THE RELIGION CLAUSES AND FREEDOM OF SPEECH IN AUSTRALIA AND THE UNITED STATES: INCIDENTAL RESTRICTIONS AND GENERALLY APPLICABLE LAWS

*David S. Bogen**

TABLE OF CONTENTS

* Associate Dean, Professor and T. Carroll Brown Scholar, University of Maryland School of Law. B.A., 1962, LL.B., 1965, Harvard University; LL.M., 1967, N.Y.U. Law School. My thanks to my research assistants, Harry Malone and Scott McCabe, University of Maryland School of Law Class of '98, my colleagues William Reynolds and Greg Young, George Winterton of the University of New South Wales, and George Williams of the Australian National University for saving me from the most egregious of errors.

I. INTRODUCTION

Both Australia and the United States have constitutional protections against the establishment of religion and for freedom of both religion and speech. The First Amendment protects these freedoms in the United States.[1] Section 116 of the Australian Constitution contains similar clauses on religion, but has no free speech clause.[2] Nevertheless, the High Court of Australia found that freedom of communication on matters of government and politics was implicit in the constitutional provisions on voting for federal offices and constitutional referenda.[3]

The Australian High Court makes the purpose of a law of central importance in determining whether the law is an unconstitutional violation of the protections for religion and speech.[4] The United States Supreme Court is less explicit, but recent decisions have also made purpose important to its First Amendment analysis.[5] Sometimes purpose is expressly considered; at other times a concern with purpose motivates the Supreme Court's adoption of a doctrine. Purpose, in this sense, is neither the subjective motives of legislators voting for a measure nor the measure's likely objective effects. It is a construct of the law's goal derived from the likely effects of the measure, common human experience with respect to the likelihood that such effects would be desired by legislators or would be sought by such means in the context in which the law was adopted, supported with evidence for the law's context that may include statements of those involved in the process.

Concern with purpose explains the judicial treatment of generally applicable laws which regulate behavior that is not ordinarily engaged in for religious or expressive reasons. The restriction of religion or speech is not likely to be the purpose of the generally applicable law. Any restriction incidental to a law of general application will receive less scrutiny than limitations in laws focused on speech or religious activities.[6] Some courts even say that generally applicable laws pose no constitutional issue at all.

This Article describes Australian constitutional law with respect to religion and freedom of political discussion. A major theme of the handful of Australian High Court cases dealing with this issue has been the importance of determining the purpose or objective of the law. As part of this process, the Australian courts use the concept of proportionality. The High Court has deferred to the legislature, and it has begun to circumscribe the scope of constitutional protections for

---

1. U.S. CONST. amend. I.

2. *See* AUSTL. CONST. ch. V, § 116.

3. Australian Capital Television Pty. Ltd. v. Commonwealth (ACTV) (Austl. 1992) 177 C.L.R. 106, 110-11 (Mason, C.J.).

4. *See id.* at 240 (McHugh, J.).

5. *See generally* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996).

6. *See generally* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1201 (1996) (analyzing the limiting principles developed by the Supreme Court in treating incidental burdens as infringements on fundamental constitutional rights to engage in primary conduct).

free speech. It may even borrow from conflicting United States precedents, and exempt generally applicable laws from constitutional scrutiny with a presumption that any impact on constitutionally protected religion or speech is incidental to legitimate purposes. This Article concludes by analyzing the arguments for treating generally applicable laws as immune from constitutional scrutiny, and suggests it is a bad idea.

Australia and the United States each could profitably consider elements of the approach taken by the courts of the other nation to carefully scrutinize even generally applicable laws for their lack of proportion. The United States' experience with its religion clauses should make Australian courts wary of immunizing generally applicable laws from review under Section 116 of the Australian Constitution. Similarly, the Australian insistence on proportionality to uncover improper purpose in political discussion cases provides a helpful note of caution for United States courts faced with free speech challenges to generally applicable laws.

II. AUSTRALIAN CONSTITUTIONAL GUARANTEES FOR RELIGION AND SPEECH

The Australian High Court traditionally approaches the relationship between the powers granted the central government and the limitations on those powers quite differently than the United States Supreme Court. The High Court's opinions focus on characterization—whether the law should be characterized as one "with respect to" a Commonwealth power.[7] The High Court is more skeptical than its United States counterpart of claims that an act is within the general powers of the central government. For example, the United States Supreme Court found the commerce clause[8] permitted federal regulation of the amount of home grown wheat a farmer could consume because it substantially affected interstate commerce.[9] In contrast, the Australian High Court held that the similar Australian trade and commerce clause[10] did not authorize government operation of air service between two points in the same state even though such service was arguably necessary to make the concurrent service between the state and the Northern Territory economically viable.[11]

---

7. *See* Leslie Zines, *Characterisation of Commonwealth Laws*, *in* AUSTRALIAN CONSTITUTIONAL PERSPECTIVES 33 (H.P. Lee & George Winterton eds., 1992).

8. "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

9. Wickard v. Filburn, 317 U.S. 111, 125 (1942). The decision of *Wickard* was reaffirmed in a recent case that limited the reach of the commerce power. *See* United States v. Lopez, 115 S. Ct. 1624, 1630 (1995).

10. "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: (i) Trade and commerce with other countries, and among the States." AUSTL. CONST. ch. I, pt. V, § 51(i).

11. Attorney-General *ex rel* Ansett Transp. Indus. Pty. Ltd. v. Australian Nat'l Airlines Comm'n (Austl. 1976) 138 C.L.R. 492, 508 (Stephen, J.).

Until recently, the Australian High Court's careful scrutiny of whether an act is within a grant of power was matched by its reluctance to give substantial content to the affirmative restrictions on power.[12] The High Court paid less attention to specific limitations on the granted powers in part because the founders of the Australian Constitution clearly repudiated the American-style Bill of Rights.[13] Nevertheless, the Australian Constitution does protect some individual rights.[14] The High Court revitalized several of these affirmative restrictions during the past several years and has even, within limits, implied new ones.[15]

---

12. Peter Hanks, *Constitutional Guarantees*, *in* AUSTRALIAN CONSTITUTIONAL PERSPECTIVES, *supra* note 7, at 92-95.

13. The High Court stated:

> [I]t is difficult, if not impossible, to establish a foundation for the implication of general guarantees of fundamental rights and freedoms. To make such an implication would run counter to the prevailing sentiment of the framers that there was no need to incorporate a comprehensive Bill of Rights in order to protect the rights and freedoms of citizens. That sentiment was one of the unexpressed assumptions on which the Constitution was drafted.

Australian Capital Television Pty. Ltd. v. Commonwealth (Austl. 1992) 177 C.L.R. 106, 136 (Mason, C.J.). One commentator stated, "The framers of the Australian Constitution were not prepared to place fetters upon legislative action, except and in so far as it might be necessary for the purpose of distributing between the State and the central Government the full extent of legislative power." Sir Owen Dixon, *Speech to the American Bar Association in August 1944*, *in* JESTING PILATE AND OTHER PAPERS AND ADDRESSES 101-02 (1965). Instead, "responsible government in a democracy is regarded by us as the ultimate guarantee of justice and individual rights." SIR ROBERT MENZIES, CENTRAL POWER IN THE AUSTRALIAN COMMONWEALTH 54 (1967).

14. *See* N.K.F. O'Neill, *Constitutional Human Rights in Australia*, 17 FED. L. REV. 85, 85 (1987). For example, section 41 provides rights of electors of a state. *Id.* at 86. Section 51 xxxi permits the federal government to appropriate land but only on fair terms—the equivalent of the taking clause of the Fifth Amendment of the United States Constitution. *Id.* at 86-88. Section 80 provides for trial by jury. *Id.* at 88. Section 92 speaks in broad terms of freedom of interstate trade, commerce and intercourse. *Id.* at 98. Section 117 is the equivalent of the privileges and immunities clause of Article IV of the United States Constitution. *Id.* at 112-13.

15. *See, e.g.*, Cheatle v. Regina (Austl. 1993) 177 C.L.R. 541, 559 (Lathan, C.J.) (requiring a unanimous verdict in jury cases); Dietrich v. Regina (Austl. 1992) 177 C.L.R. 292, 299 (Mason, C.J. and McHugh, J.) (requiring counsel for fair trial); Australian Capital Television Pty. Ltd. v. Commonwealth, 177 C.L.R. at 134 (Mason, C.J.) (implying freedom of political discussion from the Constitution); Street v. Queensland Bar Ass'n (Austl. 1989) 168 C.L.R. 461, 493 (Mason, C.J.) (stating that Section 117 applies to forbid a residence requirement for membership in the bar, including the requirement that an attorney must practice primarily in Queensland, because it operated discriminatorily using reasonably proportionate type of analysis); *see also* GEOFFREY LINDELL, *Recent Developments in Constitutional Interpretation*, *in* FUTURE DIRECTIONS IN AUSTRALIAN CONSTITUTIONAL LAW 1, 1 (1994) [hereinafter FUTURE DIRECTIONS]; Peter Bailey, *"Righting" the Constitution Without a Bill of Rights*, 23 FED. L. REV. 1 (1995) (surveying a series of twelve cases "curbing the power of the executive" and "focus[ing] on the protection of the rights of individuals").

