernatural'.[38] The term 'secular' further explicitly modifies humanism by emphasising its separation from and rejection of all things supernatural, and emphasising the way humanism possesses a 'confidence' in reason (instead of 'god') as the foundation for existential improvement and the ethical life.[39] Some secular humanists have also defined themselves specifically in terms of a 'creed':

1. the determination of truth through free inquiry;

2. the separation of church and state;

3. a commitment to freedom and against totalitarianism;

4. ethics based on intellectual choice and independent of religious proclamation;

5. moral education-the teaching of values and methods of making moral decisions;

6. religious skepticism;

7. the importance of reason;

8. the importance of science and technology;

9. belief in evolution;

[37] Felderhof, above n 19, 150-151.

[38] Eric Freed, 'Secular Humanism, the Establishment Clause and Public Education' (1986) 61 *New York University Law Review* 1149, 1154.

[39] Ibid 1155-1156.

10. the importance of education.[40]

This version of secular humanism possesses a unique set of values which corresponds to the 'secular' values referred to as part of the earlier definition of secularity and secularisation. On that basis it could be said that secular humanism is the systematic outworking of the secular position put in the form of a worldview which directly challenges religious worldviews. Others go even further than this definition, characterising secular humanism as itself a religion.

For example, McGhehey defines secular humanism, or 'atheistic or naturalistic humanism', as a 'philosophical, religious, and moral system of belief' which 'denies the existence of the supernatural or transcendent'.[41] Whitehead and Conlan define secular humanism as a 'religion whose doctrine worships Man as the source of all knowledge and truth'.[42] They assert that secularism is a 'doctrinal belief that morality is based solely in regard to the temporal well-being of mankind to the exclusion of all belief in God, a supreme being, or a future eternity'.[43] The secular refers to the physical and temporal rather than the spiritual and eternal, and humanism is a philosophy which focuses on the achievement and interests of human beings and the quality of being human, as opposed to abstract beings and problems of theology.[44] Finally, they claim secularism is not only indifferent to religious

[40] Ibid 1155. See also John Whitehead and John Conlan, 'The Establishment of the Religion of Secular Humanism and its First Amendment Implications' (1979) 10 *Texas Law Review* 1, 37-54.

[41] Kathleen McGhehey, 'The Public School Curriculum, Secular Humanism, and the Religion Clauses' (1989) 28 *Washburn Law Journal* 380, 389-390.

[42] Whitehead and Conlan, above n 40, 30-31. See also Steven Lee, '*Smith v Board of School Commissioners*: The Religion of Secular Humanism in Public Education' (1988) 3 *Notre Dame Journal of Law, Ethics and Public Policy* 591.

[43] Whitehead and Conlan, above n 40, 29-30.

[44] Ibid.

belief systems, but actively seeks to impose its own ideology on the state and through the state.[45]

However, Freed argues that it is inconclusive whether secular humanism can be regarded as a religion. If one focuses on the fact that secular humanism 'manifests functional analogues' to belief in God and the supernatural 'in its belief in reason and focus upon the natural world', possessing a system of beliefs about ultimate questions 'that could function as the belief in God does in traditional religions', then 'secular humanism should be considered a religion'.[46] If secular humanism then becomes a defining feature of a state, this could be viewed as a kind of 'sacralisation of politics' which is problematic from an establishment perspective.[47] However, if one focuses on 'external characteristics and typical beliefs', secular humanism is 'clearly nonreligious in nature for establishment clause purposes'.[48] Moreover, Freed claims, secular humanism's ideas could be viewed as philosophical rather than religious.[49]

Perhaps the only clear outcome is that categorising the secular or secular humanism (they will now be used interchangeably based on the definitions provided) as a religion has some merit, but will be inevitably controversial and contestable. Notwithstanding that caveat, the arguments in this article and particularly in Parts III and IV are intended to suggest that secular humanism is religious in nature, not

[45] Ibid 31.

[46] Freed, above n 38, 1168-1170.

[47] See e.g. Emilio Gentile and Robert Mallett, 'The Sacralisation of politics: Definitions, interpretations and reflections on the question of secular religion and totalitarianism' (2000) 1(1) *Totalitarian Movements and Political Religions* 18.

[48] Freed, above n 38, 1170.

[49] Freed, above n 38, 1171-1172.

merely philosophical. These arguments occur in the context of questioning the propriety of the 'secular state' as a neutral approach for structuring the relationship between religion and politics, particularly in the Australian establishment context. The next part turns to consider this approach.

III THE SECULAR STATE

A *Secularism as a Structure for Religion/State Relationships*

In addition to what has already been discussed above, there is a voluminous literature on the issue of characterising the structural relationship between religion and the state, including several diverging positions on secularism. There is room here to only very briefly summarise. Some leading scholars have characterised our societies as 'post-secular', by which they mean that social states of religiousity are shifting and the trend of secularisation is reversing, resulting in academic commentators seeking to make sense of religion and its place in a so-called 'post-secular' society where belief is in vogue again.[50] In this context Habermas argues that the secular and the religious (in particular Christianity) have a shared intellectual, social and political heritage, and it is therefore both imprudent and impractical to exclude religious influence from the intellectual, social and political spheres.[51] Other scholars have re-interrogated the secular, secularisation theories and secular-liberal politics from various philosophical and theological perspectives, especially with a view to undermining the classical secular position which claims that secularism is a

[50] See e.g. the collection of essays in Philip Gorski (ed), *The Post-Secular in Question: Religion in Contemporary Society* (New York University Press, 2012).

[51] See e.g. Jurgen Habermas, 'Religion in the Public Sphere' (2006) 14(1) *European Journal of Philosophy* 1; Jurgen Habermas, 'Notes on Post-Secular Society' (2008) 25(4) *New Perspectives Quarterly* 17; Jurgen Habermas et al, *An Awareness of What is Missing: Faith and Reason in a Post-Secular Age* (Polity Press, 2010).

neutral approach to theories of state without any religious characteristics.[52] Finally, still others have restated and vigorously reasserted particular versions of political liberalism and secularism, arguing that a 'secular' or 'neutral non-religious approach' is necessary for a properly functioning democracy in terms of equality, freedom and participation.[53]

The traditional and most popular narrative of secularist theories of state in modern liberal Western democracies is the idea of a formal separation of church and state, where the secular identifies a sphere known as the religious, and distinguishes that (private) sphere from public institutions like the state, politics and law.[54] There are two main traditions of secularism in this context. The first is 'laicism', a separationist narrative which seeks to expel religion from politics, and the second is 'Judeo-Christian', a more accommodationist position which recognises Judeo-Christianity as the unique foundation for secular democracy.[55] The object of laicism is to create a 'neutral' public space in which religious beliefs and institutions lose their political significance and their voice in political debate, or exist purely in the

[52] See e.g. Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford, 2003); William Connolly, *Why I Am Not a Secularist* (University of Minnesota Press, 1999); Craig Calhoun et al (eds), *Rethinking Secularism* (Oxford, 2011); Charles Taylor, *A Secular Age* (Harvard University Press, 2007); John Milbank, *Beyond Secular Order: The Representation of Being and the Representation of the People* (Wiley-Blackwell, 2013); Alex Deagon, *From Violence to Peace: Theology, Law and Community* (Hart, 2017).

[53] See e.g. 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: Expanded Edition* (Columbia, 2011); Stephen Macedo, *Liberal Virtues: Citizenship, Virtue, and Community in Liberal Constitutionalism* (Oxford, 1991); Robert Audi, *Religious Commitment and Secular Reason* (Cambridge, 2000); Brian Leiter, *Why Tolerate Religion?* (Princeton, 2013).

[54] Hurd, above n 4, 13-14; Carl Hallencreutz and David Westerlund, 'Anti-Secularist Policies of Religion' in David Westerlund (ed) *Questioning the Secular State: The Worldwide Resurgence of Religion in Politics* (C. Hurst and Co, 1996) 3.

[55] Hurd, above n 4, 5. See also Semiha Topal, 'Everybody Wants Secularism – But Which One? Contesting Definitions of Secularism in Contemporary Turkey' (2012) 25(1) *International Journal of Politics, Culture and Society* 1.

private sphere. 'The mixing of religion and politics is regarded as irrational and dangerous'.[56] Laicism argues that a state is either religious and authoritarian or secular and democratic, while adopting and expressing a 'pretense of neutrality' regarding the assumption that a fixed and final separation between religion and politics is both possible and desirable.[57] Judeo-Christian secularism does not attempt to expel religion from political discourse or starkly distinguish between religious and secular but instead argues that traditional Judeo-Christian beliefs and culture form the ground and framework for a liberal democracy. It produces a set of common assumptions which will remove sectarian division and allow moral consensus through democratic deliberation.[58]

Bhargava articulates at least three different models of political secularism in the West. The first is 'one-sided exclusion' or the French model, where the state can intervene in all religious matters but no corresponding power was available to any other religion. The second is 'mutual exclusion' or the US model, which consists of the strict separation of the affairs of the state from religious affairs and vice versa. This is designed to promote religious liberty by preventing the state or other religions using the state apparatus to restrict religious freedom. Third is the European or UK 'moderate secularism', where the public or official monopoly of religion remains intact even as its social and political influence declines.[59] The US model appears to correspond closely to the laicist account and the UK model reflects a Judeo-Christian account.

[56] Hurd, above n 4, 5.
[57] Ibid.
[58] Ibid 6.
[59] Rajeev Bhargava, 'How Secular is European Secularism?' (2014) 16(3) *European Societies* 329, 330-332.

