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I. INTRODUCTION

Unlike the Constitution of the United States, the Australian Constitution does not contain a bill of rights. There are, however, a number of provisions dispersed throughout the Australian Constitution which could be regarded as "rights" provisions. Prominent among these is section 116 which deals with religion. It reads as follows: "The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth."[1]

Section 116 of the Australian Constitution ostensibly imitates the First Amendment of the United States Constitution which stipulates that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[2]

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1. AUSTL. CONST. § 116.

2. U.S. CONST. amend. I. Although § 116 is an adaptation of the First Amendment, it does not contain a freedom of expression guarantee. But the Australian High Court has recently inferred from the constitution a freedom of communication with regard to political and public affairs. Stephens v. West Australian Newspapers Ltd., 182 C.L.R. 211 (1994) (Austl.); Theophanous v. Herald & Weekly Times Ltd., 182 C.L.R. 104 (1994) (Austl.); Australian Capital Television Party Ltd. v. Commonwealth, 177 C.L.R. 106 (1992) (Austl.); Nationwide News Party Ltd. v. Wills, 177 C.L.R. 1 (1992) (Austl.).

Interestingly, section 116 does not apply to the six Australian states.[3] In contrast to the U.S. legal doctrine of incorporation, section 116 operates only as a fetter upon the exercise of legislative power by the federal Commonwealth Parliament.[4]

However, the usefulness of section 116 is limited because, in Australia's federal system, the Commonwealth Parliament lacks legislative power to make laws with respect to "religion." The Commonwealth Parliament has power to make law on only those subjects listed in sections 51 and 52 of the Australian Constitution. Subject matters which are not listed remain within the residual legislative power of the states. Because "religion" is not an enumerated subject in sections 51 and 52, it falls under the residual power of the states. Consequently, the effect of section 116 is understandably limited. It might, however, be expected that the restraint embodied in section 116 may operate to invalidate laws passed by the Commonwealth under an enumerated power if their *effect* (as opposed to their purpose) is to establish

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3. Grace Bible Church v. Reedman, 54 A.L.R. 571 (1984) (S. Austl. Sup. Ct.). *See generally* G. de Q. Walker, *Dicey's Dubious Dogma of Parliamentary Sovereignty: A Recent Fray with Freedom of Religion*, 59 AUSTL. L.J. 276 (1985) (discussing *Grace Bible*'s embrace of the parliamentary omnipotence theory).

4. This raises the question whether § 116 applies to executive and administrative acts of the government. Chief Justice Barwick, commenting on the establishment of religion clause of § 116, said in Attorney-General of Victoria *ex rel.* Black v. Commonwealth, 146 C.L.R. 559 (1981) (Austl.) (Hereinafter *State Aid Case*), that even though § 116 is directed at Commonwealth legislative action, if an executive act comes "within the ambit of the authority conferred by the statute, and does amount to the establishment of a religion, the statute which supports it will most probably be a statute for establishing a religion and therefore void as offending s 116." *Id.* at 581. Although Chief Justice Barwick's statement was made in the context of the establishment clause, there appears to be no compelling reason why his observation should not equally apply to the free exercise guarantee of § 116. The validity of this point was confirmed by Justice Jackson in Minister for Immigration & Ethnic Affairs v. Lebanese Moslem Association, 71 A.L.R. 578 (1987) (Austl. Fed. Ct.) (en banc), where he said that "the true situation is that if an enactment permitted executive action under it which amounted to a prohibition upon the free exercise of any religion, the enactment to the extent that it permitted such action . . . would be invalid." *Id.* at 584.

It is a question of considerable interest whether § 116 also applies to the exercise of judicial power. For example, orders made under the Family Law Act (1975) (Austl.) are authorized by legislation, and if the legislation allows or requires the making of decisions which amount to an establishment of religion or infringe upon freedom of religion, it could be contended that the legislation is invalid. However, in New v. New (unreported application to the high court for special leave to appeal) (Mar. 5, 1982) (Austl.), Chief Justice Gibbs expressly rejected the application of § 116 to judicial orders because this section only dealt with "laws," and therefore did not address itself to judges.

any religion or to prohibit the free exercise thereof.[5] The legitimacy of this expectation will be examined in this paper.

The first and second parts of section 116 are directed at preventing Commonwealth involvement with religion which amounts to "establishment," while the third part of the section protects the freedom of an individual to practice a religion. This article focuses upon the relevant Australian jurisprudence with respect to these clauses in order to understand the "purpose approach." Under the purpose approach, a law's constitutionality depends on its purpose, rather than its effect. Comparing section 116 to the First Amendment of the United States Constitution, this article argues that the United States Supreme Court has recently interpreted the First Amendment to require a version of the Australian purpose approach—namely, the "neutrality" principle.

II. THE ESTABLISHMENT CLAUSE IN SECTION 116

Many churches in Australia, especially the Catholic Church, manage religious schools propagating their own values. In the 1960s, unceasing demands were made by church-sponsored schools to receive government financial assistance to facilitate the education of their pupils. In 1969, the Commonwealth government responded by making state aid available to church-sponsored schools. Disagreement on the issue of providing financial support to parochial schools climaxed with the Australian High Court's celebrated decision in *Attorney-General of Victoria ex rel. Black v. Commonwealth* (or the *State Aid Case*).[6]

The *State Aid Case* dealt with provisions of Commonwealth legislation which provided grants to the states for distribution to parochial schools.[7] These provisions were challenged by the Council for the Defense of Government Schools ("DOGS") on the ground that they amounted to an establishment of religion prohibited by section 116.[8] The argument advanced by DOGS maintained that the Commonwealth constitution requires the strict

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5. *See* Adelaide Co. of Jehovah's Witnesses v. Commonwealth, 67 C.L.R. 116, 123 (1943) (Austl.).

6. 146 C.L.R. 559.

7. *Id.* at 560.