The religion clauses in the Australian Constitution prohibit laws "for establishing any religion . . . or for prohibiting the free exercise of any religion."[16] This language has been a major factor in making the "purpose" of a challenged law determinative of its constitutionality. The centrality of purpose in the religion clauses has similarities to the High Court's approach to the new implied freedom of political discussion. In the freedom of political discussion cases, the High Court has tested the purpose of the law by its proportionality as a measure to implement a proper governmental interest.[17] Nevertheless, the latest decisions display considerable deference toward the legislature in applying the constitutional standard and suggest some retreat from a broad view of the protected right.[18]

A. *Section 116 of the Australian Constitution*

Section 116 of the Australian Constitution initially appears quite similar to the religion clauses of the First Amendment to the United States Constitution. The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[19] Section 116 provides: "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."[20]

There are major differences, however, in the subsequent development of the constitutional provisions of the two nations. The First Amendment has been applied to the states through the Fourteenth Amendment,[21] and its religious clauses have been the subject of much litigation.[22] By contrast, section 116

---

16. AUSTL. CONST. ch. V, § 116.

17. Australian Capital Television Pty. Ltd. v. Commonwealth, 177 C.L.R. at 143-44 (Mason, C.J.).

18. *See, e.g.*, Langer v. Commonwealth (Austl. 1996) 134 A.L.R. 400, 405-06 (Brennan, C.J.) ("[I]f the impairment of the freedom is reasonably capable of being regarded as appropriate and adapted to the achieving of a legitimate legislative purpose and the impairment is merely incidental to the achievement of that purpose, the law is within power.").

19. U.S. CONST. amend. I.

20. AUSTL. CONST. ch. V, § 116.

21. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). The Fourteenth Amendment to the United States Constitution protects the free exercise of religion from deprivation by state governments acting without due process. *Id.* That protection incorporates the same standards as the First Amendment's protection of free exercise against federal government prohibitions. *Id.*

22. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) (examining free exercise of religion guaranteed by the First Amendment); Jesse H. Choper, *The Free Exercise Clause: A Structural Overview and an Appraisal of Recent Developments*, 27 WM. & MARY L. REV. 943, 944-45 (1985-86) (describing the strict scrutiny test of constitutionality as applied to religious liberty); Michael W. McConnell, *Free Exercise Revisionism and the* Smith

applies only to the Commonwealth,[23] and the High Court has never found a violation.[24]

One reason for the absence of section 116 litigation has been that the precedents are not promising for those who would attack commonwealth laws. The cases support a purpose-centered interpretation of section 116 which tends to uphold generally applicable laws that do not target religion. The High Court's latest decision reaffirmed the centrality of purpose to section 116, but left open, to some degree, the methodology to be used in determining purpose in such cases.[25]

The High Court has consistently held that section 116 is not violated unless the purpose of the challenged law is to establish religion or prohibit its free exercise.[26] The High Court recently reaffirmed the centrality of purpose as the touchstone for constitutionality under section 116 in *Kruger v. Commonwealth.*[27] The decision, however, did not entirely resolve how the Court should determine purpose.

The *Kruger* decision involved a suit brought by the so-called "stolen generation,"[28] children who had been removed from their homes pursuant to the Aboriginals Ordinance of 1918, and one of the mothers whose children had been taken.[29] Section 7 of the Ordinance made the Chief Protector of the Aboriginals the legal guardian of all aboriginal and half-caste children.[30] Section 6 authorized him to take custody of the children if, in his opinion, it was necessary or desirable in the interests of the child to do so; section 16 allowed him to keep any

---

Decision, 57 U. CHI. L. REV. 1109, 1110 (1990) (discussing that free exercise does not relieve an individual of complying with a "valid and neutral law of general applicability").

23. ENID CAMPBELL & HARRY WHITMORE, FREEDOM IN AUSTRALIA 377 (1973).

24. *See infra* note 26 and accompanying text. It should be noted that only one of the High Court's four decisions occurred within the past fifteen years.

25. *See* Kruger v. Commonwealth (Austl. 1997) 146 A.L.R. 126, 153-54 (Dawson, J.).

26. *See* Attorney-General *ex rel* Black v. Commonwealth (Austl. 1981) 146 C.L.R. 559, 604 (Gibbs, J.) (stating that a law that provides financial aid to a church-related school does not violate the establishment clause as long as its purpose is not to recognize it as a national institution); Adelaide Co. v. Commonwealth (Austl. 1943) 67 C.L.R. 116, 149 (Rich, J.) (stating that regulations preventing the dissemination of principles subversive to the Commonwealth do not infringe on section 116); Krygger v. Williams (Austl. 1912) 15 C.L.R. 366, 370 (Griffith, C.J.) (stating that compulsory military training is not a violation of the free exercise of religion); s*ee also* Stephen McLeish, *Making Sense of Religion and the Constitution: A Fresh Start for Section 116*, 18 MONASH U. L. REV. 207, 210 (1992).

27. Kruger v. Commonwealth (Austl. 1997) 146 A.L.R. 126. Justice McHugh did not reach this issue because he found that Section 116 did not apply to laws governing the territory. *Id.* at 218 (McHugh, J.).

28. Thorpe v. Commonwealth (Austl. 1997) 144 A.L.R. 677, 694 (Kirby, J.) (holding that suit for declaration dismissed for want of jurisdiction).

29. Kruger v. Commonwealth, 146 A.L.R. at 132 (Brennan, C.J.). The Governor General promulgated the Ordinance in 1918 and amended it from time to time pursuant to powers conferred by section 7(3) of the Northern Territory Acceptance Act of 1910 and by section 13 of the Northern Territory (Administration) Act of 1910. *Id.*

30. *Id.* at 133.

aboriginal or half-caste within the boundaries of a reservation or in an aboriginal institution.[31] Regulations to carry out the Ordinance gave Protectors the discretion to send any aboriginal or half-caste children to the nearest aboriginal institution or school.[32] Although Australians have regarded the practice of enforced separations as unacceptable for decades, the affected individuals had no recourse for the harm done.[33] In 1997, the Human Rights and Equal Opportunity Commission engaged in an inquiry and made a report on the full extent and impact of these policies.[34] The political climate surrounding the inquiry, the development of implied freedoms, and the expansive interpretation of other limits on government by the High Court emboldened these plaintiffs to sue.[35] A critical part of their claim was that the Ordinance was unconstitutional[36] and that such a constitutional violation gave rise to an individual cause of action.[37] Section 122 of the Australian Constitution, however, gives Parliament plenary power to make laws for the territory.[38] Thus, the plaintiffs' argument focused primarily on the claim that the Ordinance violated a limit on governmental power.[39] The only express limit they cited was Section 116.[40] The plaintiffs claimed that removal from an aboriginal community separated the child from his or her culture and system of beliefs, thereby impairing the free exercise of religion.[41]

---

31. *Id.* at 133-34.

32. *Id.* at 134 (citing Regulations (General) under section 3 of the Aboriginals Ordinance of 1918 and section 6 of the Aboriginal Regulations of 1933).

33. *Id.* at 134-35.

34. HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION, BRINGING THEM HOME: REPORT OF THE NATIONAL INQUIRY INTO THE SEPARATION OF ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN FROM THEIR FAMILIES (1997). For an affecting story of the impact of this policy on an individual, see SALLY MORGAN, MY PLACE (1987).

35. Kruger v. Commonwealth, 146 A.L.R. at 136 (Brennan, C.J.).

36. *Id.*

37. *Id.* at 142.

38. Section 122 states:

> The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any Territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.

AUSTL. CONST. ch. VI. § 122; *see also* Australian Nat'l Airways Pty. Ltd. v. Commonwealth (Austl. 1945) 71 C.L.R. 29 (discussing plenary character of the power).

39. Kruger v. Commonwealth, 146 A.L.R. at 173-74 (Toohey, J.).

40. *Id.* at 173.

41. *Id.* at 173-74. The relationship of indigenous groups to the land has an important religious dimension. *See* Nonie Sharp, *No Ordinary Case: Reflections Upon* Mabo (No 2), 15 SYD. L. REV. 143, 151 (1993). Nevertheless, the heated debates on the topic have not involved section 116. Clashes over aboriginal land rights have often been at the state level where section 116 does not apply. The most significant development to date was the decision in *Mabo v. Queen-*

The questions referred to the High Court included whether the power to enact laws, ordinances, and regulations for the territory was so restricted by any claimed limitations including section 116 as to invalidate them.[42]

Five justices held that section 116 did not invalidate the Ordinance and regulations,[43] while the sixth insisted that the record was not sufficient to make the determination.[44] Chief Justice Gerard Brennan stated that none of the laws as properly construed could be seen as a law for prohibiting the free exercise of religion because they did not appear to have a forbidden purpose.[45] Even if individual "protectors" had taken children from their parents for the purpose of interfering with religious exercise, that would be an abuse of power rather than a ground for setting aside the regulations.[46] Justice William Gummow stated that the question was "whether the Commonwealth has made a law in order to prohibit the free exercise of any religion, as the end to be achieved,"[47] and Justice Daryl Dawson agreed with him on this point.[48] Justice Gummow concluded that even though the law might have the effect of denying the children instruction in the religious beliefs of their community, "there is nothing apparent in the 1918 Ordinance which suggests that it aptly is to be characterised as a law made in order to prohibit the free exercise of any such religion, as the objective to be achieved by the implementation of the law."[49] Justice Toohey agreed that the language of the 1918 Ordinance did not disclose any forbidden purpose, and the High Court should state it did not violate section 116.[50] Only Justice Mary Gaudron thought that the Ordinance might disclose a forbidden purpose on its

---

sland (Austl. 1992) 175 C.L.R. 1. Prior to this case, it was generally accepted that the doctrine of *terra nullius* applied to Australia—that all law proceeded from the Crown. *Id.* at 26-27 (Brennan, J.). The High Court rejected this doctrine, finding that another legal system coexisted with crown sovereignty. *Id.* at 34. While Crown grants were recognized as extinguishing native title in crown courts, however unjust those actions might be, native title remained in lands that had not received a positive grant. *Id.*

42. Kruger v. Commonwealth, 146 A.L.R. at 173 (Toohey, J.). The proceedings followed section 18 of the Judiciary Act of 1903 which allows a member of the High Court sitting alone to reserve any question for consideration of the Full Court. Judiciary Act of 1903, § 18 (Austl.). The Chief Justice reserved the questions in this case on the basis that they do not call for any ascertainment of facts which require submission of evidence. Kruger v. Commonwealth, 146 A.L.R. at 137 (Brennan, C.J.).