Benson also provides a useful taxonomy, specifically from an establishment perspective in the US context:

> At least three definitions of a "secular" state seem to be most frequently used:
>
> 1. The state is expressly non-religious and must not support religion in any way (neutral secular);
>
> 2. The state does not affirm religious beliefs of any particular religious group but may act so as to create conditions favourable to religions generally ("positive" secular);
>
> 3. The state is not competent in matters involving religion but must not act so as to inhibit religious manifestations that do not threaten the common good ("negative" secular).
>
> In all three of these the state is viewed as "outside" the "faith-claims" represented by "religious views." This "external" aspect is largely implicit.[60]

These three definitions fall roughly into the three main frameworks for interpreting the religion/state relationship through an establishment clause, as articulated by Cornelius: 'Wall of Separation or absolute separation theory', 'Strict Neutrality theory', and the 'Accommodation theory'.[61] Wall of Separation theory creates a complete and permanent separation of the spheres of civil and religious authority, prohibiting the use of public funds to aid religion and the interference of religion in state affairs.[62] This is the 'hard secularist' or 'laicist' position. Strict Neutrality involves the state being 'religion-blind' in the sense of not using religion as a standard for action or inaction, and not creating a benefit for religion or imposing a burden on religion.[63] Although not as explicit, this is also in effect a laicist position. Finally, Accommodation theory allows government cooperation with and assistance to religions, as long as there is no preferential treatment for particular religions and

[60] Benson, above n 11, 530.

[61] William Cornelius, 'Church and State – the Mandate of the Establishment Clause: Wall of Separation or Benign Neutrality' (1984) 16(1) *St. Mary's Law Journal* 1, 10.

[62] Ibid 12.

[63] Ibid 12-13.

no religious compulsion for non-believers.[64] This is a non-discriminatory approach which corresponds to the Judeo-Christian account.

Given these multifaceted definitions, it is important to be clear about what precisely is meant when this article says that a 'secular state' is not truly 'neutral', or that it is not an appropriate approach to theories of state. This article supports a Judeo-Christian/Accommodationist view which means that a particular religion should not be identified with the state, but the state can still facilitate and support different religions equally. This only means the state is non-discriminatory, not that it occupies some neutral, non-religious position called 'the secular'. The problem this article identifies is when a laicist secular state approach excludes 'religion' under the rationale of neutrality, but in its place imposes the values of secular humanism, which is itself arguably a religion. If the secular is a kind of religion, the laicist approach is not actually neutral and not an appropriate approach to theories of state.

Freed intends to bypass the problem of the allegedly religious characteristics of secular humanism by using a 'neutrality standard' rather than focusing on the definition of religion.[65] He advocates for state neutrality in the sense that the state only supports those ideas which can be classified as 'nonreligious (or truly secular)', as opposed to that which is religious or antireligious.[66] Where the state only supports the nonreligious, this will not constitute establishment. This neutrality approach might form the basis for an objection that there really is no conflict between laicist secularism and traditional religions such as Christianity. Indeed, there are some biblical passages which can be interpreted as advocating some kind of separation

[64] Ibid 13-14.
[65] Freed, above n 38, 1171-1173.
[66] Ibid.

between religion and the state.[67] Many scholars who advocate for separation support religious freedom and encourage a secularist approach for the sake of neutrality, equality, freedom and non-discrimination between religions – that is, to preserve religion.[68]

However, this proposed solution of the neutrality standard merely reinscribes the problem. The preceding outline of secular humanism suggests that there is no 'nonreligious' or 'truly secular' neutrality in the sense that Freed and others contend for. According to Alexander, Greenawalt recognizes that there is no neutral position in relation to the various metaphysical and normative views, and these views cannot be neatly delineated into secular and religious, especially given Greenawalt's view that religion cannot be conclusively defined.[69] More importantly, Benson notes that states cannot be truly neutral towards metaphysical or religious claims because the inaction towards some claims constitutes an affirmation of others.[70] Treating the secular sphere as neutral unofficially sanctions atheistic or agnostic beliefs with their own faith affirmations, such as 'there is no God' or 'God cannot be known'; these claims cannot be empirically proven, rendering them the default faith position for this 'secular' state.[71] As Somerville explains, 'some might see an irony in the fact

[67] See e.g. Jesus' claim that his followers and his kingdom are not of this world (John 18:36), or the injunctions to submit to the civil authorities (Romans 13:1-10).

[68] See e.g. Rawls, above n 53, 207-208; Audi, above n 53, 6, 34, 36; Robert Audi, 'The Place of Religious Argument in a Free and Democratic Society' (1993) 30 *San Diego Law Review* 677, 687, 694. This was the case for Australia's establishment clause, as will be explained below.

[69] Alexander, Religion Clause Theory, above n 1, 244.

[70] Benson, above n 11, 520. C.f. the 'Benign Neutrality' of Cornelius which possesses a 'harmless and favourable disposition' towards religion as long as compulsion and preferential treatment are avoided: Cornelius, above n 61, 35-39.

[71] Benson, above n 11, 545-546. See also Robert Melnick, 'Secularism in the Law: The Religion of Secular Humanism' (1981) 8 *Ohio Northern University Law Review* 329. C.f. Wojciech Sadurski 'Neutrality of Law Towards Religion' (1989) 12 *Sydney Law Review* 420 who advocates a strict separationist view on the basis that neutrality is not preserved when

that secularism betrays the marks of a quasi-religious ideology, on any functional definition of the religious.'[72]

Leigh and Ahdar note that the modern, secularist liberalism which arises out of an expanding state 'rightfully deserves criticism' because it is 'not neutral' when it comes to approaching religion; rather neutrality is a mirage which masks the taming of religious passions and the treatment of religious views as mere subjective preference which does not require attendance by the state.[73] In particular, this expansive and activist state focuses on consequential equality and substantive ends rather than individual procedural rights, has 'definite views about the good life', and the 'coercive apparatus to enforce it where necessary'.[74] In other words, the secular liberal state is not neutral, but has its own set of values which it imposes in competition with the values of traditional religions while simultaneously claiming legitimacy through neutrality.

Benson develops these contentions in some detail. He observes that the secular as an implicit faith position can use its false claim of neutrality to establish a state hegemony against explicit faith traditions, marginalising them and restricting their involvement in the public sphere.[75] When the faith assumptions of the non-religious are acknowledged, this will lay the platform for a proper engagement which recognises that we as humans always operate on some basis of faith.[76] This is not to advocate for a theocracy, but to expose the deceptive way in which people consider

preference is given to religious over non-religious views. However, this assumed dichotomy between religious and non-religious is precisely what this article questions.

[72] Somerville, above n 10, 251.

[73] Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford, 2013 2nd ed) 17-18.

[74] Ibid 16-17.

[75] Benson, above n 11, 521-522.

[76] Ibid 529.

the secular as entirely free of faith claims. Again, there should be a separation of church and state in the sense that the state is non-discriminatory when it comes to religion, but this does not mean that the state is free of faith or religiously neutral in the sense that it contains no faith claims and must silence religious voices and insights.[77] Hence '…the secular cannot be a realm of "non-faith". For there is no such realm. The question, then, is *what kinds of faith* are operative, not *whether or not* there is faith at work.'[78]

This contention converges with the conclusions drawn from an analysis of the Australian constitutional jurisprudence which is to follow. For example, Mortensen identifies potential problems with the strict separation involved in a 'wall of separation', 'because it is potentially anti-religious… separating the religious from the sphere of government action privileges the non-religious or the antireligious in the public square'.[79] The idea of state neutrality (as advanced by Patrick) embeds a distinct preference for particular types of religion and religious expression, is therefore 'not one of neutral evenhandedness', and neutrality itself is problematic in an arena of moral pluralism.[80] To contextualise these claims, an explanation of Australia as a secular state is required.

[77] Ibid 542-543.

[78] Ibid 531-532.

[79] Reid Mortensen, 'The Establishment Clause: A Search for Meaning' (2014) 33(1) *University of Queensland Law Journal* 109, 124.

[80] Ibid 124-125; c.f. Jeremy Patrick, 'Religion, Secularism, and the National School Chaplaincy and Student Welfare Program' (2014) 33(1) *University of Queensland Law Journal* 187.

B *Australia as a Secular State*

The traditional idea of Australia as a secular state arises from Section 116 of the Constitution, which states that:

> The Commonwealth shall not make any law for establiing 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.[81]

The first phrase of s 116 is known as the 'establishment clause'. In *Attorney-General (Vic); Ex rel Black v Commonwealth* or the 'Defence of Government Schools' (*DOGS*) case, the High Court took a narrow view of what it means to 'establish any religion'.[82] It held that the establishment clause prohibits the 'statutory recognition of a religion as a national institution' or a 'state church', and prohibits a 'deliberate selection of one [religion] to be preferred before others' which creates a 'reciprocal relationship imposing rights and duties on both parties'.[83] Establishment may include the 'entrenchment of a religion as a feature of and identified with the body

[81] For an overview and consideration of the legal and historical context of s 116, see Anthony Blackshield, 'Religion and Australian Constitutional Law' in P Radan et al (eds) *Law and Religion* (Routledge, 2005). For the Establishment clause specifically see Mortensen, Establishment Clause, above n 79.

[82] (1981) 146 CLR 559; Joshua Puls, 'The Wall of Separation: Section 116, the First Amendment and Constitutional Religious Guarantees' (1998) 26 *Federal Law Review* 139, 143-145.

[83] *DOGS* (1981) 146 CLR 559 at 582 per Barwick CJ; at 604 per Gibbs J; at 612 per Mason J; at 653 per Wilson J; see also Luke Beck, 'Clear and Emphatic: The Separation of Church and State Under the Australian Constitution' (2008) 27(2) *University of Tasmania Law Review* 161, 174-176; Mortenson, Establishment Clause, above n 79, 115-119.

politic', and the 'identification of the religion with a civil authority so as to involve the citizen and the Commonwealth in the observance and maintenance of it'.[84]

These notions could be more colloquially summarised as a separation between Church and State. However, as Stephen J noted in *DOGS*, s 116 'cannot readily be viewed as the repository of some broad statement of principle concerning the separation of Church and State, from which may be distilled the detailed consequences of such separation.'[85] Beck usefully clarifies that 'in Australia, at the federal level, the constitutional "separation of Church and State" means only the legal effect of s 116'.[86] Nevertheless, many commentators assume that the separation of church and state which is the legal effect of s 116 is also, in fact, the establishment of a secular state.[87]

This may partly be because of the religious arguments which undergirded the inclusion of s 116. One of the main arguments for the inclusion of s 116 as a limit on Commonwealth legislative was that the preamble recognition of 'God' would transform the Australian identity into a religious identity, therefore allowing the Commonwealth to pass religious laws.[88] The Adventists, supported by the secularists, advocated for a limiting provision to prevent the passing of Sunday

[84] *DOGS* (1981) 146 CLR 559 at 582 per Barwick CJ; at 604 per Gibbs J; at 612 per Mason J; at 653 per Wilson J; see also Beck, Clear and Emphatic, above n 83, 174-176.