8. *Id.*

separation of church and state.[9] In particular, DOGS argued that the Commonwealth could not render any assistance to a religious group or provide governmental support for church-related schools.[10] The high court rejected the argument for such strict separation of church and state by a six to one majority, holding instead that financial assistance to parochial schools does not violate section 116 provided the assistance is given in a nondiscriminatory manner.[11]

Chief Justice Barwick held that "establishing" a religion required "the entrenchment of a religion as a feature of and identified with the body politic . . . so as to involve the citizen in a duty to maintain it and the obligation of, in this case, the Commonwealth to patronize, protect and promote the established religion."[12] Similarly, Justice Gibbs held that section 116 only prevented Parliament from making any law conferring the status of a state religion or church upon a particular religion or religious body.[13] Similar views were expressed by Justice Stephen.[14]

The high court majority heavily emphasized the word "for" in section 116.[15] In order to violate the establishment clause, the law's purpose must be "for" the creation of a state-sponsored church or religion.[16] However, the high court did not indicate whether, to offend the establishment clause, the establishment had to be the sole purpose, or merely a primary, dominant, or significant purpose of the law.[17]

The lone dissenter, Justice Murphy, endorsed a theory of strict separation between church and state.[18] He relied on U.S. Supreme Court decisions in which the First Amendment was interpreted as requiring a high wall of separation between church and state.[19] In particular, he pointed out that the First Amendment's Establishment Clause had been interpreted as prohibiting the provision of financial assistance to religious

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9. *Id.* at 561-62.
10. *Id.* at 563.
11. *Id.* at 559.
12. *Id.* at 582.
13. *Id.* at 604.
14. *Id.* at 610.
15. *Id.* at 581, 583.
16. *Id.* at 584.
17. *See infra* note 95.
18. *State Aid Case*, 146 C.L.R. at 632 (Murphy, J., dissenting).
19. *Id.* at 628-29 (citing Everson v. Board of Educ., 330 U.S. 1 (1946)).

schools.[20] He cited Justice Hugo Black who, in *Everson v. Board of Education*,[21] stated: "Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another."[22] Justice Murphy's reliance on American decisions is misplaced considering that the American and Australian provisions, despite similarities, are worded differently.

It is instructive to compare the language of section 116 with the wording of the First Amendment. The First Amendment states that "Congress shall make no law respecting an establishment of religion."[23] Section 116, on the other hand, stipulates that the "Commonwealth shall not make any law for establishing any religion."[24] The difference in terminology is significant. Section 116 refers to the establishment of *any* religion while the American clause prohibits the establishment of *all* religion. This suggests that section 116 is aimed at any type of assistance which tends to promote the interests of one church or religious community over those of another,[25] but not, unlike the First Amendment, at prohibiting the government from aiding religion in general.

In the *State Aid Case*, the high court used what could be called the "purpose approach" by empbasizing that the establishment clause is only violated if the Commonwealth law is "for" the establishment of a religion. Under this approach a law will violate the establishment clause of section 116 only if it is designed to create a state-sponsored religion or church.[26] Thus, a Commonwealth law made pursuant to an enumerated parliamentary power under sections 51 and 52 will be constitutional even if its "effect" is to benefit religion.[27] In other words, govern-

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20. *See id.* at 628.

21. 330 U.S. 1, 15 (1946), *cited in State Aid Case*, 146 C.L.R. at 628-29.

22. *Id.* at 15.

23. U.S. CONST. amend. I.

24. AUSTL. CONST. § 116.

25. *See* F.D. Cumbrae-Stewart, *Section 116 of the Constitution*, 20 AUSTL. L.J. 207, 207-08 (1946); *cf.* Clifford L. Pannam, *Travelling s 116 with a US Road Map*, 4 MELB. U. L. REV. 41, 61 (1964).

26. *See State Aid Case*, 146 C.L.R. 559, 559 (1981) (Austl.).

27. In Nelson v. Fish, 92 A.L.R. 187, 191 (1990) (Austl.), Justice French held that the Marriage Act's recognition of marriages performed by specific religious denominations was not an "establishment" of religion, especially considering § 51(xxi) of the constitution which gives the Commonwealth power over marriage. *See* Marriage Act (1961) (Austl.). But he added: "That is not to say that the legislation could validly

ment can indirectly promote or advance any religion when that is incidental to the principal secular purpose the state is pursuing.[28] The high court's emphasis on the purpose of the law indicates that the constitutionality of such law ultimately depends on the form in which it is expressed. Indeed, if the language does not appear to involve the creation of a religion, it will not offend section 116 regardless of its content.[29] The purpose approach does not usually require an examination by the high court of the substance of the law or of its effect on religious bodies or parochial schools.

Therefore, the main thrust of the establishment clause of section 116 is to prevent Commonwealth action from leading to *direct* involvement in and promotion of a *particular* religion. The noted early commentators on the Australian Constitution, Quick and Garran, wrote: "By the establishment of religion is meant the erection and recognition of a State Church, or the concession of special favours, titles, and advantages to one church which are denied to others. It is not intended to prohibit the Federal Government from recognizing religion or religious worship."[30]

III. AMERICAN ESTABLISHMENT CLAUSE JURISPRUDENCE

A. The Neutrality Test

The Australian High Court's interpretation of the establishment clause of section 116 is surprisingly compatible with the U.S. Supreme Court's most recent interpretation of the First Amendment's Establishment Clause. Indeed, as will be seen in this section, during the last decade the Supreme Court has, with increasing frequency, substantially modified its previously strict doctrine of separation of church and state to require a neutrality test.

The strict doctrine of separation of church and state became part of First Amendment jurisprudence in 1947 when the Supreme Court delivered its judgment in *Everson v. Board of Edu-*

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authorise a monopoly in religious marriages in favour of one particular denomination." *Nelson*, 92 A.L.R. at 191.

28. *Nelson*, 92 A.L.R. at 191.

29. *See State Aid Case*, 146 C.L.R. at 579 (stating that a law which establishes a religion will inevitably do so expressly and directly, not constructively).

30. SIR JOHN QUICK & ROBERT R. GARRAN, THE ANNOTATED CONSTITUTION OF THE AUSTRALIAN COMMONWEALTH 951 (Angus & Robertson eds., 1901).

cation.[31] Justice Black's opinion for the Court expressed the doctrine as follows:

> [N]either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.[32]

Over the years, the Supreme Court realized that the strict separation test was impracticable because its implementation adversely affected the constitutional right to the free exercise of religion. This difficulty is the consequence of an inherent conflict between the establishment and free exercise provisions of the First Amendment.