43. *See* Kruger v. Commonwealth, 146 A.L.R. at 138 (Brennan, C.J.), 153 (Dawson, J.), 173-74 (Toohey, J.), 218-20 (McHugh, J.), 232 (Gummow, J.).

44. *Id.* at 212 (Gaudron, J.).

45. *Id.* at 138 (Brennan, C.J.).

46. *Id.* at 135-36.

47. *Id.* at 232-33 (Gummow, J.).

48. *Id.* at 153 (Dawson, J.). Justice Dawson also argued that section 116 was inapplicable to this case because it did not restrict the Commonwealth's power over the territories. *Id.* Justice McHugh agreed with him on this point. *Id.* at 218 (McHugh, J.). However, Justices Gummow, *id.* at 232 (Gummow, J.), Toohey, *id.* at 173 (Toohey, J.), and Gaudron, *id.* at 202-03 (Gaudron, J.) stated that section 116 did restrict section 122.

49. *Id.* at 233 (Gummow, J.).

50. *Id.* at 173-74 (Toohey, J.).

face.[51] Given the effect of the law, Justice Gaudron argued that preventing participation of the children in religious practices that were part of the community activities might appear to be a purpose of the Ordinance.[52]

Justices Toohey and Gummow intimated that a law that was constitutional on its face might be challenged with evidence that it was a "circuitous device" to attain a forbidden end, but held that such a challenge was not appropriate in the posture of the case before them.[53] They did not discuss what evidence they would accept or what standard would be applicable if the issue were properly presented. Justice Gummow did state, however, that "a law which protects or regulates the personal or property rights of others will not ordinarily offend [section] 116, despite curtailment by the general operation of that law of overt activity which in respect of some persons may give expression to their religious beliefs."[54] Justice Gummow supported this statement by citing to *Employment Division v. Smith*,[55] a United States case which stated that generally applicable laws are not subject to the free exercise clause of the First Amendment.[56]

While other justices considered the law to be religiously neutral on its face, Justice Gaudron derived purpose from its effect.[57] Because the effect on religion could have been the purpose of the law, Justice Gaudron argued that the Commonwealth could avoid section 116 only by pleading that the law was necessary to attain some overriding public purpose or that it was for a specific purpose unconnected with the free exercise of religion and only incidentally affected that freedom.[58] If the Commonwealth did so, "a question might arise, if the plea were to be made good, whether the interference with religious freedom, if any, effected by the Ordinance was appropriate and adapted or, which is the same thing, proportionate to the protection and preservation of those people."[59]

In sum, section 116 invalidates laws only when they are enacted with a forbidden purpose. But these cases do not resolve how a court determines whether a forbidden purpose exists. On the one hand, the High Court might find that a law which impairs free exercise without sufficient justification is "discriminatory," despite its apparent generality, and, therefore, has a forbidden "purpose." The same could be true of a law challenged as an "establishment." In cases decided under section 92[60] and section 117,[61] the High Court found

---

51. *Id.* at 208-09 (Gaudron, J.).

52. *Id.* at 211.

53. *Id.* at 173 (Toohey, J.), 233 (Gummow, J.).

54. *Id.* at 232 (Gummow, J.).

55. Employment Div. v. Smith, 484 U.S. 872 (1990).

56. Kruger v. Commonwealth, 146 A.L.R. at 232 n.461 (Gummow, J.) (citing Employment Div. v. Smith, 484 U.S. at 878-80).

57. *Id.* at 207 (Gaudron, J.).

58. *Id.* at 211.

59. *Id.* at 212.

60. In *Castlemaine Tooheys Ltd. v. South Australia*, the High Court invalidated a fee imposed on nonrefillable bottles. Castlemaine Tooheys Ltd. v. South Australia (Austl. 1990) 169 C.L.R. 436, 477 (Mason, C.J., joined by Brennan, Deane, Dawson, and Toohey, JJ.). Noting that

discrimination existed because facially neutral laws had a differential impact. Applying section 116 in *Kruger*, Justice Gaudron inferred purpose from effect, even though the law was not triggered by religion.[62] Justice Gaudron would use proportionality to test such a law.[63]

On the other hand, prior decisions upheld generally applicable laws with comments that suggested that they did not pose a serious threat to section 116.[64] Most of the justices in *Kruger* looked to the religiously neutral appearance of the law in upholding it.[65] Although the High Court might be willing to look behind the surface where a law impacts religion significantly with little justification and the surrounding discussion evinces a motive of establishment or suppression of religion, the search for purpose would begin with a strong presumption in the law's favor. In *Kruger*, Justice Gummow's reference to *Smith* supports the proposition that section 116 decisions may uphold generally applicable laws without carefully scrutinizing them.[66]

---

intrastate bottlers used refillable bottles, the High Court saw a substantial differential impact as a result of the state law. *Id.* at 475-76. In analyzing the basis for the law, the High Court noted that no significant differential fee between refillable and nonrefillable bottles was needed to encourage consumers to return bottles. *Id.* at 476. The only justification for a discriminatory fee was to discourage the use of nonrefillable bottles. *Id.* at 474. The energy and environmental costs of such bottles, however, were largely borne by other states where the bottles were made. *Id.* at 476. As a result, the High Court held that the fee was not reasonably proportionate to the legitimate bases for state action. *Id.* at 477.

61. In *Street v. Queensland Bar Ass'n*, the High Court invalidated a requirement that Queensland bar members not practice elsewhere, noting that the provision had a differential impact on nonresidents. Street v. Queensland Bar Ass'n (Austl. 1989) 168 C.L.R. 461, 589-90 (McHugh, J.).

62. Kruger v. Commonwealth, 146 A.L.R. at 207 (Gaudron, J.).

63. *Id.*

64. For instance, *Krygger v. Williams* involved a law of general applicability, and the High Court saw no problem with its impact on religion. Krygger v. Williams (Austl. 1912) 15 C.L.R. 366, 371-72 (Barton, J.). Closer scrutiny was given in *Adelaide Co. v. Commonwealth* because the law required examination of the religion's teachings. The Governor-General's decision was directed at a particular religious group, and its effect was devastating to the sect. Adelaide Co. v. Commonwealth (Austl. 1943) 67 C.L.R. 116, 134-35 (Latham, C.J.). Nevertheless, the High Court decided that section 116 was not violated. *Id.* at 131-32. The law supported the conduct of the war, and the religious motivation for opposition was irrelevant to the decision to suppress it. *Id.* at 132-33. The justices in *Attorney-General ex rel. Black v. Commonwealth* did not examine the impact of the grant on religious schools, but nevertheless upheld them. Attorney General *ex rel.* Black v. Commonwealth (Austl. 1981) 146 C.L.R. 559.

65. *See* Kruger v. Commonwealth, 146 A.L.R. at 153 (Brennan, C.J.), 173 (Toohey, J.), 233 (Gummow, J.).

66. *See id.* at 233 (Gummow, J.) (citing Employment Div. v. Smith, 484 U.S. 872, 878-80 (1990)).

B. *The Implied Freedom of Political Discussion*

The Australian Constitution does not have a First Amendment style clause that protects speech. The framers considered the American model, but omitted any reference to freedom of speech.[67] As a result, the High Court's implication of a constitutional protection for political discussion in the absence of an express guarantee generated a great deal of discussion.[68]

Since 1992, an implied freedom of political discussion has become a permanent part of the Australian constitutional landscape. As with religious freedom, the High Court's standard for constitutionality focuses on the law's objective.[69] Under the rubric of determining whether a law is "appropriate and adapted" to a valid objective, the High Court scrutinizes the proportionality of a challenged law as a means to implement legitimate government interests.[70] The High Court seems likely to apply that standard to generally applicable laws as well, while granting substantial deference to the legislature.

---

67. Michael Stokes, *Constitutional Commitments not Original Intentions: Interpretation in the Freedom of Speech Cases*, 16 SYDNEY L. REV. 250, 254-55 (1994).