[85] *DOGS* (1981) 146 CLR 559 at 610-612.

[86] Beck, Clear and Emphatic, above n 83, 164.

[87] In the US context, see e.g. Steven Smith, 'Separation and the "Secular": Reconstructing the Disestablishment Decision' (1989) 67(5) *Texas Law Review* 955.

[88] Richard Ely, *Unto God and Caesar: Religious Issues in the Emerging Commonwealth, 1891-1906* (Melbourne University Press, 1976) 21-31.

observance laws. In their view, religion and the state should be kept completely separate to prevent unsound government and religious persecution by the state.[89] This separation narrative also appears to encapsulate what is meant by the scholarly assumption that Australia is a secular state. Mortensen says explicitly that the establishment clause is 'one of our most important institutions of liberal secularism'.[90] Going back to Locke's distinction between belief and knowledge, Mortenson argues for the state to be disinterested and skeptical when it comes to religious issues to prevent the state from defining permissible religious belief and practice. In other words, religion is irrelevant to legal and political status such that there is an effective separation between church and state.[91]

Beck also acknowledges the 'received wisdom that Australia's system of government is secular and religiously neutral'.[92] In this context Commonwealth law should not advocate for or protect any one religion above others. Australia is a 'modern, multicultural and secular state' with 'secular institutions of government'.[93] Here Beck is arguing that s 116 should prevent particular religious laws from operating. The idea of secular means separation; that is, Commonwealth laws should not contain or advocate particular religious content. In addition, Commonwealth laws should not protect particular religions from criticism by other religions or nonreligions (i.e. through blasphemy laws). Australia as a secular state means that religion should not be regulated by the state.

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[89] Luke Beck, 'Higgins' Argument for Section 116 of the *Constitution*' (2013) 41 *Federal Law Review* 393, 397-398. See also Reid Mortensen, Establishment Clause, above n 79, 111-113.

[90] Reid Mortensen, 'Blasphemy in a Secular State: A Pardonable Sin?' (1994) 17(2) *UNSW Law Journal* 409.
427.

[91] Ibid 426-427.

[92] Beck, Clear and Emphatic, above n 83, 195.

[93] Ibid 187, 182.

The recent New South Wales Court of Appeal decision of *Hoxton Park Residents Action Group Inc v Liverpool City Council* is an example of judicial commentary assuming that Australia is a secular state.[94] Acting Justice Basten explicitly states that s 116 'establishes the Commonwealth as a secular polity', and the justification given is the content of s 116.[95] The assumption is clearly that it is the legal effect of s 116 which makes Australia a secular state. Here a secular polity is defined to mean 'separation' between the state and religion, or state 'neutrality' towards religion. Advocating separation assumes that only state neutrality will avoid sectarian division on religious issues, producing true freedom of religion.[96] Acting Justice Basten refers to the *DOGS* definition of 'establish', which involves the 'preferential treatment' of one religion to the exclusion of others. Acceptable legislation must be 'neutral and non-discriminatory as between secular and other religious institutions and as between different faiths'.[97] Therefore, a secular polity with state neutrality means avoiding discriminatory or preferential treatment, including genuine neutrality with regard to the secular (as opposed to 'other religions').

There is a subtle difference between the secularity articulated by Basten JA, and that articulated by Mortensen and Beck. Acting Justice Basten views the Australian secular polity as non-discriminatory between religion – more of an accommodationist view which acknowledges the presence of religion and allows the state to regulate religion, as long as it is done equally (and within the scope of all the other requirements in s 116). Acting Justice Basten also effectively equates the secular with religion by referring to 'secular and other religious institutions', acknowledging the requirement for genuine neutrality in terms of equal treatment

[94] [2016] NSWCA 157 (Basten JA).
[95] Ibid [249].
[96] Ibid [253].
[97] Ibid [279].

between all faiths, including both secular humanism and the traditional religions. Conversely, in the works cited Mortensen and Beck appear to be advocating for a strict separation or laicist approach, where the state and religion are completely separate. A secular state regards religion as irrelevant and is religiously neutral in the sense of non-religious – or at least that is what is claimed. For as has been already indicated and will be explained further, secularism in this strict separationist sense is not truly neutral, for the secular is actually a kind of religion.

State secularism as lacking neutrality is more explicit in some other commentators. Thornton and Luker question 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'.[98] Their basis for this, they claim, is the philosophy of state secularism which eschews the privileging of one religion over others. There is perhaps an element here of the accommodationist approach to s 116 in terms of law not privileging a particular religion, but Thornton and Luker go even further, decrying religious influence and effectively advocating an idea of state secularism as a separation not only between religion and law, but also religion and politics – i.e. religions are not allowed to 'influence' 'public affairs and discourse'. This seems very far removed from the original purpose of s 116 as simply providing a non-discriminatory approach to religion for prevention of sectarian division, and implies not a true neutrality in the sense of the state not advocating for a particular religion, but a deliberate exclusion of religion from the public domain and the consequent dominance of 'secularism'.

[98] M Thornton and T Luker (2009) 'The Spectral Ground: Religious Belief Discrimination' 9 *Macquarie Law Journal* 71, 72, 74.

For the framers who constructed s 116 and inserted it into the Constitution, rather than a strict insistence on the state as a secular entity which excluded public religion, what was important was the state avoiding the promotion of religion which would cause sectarian division in the community.[99] 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.[100] For example, both Higgins and Barton 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.[101] There should be a state impartiality towards religion, reflected both in the avoidance of religious preference and the protection of individual and group autonomy in matters of religion as participants in the wider community.[102] 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 [sic] likes'.[103]

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.[104] Consequently, the purpose undergirding

[99] S McLeish (1992) 'Making Sense of Religion and the Constitution: A Fresh Start for Section 116' 18 *Monash University Law Review* 207, 221–22.

[100] Ibid 222.

[101] *1898 Australasian Federation Conference Third Session Debates*, Melbourne, 17 March 1898, 2474 (H B Higgins and Hon Edmund Barton).

[102] McLeish, above n 99, 223.

[103] *1898 Australasian Federation Conference Third Session Debates*, Melbourne, 8 February 1898, 660 (J H Symon).

[104] Puls, above n 82, 140.

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'.[105] 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'.[106]

Thus, it seems to be assumed that the establishment clause, at least formally, implies the approach of state secularism or a state 'establishment' of the secular in the sense that secularism is viewed as an established feature of the Australian polity.[107] Some commentators interpret this as laicism or strict separation where religion is irrelevant to the state and should be kept in a private context, while others take a more accommodationist view which allows public religion and the state to regulate religion in a non-preferential and non-discriminatory way.

The argument for a secular state in terms of loosely separating religion from the state as a means of preventing one religion dominating others, or preventing a state-enforced orthodoxy, is a persuasive one and consistent with the original purpose behind s 116 as articulated by the framers and later in *Hoxton Park Residents*. It is not that conclusion which is really contested in this article. Rather, the article questions the premise that the 'secular' state is actually a neutral arbiter between different religions when this premise forms part of an argument for a secular state in terms of laicist strict separation. It is precisely this problem which Mortensen later

[105] Ibid 151; C.f. Gabriel Moens, 'The Menace of Neutrality in Religion' (2004) 5(1) *Brigham Young University Law Review* 525.

[106] *1898 Australasian Federation Conference Third Session Debates*, Melbourne, 8 February 1898, 659 (J H Symon).

[107] See also Puls, above n 82; McLeish, above n 99; Sadurski, Neutrality of Law, above n 71, 421. This is despite Sadurski's persuasive critique of the High Court's reasoning regarding the narrow interpretation of establishment at 448-451.

cites for rejecting the equivalent framework of a 'wall of separation' in the sense of a complete separation between religion and the state, coming down in favour of Australia as non-discriminatory between religions.[108]

As the next part will examine in the Australian context, if the secular is actually a type of religion, a laicist secular state merely reinforces one 'religion' dominating others and produces a different kind of state-enforced orthodoxy. This has significant consequences for Australian High Court interpretation of the establishment clause and the definition of religion; for if it is the case that the secular is a kind of religion, the idea that Australia can be straightforwardly called a 'secular state' is called into serious question from a constitutional perspective.

IV THE SECULAR AND THE RELIGIOUS

A *The High Court on the Secular and the Religious*

What the Australian debate about the establishment clause lacks is an analysis of the relationship between the secular and the religious. The discussions which do occur focus on the definition of religion generally without exploring the question of whether the secular or secular humanism could fit within the various proposed definitions, or focus on the nature and scope of establishment without considering whether the secular could be established.[109] Consequently, there is significant ambiguity regarding the extent to which the secular can be considered as a religion

[108] Mortensen, Establishment Clause, above n 79, 123-126.

[109] See e.g. Wojciech Sadurski (1989b) 'On Legal Definitions of Religion' (1989) 63 *Australian Law Journal* 834, 837-840; McLeish, above n 99, 224-226; Puls, above n 82, 154-156; Beck, Clear and Emphatic, above n 83, 194; Luke Beck, 'The Establishment Clause of the Australian Constitution: Three Propositions and a Case Study' (2014) 35 *Adelaide Law Review* 225; Mortensen, Establishment Clause, above n 79.

for Australian constitutional purposes, and following from that whether or not a secular state can be viewed as in conflict with the establishment clause. Part IV therefore specifically considers whether the secular can be viewed as a type of religion in the Australian establishment context.

According to the High Court, the definition of religion in the Australian constitutional context extends beyond monotheistic or even theistic religions, and includes belief in a supernatural thing or principle, where supernatural means that which is beyond perception by the five natural senses. Religion need not include any form or code of conduct, only a few specific beliefs. More generally, the category of religion is not closed.[110] In *Jehovah's Witnesses*, Latham CJ indicated the broad and dynamic nature of what constitutes religion, and the consequent reluctance of the High Court to impose a precise definition.[111] He stated that religion may include a set of beliefs, code of conduct, or some kind of ritual observance. Religion is not restricted to mere variations of theism, but includes non-theistic religions such as Buddhism. Religion for the purposes of s 116 and the establishment clause is to be regarded as operating with respect to all these factors, and it is not for the High Court to 'disqualify certain beliefs as incapable of being religious in character'.[112] However, in *Church of the New Faith* (the 'Scientology' case), the High Court clarified this general position and articulated more specific indicia to be referenced in the determination of whether particular conduct and/or beliefs is classified as religion.[113]

[110] Beck, Clear and Emphatic, above n 83, 164-167.
[111] *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116.
[112] Ibid 123-124.
[113] *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120.