A natural tension exists between allowing a right to free exercise on the one hand and forbidding the establishment of a state religion on the other. In an attempt to resolve this conflict, the Court has developed a number of tests to ascertain whether the Establishment Clause has been violated. In many cases the purpose of these tests has been to mitigate the adverse impact of the *Everson* decision and to soften its effect on the free exercise of religion. The test developed by the Supreme Court in *Lemon v. Kurtzman*[33] proved to be the most durable.[34] In *Lemon*, the Supreme Court laid down the following test for the constitutionality of statutes: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that

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31. 330 U.S. 1 (1947).

32. *Id.* at 15-16.

33. 403 U.S. 602 (1971).

34. In the *State Aid Case*, one of the majority justices, Justice Wilson held that U.S. case law was inapplicable but nevertheless proceeded to apply the *Lemon* test in dicta. 146 C.L.R. 559, 652, 656-57 (1981) (Austl.). He indicated that the legislation had a secular purpose and a primary secular effect. He also pointed out that state aid did not constitute an excessive "entanglement" of government and religion. *Id.*

neither advances nor inhibits religion . . . ; [third], the statute must not foster 'an excessive government entanglement with religion.'"[35]

In many ways, however, the *Lemon* test has proved unworkable. As a result, the Supreme Court now favors an American version of the Australian purpose approach: the "neutrality test." The Court's interpretation of the First Amendment in *Rosenberger v. Rector & Visitors of the University of Virginia*,[36] decided in June 1995, illustrates the turn towards a neutrality principle. In fact, the Supreme Court's reasoning in *Rosenberger* is strikingly similar to the high court's interpretation of section 116 in the *State Aid Case*.[37] While *Rosenberger* deals with a conflict between the Free Speech Clause and the Establishment Clause, it can by extension he applied to the Free Exercise Clause and the Establishment Clause.

In *Rosenberger* the University of Virginia ("University"), a state instrumentality, authorized payments from its Student Activities Fund ("SAF") to outside contractors to cover the printing costs of a variety of publications issued by student groups. The University withheld authorization for payments to a printer on behalf of Rosenberger of Wide Awake Productions ("WAP") on the basis that, contrary to SAF guidelines, the journal had a religious editorial content.[38]

WAP argued that this refusal to authorize payment violated their First Amendment right to freedom of speech. The Fourth Circuit[39] held that while the University's viewpoint discrimination[40] violated the Free Speech Clause of the First Amendment,

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35. 403 U.S. at 612-13 (citation omitted) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

36. 115 S. Ct. 2510 (1995).

37. *See supra* part II.

38. 115 S. Ct. at 2514-15.

39. Rosenberger v. Rector & Visitors of the Univ. of Va., 18 F.3d 269, 280-81 (4th Cir. 1994).

40. Viewpoint discrimination refers to an illegitimate form of regulation that applies to speech taking place in a public forum. For purposes of the First Amendment, a public forum is publicly owned property that has been historically associated with the exercise of First Amendment rights or publicly owned property opened for use by the public as a place for expressive activity. United States v. Grace, 461 U.S. 171 (1983); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983); Edwards v. South Carolina, 372 U.S. 229 (1963).

If expressive activity takes place in a public forum, the State may only regulate the time, place, and manner of the speech, Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981), and may not impose "viewpoint" regulations that

that discrimination was permissible in order to comply with the Establishment Clause.[41]

In a five-to-four decision, the Supreme Court held that invoking University guidelines to deny financial support to WAP constituted a denial of WAP's right of free speech.[42] The University's actions were interpreted as unconstitutional viewpoint discrimination rather than permissible line-drawing based on content. By the very terms of the SAF prohibition, the University did not exclude religion as a subject matter, but selected for disfavored treatment those student journalistic efforts with religious editorial viewpoints. The Court found that the University could not discriminate against the viewpoint of private persons whose speech it subsidizes.[43]

As mentioned above,[44] the Court of Appeals in *Rosenberger* ruled that withholding financial support from WAP violated the Free Speech Clause of the First Amendment, but nevertheless proceeded to hold that the University's action was justified to avoid a violation of the Establishment Clause. The Supreme Court, on the other hand, found that it was not necessary for the University to deny eligibility to student publications based on their viewpoint in order to obey the Establishment Clause.[45] The neutrality demanded of the state by the respective clauses of the First Amendment was compromised by the University's course of action.[46] The viewpoint discrimination inherent in the University's regulation required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief.[47] This course of action was a denial of the right of free speech that risked fostering a pervasive bias or hostility toward religion, which could undermine the neutrality required by the Establishment Clause.

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censor the content or the subject matter of the speech, unless the regulation is "necessary to serve a compelling state interest and narrowly drawn to achieve that end." *Perry*, 460 U.S. at 45; *see also* Lamb's Chapel v. Center Moriches Sch. Dist., 508 U.S. 384 (1993); *Heffron*, 452 U.S. 640.

41. *Rosenberger*, 18 F.3d at 280-81.

42. *Rosenberger*, 115 S. Ct. at 2516-20.

43. *See id.* at 2519 (citing Regan v. Taxation with Representation of Wash., 461 U.S. 540, 548 (1983)).

44. *See supra* note 39 and accompanying text.

45. *Rosenberger*, 115 S. Ct. at 2523.

46. *See id.* at 2517.

47. *See id.* at 2520.

Therefore, the Court held that the Establishment Clause was not violated when the University honored its duties under the Free Speech Clause through giving financial support to WAP.[48]

The Supreme Court's decision in *Rosenberger* rehabilitates its dominant interpretation of the Establishment Clause in the nineteenth century. For example, in 1899, the Supreme Court decided in *Bradfield v. Roberts*[49] that government can, without violating the First Amendment, appropriate monies for a hospital conducted by Catholic nuns. The Court found that the purpose of the appropriation was not to establish religion but rather to enable the hospital to provide quality medical services.[50]

Rosenberger's neutrality principle has the advantage of facilitating an accommodation between the Establishment and Free Exercise Clauses of the First Amendment. Such accommodation was also promoted by the Supreme Court in a number of cases prior to the decision in *Rosenberger*. One such case is *Zobrest v. Catalina Foothills School District*.[51]

Petitioner James Zobrest, who had been deaf since birth, asked his school district to provide a sign-language interpreter to accompany him to classes at a Roman Catholic high school, pursuant to the Individuals with Disabilities Education Act ("IDEA").[52] The school district refused on the ground that to provide a pupil at a religious school with an interpreter would violate the Establishment Clause.