68. *See generally* A.R. Blackshield, *The Implied Freedom of Communication, in* FUTURE DIRECTIONS, *supra* note 15, at 232-35; Jeffrey Goldsworthy, *Implications in Language, Law and the Constitution, in* FUTURE DIRECTIONS *supra* note 15, at 150; Gabriel A. Moens, *The Wrongs of a Constitutionally Entrenched Bill of Rights, in* AUSTRALIA: REPUBLIC OR MONARCHY 233 (M.A. Stephenson & Clive Turner eds., 1994); *Symposium: Constitutional Rights for Australia?*, 16 SYDNEY L. REV. 145 (1994); Gerard Carney, *The Implied Freedom of Political Discussion—Its Impact on State Constitutions*, 23 FED. L. REV. 180 (1995); Deborah Z. Cass, *Through the Looking Glass: The High Court and the Right to Speech*, 4 PUB. L. REV. 229 (1993); Peter Creighton, *The Implied Guarantee of Free Political Communication*, 23 U. WEST. AUSTL. L. REV. 163 (1993); Neil F. Douglas, *Freedom of Expression Under the Australian Constitution*, 16 U. NEW S. WALES L.J. 315 (1993); J.J. Doyle, *Constitutional Law: "At the Eye of the Storm,"* 23 U. WEST. AUSTL. L. REV. 15 (1993); Arthur Glass, Australian Capital Television *and the Application of Constitutional Rights*, 17 SYDNEY L. REV. 29 (1995); Timothy H. Jones, *Legal Protection for Fundamental Rights and Freedoms: European Lessons for Australia*, 22 FED. L. REV. 57 (1994); Geoffrey Kennett, *Individual Rights, the High Court and the Constitution*, 19 MELB. U. L. REV. 581 (1994); Jeremy Kirk, *Constitutional Implications from Representative Democracy*, 23 FED. L. REV. 37 (1995); Leighton McDonald, *The Denizens of Democracy: The High Court and the "Free Speech" Cases*, 5 PUB. L. REV. 160 (1994); Robert M. O'Neil, *Freedom of Expression and Public Affairs in Australia and the United States: Does a Written Bill of Rights Really Matter*, 22 FED. L. REV. 1 (1994); D.A. Smallbone, *Recent Suggestions of an Implied "Bill of Rights" in the Constitution, Considered as Part of a General Trend in Constitutional Interpretation*, 21 FED. L. REV. 254 (1993); Donald Speagle, Australian Capital Television Pty. Ltd. v. Commonwealth, 18 MELB. U. L. REV. 938 (1992); Sally Walker, *The Impact of the High Court's Free Speech Cases on Defamation Law*, 17 SYDNEY L. REV. 43 (1995); George Williams, *Civil Liberties and the Constitution—A Question of Interpretation*, 5 PUB. L. REV. 82 (1994); George Williams, Engineers *is Dead, Long Live the Engineers!*, 17 SYDNEY L. REV. 62 (1995).

69. Blackshield, *supra* note 68, at 251.

70. *Id.*

1. *The Implication of an Implied Freedom*

Australian Courts have long followed the English principle that "a court will interpret laws of the Parliament in light of a presumption that the Parliament does not intend to abrogate human rights and fundamental freedoms."[71] High Court members have also considered fundamental freedoms in determining whether a law could be justified as incidental to a power granted to the commonwealth government.[72] Despite the influence that such background freedoms have had on the interpretation of the laws, and even on determining whether they were enacted as a means of carrying out a granted power, they do not prevent the legislature from validly enacting a law pursuant to an express grant of power even if the law's purpose was to impair a fundamental common-law value.

In 1992, the High Court took the next step, deciding that freedom of political discussion is implicit in the Constitution and directly limits legislative action even under express grants of power. In *Nationwide News Pty. Ltd. v. Wills*,[73] the High Court unanimously invalidated a commonwealth law prohibiting criticism

---

71. *See In re* Bolton (Austl. 1987) 162 C.L.R. 514, 523 (Brennan, J.); Potter v. Minahan (Austl. 1908) 7 C.L.R. 277, 304 (O'Connor, J.). Justice Brennan also stated, "but the court cannot deny the validity of an exercise of a legislative power expressly granted merely on the ground that the law abrogates human rights and fundamental freedoms or trenches upon political rights which, in the court's opinion, should be preserved." Nationwide News Pty. Ltd. v. Wills (Austl. 1992) 177 C.L.R. 1, 43 (Brennan, J.); *see also* Bropho v. Western Australia. (Austl. 1990) 171 C.L.R. 1, 17-18 (Mason, C.J., Deane, Dawson, Toohey, Gaudron, and McHugh, JJ.); Wentworth v. New S. Wales Bar Ass'n (Austl. 1992) 176 C.L.R. 239, 250-54 (Deane, Dawson, Toohey, and Gaudron, JJ.).

72. Davis v. Commonwealth (Austl. 1988) 166 C.L.R. 79, 100 (Mason, C.J., Deane, and Gaudron, JJ.); Australian Communist Party v. Commonwealth (Austl. 1951) 83 C.L.R. 1, 192-95 (Dixon, J.); *see also* George Williams, *Reading the Judicial Mind: Appellate Argument in the* Communist Party *Case*, 15 SYDNEY L. REV. 3, 23-25 (1993). Where a statute can be justified only as a means to accomplish an end in power, an unnecessary impact on fundamental values may suggest the law was not designed to accomplish that end.

In *Nationwide News*, Chief Justice Mason observed:

> *Davis* establishes two propositions. First, that, even if the purpose of a law is to achieve an end within power, it will not fall within the scope of what is incidental to the substantive power unless it is reasonably and appropriately adapted to the pursuit of an end within power, i.e., unless it is capable of being considered to be reasonably proportionate to the pursuit of that end. Secondly, in determining whether that requirement of reasonable proportionality is satisfied, it is material to ascertain whether, and to what extent, the law goes beyond what is reasonably necessary or conceivably desirable for the achievement of the legitimate object sought to be attained and, in so doing, causes adverse consequences unrelated to the achievement of that object. In particular, it is material to ascertain whether those adverse consequences result in any infringement of fundamental values traditionally protected by the common law, such as freedom of expression.

Nationwide News Pty. Ltd. v. Wills, 177 C.L.R. at 30-31 (Mason, C.J.) (footnotes omitted).

73. Nationwide News Pty. Ltd. v. Wills (Austl. 1992) 177 C.L.R. 1.

of the Industrial Relations Commission.[74] Four Justices did so on the grounds of an implied freedom of speech.[75] The other three Justices said that the statute was not reasonably appropriate as a means of exercising any specific power, and did not reach the issue of implied freedom.[76]

On the same day, in *Australian Capital Television Pty. Ltd. v. Commonwealth (ACTV)*,[77] the High Court struck down a commonwealth ban on broadcasting political advertising during election periods in commonwealth, state, and territorial elections.[78] The statute had prohibited the broadcast of any matter on behalf of the government or political advertisements by anyone during the election period, with exemptions for news programs and the like.[79] It also required the allocation of free broadcast time to candidates during this period.[80] Because the Constitution granted Parliament power to regulate broadcasting,[81] the High Court had to decide whether the power was specifically limited.[82] The Justices ruled that an implied freedom limited the granted power.[83]

Then Chief Justice Anthony Mason observed that "[f]reedom of communication [in relation to public affairs and political discussion] is so indispensable to the efficacy of the system of representative government for which the Constitution makes provision that it is necessarily implied in the making of that provision."[84] He stated that the implied freedom extends to all matters of public affairs because there is no limit on matters that may be relevant to debate in the Commonwealth Parliament and because the fiscal relationship between Commonwealth and state governments creates the potential for matters of local

---

74. *Id.* at 2. The High Court found that the statute which proscribed "words calculated to bring a member of the Commission or the Commission into disrepute" was not subject to the defenses normally available for persons charged with contempt of court. *Id.* at 26 (Mason, C.J.). But it is very unlikely that the legislators who adopted the statute and the commission that reviewed it recognized that this law would be interpreted to muzzle truthful criticism that demonstrated commission improprieties.

75. *Id.* at 48-49 (Brennan, J.), 72-77 (Deane and Toohey, JJ.), and 94-95 (Gaudron, J.).

76. *Id.* at 23 (Mason, C.J.), 84 (Danson, J.), 95 (McHugh, J.).

77. Australian Capital Television Pty. Ltd. v. Commonwealth (Austl. 1992) 177 C.L.R. 106.

78. *Id.* at 147 (Mason, C.J.).

79. *Id.* at 124.

80. *Id.*

81. Section 51(v) of the Australian Constitution grants power with respect to "postal, telegraphic, telephonic, and other like services." AUSTL. CONST. ch. V, § 51(v). Radio and television broadcasting are "like services" under this section. *See* Herald & Weekly Times Ltd. v. Commonwealth (Austl. 1966) 115 C.L.R. 418, 432 (Kitto, J.); Jones v. Commonwealth (No. 2) (Austl. 1965) 112 C.L.R. 206, 226 (Kitto, J.).

82. Australian Capital Television Pty. Ltd. v. Commonwealth, 177 C.L.R. at 142-43 (Mason, C.J.).

83. *Id.* at 147.

84. *Id.* at 140.

concern to become national.[85] Therefore, the implied freedom applied to the entire statute, including the regulations dealing with state and territorial elections. Justices Deane, Toohey, and Gaudron agreed that the implied freedom applied to candidate discussion in all elections and that it was violated by the prohibition on political advertising combined with a system of free time that favored established political parties and discriminated against new ones.[86]

Two years after *ACTV*, the High Court applied the new implied freedom in three cases, two of which involved state laws. By a four to three margin, the High Court stated that the implied freedom of political discussion in the Australian Constitution restricted common-law libel and state libel statutes as applied to criticism of federal legislators in *Theophanous v. Herald & Weekly Times Ltd.*[87] and that a similar implication in a state constitution restricted their application to criticism of state legislators in *Stephens v. West Australian Newspapers Ltd.*[88] In *Cunliffe v. Commonwealth*,[89] the same four judges ruled that the implied freedom in the Australian Constitution applied to advising and representing aliens on immigration matters, although the High Court upheld the statute with the vote of one of the four who had declared the implied freedom applicable.[90]

Chief Justice Mason, joined by Justices Gaudron and Toohey in both *Theophanous* and *Stephens,* interpreted the implied freedom of political discussion broadly, quoting Eric Barendt's definition of "political speech" to describe

---

85. *Id.* at 142.