Acting Chief Justice Mason and Brennan J observed that humanity has sought answers to fundamental questions such as the existence of the universe, the meaning of human life, and human destiny, and some believe that an adequate solution to these issues 'can be found only in the supernatural order, in which man [sic] may believe as a matter of faith, but which he [sic] cannot know by his [sic] senses and the reality of which he [sic] cannot demonstrate to others who do not share his [sic] faith'.[114] This faith may be revealed or confirmed through some supernatural authority or it may be based in reason alone; 'faith in the supernatural, transcending reasoning about the natural order, is the stuff of religious belief'.[115] Religious belief 'relates a view of the ultimate nature of reality to a set of ideas of how man [sic] is well advised, even obligated, to live'.[116] They concluded:

> We would therefore hold that, for the purposes of the law, the criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief…Those criteria may vary in their comparative importance, and there may be a different intensity of belief or of acceptance of canons of conduct among religions or among the adherents to a religion. The tenets of a religion may give primacy to one particular belief or to one particular canon of conduct.[117]

Justices Wilson and Deane stated similar principles, though they provided more detailed criteria. They agreed that religion should not be limited to the theistic religions, and also agreed with Latham CJ's view that there is no single characteristic of religion which may be formalised as a legal criterion to be analysed using logical structures. Instead, the question will usually be determined 'by reference to a number of indicia of varying importance', or 'guidelines' which are 'derived from

[114] Ibid 134.
[115] Ibid.
[116] Ibid 135.
[117] Ibid 137.

empirical observation of accepted religions'.[118] They summarise what is, in their view, five of the more important indicia in this way:

> One of the more important indicia of "a religion" is that the particular collection of ideas and/or practices involves belief in the supernatural, that is to say, belief that reality extends beyond that which is capable of perception by the senses. If that be absent, it is unlikely that one has "a religion". Another is that the ideas relate to man's nature and place in the universe and his relation to things supernatural. A third is that the ideas are accepted by adherents as requiring or encouraging them to observe particular standards or codes of conduct or to participate in specific practices having supernatural significance. A fourth is that, however loosely knit and varying in beliefs and practices adherents may be, they constitute an identifiable group or identifiable groups. A fifth, and perhaps more controversial, indicium is that the adherents themselves see the collection of ideas and/or practices as constituting a religion.[119]

Justices Wilson and Deane emphasise that the indicia do not determine the question, and are to be used as an aid. However, they note that all the indicia are satisfied by most or all leading religions, and it is therefore unlikely that an impugned 'religion' would be classified as such if it lacked all or most of the indicia. Conversely it would be unlikely that any impugned 'religion' which satisfied the indicia would be denied classification as a religion.[120] Hence, the definition of religion in Australia is broad and dynamic for constitutional purposes; a definition has not been explicitly prescribed by the High Court and will be largely dependent on the flexible application of the indicia in each unique circumstance.

[118] Ibid 171-173.
[119] Ibid 173-174.
[120] Ibid 173-174.

As mentioned previously, the primary Australian legal authority on the establishment clause is the *DOGS* case.[121] Both the majority and dissenting judgments in *DOGS* appear to assume the traditional dichotomy between religious and secular, at least as far as it was relevant in the case (which considered whether Commonwealth grants to non-government schools, including 'religious' schools, constituted establishment of a religion). For example, Barwick CJ for the majority argued that 'church schools impart education in ordinary secular subjects' and also 'give religious as well as secular instruction'.[122] He continued:

> If it be assumed that in some schools religious and secular teachings are so pervasively intermingled that the giving of aid to the school is an aid to the religion, and if it be further assumed that some religions, which conduct more schools than others, will receive more aid than others, it still does not follow that any religion is established by the legislation.[123]

The fact that religious schools educate on both religious and secular subjects, and that religious and secular teachings may be intermingled, implies that there is a fundamental distinction between the secular and the religious. Similarly, Murphy J in dissent states that 'the general picture is that as well as secular instruction each of the church schools engages in instruction in its particular religion'.[124] Furthermore, Murphy J compares the 'secular purpose' of using school buildings to educate to the 'religious goal' of instruction in that particular religion. The fact that the school is primarily an educational institution outweighs its nature as a 'religious' school.[125] Again, there is a clear and unmistakable demarcation between the secular and religious. It follows from this categorisation that characterising the secular as

[121] *DOGS* (1981) 33 ALR 321.
[122] Ibid 332.
[123] Ibid 346.
[124] Ibid 359.
[125] Ibid 389.

religious or as a type of religion would be quite foreign to the way the High Court expressed itself in *DOGS*.[126]

This approach was also followed in *Church of the New Faith*, which considered the definition of religion more specifically with implications for the relationship between the religious and the secular.[127] Acting Chief Justice Mason and Brennan J explicitly rejected the US Supreme Court criteria for defining religion, which included an analysis of the kinds of questions the impugned religion asks. If those questions are of a fundamental nature, relating to origin, purpose, destiny and humanity's place in the universe, this lends support to considering the 'worldview' as a religion.[128] On that basis, the Supreme Court included Secular Humanism as a religion. However, Mason ACJ and Brennan J argued that that the focus should be not be on the kinds of questions that are asked, but whether the answers are expressed in terms referring to the supernatural as earlier defined:

> To attribute a religious character to one's views by reference to the questions which those views address rather than by reference to the answers which they propound is to expand the concept of religion beyond its true domain… such an approach sweeps into the category of religious beliefs philosophies that reject the label of a religion and that deny or are silent as to the existence of any supernatural Being, Thing or Principle.[129]

It seems straightforward that the Justices had in mind here the notion of, for example, secular humanism being defined as a religion. Their argument would entail the conclusion that the secular is not a type of religion because it rejects the label of a

[126] A distinct but importantly related discussion is the scope of 'religion' in the context of the establishment clause, and particularly whether and how s 116 may regulate 'non-religions'. This issue and the position of various commentators will be analysed in the section 'Secularism and Establishment' later in this part.

[127] *Church of the New Faith* (1983) 49 ALR 65.

[128] Ibid 76.

[129] Ibid.

religion and explicitly eschews a supernatural being, thing or principle. The argument firstly assumes that no worldview which rejects the label of religious is in fact religious. However, there is reason to doubt the validity of this assumption, or at least its status as anything more than a single and relatively insignificant factor to be taken into account. It is conceivable that a worldview which appears to be religious may not express itself as religious, and so a consideration of other more significant indicative factors may be necessary to determine whether the worldview is in fact a religion. This is the approach taken by Wilson and Deane JJ, and such an approach is far less reductionist.[130]

The other claim is that a worldview which denies or is silent as to the existence of the supernatural cannot be a religion. An equivalent statement would be that a worldview which explicitly or implicitly eschews the supernatural cannot be a religion. Such a statement assumes that religion must embrace, rather than eschew, the supernatural. This is plain enough, but a further assumption is that embracing the supernatural necessarily involves ascription of or to the supernatural. For example, secular humanism cannot be a religion because its answers to the fundamental questions of life are not framed explicitly in supernatural terms. This objection is actually quite similar to the labelling objection because it relies on intentionality and explicit terminology rather than the characteristics of the belief. It again is conceivable that a worldview may explicitly eschew the supernatural while implicitly embracing it, and this article's position is that applying the indicia outlined by Wilson and Deane JJ may be enough to suggest an implicit religion, if not an explicit one. For example, as the indicia are applied to secular humanism later in this part, the article suggests that the secular humanist reliance on reason

[130] C.f. Puls, above n 82, 154.

occupies the category of supernatural in the sense that reason is not perceptible by the natural senses. If such a contention is successfully made out, it supports the position that the secular is a type of religion.

Furthermore, though Mason ACJ and Brennan J appear to very much reject the idea that the secular is a kind of religion, they make one statement which implicitly (and possibly unconsciously) supports the idea that the secular is a kind of religion. The Justices claim that 'under our law, the State has no prophetic role in relation to religious belief; the State can neither declare supernatural truth nor determine the paths through which the human mind must search in a quest for supernatural truth'.[131] At first glance it seems patently absurd to argue that this is endorsing a view that the secular is a kind of religion. It seems to be merely giving expression to the accepted view that Australia is a secular state. Let us, however, examine the quote more closely.

It is assumed by the Justices that the State cannot declare supernatural truth and Australia is a secular state. As previously discussed, a traditional view of the secular rejects the existence of the supernatural. This raises an important and fundamental question. If the State is secular and cannot declare supernatural truth, does this mean it cannot declare itself as secular, which traditionally entails the rejection of supernatural truth? In other words, the rejection of supernatural truth could itself be seen as a type of supernatural truth. One might claim that it is rather a truth about the supernatural, and not a supernatural truth in terms of a religious doctrine of some type. However, this is just to redefine supernatural as religious, when the nature of religion is to be defined, according to the more detailed approach of Wilson and

[131] *Church of the New Faith* (1983) 154 CLR 120 at 134; Beck, Clear and Emphatic, above n 83, 175.

Deane JJ, by multiple indicia – only one of which is the supernatural nature of the view. Furthermore, 'supernatural' is itself defined as not perceptible by the five natural senses, and on the face of it the secular claim that the supernatural does not exist (or the rejection of supernatural truth) cannot be verified by the natural senses. Thus, the problem of the State declaring itself as secular (where secularism is arguably a supernatural truth) could be read as suggesting that the secular is a type of religion.

Clarifying the argument for this rather radical claim, the initial premise is that the State declares itself as secular. The secular, or secular humanism, claims that the supernatural does not exist. This (as asserted) fact that the supernatural does not exist cannot be perceived by the natural senses; it is impossible to empirically verify, for example, whether 'God' or a 'supernatural realm' exists. This inability to be perceived by the natural senses is precisely the definition of supernatural, according to the High Court. Therefore, bearing in mind that belief in some form of the supernatural is one of the criteria for religion, it follows that the secular is a kind of religion, because it, paradoxically, believes in a supernatural claim that there is no supernatural. It further follows from this that the secular is not a truly 'non-religious' or 'neutral' view for the State to hold or be. It also suggests incongruence foundational to the concept of a 'secular state' which is addressed later in the context of the establishment clause.