Thus, the issue before the U.S. Supreme Court was whether the hiring of an interpreter for a deaf student at a Catholic high school violated the Establishment Clause. A majority of the Supreme Court stated that the Court had never held that "'religious institutions are disabled by the [Establishment Clause of the] First Amendment from participating in publicly sponsored social welfare programs.'"[53] If the Establishment Clause did bar religious groups from receiving general government benefits, then "'"a church could not be protected by the police and fire

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48. In dissent, Justices Souter, Stevens, Ginsburg, and Breyer held that the majority approved direct funding of core religious activities by an arm of the state and therefore condoned a violation of the Establishment Clause. *Id.* at 2533.

49. 175 U.S. 291 (1899).

50. *Id.* at 299-300.

51. 509 U.S. 1 (1993).

52. 20 U.S.C. § 1400 (1994).

53. *Zobrest*, 509 U.S. at 8 (quoting Bowen v. Kendrick, 487 U.S. 589, 609 (1988)).

departments, or have its public sidewalk kept in repair.'"[54] For this reason, the Court noted that it had "consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit."[55]

According to previous Supreme Court holdings, a neutral governmental service that is carried out at a parochial school will not violate the Establishment Clause so long as the governmental service is part of a general program that does not favor religion.[56]

In *Zobrest*, the Court further pointed out that "under the IDEA, no funds traceable to the government ever find their way into sectarian schools' coffers."[57] The Court found that IDEA created a neutral government program that dispensed aid not to schools but to individual handicapped children.[58] As a result, the Court held that the Establishment Clause did not prevent the school district from furnishing Zobrest with an interpreter in order to facilitate his education.[59]

The *Rosenberger* and *Zobrest* decisions reveal a tenuous majority of the Supreme Court favoring an interpretation of the Establishment Clause which condones laws and practices that incidentally benefit religion or religious bodies. The majority in these decisions embraced what could be called a "neutrality test," which requires that religion, as far as is practicable, should be irrelevant to the distribution of burdens and benefits in society. For the majority on the Supreme Court, condoning viewpoint discrimination on the grounds that it is mandated by the Establishment Clause is an improper denial of benefits to religious organizations. The dissenting opinion in *Rosenberger* focused on the publication's religious orientation as the relevant characteristic justifying denial of financial benefits which other-

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54. *Id.* (quoting Widmar v. Vincent, 454 U.S. 263, 274-75 (1981) (quoting Roemer v. Maryland Pub. Works Bd., 426 U.S. 736, 747 (1976) (plurality opinion))).

55. *Id.*; *see also* Mueller v. Allen, 463 U.S. 388 (1983).

56. *Zobrest*, 509 U.S. at 10 (citing Wolman v. Walter, 433 U.S. 229, 244 (1977)).

57. *Id.*

58. *Id.* at 13.

59. *Id.* at 14.

wise would have been available.[60] By doing so, the dissent advocated a form of discrimination in favor of secularism which would breach the majority's neutrality test.

The Supreme Court's neutrality test is similar to the Australian High Court's interpretation of section 116 because both condone government aid that indirectly benefits religion. The Supreme Court has not, however, consciously embraced the purpose approach invoked by the Australian High Court in the *State Aid Case*. This is relevant because, in some cases, even laws that incidentally benefit religion may be held to be unconstitutional in the United States. Such would be the result if the Supreme Court were to rely on the second prong of the *Lemon* test which would invalidate laws which have the "effect" of benefiting religion.[61]

B. Public Access Jurisprudence

The applicability of the neutrality principle in U.S. Establishment Clause jurisprudence is reinforced by a number of cases dealing with access by religious groups to public facilities. One such case is *Board of Education of Westside Community Schools v. Mergens*.[62] Westside school officials denied Mergens's request for permission to form a Christian student club that would have the same access privileges as other voluntary student clubs to school facilities after school hours, with the exception that it would have no faculty sponsor. The Supreme Court majority rejected the Board of Education's argument that, by allowing the club to exist on campus, they would be promoting or advancing a certain religion, in contravention of the Establishment Clause.[63] The Court indicated that "the broad spectrum of officially recognized student clubs at Westside . . . would counteract any possible message of official endorsement or preference for religion."[64] The Court stated:

> Although a school may not itself lead or direct a religious club, a school that permits a student-initiated and student-led religious club to meet after school, just as it permits any other stu-

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60. Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510, 2534 (1995).

61. *See supra* note 35 and accompanying text.

62. 496 U.S. 226 (1990).

63. *Id.* at 233-34.

64. *Id.* at 252.

> dent group to do, does not convey a message of state approval or endorsement of that particular religion.[65]

In *Mergens* the Court quoted the Equal Access Act which provided:

> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.[66]

The Court held that the Act did not violate the Establishment Clause and forbade discrimination against the proposed on-campus religious club on the basis of its religious content.[67]

In *Lamb's Chapel v. Center Moriches School District,*[68] the Supreme Court similarly used a neutrality approach, holding that preventing a church from showing a religiously oriented film series on family values and child-rearing after hours on school premises violated the Freedom of Speech Clause.[69] The Court pointed out that permitting district property to be used to exhibit the film would not have constituted an establishment of religion under the *Lemon* test.[70] Because the film would not have been shown during school hours, would not have been sponsored by the school, and would have been open to the public, there would be "no realistic danger that the community would think that the district was endorsing religion or any particular creed."[71] Any benefit to religion or the church would have been incidental.

The neutrality principle used in *Lamb's Chapel* is reinforced by the recent Supreme Court decision in *Capitol Square Review Board v. Pinette.*[72] Justice Scalia, joined by Chief Justice

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65. *Id.*
66. *Id.* at 235 (quoting 20 U.S.C. § 4071(a) (1994)).
67. *Id.* at 243-47.
68. 508 U.S. 384 (1993).
69. *Id.* at 393-94.
70. *Id.* at 395.
71. *Id.*
72. 115 S. Ct. 2440 (1995).