86. *Id.* at 174 (Deane and Toohey, JJ.), 212 (Gaudron, J.). Justice McHugh agreed that the Act unconstitutionally interfered with freedom of choice in federal elections. *Id.* at 227 (McHugh, J.). He found that the Act's application to state elections was unconstitutional because it interfered with the functioning of the states. *Id.* at 244-45. Justice Brennan agreed that there was a constitutional implication of freedom of communication in federal elections, but he did not believe that the statute violated it. *Id.* at 149-62 (Brennan, J.). On the other hand, he agreed with Justice McHugh that a portion of the law impermissibly impaired the states. *Id.* at 162-64. Justice Dawson dissented since he thought the law was valid entirely. *Id.* at 189 (Dawson, J.).

87. Theophanous v. Herald & Weekly Times Ltd. (Austl. 1994) 182 C.L.R. 104. The joint opinion of Chief Justice Mason, Justice Toohey, and Justice Gaudron controlled.

88. Stephens v. West Australian Newspapers Ltd. (Austl. 1994) 182 C.L.R. 211. Again the joint opinion of Chief Justice Mason and Justices Toohey and Gaudron controlled on the issue of the existence of the implied freedom and the standard to be applied because of the supporting vote of Justice Deane who would have given even greater protection to the speech. The three justices found, however, that the defense pleaded in one count was bad because the defendant failed to allege that publication was neither knowingly false nor reckless and was reasonable in the circumstances. *Id.* at 231-34 (Mason, C.J., Toohey, and Gaudron, JJ.).

89. Cunliffe v. Commonwealth (Austl. 1994) 182 C.L.R. 272.

90. *Id.* Although a majority—Chief Justice Mason, Justices Deane, Toohey, and Gaudron—found the implied freedom applicable, Justice Toohey found no violation. *Id.* at 378-85 (Toohey, J.). Toohey's vote, together with the three justices—Brennan, Dawson, and McHugh—who found the implied freedom of political discussion inapplicable, resulted in upholding the law.

what is protected: "'all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about.'"[91]

The plurality applied a balancing test which weighed the need to protect the efficacious working of representative democracy against protection of individual reputation.[92] They observed that the common law of libel tilted too far against freedom of communication,[93] but the *New York Times Co. v. Sullivan*[94] standard used in the United States, which placed the burden on the plaintiff to prove knowing falsity or reckless disregard, tilted too far against reputational interests.[95] Justice Deane voted with the plurality, although he would have completely abrogated state defamation laws with respect to publication of statements about the official conduct or suitability of a member of the Parliament or other holder of high Commonwealth office.[96]

While the majority's views on implied freedom were broad, the orders tended to be narrow. The question presented in *Stephens* was whether a defense to a defamation suit brought by a state legislator that was pleaded in terms of an implied freedom of communication was bad in law.[97] The defendant failed to anticipate the *Theophanous* standard; the pleading assumed that plaintiff would have to demonstrate a violation of the *New York Times* standard.[98] The High

---

91. Theophanous v. Herald & Weekly Times Ltd., 182 C.L.R. at 124 (quoting ERIC BARENDT, FREEDOM OF SPEECH 152 (1985)). In separate opinions in *Cunliffe*, each of the members of the *Theophanous* majority found migration agents within this concept. Chief Justice Mason stated that freedom "necessarily extends to the workings of the courts and tribunals which administer and enforce the laws of this country." Cunliffe v. Commonwealth, 182 C.L.R. at 298 (Mason, C.J.). Justice Deane explained that immigration assistance and immigration representations "constitute communication and discussion about matters relating to the government of the Commonwealth, that is to say, political communication and discussion." *Id.* at 340-41 (Deane, J.). Justice Gaudron concurred with Justice Deane on this point. *Id.* at 387 (Gaudron, J.). Justice Toohey held that freedom "must include the communication of information and the expression of opinions regarding matters that involve a minister of the Government." *Id.* at 380 (Toohey, J.).

92. Theophanous v. Herald & Weekly Times Ltd., 182 C.L.R. at 131-33 (Mason, C.J., Toohey, and Gaudron, JJ.).

93. *Id.* at 131.

94. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

95. The plurality would permit an affirmative defense in defamation actions brought by public officials if it is established that (1) the defendant was unaware of the falsity, (2) the defendant did not publish recklessly—not caring if the statement was true or false, and (3) the publication was reasonable in the circumstances—steps were taken to determine the truth or there were sufficient reasons for failing to take such steps. Theophanous v. Herald & Weekly Times Ltd., 182 C.L.R. at 140-41 (Mason, C.J., Toohey, and Gaudron, JJ.).

96. *Id.* at 188 (Deane, J.).

97. Stephens v. West Australian Newspapers Ltd. (Austl. 1994) 182 C.L.R. 211, 229-31 (Mason, C.J., Toohey, and Gaudron, JJ.).

98. *See id.* at 234.

Court ruled that the pleading based on an implied freedom was erroneous.[99] In *Cunliffe*, the High Court upheld a migration agent registration law against an implied freedom challenge.[100] Only in *Theophanous* did the High Court hold proper a pleading based on an implied freedom.[101]

In two 1996 decisions, the High Court indicated that it would give significant deference to the legislature in applying the implied freedom. In *Langer v. Commonwealth*,[102] the High Court upheld a Commonwealth law that prohibited persons from encouraging voters to mark their ballots in a manner not in accord with the ballot directions.[103] The High Court reaffirmed the existence of some implied freedom, but ruled that it had not been violated.[104] The Justices concluded that the law was "reasonably capable of being viewed as appropriate and adapted" to implement a proper policy relating to voting procedures.[105] Only Justice Dawson dissented, arguing that it violated the Constitutional provisions for elections by the people for government to punish people for telling electors the truth about a lawful means of voting.[106]

A similar state statute regulating elections for state legislators was unanimously upheld in *Muldowney v. South Australia*.[107] Not only did the Court hold that the law was appropriate and adapted, but members pointed out that the implication from the Commonwealth Constitution was to maintain the processes of the Commonwealth and not those of the states.[108]

---

99. *Id.*

100. Cunliffe v. Commonwealth (Austl. 1994) 182 C.L.R. 272, 333 (Brennan, J.), 367 (Dawson, J.), 385 (Toohey, J.), 397 (McHugh, J.).

101. Theophanous v. Herald & Weekly Times Ltd., 182 C.L.R. at 140 (Mason, C.J., Toohey, and Gaudron, JJ.).

102. Langer v. Commonwealth (Austl. 1996) 134 A.L.R. 400.

103. *Id.* at 405 (Brennan, C.J.).

104. *Id.* at 405-06.

105. *Id.* at 419 (Toohey and Gaudron, JJ.); *see* David S. Bogen, *Telling the Truth and Paying for It: A Comparison of Two Cases—Restrictions on Political Speech in Australia and Commercial Speech in the United States*, 7 IND. INT'L & COMP. L. REV. 111, 117-20 (1996) (discussing Langer v. Commonwealth (Austl. 1996) 134 A.L.R. 400).

106. Langer v. Commonwealth, 134 A.L.R. at 412 (Dawson, J., dissenting).

107. Muldowney v. South Australia (Austl. 1996) 136 A.L.R. 18.

108. Chief Justice Brennan said that the implied freedom of political discussion in the Commonwealth Constitution did not apply to state regulations of state elections. *Id.* at 22-23 (Brennan, C.J.). Justice Toohey stressed his view that the Commonwealth Constitution did not create any implication of representative government at the state level. *Id.* at 29 (Toohey, J.). Justice Gummow found the law would be constitutional even if the implied freedom were applicable, so he did not find it necessary to rule on whether the Commonwealth implied freedom applies to state regulations of state electoral processes. *Id.* at 40 (Gummow, J.). Justice McHugh agreed with Gummow's opinion, but he had previously stated that the implication from the federal constitution did not apply to state elections. *Id.* at 35 (McHugh, J.). Justice Gaudron's concurring opinion maintained the applicability of the implied freedom of political discussion in state elections. *Id.* at 30 (Gaudron, J.). She acknowledged that "[t]he purpose of the freedom to discuss political matters identified in *Nationwide News Pty Ltd v Wills* and in *Australian Capital Television Pty Ltd v Commonwealth* is to maintain the democratic processes of the Commonwealth of Australia, not

2. *1997:* Lange, Krüger, *and* Levy

Although the first decisions on the implied freedom of political communication seemed to suggest a general principle of representative democracy was implicit in the Constitution, the High Court has now rejected the implication of any principle that is not tied to the specific provisions of the Constitution.[109] Three decisions in 1997 examined the implied freedom, taking up a challenge to reexamine the concept that Justice Gummow had issued the previous year in a reapportionment case, *McGinty v. State of Western Australia.*[110]

The reconsideration took place primarily in *Lange v. Australian Broadcasting Corp.*[111] David Russell Lange, the former premier of New Zealand, sued the Australian Broadcasting Corporation for defamation.[112] The defendant pleaded both the constitutional implied freedom and a common-law qualified

---

those of its States." *Id.* Thus, her opinion was consistent with that of Justice Toohey. Nevertheless, she contended that the interrelationship of commonwealth and state governments made the implied freedom applicable to state as well as federal legislatures. *Id.* at 31-32.