Mortensen could be seen as alluding to that same incongruence from a different angle. He states:

> Certainly, a "free market in all opinions" does not leave it open to Christians, Muslims, Hindus or Secular Humanists to define through the coercive powers of the state spheres of orthodoxy and permissible religious and anti-religious discourse.[132]

Though the sentiment of this quote is beyond dispute, the most interesting thing about it is the inclusion of Secular Humanists in a category also consisting of Christians, Muslims and Hindus. The argument appears to be that allowing a robust democracy and free speech where all opinions can be heard does not extend to allowing various individual views to dictate these debates through the state apparatus. Mortensen does mention religious and anti-religious discourse, and so it may be that Secular Humanism is viewed as anti-religious and the Christians, Muslims and Hindus are viewed as religious, but their combined grouping does yield ambiguity. Even assuming that Mortensen did not intend to put Secular Humanism in a religious category, it does at least open the possibility that a secular state, presumably governed by secular humanism, is not the best approach to regulating different views because it is not truly neutral.

More explicitly, Whitehead and Conlan argue that in the US establishment context, secularism or secular humanism (which they equate) can be considered as a 'belief' and therefore a 'religion' for establishment purposes.[133] 'It is clear that secular humanism is a religious belief system subject to first amendment protection and prohibition'.[134] Thus, if the religion of secular humanism is entrenched in government policy and programs, this should be deemed unconstitutional.[135] The

[132] Mortensen , Blasphemy, above n 90, 431.

[133] Whitehead and Conlan, above n 40, 1-2. See also Steven Lee, '*Smith v Board of School Commissioners*: The Religion of Secular Humanism in Public Education' (1988) 3 *Notre Dame Journal of Law, Ethics and Public Policy* 591.

[134] Whitehead and Conlan, above n 40, 13.

[135] Ibid 17-18. But see the strident critique by Robert Davidow, '"Secular Humanism as an "Established Religion": A Response to Whitehead and Conlan' (1980) 11 *Texas Law Review* 51.

religious aspect of secular humanism focuses upon humanity and its concerns and is consequently restricted to what is physically observable or knowable through the intellect. McGhehey notes that Secular Humanism has 'organisational structures, 'revered leaders', and adherents who proselytize.[136] Since secular humanism denies the existence of God and the supernatural without a scientific basis, it is in effect a faith position. She concludes:

> The tenets of Secular Humanism which, for example, deny the existence of the supernatural and advance a position concerning the nature of the universe, the nature and purpose of man, and the source of morality are faith-based. This aspect of Secular Humanism supports the argument that it should be considered a religion for constitutional purposes. As such, materials espousing the underlying beliefs of Secular Humanism should be analyzed as any other religion.[137]

Apart from this, there is further literature which critiques secularism generally and the specific idea of secular law, arguing that secularism is actually a type of religion. The next section briefly outlines that literature to support the argument that the secular is a type of religion which can be evaluated as such when addressing the problem of secularism potentially being established in the form of the secular state.

B *Secularism as a Type of Religion*

The first kind of analysis is a purely theological/philosophical analysis which is characteristic of someone like John Milbank. Milbank's argument is that the secular is not actually an 'autonomous discipline', but borrows 'modes of expression from religion' – in this sense, secular reason (reason allegedly separated from faith) is

[136] McGhehey, above n 41, 390.
[137] Ibid 390-391.

actually 'heresy in regard to Christian orthodoxy'.[138] This means the governing assumptions of the secular are bound up with the modification or rejection of orthodox Christian positions, and these are no more rationally justifiable than the Christian positions themselves in the sense that they are equally based in faith.[139] The claim is that 'behind the *politics* of modernity (liberal, secular) is an *epistemology* (autonomous reason), which is in turn undergirded by an *ontology* (univocity and denial of participation)'.[140] In short, according to Milbank there are at least two reasons why the secular can be viewed as religion. First, the secular was contingently invented out of a theological framework and is based on theological assumptions; second, the secular has faith in autonomous reason. These reasons are considered in turn.

Milbank argues that Duns Scotus' univocity of Being (that God and creation exist in the same way) and separation of theology from philosophy are related since the univocal nature of Being implies an *a priori* notion of being which is then applied to God, rather than considering God the very paradigm or distinctive pinnacle of being. This notion of Being detached from the divine nature and revelation therefore fundamentally separates ontology from theology, or metaphysics from revelation. Being can be apprehended by pure reason apart from faith.[141] In place of a Thomist participatory framework which understands the immanent as 'suspended from' the

[138] John Milbank, *Theology and Social Theory: Beyond Secular Reason* (Blackwell Publishing, 1990) 1. For a full version of the ensuing arguments with detailed explanations see Deagon, above n 52.

[139] John Milbank, 'The Double Glory, Or Paradox Versus Dialectics: On Not Quite Agreeing with Slavoj *Žižek'* in C Davis (ed), *The Monstrosity of Christ: Paradox or Dialectic?* (MIT Press, 2009) 216.

[140] James Smith, *Introducing Radical Orthodoxy: Mapping a Post-Secular Theology* (Baker, 2004) 99-100.

[141] John Milbank, *Theology and Social Theory: Beyond Secular Reason* (Blackwell, 2nd ed., 2006) 305-306.

transcendent, Duns Scotus assumed an ontology based on a univocal or 'flattened' being, one which denied the depth of being and 'unhooked' it from the transcendent, allowing the emergence of a 'secular' plane and 'secular' reason which are completely independent of the transcendent.[142]

This admittedly dense summary is designed to demonstrate one key claim: the secular contingently originated from within the Christian theological framework, and is predicated on theological assumptions surrounding the nature of being and knowledge. The secular is not inevitable; rather, like many religious sects, it was in effect created as a result of theological and philosophical disagreement. This indicates that the secular can be viewed as a type of religion in the sense that it is composed of particular assumptions and beliefs which are heterodox rejections or alterations of Christian theology.

The fact that the secular elevates or has faith in pure, autonomous reason also indicates that it can be viewed as a type of religion. The idea of faith assumed by Milbank comes from the New Testament use of the Greek term *pistis*, which means to have a conviction or trust in, and its root means to be persuaded. Milbank specifically defines faith and trust interchangeably: to trust is to have faith in, and to have faith is to trust. Faith includes both the affective element of trust, and the intellectual element of persuasion through reasons.[143] Perhaps counter-intuitively, this kind of faith is central to the legal context of the secular state. There is a type of religious soteriology implied in law, even its most 'secularised' iterations:

> Great hope is placed in law, properly understood and administered, as a vehicle for the transformation of society. Most movements for modern reform accept without question

[142] Smith, above n 40, 88-89.

[143] John Milbank, *The Future of Love: Essays in Political Theology* (Cascade Books, 2009) 150-153.

> law's account of itself as autonomous, universal, and above all, secular – meaning, in the first instance, religiously neutral, but also, more strongly, paradigmatically rational… law's claim to the universal resembles – indeed arguably derives its power from – the universalism that is claimed by… Christianity.[144]

Similarly, it might even be claimed that every legal system needs a transcendent source to give authority to its contents – even if, in lieu of a 'higher source', that transcendent source is law itself.[145] If it is accepted that there is no transcendent source attracting people's trust, law becomes the entity that people trust. 'To work effectively law must rely on more than coercive sanctions… it must attract people's trust and commitment. Quite simply, citizens must… place their faith in it'.[146] Law encourages belief in its own sanctity in order to encourage obedience.[147] Hence, the notion of faith may be viewed as essential to the effective functioning of law, especially from a secular perspective. The secular assumption is that there is nothing transcendent, particularly when it comes to the functioning of the state. However, the secular state creates a *de facto* 'God' by placing its faith in the 'god' of law together with its attributes of reason and rationality. As such, even secular reason, which claims to be pure reason or autonomous reason apart from faith, is actually a type of faith, similar to 'religious' faith. Such faith is not necessarily apart from reason or unreasonable, but faith is involved nonetheless. Since faith is an intrinsic part of religion, if this claim that the secular operates on the basis of faith is sustained, it would support the argument that the secular is actually a type of religion.

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[144] W Fallers-Sullivan, R Yelle, and M Taussig-Rubbo, 'Introduction' in W Fallers-Sullivan, R Yelle, and M Taussig-Rubbo (eds), *After Secular Law* (Stanford, 2011) 2-3.

[145] Ibid 3. Perhaps this allows law to be considered in terms of the mythic or pagan – see e.g. P Fitzpatrick, *The Mythology of Modern Law* (Routledge, 1992).

[146] Rex Ahdar, 'The Inevitability of Law and Religion: An Introduction' in R Ahdar (ed), *Law and Religion* (Ashgate, 2000) 5.

[147] Ibid.

Aquinas also attempts to demonstrate that the process of the natural sciences and the process of sacred doctrine both rely on faith, for both are either self-evident or reducible to the knowledge of a higher science which is self-evident, and simply accepted on the basis of that authority.[148] On this interpretation, though reason is distinguished from faith, both are ultimately based in faith. Both matters of reason (science) and matters of faith (doctrine), though operating on different planes, necessarily involve faith.

It may even be contended that faith is actually a presupposition of reason, which implies that the very notion of reason apart from faith is problematic. For if reason is viewed as independent of or autonomous from faith, and reason has no absolute foundations based in faith, then argument between different positions is precluded and pragmatically absurd. Any arguments which seek to go beyond tautology have to 'assume areas of given agreement', and to 'win an argument means to show the contradiction of alternative positions' – outside a 'horizon of shared faith' (or 'common feeling') no arguments would get off the ground.[149] Beyond the level of formal logic there is no single 'reason' without presuppositions, there are only many different, complexly overlapping traditions of reason (such as practical reason or speculative reason).[150] Though this does call into question the objective certainty of 'reason', it does not mean faith is a 'trump card' which may be played so as to end all discussion. Rather, acknowledging the different faith perspectives of participants and establishing commonly acceptable ground rules is the beginning of discussion. To suggest that reason is ultimately based in faith does not lead to the end of pursuing knowledge, but provides the means by which more nuanced and circumspect

[148] Thomas Aquinas, *Summa Theologica* (William Benton, 1952 vol 1) 4.