Rehnquist and Justices Kennedy and Thomas,[73] held that religious expression does not violate the Establishment Clause "where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms."[74] In *Pinette*, the Establishment Clause was not violated by a religiously neutral policy which permitted a private party (the Ku Klux Klan)[75] to display an unattended religious symbol (a cross) in a traditional public forum located next to the local seat of government.[76]

The Court rejected the argument that, because an observer might mistake private expression for officially endorsed religious expression, the state's content-based restriction on speech is constitutional[77] and reiterated that, under the Establishment Clause, governments are free to develop neutral policies that may incidentally benefit religion.[78]

Although Justice Scalia's opinion agreed with the proposition that the state may not espouse a religious message, he concluded that the state had not sent such a message, but rather had merely allowed others to do so on its property.[79] Thus, by allowing private parties access to a traditional public forum, the state had only provided an incidental benefit to religion.[80] Requiring

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73. Justices O'Connor, Breyer, and Souter concurred in part and in the judgment. *Id.* at 2451.

74. *Id.* at 2450.

75. The identity of the private party was relevant to several Justices. *See id.* Justices Stevens and Ginsburg argued that the cross may evoke different reactions from different individuals. *Id.* at 2465, 2475. Some might interpret it as an inspirational symbol of the crucifixion and resurrection of Jesus Christ. *Id.* at 2465. However, because the cross was erected by the Ku Klux Klan, other observers might regard it as an anti-Semitic symbol of bigotry and disrespect. *Id.* Justice Stevens' dissent further argued that given either interpretation, permitting the display of the cross violates the Establishment Clause. *Id.* Under the first interpretation, display of the cross should be prohibited because it is clearly a religious symbol. *Id.* Under the second interpretation, the cross should be prohibited because the Establishment Clause prohibits official sponsorship of irreligious as well as religious messages. *Id.* (citing Wallace v. Jaffree, 472 U.S. 38, 52-53 (1985) ("[T]he First Amendment embraces the right to select any religious faith or none at all.")). This principle is binding whether or not the anti-religious message is also a bigoted message. *Id.* (citing United States v. Ballard, 322 U.S. 78, 86-88 (1944) (noting that the First Amendment is not limited to any particular religious group or type of religion but applies to all)).

76. *See id.*

77. *Id.* at 2447.

78. *Id.* (citing Bowen v. Kendrick, 487 U.S. 589, 608 (1988)).

79. *Id.* at 2447-48.

80. *Id.* at 2449-50.

neutral public access that allows incidental benefit to religion further demonstrates the Court's neutrality principle and the similarities to the Australian purpose approach.

C. The Coercion Test

The neutrality principle has recently been complemented by the "coercion test."[81] According to this test, the government may not coerce a person, either physically or mentally, into attending or participating in religious activities. Compelling religious participation subjects secularism to unfavorable treatment, thereby violating the neutrality principle. *Lee v. Weisman* provides a good example of the Supreme Court's application of the coercion test.[82]

In *Weisman*, the Supreme Court considered whether a religious exercise (a nonsectarian prayer) may be conducted at a school graduation ceremony where the high school graduates are required to either tolerate the prayer or not attend their own graduation.[83] The Supreme Court held that the school district's supervision and control of a high school graduation ceremony placed subtle and indirect pressure on attending students to stand as a group or maintain respectful silence during the invocation and benediction and, in effect, to endorse the religious observance.[84]

In a powerful dissent, Justice Scalia, joined by Chief Justice Rehnquist and Justices White and Thomas, argued that the "'meaning of the Clause is to be determined by reference to historical practices and understandings.'"[85] The dissent accused the majority of disregarding the tradition of nonsectarian prayer to God at public celebrations which is an older and more enduring tradition than that of public school graduation ceremonies themselves. Thus, the practice of school prayer has deep foundations in the historic practice of the American people.[86]

The dissenting justices criticized the notion of "psychological coercion" on the ground that it is easily manipulable and is an

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81. *See, e.g.*, Lee v. Weisman, 505 U.S. 577 (1992).
82. *Id.*
83. *Id.*
84. *Id.* at 592.
85. *Id.* at 631 (quoting County of Allegheny v. ACLU, 492 U.S. 573, 657, 670 (1989)).
86. *Id.* at 632.

empty vessel that can be used conveniently to reach a predetermined result.[87] However, by rejecting the coercion test, the dissenting justices also rejected the neutrality test, since the neutrality test is simply a generalized version of the coercion test. The effect of the dissent in *Weisman* was to give preference to religion over secularism. That view, unlike the majority's holding, failed to resolve the conflict between the Establishment Clause and the Free Exercise Clause.

Although the majority declared school graduation prayer unconstitutional, *Lee v. Weisman* nevertheless represents another example of relaxation of the doctrine of strict separation of church and state. Indeed, if no coercion of a physical or psychological nature had been found, then the prayer would have been allowed, even if it had indirectly benefited religion. Because of this, the *Weisman* majority focused more on the nature of the concept of coercion and avoided a discussion of the inherent tension that exists between the Establishment and Free Exercise Clauses.

Following *Rosenberger* and *Weisman*, it appears that the Establishment Clause only prohibits the government from rendering direct benefit to religion. As was recently noted by Reid Mortensen, "this obscures the extent to which the older requirement that legislation have a secular effect now applies."[88] Indeed, this differs from the *Lemon* test which suggests that the Establishment Clause requires governmental action to have a primary secular effect if it is to be constitutional.[89] Despite the *Lemon* test, current U.S. Establishment Clause jurisprudence appears to be based on a neutrality/coercion principle, one similar to the Australian purpose approach.

IV. THE PURPOSE APPROACH AND FREE EXERCISE

The Australian High Court's interpretation of the establishment clause of section 116 may commend itself because it avoids the tension that exists in U.S. jurisprudence between the Estab-

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87. *See id.* at 644 (stating that the psycho-coercion test is as infinitely expandable as the reasons for psychotherapy itself).

88. Reid D. Mortensen, The Secular Commonwealth: Constitutional Government, Law and Religion 218 (1995) (unpublished Ph.D. dissertation, The University of Queensland).

89. *See supra* note 35 and accompanying text.

lishment and Free Exercise Clauses. Indeed, free exercise of religion is better served by an interpretation of the establishment clause which allows indirect benefit to a religion or church school.