109. *See* Lange v. Australian Broad. Corp. (Austl. 1997) 145 A.L.R. 96, 112.

110. McGinty v. Western Australia (Austl. 1996) 134 A.L.R. 289. Justice Gummow followed Justice McHugh in raising serious questions over whether any implication could be drawn from a principle of representative democracy apart from the specific provisions of the Constitution. *Id.* at 290-91 (McHugh, J.). In *McGinty*, the plaintiffs claimed that electoral districts must be equal in population because the Constitution required members of the House of Representatives of the Commonwealth Parliament to be "chosen by the people"—"one man, one vote" in United States terms. *Id.* at 293-94 (Brennan, C.J.); *see also* AUSTL. CONST. ch. I, § 24. The plaintiffs argued that *ACTV* supported their theory because it relied on a principle of representative democracy implicit in the electoral provisions. McGinty v. Western Australia, 134 A.L.R. at 364 (Gummow, J.). Justice Gummow, who replaced retired Chief Justice Mason, joined the *Theophanous* dissenters to uphold the existing electoral system. *Id.* at 390. They said that "chosen by the people" meant elections must be direct rather than indirect. *Id.* at 378. Although individual voters in a direct election must have an opportunity to discuss political issues in order to satisfy the constitutional requirement of choice, that does not control the size of the district in which they vote. *Id.*

Justice Gummow accepted the implied freedom precedent of *ACTV*, but he suggested the need to reexamine the 1994 cases. *Id.* at 364. He saw them as suggesting a principle of representation beyond the specific provisions of the Constitution:

> [T]he process of constitutional interpretation by which this principle was derived (being an implication at a secondary level), and the nature of the implication (which restrains not only the exercise of legislative, executive or judicial power but also what otherwise would be the operation of the general law upon private rights and obligations) departed from previously accepted methods of constitutional interpretation. If it now were sought to apply the principle then the need for further examination of it would arise.

Id. at 391.

111. Lange v. Australian Broad. Corp. (Austl. 1997) 145 A.L.R. 96.

112. *Id.* at 99.

privilege, and the High Court took the occasion to reexamine its rulings in *Theophanous* and *Stephens*.[113] With Justice Michael Kirby replacing the retired Justice Deane, the High Court mustered a unanimous opinion.[114]

The opinion struck a compromise, rejecting several statements in *Stephens* and *Theophanous*, while reaffirming the basic implication of a constitutional freedom.[115] Although the High Court disavowed any principle of representative democracy apart from the Constitutional provisions, it left open how far the implications from those provisions might extend and it gave an even greater reach to the common-law privilege.[116] The High Court struck down the constitutional defense and concluded that the common-law qualified privilege was not supported by the particulars of the case.[117]

The High Court stated that the implied constitutional freedom precluded the operation of English common-law defamation:

> *Theophanous* and *Stephens* should be accepted as deciding that in Australia the common law rules of defamation must conform to the requirements of the Constitution. Those cases should also be accepted as deciding that, at

---

113. *Id.* at 96.

114. *Id.*

115. The High Court drew the support of the majority from the earlier cases by reaffirming the existence of an implied freedom incompatible with the common law as it previously existed. The Justices stated that the implied freedom extended beyond the election period, contrary to suggestions in Justice McHugh's dissent in *Theophanous*, and that it applied to reports of the conduct of the executive branch, and could, in particular cases, reach discussion of matters at the state and local levels. *Id.* at 107.

McHugh and Dawson had been particularly critical of extensions beyond specific constitutional provisions. *See* Theophanous v. Herald & Weekly Times Ltd. (Austl. 1994) 182 C.L.R. 104, 198-205 (McHugh, J.); Australian Capital Television Pty. Ltd. v. Commonwealth (Austl. 1992) 177 C.L.R. 106, 184 (Dawson, J.). They were reassured that the freedom of communication was tied to Constitutional provisions and not a principle that might extend beyond the areas dealt with by those provisions. Lange v. Australian Broad. Corp., 145 A.L.R. at 111. Chief Justice Brennan argued that the Constitution was not incompatible with the common law. Theophanous v. Herald & Weekly Times Ltd., 182 C.L.R. at 153 (Brennan, J.). An expansion of the common law qualified privilege, citing language from Justice McHugh in *Stephens v. West Australian Newspapers Ltd.* resulted in finding that the common law was compatible. Lange v. Australian Broad. Corp., 145 A.L.R. at 115-16 (citing Stephens v. West Australian Newspapers Ltd. (Austl. 1994) 182 C.L.R. 211, 264). The opinion in *Lange* reinstated protection for plaintiffs where the statement was actuated by malice. *See id.* at 118. Even if the defendant met its burden of showing that its conduct was otherwise reasonable, plaintiff could defeat the qualified privilege by demonstrating that the speech was "actuated" by malice. *Id.* The High Court agreed with Chief Justice Brennan's insistence that the implied freedom was not an individual right but a limitation on the granted power. *Id.* at 119. Finally, it required plaintiff to allege sufficient particulars to show the relationship to the specific Constitutional provision and did not permit any inference to be made that discussion of politics of another country would necessarily be within the freedom of communication. *Id.*

116. Lange v. Australian Broad. Corp., 145 A.L.R. at 104-06.

117. *Id.* at 119.

> least by 1992, the constitutional implication precluded an unqualified application in Australia of the English common law of defamation in so far as it continued to provide no defense for the mistaken publication of defamatory matter concerning government and political matters to a wide audience.[118]

In so doing, rather than supplanting the common law with the Constitution, the High Court changed the common law. Unlike in the United States where the "common law" is decided for each state by its own courts, the common law in Australia is determined by the High Court for all jurisdictions and thus is truly "common" throughout the land.[119] Still, in developing the common law, the High Court noted that courts must act consistently with the Constitution.[120] "The common law of libel and slander could not be developed inconsistently with the Constitution, for the common law's protection of personal reputation must admit as an exception that qualified freedom to discuss government and politics which is required by the Constitution."[121]

In expanding the common-law qualified privilege in *Lange*, the Court could and did go beyond the requirements of the Constitution. It extended the privilege to protect communications made to the public on a government or political matter.[122] The High Court concluded that political and governmental matters should be considered of interest to everyone:

> With the increasing integration of the social, economic and political life of Australia, it is difficult to contend that the exercise or failure to exercise public functions or powers at any particular level of government or administration, or in any part of the country, is not of relevant interest to the public of Australia generally.[123]

By reaching the discussion of government and political matters that affect the people of Australia, the privilege could apply to speech not within the freedom of communication implied from the specific constitutional provisions on federal elections, responsible government, and constitutional amendment:

---

118. *Id.* at 103.

119. *Id.* at 108-09.

120. *Id.* at 111.

121. *Id.*

122. *Id.* at 115. The High Court held that the qualified privilege includes as a criterion "reasonableness of conduct" when the privilege is applied to publications that would not have been considered subject to the qualified privilege at English common law. *Id.* at 117. Further, the defense will be defeated if the plaintiff proves that the publication was "actuated" by ill will or other improper motive. *Id.* at 117-18. In this respect, the High Court reversed *Theophanous*. *Id.* at 118.

123. *Id.* at 115 (quoting Stephens v. West Australian Newspapers Ltd. (Austl. 1994) 182 C.L.R. 211, 264 (McHugh, J.)).

> For example, discussion of matters concerning the United Nations or other countries may be protected by the extended defense of qualified privilege, even if those discussions cannot illuminate the choice for electors at federal elections or in amending the Constitution or cannot throw light on the administration of federal government.
>
> Similarly, discussion of government or politics at State or Territory level and even at local government level is amenable to protection by the extended category of qualified privilege, whether or not it bears on matters at the federal level.[124]

In *Lange*, the defendant pleaded that the publication concerned the plaintiff as a member of the New Zealand Parliament and as Prime Minister of New Zealand.[125] Because the pleadings revealed no connection with Australia, the High Court held that they did not bring the publication within the extended defense, leaving open the possibility that further particulars could bring the publication within the defense.[126] "By reason of matters of geography, history, and constitutional and trading arrangements, however, the discussion of matters concerning New Zealand may often affect or throw light on government or political matters in Australia."[127]

The High Court emphasized that its interpretation of an implied freedom of communication served to preserve the operation of the system of government, rather than to protect the individual:

> Unlike the First Amendment to the United States Constitution, which has been interpreted to confer private rights, our Constitution contains no express right of freedom of communication or expression. Within our legal system, communications are free only to the extent that they are left unburdened by laws that comply with the Constitution.[128]

Thus, the High Court concluded that the defendants' claim that the matter was "published pursuant to a freedom guaranteed by the Commonwealth Constitution was bad in law."[129] The proper defense should be framed as a common-law or statutory privilege. Any claim that a statute improperly diminished that privilege in violation of the Constitution would not be stated as a defense to the defamation complaint, but as a response to specific assertion of that statute.[130] In other

---

124. *Id.* at 115-16.
125. *Id.* at 99.
126. *Id.* at 96.
127. *Id.* at 119.
128. *Id.* at 112.
129. *Id.* at 96.
130. The High Court also held that the New South Wales defamation statute did not place an undue burden on protected communications, because section 22 protected matter published to

words, rather than claiming a right to speak, the defendant must claim that the legislature or the executive acted beyond its power. The focus should be on the extent of the powers of government rather than on individual rights.