[149] John Milbank, 'Hume vs Kant: Faith, Reason and Feeling' (2011) 27 *Modern Theology* 276, 276, 278.

[150] Milbank, Future of Love, above n 143, 35.

questioning and investigation can continue, leading to more moderate and therefore more convincing conclusions.

Discursive reason operates within strict limits and is therefore not competent to pronounce judgment against other metaphysical or religious positions. A certain stance of faith is always involved.[151] Milbank further argues that any sharp separation of reason and faith is 'dangerous', because it implies that 'faith at its core is non-rational and beyond the reach of argument', while simultaneously implying that 'reason cannot impact on issues of substantive preference'.[152] But in reality, reason and faith are always intertwined in a beneficial way. Reason has to make certain assumptions and trust in the reasonableness of reality. Faith has to continuously think through the coherence of its own intuitions in a process that often modifies these intuitions. Thus, 'critical faith becomes a more reflective mode of feeling', and 'reason has always to some degree to feel its way forward'.[153] So secular reason, despite its claims to the contrary, is actually based in faith. The structure of the secular, in the sense that it intrinsically has faith in reason, expresses itself in a religious mode and this indicates that it can be viewed as a type of religion.

Asad takes a more anthropological approach which identifies that this strict version of secularism involves the attempt to define a state independent of religion such that citizens can be united as members of a state despite religious differences. Asad ultimately argues that secularism is a 'transcendent mediation' which paradoxically attempts to remove references to the transcendent real of religion.[154] Moreover,

[151] Milbank, Hume vs Kant, above n 149, 276-277.
[152] Ibid 277.
[153] Ibid.
[154] Asad, above n 20, 5. For more on the way in which it is said that Christianity invented the 'secular' and distinguished it from the 'religious' (secularising itself?) and the interplay of the secular and the religious, see Gil Anidjar, 'Secularism' (2006) 33(1) *Critical Inquiry* 52. For

Asad rejects the claim that this strict version of secularism is neutral and tolerant. Despite claims of negotiation and persuasion being the methods used in such a secular society, ultimately there is recourse to the violence of law to impose particular values. Indeed, negotiation with the threat of forced legal compliance in the event of disagreement is simply an exercise of power, for 'the law does not deal in persuasion', but always 'works through violence'.[155] He further argues that 'a secular state does not guarantee toleration; it puts into play different structures of ambition and fear'.[156] In other words, the secular is not truly neutral and not always rational – it can involve coercion and imposition of state perspectives.

Therefore, there are at least two reasons why the secular is a type of religion according to Milbank. First, the secular is a contingent invention based in a religious framework and operates on the basis of religious assumptions, and second, the secular has a faith in reason. It possesses a faith object similar to the way that many religions possess a faith object. In addition, Asad's analysis suggests that the secular is a type of religion in the way that it can attempt to impose its own perspective through the state apparatus. This literature and analysis of the High Court judgments indicate that the High Court's definition of religion can be challenged, particularly its explicit stark contrast between religion and secular.

It specifically raises the question of whether the religious indicia proposed by the High Court ought to be accepted by law and religion scholarship. Acting Chief Justice Mason and Brennan J only very sparsely cite scholarly non-legal (theological or sociological) sources to justify their development of the concept of religion and

jurisprudential implications of this contingent distinction see e.g. A Sarat, L Douglas and M.M. Umphrey (eds), *Law and the Sacred* (Stanford, 2007).

[155] Asad, above n 20, 6.

[156] Ibid 8.

criteria for defining it; Wilson and Deane JJ appear to cite no such literature at all. Given the controversial nature of such proclamations and the relative lack of expertise on the part of judges making them, there is certainly scope for challenging the High Court's concept of and criteria for religion.[157] However, this article will not attempt to do that here. For the purposes of determining whether the secular is a religion in the context of the establishment clause, these definitions and indicia must be used whether they are justified or not and whether one agrees with them or not. As Beck insightfully observes, 'mimicking the High Court's approach is methodologically useful in any attempt to predict the course of legal development'.[158] The object therefore is not to question these definitions and indicia, but to see whether the secular (as unpacked in this article) fits within them, and consequently whether Australia could be establishing a secular state in conflict with the establishment clause.

C *Secularism and Establishment*

There is a preliminary question as to whether secularism can truly be viewed as a 'recognised' state religion 'preferred before others', which is entrenched 'as a feature of and identified with the body politic'; in other words, whether the secular is truly 'established' given the High Court's narrow interpretation of 'establish'.[159] It is curious that in *Hoxton Park Residents* Basten JA referred to s 116 as 'establishing' a 'secular polity', and if establish is given its constitutional meaning that would appear to answer the question.[160] However, it is also possible that Basten

[157] See also e.g. Sadurski, Legal Definitions of Religion, above n 109, 837-840; Puls, above n 82, 154-156.

[158] Beck, Establishment Clause, above n 109, 226.

[159] *DOGS* (1981) 146 CLR 559 at 582 per Barwick CJ; at 604 per Gibbs J; at 612 per Mason J; at 653 per Wilson J.

[160] *Hoxton Park Residents Action Group Inc v Liverpool City Council* [2016] NSWCA 157 [249] (Basten JA).

JA was merely using the term 'establish' in its dictionary sense, so this should not be viewed as determinative.

The Court of Appeal in *Hoxton Park Residents (No 2)* noted that given the ability of the High Court to now examine the convention debates in construing Constitutional provisions (which was not allowed when *DOGS* was decided), there is scope for the possibility of a more flexible and less restrictive interpretation of what it means to 'establish' a religion.[161] The Court of Appeal did not expand on this proposition, but more recent High Court authority supports the idea that s 116 might be amenable to a more flexible interpretation than the one adopted in *DOGS*, or even the idea that the *DOGS* approach is too restrictive.[162] Beck proposes that a less restrictive interpretation of the establishment clause would involve operation in cases where the impugned law is supported by a head of power and understanding the term establishment more broadly and in multiple ways; it would also affirm that non-organised or non-institutional religions may be established.[163]

Beck also considers the idea that terms in s 116 have a centre and circumference of meaning. In this sense 'establishing a religion' possesses the narrow meaning articulated in *DOGS* (the centre) but does not exhaust that meaning (the circumference).[164] One could also apply this methodology to the meaning of religion in terms of the secular being a religion. Beck does note that there must be a boundary to conception of the terms, but given the argument that the secular is a type of

[161] See *Hoxton Park Residents Action Group Inc v Liverpool City Council (No 2)* (2011) 256 FLR 156, 166 [32]; Luke Beck, 'Dead DOGS? Towards a Less Restrictive Interpretation of the Establishment Clause: Hoxton Park Residents Action Group Inc v Liverpool City Council (No 2)' (2014) 37 *University of Western Australia Law Review* 59, 65.

[162] Beck, Dead DOGS, above n 161, 66-68; Beck, Establishment Clause, above n 109, 227-230. See also Mortensen, Establishment Clause, above n 79, 119-120.

[163] Beck, Dead DOGS, above n 161, 70-71.

[164] Beck, Establishment Clause, above n 109, 234-235.

religion and the idea that establishing a religion is a question of degree more open to flexible interpretation, it is possible that the secular could be an established religion for the purposes of s 116.

Beck further argues that the definition of establishment by Barwick CJ in *DOGS* is problematic because the Church of England may not even meet the definition. Beck proposes a less restrictive definition which accords with the tenor of the judgments: that 'a relationship or association between state and religion… amounts to an identification of the state with a religion'.[165] This effectively means the establishment clause 'prohibits the Commonwealth from establishing programs that result in a religion or multiple religions becoming identified with the Commonwealth'.[166] Given Beck's own characterisation of Australia as a 'secular state' with 'secular institutions of government', and Thornton and Luker's assertion that the Australian polity is committed to 'state secularism', if it is accepted that the secular is a kind of religion, this gives even greater support to the proposition that Australia structured as a laicist secular state breaches the establishment clause.[167] If, for example, the terms 'Christian' or 'Islamic' were substituted for 'secular', any reasonable reading of these comments would interpret them as saying that Australia is a Christian State or an Islamic State – in other words, a religious state in contravention of the establishment clause.

This is commensurate with the US establishment position. It is likely the US Supreme Court would hold that specific government sponsorship of traditionally nonreligious or antireligious ideas (i.e. secularism or secular humanism) may be

[165] Ibid 240.
[166] Ibid.
[167] Beck, Clear and Emphatic, above n 83, 182, 187, 195; Thornton and Luker, Spectral Ground, above n 98, 74.

incompatible with the prohibition against religious establishment.[168] If that is the case, it does not seem implausible that a government preference for so-called 'nonreligions' over 'religions' could also be held to be a breach of non-establishment in the Australian context. This would, at least, be consistent with interpretation of the free exercise clause. In *Jehovah's Witnesses*, Latham CJ noted that s 116 'protect[s] the right of a man [sic] to have no religion', and Beck alludes to the notion of a 'denial of religious freedom for an atheist'.[169] If protection of free exercise of religion includes the exercise of non-belief and non-religion, it is not a great stretch to say that the prohibition against establishment of religion includes a corresponding prohibition against the establishment of no religion or non-belief – what is traditionally known as secularism.

Against this view, Puls contends that McLeish (and presumably Beck, though Beck is writing subsequent to Puls) incorrectly extends Latham CJ's sound principle that s 116 protects the 'right to not exercise a religion' to make it equivalent to 'a freedom to exercise a non-religion'.[170] Puls argues that these are two very different things: Latham CJ was merely pointing out that there should be no state sanction for choosing not to exercise a religion, and it does not follow that s 116 protects this as a freedom. More generally, Puls claims that 'it is contrary to logic and the plain text of s 116 to ask what kind of non-religion is protected by s 116. The answer must surely be none.'[171]

[168] See Greenawalt, above n 33, 754-755, 793-794.

[169] (1943) 67 CLR 116 at 123; Beck, Clear and Emphatic, above n 83, 194; McLeish, above n 99, 224-226.

[170] Puls, above n 82, 153.