However, the high court's purpose approach, namely that the establishment clause is violated only if the purpose of the law is to create a state church,[90] is capable of being extended to the interpretation of the free exercise of religion guarantee. If so, the free exercise clause would only be violated when the legislature's purpose is to impede or prohibit the free exercise of religion. Thus, if the high court's interpretation is extended to the free exercise and observance clauses, government may, albeit indirectly, effectively impose any religious observance and may impede or prohibit the free exercise of religion. Although such an approach is admittedly incompatible with the recent trend in the high court to liberally interpret constitutional guarantees,[91] it is a feasible interpretation of the free exercise clause. The salience of this point is that extension of the purpose approach to the free exercise clause of section 116 would require a repudiation of the neutrality principle and would involve the elevation of secularism at the expense of religion. Extension of the establishment clause's purpose approach to the free exercise guarantee is not unthinkable as illustrated by *Lebanese Moslem Association v. Minister for Immigration & Ethnic Affairs.*[92]

Lebanese Moslem involved a decision by the Minister for Immigration to deport a Muslim Imam. The Lebanese Moslem Association alleged that the deportation was a violation of their free exercise rights guaranteed under section 116.[93] In his decision, Justice Pincus noted that it was unclear whether the word "for" in the free exercise clause should be interpreted in the same way it had been where it appears in the establishment clause.[94] If so, then the free exercise clause would not be infringed unless the law has as its sole object the prohibition of the free exercise of religion.[95] However, Justice Pincus felt that such

90. *See supra* text accompanying notes 7-16, 21-22.
91. *See* Street v. Queensland Bar Ass'n, 168 C.L.R. 461, 527, 569 (1989) (Austl.).
92. 67 A.L.R. 195 (1986) (Austl. Fed. Ct.) (Pincus, J.).
93. *Id.* at 207.
94. *Id.* at 209.
95. *Id.* at 209-10.

a restrictive interpretation was not warranted:[96] "Otherwise, much activity central to the life of religion in this country could be brought to an end by legislation whose purpose is, for example, defence, or control of entry of aliens."[97] Following the trend of U.S. Supreme Court decisions, it would be inconsistent with religious freedom for the government to determine the suitability of an individual as a religious leader.[98] Justice Pincus noted that the free exercise guarantee applied to administrative as well as legislative action.[99] Thus, the Minister for Immigration could not use his deportation powers to prevent a religious leader from making statements as to purely religious matters.[100] Furthermore, the Minister could not deport a religious leader on the basis that his religious congregation would be better served by a new leader.[101]

On appeal,[102] the full federal court reversed the decision of Justice Pincus. Justice Fox held that, in deporting an Imam, the Minister had no intention of prohibiting the free exercise of religion, nor was that the purpose of his actions.[103] Justice Fox took a narrow view of the operation of the free exercise of religion clause. Permission for the Imam to remain had not been granted. Thus, as a noncitizen, he was subject to deportation.[104] The practice of Islam was not prohibited, though a new Imam would have to be found.[105] Justice Jackson stated that "the question which arises is not whether the [Minister of Immigration] took into account the terms of s 116 . . . but rather whether the exercise of power is 'for' one of the ends provided by s 116."[106] The *intention* of the Minister was not to interfere with religious freedom; it was to remove what he saw as a destabilizing influence in the

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96. *Id.*
97. *Id.* at 210.
98. *Id.* at 211.
99. *Id.* at 212 ("[O]therwise, the absurd result could be achieved that prohibition of religion could be brought about by executive action as long as no trace of an intention to attack religion appeared in the enabling statute.") (citing Kerr v. Pelly, 97 C.L.R. 310, 318 (1957) (Austl.)).
100. *Id.* at 213.
101. *Id.*
102. Minister for Immigration & Ethnic Affairs v. Lebanese Moslem Ass'n, 71 A.L.R. 578 (1987) (Austl. Fed. Ct.) (en banc).
103. *Id.* at 579.
104. *Id.* at 579-80.
105. *Id.* at 580.
106. *Id.* at 585.

community.[107] Disruption of the group's worship because of the deportation of its Imam did not prohibit free exercise.[108] Refusal to permit a religious leader to remain in Australia was not a prohibition of the free exercise of that religion.[109] To this the court added a caveat: "It may be that circumstances such as repeatedly refusing to allow any overseas ministers of a religion to enter or remain in Australia might in a different case amount to such a prohibition."[110] However, the court noted that was not the situation in *Lebanese Moslem*.[111]

Lebanese Moslem illustrates that, in Australia, there is confusion over whether section 116 requires application of the purpose approach in free exercise cases.[112] This confusion extends to the question of whether the purpose approach would involve a violation of the neutrality principle, especially since the purpose approach might lead to hostility toward religious exercises. There is, however, evidence in Australia's leading case on the free exercise of religion, *Adelaide Co. of Jehovah's Witnesses v. Commonwealth*,[113] that application of the neutrality principle to all cases involving the interpretation of section 116 is required.

In *Jehovah's Witnesses*, the National Security ("Subversive Organisations") Regulations were challenged by the Jehovah's Witnesses.[114] These regulations were challenged on three grounds: First, the regulations prohibited any associations that may have been prejudicial to the prosecution of the war in which the Commonwealth was engaged (World War II).[115] Second, they provided for the dissolution of such associations.[116] Third, the regulations vested the property of such associations in the Commonwealth.[117] As a result of their religiously motivated antiwar stance, the Jehovah's Witnesses were prosecuted under these regulations.[118]

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107. *Id.* at 594.
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *See, e.g., id.* at 593 (noting differing interpretations of the word "for" in § 116).
113. 67 C.L.R. 116 (1943) (Austl.).
114. *Id.* at 119.
115. *Id.* at 134.
116. *Id.* at 136.
117. *Id.* at 139.
118. *Id.* at 145.

While the high court invalidated the regulations on the basis that they were unsupported by any enumerated Commonwealth power, including the defence power,[119] the court considered the argument that the regulations violated section 116.[120] In his opinion, Chief Justice Latham examined the nature and scope of the religious freedom protected by section 116. He articulated an abstract principle behind the religion clauses of section 116: "Section 116 . . . is based upon the principle that religion should, for political purposes, be regarded as irrelevant."[121] He continued:

> The prohibition in s. 116 operates not only to protect the freedom of religion, but also to protect the right of a man to have no religion. No Federal law can impose any religious observance. Defaults in the performance of religious duties are not to be corrected by Federal law . . . . Section 116 proclaims not only the principle of toleration of all religions, but also the principle of toleration of absence of religion.[122]

The Chief Justice's statement consolidates two distinct notions which must be separated for the purpose of conceptual clarity. It is necessary to distinguish between laws which are mainly intended to discriminate among religions vis-à-vis each other and, on the other hand, laws which are mainly directed against nonreligion. Laws of the former kind could, for example, favor theistic religions at the expense of nontheistic religions such as Buddhism, or favor some theistic religions over others. Laws falling into the latter category would be directed against atheists or agnostics. Chief Justice Latham's observation implies that laws which fall into either or both of these categories are caught by section 116 and hence are prohibited by the constitution. Under this interpretation, the demands of section 116 require both religion and nonreligion to be treated neutrally.