In construing the freedom of communication, the High Court left open a broad area for application. Freedom of communication protects not only free choice in federal elections, but also free choice in constitutional referenda. Furthermore, because the executive branch is responsible to the legislature, the implied freedom extends to communication concerning the behavior of the executive and how the legislators react to it. "[T]he Constitution requires "the people" to be able to communicate with each other with respect to matters that could affect their choice in federal elections or constitutional referenda or that could throw light on the performance of ministers of State and the conduct of the executive branch of government."[131] Although the implied freedom arises from provisions on commonwealth government and referenda to amend the Constitution, it could extend as well to discussions of state policy when they impact electors' choices at the federal level:

> Of course, the discussion of matters at State, Territory or local level might bear on the choice that the people have to make in federal elections or in voting to amend the Constitution, and on their evaluation of the performance of federal ministers and their departments. The existence of national political parties operating at federal, State, Territory and local government levels, the financial dependence of State, Territory and local governments on federal funding and policies, and the increasing integration of social, economic and political matters in Australia make this conclusion inevitable.[132]

The other two cases from 1997, *Kruger v. Commonwealth*[133] and *Levy v. Victoria*,[134] suggested further limits on the extent to which the implied freedom could be expanded. *Kruger* raised the section 116 free exercise clause claim and dealt with implied freedoms.[135] The plaintiffs claimed that laws in the territory restraining the movement of aborigines and removing them from their homes were an impingement on the freedom of movement and of association necessary to have political communication.[136] But the Australian Constitution does not mandate elections in territories, and several justices indicated that the implied

---

any person where the recipient had an interest or apparent interest in having information on a subject and the conduct of the publisher was reasonable in the circumstances. *Id.* at 114.

131. *Id.* at 115.

132. *Id.* at 116.

133. Kruger v. Commonwealth (Austl. 1997) 146 A.L.R. 126.

134. Levy v. Victoria (Austl. 1997) 146 A.L.R. 248.

135. Kruger v. Commonwealth, 146 A.L.R. at 128-29.

136. *Id.* at 126.

freedom of political discussion did not apply in this case.[137] Justice Gummow argued that even if some freedom and movement and association is necessary to make political communication effective, it did not stretch to the familial association at issue in the case.[138] Justice Toohey acknowledged that the implied freedom included movement and association, but found no invalidity in these laws.[139] Justice Gaudron, however, contended that the discussion of Commonwealth territorial policy was basic to representative and responsible government of the Commonwealth, and that excluding anyone from that discussion impairs it.[140]

In *Levy*, although the High Court made it clear that the implied freedom applied to expressive conduct as well as to verbal statements, the justices focused on the legitimacy of the law in question rather than on whether the implied freedom extended to the behavior regulated.[141] In that case, animal rights protesters challenged regulations that forbade persons without a license from entering hunting areas during the first two days of hunting season.[142] The High Court assumed for the purposes of its decision that the implied freedom applied to these regulations, but ruled that they were valid laws in pursuit of safety.[143] Even Justice Michael McHugh, while suggesting the connection between the anti-hunting message and the constitutionally-protected freedom was not clear, rooted the decision on the conclusion that the law was reasonably appropriate and adapted to serving an end compatible with the maintenance of the constitutionally prescribed government.[144]

Lange, *Kruger*, and *Levy* were particularly important in settling the contours of the implied freedom because the court personnel is rapidly changing. Justice Dawson retired in August of 1997. Justice Toohey has announced his plans to retire in February of 1998. Chief Justice Brennan will also retire in 1998. Of the seven Justices who decided *ACTV*, only Justices Gaudron and McHugh will remain. Nevertheless, the Court's unanimity in *Lange* demonstrates that the implied freedom has become an accepted tenet of Australian constitutional law.

The scope of the implied freedom will probably vary with the composition of the court. For instance, some communications that Justice Gaudron would find necessary for free choice in elections would be beyond the reach that Justice McHugh would give the constitutionally implied freedom. Fortunately, there is a core of speech by and about candidates for office and the behavior of officials over which they have control that the entire High Court will find constitutionally protected.

---

137. *Id.* at 163 (Dawson, J.), 219 (McHugh, J.).
138. *Id.* at 229 (Gummow, J.).
139. *Id.* at 178-79 (Toohey, J.).
140. *Id.* at 195-200 (Gaudron, J.).
141. Levy v. Victoria (Austl. 1997) 146 A.L.R. 248, 252 (Brennan, C.J.).
142. *Id.* at 250.
143. *Id.* at 251-52.
144. *Id.* at 277 (McHugh, J.).

3. *The Standards for Determining a Violation*

In *Theophanous*, the plurality explored the tension existing between common-law defamation and the requirements for a representative government and balanced the interests of individual reputation against those needs.[145] Both a balancing test and a concern for systemic needs appear to focus on the effect rather than the purpose of the challenged law. Nevertheless, the underlying concern of the High Court is with the purpose of the law. That is evident in the criteria for constitutionality unanimously articulated in *Lange*:

> [T]he freedom will not invalidate a law enacted to satisfy some other legitimate end if the law satisfies two conditions. The first condition is that the object of the law is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government or the procedure for submitting a proposed amendment to the Constitution to the informed decision of the people which the Constitution prescribes. The second is that the law is reasonably appropriate and adapted to achieving that legitimate object or end.[146]

If a law must be "enacted to satisfy some other legitimate end" to be valid, the High Court must determine whether the purpose of the law was legitimate. The conditions for upholding such a law are mechanisms for assuring the legitimacy of the purpose. The first condition demands that a legitimate purpose exists, and the second requires a relationship demonstrating that purpose is in fact the law's objective.

a. *The Legitimate Objective Test.* The *Lange* court's first condition requires a law burdening the implied freedom to have a valid objective, one which is "compatible with the maintenance of the constitutionally prescribed system."[147] It is the law's objective, not its effect, that this condition addresses. Some objectives are plainly incompatible. Restrictions on speech enacted to perpetuate the government or its policies by preventing electors from hearing negative viewpoints are inconsistent with the freedom of political discussion derived from the constitutional provisions for representative and responsible government.

Prior decisions applying the implied freedom have distinguished, in some way, between direct and incidental impairments.[148] Such distinctions are based

---

145. Theophanous v. Herald & Weekly Times Ltd. (Austl. 1994) 182 C.L.R. 104, 125-33.

146. Lange v. Australian Broad. Corp. (Austl. 1997) 145 A.L.R. 96, 108.

147. *Id.* at 96-97.

148. Former Chief Justice Mason distinguished between restrictions "which target ideas or information [direct impairments within the meaning of this paper] and those which restrict an activity or mode of communication by which ideas or information are transmitted [which may be incidental impairments]." Australian Capital Television Pty. Ltd. v. Commonwealth (Austl. 1992) 177 C.L.R. 106, 143 (Mason, C.J.). Justice McHugh distinguished between "laws which restrict

upon concern with the purpose of the law. A direct impairment indicates that suppression of political discussion was the law's objective while the incidental nature of an impairment indicates an objective unrelated to such suppression. Although the directness of the regulation of the content of political discussion suggests the purpose was the illegitimate one of suppressing political speech, the government may show that the law in fact had a proper objective.

The purposes which a direct regulation of political discussion may validly serve have been variously described. Justices Toohey and Deane have stated that a law restricting political communications would be valid where

> the prohibitions and restrictions on political communications which it imposes are either conducive to the overall availability of the effective means of such communications or do not go beyond what is reasonably necessary for the preservation of an ordered and democratic society or for the protection or vindication of the legitimate claims of individuals to live peacefully and with dignity within such a society.[149]

---

the freedom of electoral communications by prohibiting or regulating their contents and laws which incidentally limit that freedom by regulating the time, place or manner of communication." *Id.* at 234-35 (McHugh, J.).

Justices Deane and Toohey used characterization to distinguish between laws that affect political communications for reasons related to their nature as political communications (direct) and those whose effect is unrelated (incidental):

> [A] law whose character is that of a law with respect to the prohibition or control of some or all communications relating to government or governmental instrumentalities will be much more difficult to justify as consistent with the implication than will a law whose character is that of a law with respect to some other subject and whose effect on such communications is unrelated to their nature as communications of the relevant kind.

Nationwide News Pty. Ltd. v. Wills (Austl. 1992) 177 C.L.R. 1, 76-77 (Deane and Toohey, JJ.). Chief Justice Brennan insisted that a law that infringes the limitation on power will not be supported by the "power unless the infringement is merely incidental to the achievement of a legitimate (that is, non-infringing) purpose or object." Cunliffe v. Commonwealth (Austl. 1994) 182 C.L.R. 272, 324 (Brennan, J.). Justice Gaudron insisted that curtailing political discussion was an impermissible purpose for a law, but said that a law enacted to secure an end within power may be permissible despite its "incidental" impact on the protected freedom. Nationwide News Pty. Ltd. v. Wills, 177 C.L.R. at 95 (Gaudron, J.). Finally, Justice Gummow stressed the legitimacy of the statute's primary objective in upholding a statute challenged as a violation of the implied freedom. Langer v. Commonwealth (Austl. 1996) 134 A.L.R. 400, 432 (Gummow, J.) ("The primary objective of the system established by the legislation involves observance by electors of [section] 240.").

149. Australian Capital Television Pty. Ltd. v. Commonwealth, 177 C.L.R. at 169 (Deane and Toohey, JJ.) (footnote omitted).