[171] Ibid.

However, Sadurski asserts that there is no basis in a secular state for distinguishing between religious and other non-religious but deeply moral beliefs, because the privileging of one over the other calls state neutrality into question.[172] Thus Sadurski agrees with the contention that the free exercise clause could protect non-religions but his framework is fundamentally incompatible with the argument of this article. In particular, the assumption of a neutral secular state is the very issue which this article is addressing. This assumption entails a dichotomy between the secular and the religious which is problematic for the argument that the secular is a type of religion.

In any case, Sadurski's claim is also persuasively refuted by Puls. Puls reasons that Sadurski may well be right that there is no distinction between religious views and moral views in a general sense, but when specifically considering the religious clauses 'one cannot assert that there is no basis for the distinction when the basis is found in the constitutional provisions themselves'.[173] As Sadurski admits, the clauses themselves explicitly put religion in a preferred position over other moral beliefs and forms of conscience. Puls concludes that it is only religion which should attract the constitutional protection of free exercise and the constitutional prohibition against establishment.[174] This conclusion need not be challenged. The position that only religion falls within the scope of the establishment clause is compatible with the argument of this article, for the argument is not that the secular should be prohibited from establishment as another deeply held moral view.[175] Rather, the argument is that the secular should be prohibited from establishment according to its

[172] Sadurski, Neutrality of Law, above n 71, 444.
[173] Puls, above n 83, 153.
[174] Ibid 153.
[175] C.f. McLeish, above n 99, 226-227.

character as a type of religion. This is entirely consistent with Puls' responses to Sadurski and McLeish on the issue.

Finally, to circumvent this contested issue, Sadurski proposes that since non-establishment and freedom of exercise target different types of problems, religion should be given a different scope for each clause. In particular, he argues that the non-establishment clause 'attacks a non-neutral merger of secular regulatory concerns and the religious motives' and therefore should be given a narrow scope, while the free exercise clause eliminates state coercive pressure on the exercise of one's religious or moral choices and therefore religion should have a broad scope to include moral choices and issues of conscience.[176] If this proposal is accepted, it would present an objection to this article's argument that a secular state constitutes establishment of religion, because religion in the establishment context would most likely be defined narrowly to exclude the secular.

There are problems with the proposed solution. The argument is largely framed in the US context of establishment and free exercise, and does not engage with the different circumstances of the Australian constitutional context. In particular, given the High Court's uniform interpretation of religion as broad across both clauses (yet generally non-inclusive of moral choices or issues of conscience), in conjunction with their conversely uniform narrow interpretation of establishment and free exercise, the implication is that such a bifurcated solution is not realistically compatible with the Australian context. Puls agrees, contending that Sadurski's solution is 'at best counter-intuitive', 'logically unsound', and 'unnecessary'.[177] The reason there is sometimes tension between the establishment clause and the free

[176] Sadurski, Legal Definitions of Religion, above n 109, 841.
[177] Puls, above n 83, 159.

exercise clause is because both principles may need to be called upon to address the same problem. It is untenable to have a different definition of religion for each principle in these kinds of circumstances, especially when there is no apparent difference in use of the term 'religion' between the clauses.[178] Hence, there is no *a priori* reason for defining religion so narrowly as to exclude secular humanism, and so it could still potentially come within the scope of the establishment clause.

If the arguments that the secular is a type of religion are accepted, important implications follow. The most pertinent is that conditional on the assumption that s 116 establishes a laicist separation of church and state with the legal effect of implementing state secularism, this would mean that the Australian polity is implementing a type of religion as part of the structure of the state itself. If, as Beck states, the separation of church and state or the secular state is just the legal effect of the establishment clause in s 116, a strict separationist interpretation of this aspect of s 116 is predicated on an incongruity where the section which is intended to prevent the state establishment of religion in fact operates to establish a state religion.[179] More specifically, this kind of state secularism can be viewed as invalid due to breaching the establishment clause in s 116.

As mentioned earlier, McLeish has argued that 'religion' ought to be considered very broadly for the purposes of the establishment clause:

> Section 116… must… protect against the establishment of religion in general (as distinct from any single religion)…. Equally, establishment of all religions would contravene s 116. Further, the "establishment" of non-religion of some kind is bound to prohibit the

[178] Ibid.
[179] Beck, Clear and Emphatic, above n 83, 164.

> free exercise of religion. It is therefore convenient to speak loosely of a prohibition on the establishment of non-religion also.[180]

The particular claim that there is a prohibition on the establishment of non-religion is subject to McLeish's questionable assumption that s 116 regulates non-religions as well as religions. However, even if it is instead assumed that s 116 only covers religions, the distinct claim that s 116 must protect against the establishment of religion in general as distinct from any particular religion remains valid, because the latter claim is not dependent on the former claim. The fact that s 116 only regulates religions does not mean that s 116 only regulates particular religions. It can also regulate religion in general. Chief Justice Latham agrees, stating that 'the section [116] applies in relation to all religions, and not merely in relation to some one particular religion'.[181]

Therefore, to make a law characterising Australia as a 'religious state' would be incompatible with the establishment clause because it is establishing religion in general, if not any religion in particular. So McLeish's point that 'nonreligion itself has aspects which are quasi-religious, which it is the purpose of s 116 to protect' could be refined to say generally that so-called 'nonreligion', or what is traditionally known as secularism, is actually religious in nature or a type of religion.[182] In other words, it is not that s 116 protects nonreligions, but that s 116 protects religion generally, and the secular is a kind of religion. However, this general categorisation is really insufficient to sustain the argument that Australia is establishing the 'secular religion' in contravention of the establishment clause. That would only follow specifically where the secular meets the criteria for religion in the Australian

[180] McLeish, above n 99, 225.
[181] *Jehovah's Witnesses* (1943) 67 CLR 116 at 123.
[182] McLeish, above n 99, 226-228.

constitutional context. If it does, establishing Australia as a 'secular state' could effectively amount to a breach of s 116.

D *Secularism and the Religious Indicia*

The remaining issue then is whether or not the secular or secular humanism actually qualifies as a religion for the purposes of the establishment clause. Analysing this issue requires that a comparison be made between the character and tenets of the secular humanism this article has contended for, and the indicia for identifying a religion outlined by Wilson and Deane JJ with supporting material from the similar though less detailed criteria outlined by Mason ACJ and Brennan J. To the extent that the indicia are satisfied, such a comparison will lend strong support to the contention that the secular can be viewed as a religion for constitutional purposes. The first indicium is that the secular must be a collection of ideas which involve belief in a supernatural being, thing or principle, where supernatural refers to a reality which extends beyond that which is capable of perception by the senses. The article has already proposed that the secular's rejection of the supernatural may itself be a belief in the supernatural. In addition to this, despite Mason ACJ and Brennan J's apparent view that calling secular humanism a religion would be to expand the definition outside of its proper boundary, as mentioned previously the secular belief or faith in reason articulated by Milbank could be viewed as an idea which involves belief in a supernatural principle. 'Reason' and the exercise of it cannot be perceived by the senses or measured empirically; it is transcendent in that all people in all cultures possess it and use it in varying degrees. It seems possible then to view reason as a transcendent, non-physical (supernatural) principle believed in by the secular.

Perhaps this is not a fair characterisation of reason. The process of reason can be observed by the natural senses through articulation and critique of arguments and reasoning; the nature and tenets of reason can be explained and defined such that it can be apprehended and perceived by the senses. However, the same might just as fairly be said of 'God' (conceived in the most general sense) as the paradigmatic supernatural being, thing or principle. The nature and actions of God may be delineated by theological and metaphysical inquiry, written or spoken in such a way as to be perceived by the senses. To say that the concept of 'God' can be expressed in a way capable of perception by the natural senses is not the same as saying that the concept of 'God', or 'God' itself, is capable of perception by the natural senses. It is, by its very nature, transcendent. Similarly, although the nature and process of reason may be expressed in a way amenable to perception by the senses, it does not follow that the concept of reason or reason-in-itself is capable of perception by the senses. As such, the secular belief in reason as a supernatural reality, beyond perception by the senses, plausibly satisfies the first indicium.

The second indicium is the ideas relate to people's nature and place in the universe and in relation to the supernatural. Again, Mason ACJ and Brennan J emphasise that the focus should be on the supernatural content of the answers, not the fundamental nature of the questions. Such an exclusive emphasis should be rejected based on the above arguments addressing this point, considering that the secular reliance on reason involves the supernatural, the secular rejection of the supernatural is actually a supernatural claim, and the fact that both questions and answers may equally relate to fundamental ideas and the supernatural.

Furthermore, Mason ACJ and Brennan J seem to implicitly acknowledge that secular ideas relate to people's nature and place in the universe when they discuss how

humanity has sought answers to the fundamental questions of existence, meaning and destiny, and 'some' believe these can be resolved through faith, or what might be termed 'traditional' religion. In particular, they acknowledge that religious belief 'relates a view of the ultimate nature of reality to a set of ideas of how man is well advised, even obligated, to live'.[183] The fact that some believe these issues may be solved by faith or traditional religion implies that there are others who believe these problems may be solved (or not solved) by reason or non-traditional religion; that is, through a secular perspective. These others are nevertheless still discussing these issues and formulating different solutions, presumably based on reason, and relating their view of the ultimate reality to a set of ideas of how we are obligated to live. In this sense, the secular faith or belief in reason as the standard for addressing the fundamental questions of life and how to live may well satisfy the second indicium.

The third and fourth indicia require adherence to canons of conduct which give effect to the relevant beliefs, and that the adherents constitute an identifiable group. It seems straightforward that these indicia would be satisfied in terms of the secular humanist 'creed' mentioned in Part II, as this contains codes of belief and canons of conduct adhered to by an identifiable group of secular humanists in the US. Even if there is no equivalent group in Australia, the systematic outworking of the secular perspective would presumably be governed by a universal code and associated rules of reason and ethics disconnected from religious doctrine, and such a group would be relatively simple to identify in terms of ascertaining their secular beliefs. The existence of interest groups and associations such as the Council of Australian Humanist Societies, and operating political parties such as the Secular Party of

[183] *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120 at 134-135.

Australia, supports the idea that the adherents of secularism are an identifiable group, at least as much as the traditional religions constitute an identifiable group.