According to Reid Mortensen, a perceptive commentator on issues of law and religion, Chief Justice Latham seemed to have implicitly assumed in *Jehovah's Witnesses* that "a regulation purposely directed at the suppression of subversive organisations and only burdening religion by its effect might offend the free

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119. *Id.* at 132 (citing AUSTL. CONST. § 51(vi)).
120. *Id.* at 144.
121. *Id.* at 126.
122. *Id.* at 123.

exercise clause" and that "[*Jehovah's Witnesses*] probably supports the idea that the religion clauses limit the purpose and the effect of governmental action."[123] Further, Stephen McLeish has argued that the underlying purpose of section 116 is "a general conception of state neutrality toward religion, reflected both in the avoidance of religious preferences and in respect for the autonomy of individuals in matters of religion, especially as participants in the wider community."[124]

The problem associated with the extension of the purpose approach to freedom of religious exercise cases may also be illustrated by reference to United States jurisprudence. In the well-known case of *Employment Division v. Smith*,[125] the issue before the U.S. Supreme Court was whether the Free Exercise Clause required the State of Oregon to exclude religiously inspired peyote use from its general criminal prohibition and whether the State was permitted to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use.

In evaluating the respondents' claim for religious exemption from the Oregon law, the Court abandoned a balancing test that had been used in the line of cases beginning with *Sherbert v. Verner*.[126] These cases held that governmental actions which substantially burden a religious practice must be justified by a "compelling governmental interest."[127] Justice Scalia, writing for the majority, argued that this "test [was] inapplicable to an across-the-board criminal prohibition against a particular form of conduct."[128] A holding to the contrary would create an extraordinary right to ignore generally applicable laws unsupported by a compelling governmental interest.[129] Thus, although it is constitutionally permissible to exempt sacramental peyote use from the operation of drug laws, it is not constitutionally required.[130]

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123. *See* Mortensen, *supra* note 88, at 215. The *State Aid Case* makes it clear that § 116 only limits governmental purposes. *See supra* notes 6-27 and accompanying text.

124. Stephen McLeish, *Making Sense of Religion and the Constitution: A Fresh Start for Section 116*, 18 MONASH U. L. REV. 207, 223 (1992).

125. 494 U.S. 872 (1990).

126. *Id.* at 883 (citing Sherbert v. Verner, 374 U.S. 398, 402-03 (1963)).

127. *See id.*; *see also* Hobbie v. Unemployment Appeals Comm., 480 U.S. 136 (1987); Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707 (1981).

128. *Smith*, 494 U.S. at 884.

129. *Id.* at 886.

130. *Id.* at 890.

Justice Scalia argued that the Court had never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.[131] After all, it was not contended that Oregon's drug law was an attempt to regulate religious beliefs, to prevent the communication of those beliefs, or the raising of one's children in those beliefs.[132] Therefore, because the use of peyote was validly prohibited, the State could, consistent with the Free Exercise Clause, deny the respondents unemployment compensation when their dismissal resulted from use of that drug.[133] Justice Scalia's opinion represents the proposition that laws which indirectly burden freedom of religion are constitutional if they are generally applicable and have not been adopted for the purpose of discriminating against the affected religious group.[134]

The majority holding in *Smith*, in effect, rehabilitated as part of American law what is known in the relevant literature as the action-belief dichotomy.[135] The application of the dichotomy, in its simplest form, authorizes the legislator, while being deprived of all power over belief or opinion, to regulate action that is inimical to state-determined priorities or social policy. A classic description and application of the dichotomy is found in *Reynolds v. United States*.[136]

Reynolds married a second wife in obedience to the commands of his Mormon religion, which required some of its adherents to practice polygamy.[137] He justified his 'action' on the ground that it was his religious duty to practice polygamy and that refusal would result in damnation.[138] The Supreme Court, however, decided that "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."[139]

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131. *Id.* at 878-79.
132. *Id.* at 882.
133. *Id.* at 890.
134. However, the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb to 2000bb-4 (1994), endorses the law as stated by Chief Justice Burger in Wisconsin v. Yoder, 406 U.S. 205 (1972).
135. *See generally* Gabriël A. Moens, *The Action-Belief Dichotomy and Freedom of Religion*, 12 SYDNEY L. REV. 195 (1989).
136. 98 U.S. 145 (1878).
137. *Id.* at 159, 161.
138. *Id.* at 161.
139. *Id.* at 164.

Thus, the dichotomy could be used by government to subject religious practices to the regulatory power of the state.

The action-belief dichotomy had an inordinate influence upon the interpretation of the American First Amendment and section 116 of the Australian Constitution. In the *Jehovah's Witnesses* case, Chief Justice Latham, while purporting to approve of the "neutrality" principle, relied on contemporaneous decisions of the Supreme Court using an action-belief dichotomy in defining limitations to the protection of freedom of religion.[140]

In his opinion, Chief Justice Latham considered the validity of the statement that "though the civil government should not interfere with religious *opinions*, it nevertheless may deal as it pleases with any *acts* which are done in pursuance of religious belief without infringing the principle of freedom of religion."[141] Although he expressed misgivings about the validity of the dichotomy, he decided that there is "full legal justification for adopting in Australia an interpretation of s. 116 which . . . leaves it to the court to determine whether a particular law is an undue infringement of religious freedom."[142] In particular, he held that section 116 did not accord immunity to the religiously grounded action of the Jehovah's Witnesses.[143] Although admitting that section 116 protects action as well as belief, he concluded that the free exercise of religion does not allow individuals to break the law of the country.[144]

Chief Justice Latham's opinion makes it clear that religious beliefs or opinions are no basis for exempting the believer from compliance with the ordinary civil or criminal law.[145] Applying the action-belief dichotomy to the facts of the case, he concluded that the doctrine expressed by the Jehovah's Witnesses as to noncooperation with the Commonwealth in terms of military obligation was prejudicial to the defense of the community and section 116 did not grant it immunity.[146]

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140. 67 C.L.R. 116, 128 (1943).