Furthermore, there is a developing trend of secular assemblies, which have all the indicators of traditional church organisations, including services, without the so-called 'religious' aspects.[184] However, Mason ACJ and Brennan J rejected this US-style element as an indicator of religion:

> [Another] indicia is the existence of "any formal, external, or surface signs that may be analogised to accepted religions", such as formal services, a clergy or festivities. No doubt rituals are relevant factors when they are observed in order to give effect to the beliefs in the supernatural held by the adherents of the supposed religion. Thus ceremonies of worship are central to the Judaic religions manifesting their belief in and dependence on God. Mere ritual, however, devoid of religious motivation, would be a charade.[185]

It might be claimed that these secular assemblies are mere ritual devoid of religious motivation. But this is just to *define* the secular as non-religious. Such a claim assumes that the secular is not religious, which is precisely the question being determined. It is therefore not a compelling argument to reject this element in the context of Wilson and Deane JJ's indicia. In addition, the foregoing analysis suggests that the secular has supernatural aspects through its emphasis on reason, such that secular assemblies are not mere ritual in the purely natural sense that Mason ACJ and Brennan J appear to be espousing. All this indicates potential satisfaction of the third and fourth indicia. The final indicium is that the adherents see the collection of ideas and practices as constituting a religion. This is the one which is probably the least likely to be satisfied as it is unlikely that secular

[184] See for example the 'Sunday Assemblies': https://sundayassembly.com/

[185] *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 49 ALR 65 at 76.

humanists would consider themselves a religion. However, because Wilson and Deane JJ note this indicium as more controversial, it could be dispensable.[186]

Therefore, the secular potentially satisfies most, if not all, of the indicia which may be used in the determination of whether it is in fact a religion for constitutional purposes. Though it does not answer the question irrefutably, Justices Wilson and Deane emphasise that it would be unlikely that any impugned 'religion' which satisfied the indicia would be denied classification as a religion.[187] In conjunction with the arguments that identify the secular or secular humanism as a religion or as containing religious aspects, there is therefore good reason to think that the secular is a type of religion for constitutional purposes, and it follows that state secularism breaches the prohibition against the state establishment of religion in s 116. It is an incoherent approach to the relationship between church and state in Australia, because the assumption that the establishment clause establishes a laicist secular state effectively yields the conclusion that the clause intended to prevent establishment of a state religion in fact establishes a state religion. Consequently, in the limited space left the article suggests a different model should inform the relationship between church and state and High Court interpretation of s 116 – one which is a better fit within the constitutional and democratic context.

V IMPLICATIONS OF 'DISESTABLISHING' SECULARISM

It is useful to consider what an actual establishment of secular humanism would look like in order to suggest a different model. Establishing secularism would involve

[186] *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120 at 173-174. C.f. Puls, above n 83, 154 who asserts this kind of indicium as a decisive factor, but without any justification.

[187] *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120 at 173-174.

the state proclaiming itself as secular in the sense of being non-religious and neutral towards religions while actually adopting policies and legislation which privilege non-religion in a public context. In particular this is identifying the Australian Commonwealth as a secular state through passing legislation which entrenches secular/secularist (secular humanist) programs which discriminate against or undermine other religious programs. There does not appear to be any explicit legislation of this kind currently in existence, but there is legislation which could be perceived as implicitly discriminating against religion in favour of a secular agenda.[188] More pertinent at this point is the conceptual problem identified in relation to the scholars and judges which understand Australia to be a secular state, leading to an incongruent framework for interpreting the establishment clause.

Articulating a feasible alternative is a task of formidable difficulty, and that too has been acknowledged in the US situation where the definition of religion may well include fundamental convictions of conscience deriving from moral frameworks. Alexander argues that the central norm in an anti-establishment clause is the forbidding of government acts premised on theological views. However, our views about the rights and wrongs of social actions and correlating government policies will always rest on the entire web of our beliefs, including religion. Our convictions are a product of our fundamental views, which is just what religious views are.[189] 'Christianity is a religious view, but so too is Marxism or utilitarianism. The latter are non-theistic, but many "religions" one finds in representative lists of "religions" are also non-theistic.'[190] If we suppose that a person's view of upholding human

[188] See e.g. Alex Deagon, 'Defining the Interface of Freedom and Discrimination: Exercising Religion, Democracy and Same-Sex Marriage' (2017) 20 *International Trade and Business Law Review* 239-286.

[189] Alexander, Religion Clause Theory, above n 1, 245-246.

[190] Ibid 246.

rights is premised on a religious conviction and that person is a government official implementing this as government policy, is that person able to support human rights? Or would that support rest on a religious view, rendering it unconstitutional? This is the fundamental problem of religious non-establishment clauses.[191] He drives home the point:

> If political theory justifies religious accommodations, however, then when government acts on the basis of political theory, is it establishing a religion?... If claims of conscience derived from a moral theory can qualify for exemptions under the Free Exercise clause [this is specifically in the US context], then when the government acts to establish a moral theory and its commands, why is it not establishing a religion? For if I have a deep seated belief that some civil policy is wrong, and my belief is one equivalent to a religious belief, then why should I not regard the government as establishing a religion, and a false one at that?[192]

Returning to the Australian context, given the broad definition of religion (perhaps including secularism) and the real possibility of establishment through government policy, does this mean that all 'religious' and 'secular' (insofar as the 'secular' is a type of 'religion') policy reasons are unconstitutional by virtue of contravening non-establishment? Moreover, how does a government justify any policy at all without confronting this problem? While admitting the complexity of the issue and acknowledging the lack of space to give it due consideration and proper development here, this article tentatively suggests that the resolution could be found in prioritising democracy. This view argues that all religious, philosophical and scientific voices

[191] Ibid. C.f. the difficulties in the US situation identified by Cornelius and his solution of 'Benign Neutrality', which involves a harmless and favourable disposition towards religion while avoiding compulsion and preferential treatment: William Cornelius, 'Church and State – the Mandate of the Establishment Clause: Wall of Separation or Benign Neutrality' (1984) 16(1) *St. Mary's Law Journal* 1, 6-10, 35-39.

[192] Larry Alexander, 'Galston on Religion, Conscience and the Case for Accommodation' (2014) 51 *San Diego Law Review* 1065, 1068.

(like votes) should be considered equally when it comes to decision-making.[193] 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.[194]

One may of course disagree with what is expressed, but such is the nature of democratic discourse. This implies that a priority for democracy model should explicitly allow for all religious or non-religious arguments compatible with the democratic process.[195] It provides the freedom for religious and non-religious alike to express their views in a public space and contribute to public policy. It also allows a government to genuinely (neutrally) consider these different views as it articulates and implements policy, without establishing, promoting or excluding particular views. This, presumably, is what Mortenson means when he talks about a free market of opinions not leading to individual opinions (Christianity, Judaism, Buddhism or Secular Humanism) using the coercive powers of the state to establish those particular opinions and define state orthodoxy.[196]

Thus, having an authentically neutral approach would paradoxically involve acknowledging the competing religious and non-religious perspectives and allowing the state to support religion and non-religion in a non-preferential and non-discriminatory way through prioritising democracy. Rather than being read in the

[193] See e.g. V Bader (1999) 'Religious Pluralism: Secularism or Priority for Democracy?' (1999) 27 *Political Theory* 597.
[194] Ibid 614.
[195] Ibid 617.
[196] Mortensen , Blasphemy, above n 90, 431.

laicist 'secular state' sense, the establishment clause could be read in the more accommodationist sense of preventing state adoption or promotion of religion in general or any particular religion (including secularism or secular humanism), instead allowing the presence and influence of all different perspectives through reasonable policy debate. Prioritising democracy in terms of non-discrimination between religion/s is a more coherent framework for the establishment clause, and it accords with the original purpose of s 116 as articulated by the framers in Part III. This reading would also complement the operation of the free exercise clause such that different religions could freely practice their beliefs in a way which is compatible with democracy.[197]

The actual process of this requires more detailed engagement than the brief summary here, but the general idea is as follows. In the Australian democratic system, voters form political opinions on religious, philosophical, moral or other bases, and vote based on this. The elected government then, in principle, implements that policy platform from a representative democracy perspective. Thus, although the opinions undergirding the policy may well be religious in nature, the implementation or 'establishment' of that policy occurs as part of the Australian democratic system which informs the Constitution. It is therefore truly 'neutral' in the sense that it is just democracy in action, rather than the state deliberately or actually identifying with or preferring 'Christianity' or 'Secular Humanism', or any religion. Though the sketch here is crude, the fundamental point of the priority for democracy approach is to avoid state preference of or discrimination against any particular religious or 'secular' view by means of explicit establishment or restricting free

[197] See Alex Deagon, 'Defining the Interface of Freedom and Discrimination: Exercising Religion, Democracy and Same-Sex Marriage' (2017) 20 *International Trade and Business Law Review* 239-286.

exercise, either one of which would tend to stifle different or opposing views and undermine democracy.

Again, from the US context, Benson provides some perspective:

> The state must not be run or directed by a particular religion or "faith-group" but must develop a notion of moral citizenship consistent with the widest involvement of different faith groups (religious and non-religious). This… does not view the state as outside a variety of competing faith-claims but situates the state as itself inside and, therefore, concerned with the questions of faith in society. The focus is not on "religion" only, but on "faiths" of a variety of kinds. It is this…understanding that best suits the development of a free and democratic society animated by a meaningful (moral) pluralism consistent with intelligible notions of freedom, respect, and responsibility-essential to the coherence of the constitution itself… [and] permits a better grounding for citizenship as a shared moral enterprise and for the adjudication of competing faith claims as just that, competing "faith claims."[198]

This article has argued that the secular is a type of religion, and when this is combined with the assumption that Australia is a laicist secular (meaning allegedly neutral and non-religious) state, the result is that this notion of state secularism could be viewed as breaching the establishment clause. To avoid this impasse, the article suggests that Australia not be a laicist 'secular' state or a theocratic 'religious' state, but a truly neutral 'democratic' state which incorporates and implements the many and varied religious and non-religious views of its citizens in a non-discriminatory and non-preferential way in order to produce a constitutionally coherent space for open discussion of different perspectives for policy implementation.

[198] Benson, above n 11, 530-531.