141. *See id.* at 124.

142. *Id.* at 131.

143. *Id.* at 147.

144. *Id.* at 128-29; see also Reynolds v. United States, 98 U.S. 145, 166 (1878), in which Chief Justice Waite stated: "Laws are made for the government of actions, and while they cannot interfere with mere religious belief[s] and opinions, they may with practices."

145. *Jehovah's Witnesses*, 67 C.L.R. at 126-27.

146. *Id.* at 146.

A similar conclusion was also reached by Justice Starke in *Jehovah's Witnesses* who said that section 116 "does not protect unsocial actions or actions subversive of the community itself" and that the section is subject to those limitations which "are reasonably necessary for the protection of the community and in the interests of social order."[147]

The extension of the purpose approach to the free exercise of religion of the First Amendment (or section 116 of the Australian Constitution) is problematic. This is because the Free Exercise Clause would not be violated in circumstances where it is not the purpose of the relevant legislation to impede or prohibit the free exercise of religion. The *Smith* case illustrates the dangers associated with an extension of the purpose approach to the freedom of religion guarantee: Oregon's unemployment law was ruled constitutional even though its effect (as opposed to its purpose) was to impede or to affect adversely the respondent's religious freedom. Thus, if the purpose approach were extended to the Free Exercise Clause of the First Amendment, as happened in *Smith*, it would result in the rehabilitation of the action-belief dichotomy, which could be used to subject the exercise of religious freedom to the regulatory power of the state.

Although the result in the U.S. Supreme Court's decision in *Church of Lukumi Babalu Aye v. Hialeah*[148] differed from that in *Smith*, it serves as yet another illustration of the danger associated with extending the purpose approach to free exercise cases. The petitioner Church was part of the Santeria religion, which practices animal sacrifice as one of its principal forms of devotion.[149] After the Church leased land in respondent city and announced plans to establish a house of worship, the city council held an emergency public session and passed a number of ordinances directed at preventing the Church from doing so.[150]

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147. *Id.* at 155.

148. 508 U.S. 520 (1993).

149. *Id.*

150. *Id. See* Hialeah, Fla., Resolution 87-66 (June 9, 1987) (noting residents' concern over "immoral" religious practices); Hialeah, Fla., Ordinance 87-40 (June 9, 1987) (incorporating the Florida animal cruelty laws to punish the unnecessary killing of animals); Hialeah, Fla., Ordinance 87-52 (Sept. 8, 1987) (defining prohibited animal sacrifice to include ritualistic killing); Hialeah, Fla., Ordinance 87-71 (Sept. 22, 1987) (prohibiting animal sacrifice and defining "sacrifice" in the same manner as Ordinance 87-52); Hialeah, Fla., Ordinance 87-72 (Sept. 22, 1987) (defining "slaughter" as "the killing of animals for food" and prohibiting slaughter in areas not zoned for

The Supreme Court affirmed that under the Free Exercise Clause, a law that burdens a religious practice need not be justified by a compelling governmental interest if it is neutral and of general applicability.[151] However, where such a law is not neutral or not of general application, it must undergo the strictest scrutiny.[152] In such a case, the law must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.[153]

The ordinances' texts and operation demonstrated that they were not neutral, but had as their object and purpose the suppression of Santeria's central tenet, animal sacrifice.[154] That this religious exercise had been targeted was evidenced by the ordinance's use of the words "sacrifice" and "ritual."[155] Also, the ordinances' various prohibitions, definitions, and exemptions demonstrated that they were "gerrymandered" with care to proscribe religious killings of animals by Santeria Church members but to exclude almost all other animal killings.[156]

Each of the ordinances pursued the city's governmental interests only against conduct motivated by religious belief, thereby violating the requirement that laws burdening religious practices must be of general applicability.[157] The ordinances were substantially underinclusive with regard to the city's interest in preventing cruelty to animals, since they were drafted with care to forbid only animal killings occasioned by religious sacrifice, while permitting most other animal killings.[158]

The ordinances were unable to withstand the strict scrutiny which is applied to laws that target religious practices. They were not narrowly tailored to accomplish the asserted governmental interests. All were overbroad or underinclusive, as the proffered objectives could have been achieved by narrower ordi-

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slaughterhouses, but including an exemption for "small numbers of hogs and cattle," when exempted by state law).

151. *Hialeah*, 508 U.S. at 531.

152. *Id.* at 546.

153. *Id.*

154. *Id.* at 542.

155. *Id.* at 534 ("We agree that the words are consistent with the claim of facial discrimination, but the argument is not conclusive.").

156. *Id.* at 522, 535-36.

157. *Id.* at 545.

158. *Id.* at 543.

nances that burdened religion to a far lesser degree. The Court stated:

> The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures. Those in office must be resolute in resisting importunate demands and must ensure that the sole reasons for imposing the burdens of law and regulation are secular. Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices. The laws here in question were enacted contrary to these constitutional principles, and they are void.[159]

V. CONCLUSION

The preceding review of Australian and American cases reveals that legislation or action which confers incidental benefits on religion is likely to be constitutional under both the U.S. and Australian Constitutions. This achieves a reconciliation between the Free Exercise and Establishment Clauses. However, this purpose approach can only with difficulty be extended to freedom of religion, because, to the extent that it exhibits hostility toward religion, it breaches the neutrality principle. However, there remains the intellectual difficulty involved in selecting a purpose approach for establishment issues and an effect approach for free exercise issues. This might even be considered to involve the selection of a test on the basis of the result that one hopes to achieve.

It does not, however, follow from an unwillingness to extend the purpose approach to cases involving freedom of religion, that any type of legislation that affects a religious activity should be declared unconstitutional. There is obviously a need to determine the extent to which a religious practice can effectively coexist with secular demands. This is an intrinsically difficult issue since the subjection of religious practices to secular government priorities may be seen by religious adherents as an attempt by government to elevate secularism to the status of a de facto state religion, thereby abrogating or violating the neutrality principle.

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159. *Id.* at 547.

It would thus be appropriate and necessary in another article to look at the Free Exercise Clause to discover the limits of government regulation in this regard.