Justice Deane later wrote that "'necessary' in this context implies the existence of a pressing social need, and that interference with freedom of expression should be no more than is proportionate to the legitimate aim pursued."[150]

In general, the likelihood that a direct regulation of speech has an objective that is incompatible with the maintenance of the system has led justices to demand strong justifications for such laws. Chief Justice Mason and Justice McHugh would require a "compelling justification" to uphold direct regulations.[151] Justice Gaudron referred to "an overriding and important public interest" as necessary to show that a law imposing a direct prohibition on political discussion had a valid purpose.[152] Where only a minor public interest is offered for a direct prohibition on political discussion, the asserted justification is likely to be a pretext for an impermissible objective.[153]

In *Kruger*, Justice Gaudron stated that the only test for a law is whether the purpose of the law is to prohibit or restrict political communication.[154] "Questions directed to compelling justification, necessity and proportionality are, at base, questions directed to ascertaining the purpose of the law in question."[155] She then set out the relationship between the search for purpose and the distinction between direct and indirect burdens on political communication:

> [T]he purpose of a law is to be ascertained by its nature, its operation and the facts with which it deals. In ascertaining that purpose, a law which is, in terms, a prohibition or restriction on political communication or which operates directly to prevent or curtail discussion of political matters is, in my view, to be taken to have that purpose unless the prohibition or restriction is necessary for the attainment of some overriding public purpose (for example, to prevent criminal conspiracies) or, in the terms used by Deane J in *Cunliffe v The Commonwealth*, to satisfy some "pressing social need" (for example, to prevent sedition).[156]

b. *Proportionality and the "Appropriate and Adapted" Test.* Even if the government identifies a legitimate objective furthered by the challenged law, the High Court will examine the relationship between the means and the purported legitimate end of the law. The High Court in *Lange* referred to the problem of describing how that examination should take place:

---

150. Cunliffe v. Commonwealth, 182 C.L.R. at 340 (Deane, J.) (quoting Attorney General v. Guardian Newspapers (No. 2) (Austl. 1990) 1 A.C. 109, 283-84) (internal quotes omitted).

151. Australian Capital Television Pty. Ltd. v. Commonwealth, 177 C.L.R. at 143 (Mason, C.J.), 235 (McHugh, J.).

152. Cunliffe v. Commonwealth, 182 C.L.R. at 388 (Gaudron, J.).

153. *Id.*

154. Kruger v. Commonwealth (Austl. 1997) 146 A.L.R. 126, 206 (Gaudron, J.).

155. *Id.*

156. *Id.*

> Different formulae have been used by members of this court in other cases to express the test whether the freedom provided by the Constitution has been infringed. Some judges have expressed the test as whether the law is reasonably appropriate and adapted to the fulfillment of a legitimate purpose. Others have favoured different expressions, including proportionality.[157]

Most Justices have insisted that the means be proportionate to the end of furthering a competing public interest, even if the law does not discriminate among speakers or ideas.[158] Proportionality is relevant to determining the true purpose of the statute.[159]

Chief Justice Brennan would use proportionality to test the validity of a law that restricts communication while serving a legitimate interest.[160] "[T]he restriction must serve some other legitimate interest and it must be proportionate to the interest to be served."[161] Brennan subsequently explained that proportionality "is intended to embrace both the law's achieving of a legitimate purpose and the incidental character of its restriction on an absolute freedom to discuss government, governmental institutions and political matters."[162] In *Cunliffe*, Justice Brennan equated "proportionate" with "reasonably appropriate and adapted" to a legitimate end.[163]

---

157. Lange v. Australian Broad. Corp. (Austl. 1997) 145 A.L.R. 96, 108.

158. Justice McHugh would examine content neutral laws affecting the implied freedom to determine whether the restraint "is not disproportionate to the end sought to be achieved." Australian Capital Television Pty. Ltd. v. Commonwealth (Austl. 1992) 177 C.L.R. 106, 235 (McHugh, J.). Justice Toohey said, "the requirement of reasonable proportionality assists in the reconciliation of what may be proffered as irreconcilable principles. The implied freedom does not override the express grant of power. Rather, it points to the likely limits of the express grant." Cunliffe v. Commonwealth, 182 C.L.R. at 376 (Toohey, J.). Justice Kirby would also use proportionality to test laws challenged as impairing the freedom of political communication. Levy v. Victoria (Austl. 1997) 146 A.L.R. 248, 292 ("It is a useful concept, including in the context of burdens upon constitutional freedoms, so long as it is realized that it describes a process of reasoning and does not provide a sure answer to its outcome.").

159. Former Chief Justice Mason wrote that the public interest in free communication must be balanced against the competing public interest and that the restriction must be reasonably necessary to achieve the competing public interest. Australian Capital Television Pty. Ltd. v. Commonwealth, 177 C.L.R. at 143-44 (Mason, C.J.) ("If the restriction imposes a burden on free communication that is disproportionate to the attainment of the competing public interest, then the existence of the disproportionate burden indicates that the purpose and effect of the restriction is in fact to impair freedom of communication.").

160. Australian Capital Television Pty. Ltd. v. Commonwealth, 177 C.L.R. at 150 (Brennan, J.).

161. *Id.*

162. Theophanous v. Herald & Weekly Times Ltd. (Austl. 1994) 182 C.L.R. 104, 152 (Brennan, J.).

163. Cunliffe v. Commonwealth, 182 C.L.R. at 324 (Brennan, J.). Reiterating his views in *Langer*, Chief Justice Brennan stated, "In my view, if the impairment of the freedom is reasonably

Justice Gaudron used proportionality to determine purpose in two different ways. Where the law directly interferes with political communications, the interference requires a compelling justification and the law must be necessary to achieve that end.[164] "Whether a law is necessary for some such purpose depends on whether it is 'no more than is proportionate to the legitimate aim pursued.' That in turn depends on whether less drastic measures are available."[165] The less drastic alternative comparison is not necessary to determine the proportionality of a measure when the impact on speech is clearly incidental.[166] In that context, Justice Gaudron simply equated proportionality with "appropriate and adapted."[167]

There are few Australian cases concerning proportionality as an element of limitations on power.[168] The initial implied freedom cases examined laws that applied only to expressive activities such as criticism of government officials, political advertising, defamation of federal or state officials, advice to or representation of immigrants, encouraging improper voting procedures in federal or state elections, and defamation of foreign officials. Specific applications of proportionality in those cases sparked disagreement among the Justices, sometimes because they had a different appreciation of the facts and sometimes because they afforded the Parliament different degrees of deference.[169]

---

capable of being regarded as appropriate and adapted to the achieving of a legitimate legislative purpose and the impairment is merely incidental to the achievement of that purpose, the law is within power." Langer v. Commonwealth (Austl. 1996) 134 A.L.R. 400, 405-06 (Brennan, C.J.).

164. Kruger v. Commonwealth (Austl. 1997) 146 A.L.R. 126, 207 (Gaudron, J.).

165. *Id.* (quoting Cunliffe v. Commonwealth, 182 C.L.R. at 340 (Deane, J.)).

166. *Id.*

167. *Id.* at 207 (Gaudron, J.). Justice Gaudron stated:

> [A] law with respect to some subject-matter unconnected with the discussion of political matters and which only incidentally impinges on the freedom of that discussion, is not to be taken to be a law for the purpose of restricting that freedom if it is reasonably appropriate and adapted or, which is the same thing, proportionate to some legitimate purpose connected with that other subject matter.

Id.

168. *See generally* Brian F. Fitzgerald, *Proportionality and Australian Constitutionalism*, 12 U. TASMANIA L. REV. 263 (1993); H.P. Lee, *Proportionality in Australian Constitutional Adjudication*, *in* FUTURE DIRECTIONS, *supra* note 15, at 126-49; A.R. Blackshield, *The Implied Freedom of Communication*, *in* FUTURE DIRECTIONS, *supra* note 15, at 232-68; Brian F. Fitzgerald, Characterization, Proportionality and Constitutional (Legislative) Validity (unpublished manuscript on file with author).

169. For example, Justice Brennan disagreed with the majority and found portions of the statutes at issue proportionate to the legitimate ends in *ACTV*. Australian Capital Television Pty. Ltd. v. Commonwealth (Austl. 1992) 177 C.L.R. 106, 164-67 (Brennan, J., dissenting); *see also* Theophanous v. Herald & Weekly Times Ltd. (Austl. 1994) 182 C.L.R. 104, 154-55 (Brennan, J., dissenting); Stephens v. West Australian Newspapers Ltd. (Austl. 1994) 182 C.L.R. 211, 236, 257 (Brennan, J., dissenting). Justice Toohey disagreed with Justices Mason, Deane, and Gaudron

The *Kruger* and *Levy* cases involved laws of general application which the members of the High Court found appropriate and adapted to the fulfillment of a proper constitutional purpose,[170] but that test may apply for the constitutionality of any law. While Justice Gaudron specifically stated that she would use proportionality to test generally applicable laws affecting the freedom of political communication,[171] it is not clear how rigorously the Justices would scrutinize such laws.

c. *Deference.* Former Chief Justice Mason insisted that the court must determine whether the burden or restriction on political discussion is reasonably appropriate and adapted to the relevant purpose.[172] Chief Justice Mason distinguished the High Court's role in determinations of power from its role in assessing limitations on power like the implied freedom of political discussion.[173] In determining whether a law is within power, "the question is whether the law is *capable of being reasonably considered to be* appropriate and adapted to the end sought to be achieved."[174] In other words, even if the High Court believes the law is not reasonably appropriate and adapted to an end, the High Court must uphold it if others, like the Commonwealth Parliament, could reasonably believe the law to be appropriate and adapted to that end. When reasonable minds differ, the law should be sustained. In contrast, where the issue is whether a limit on power has been violated, the Court must decide for itself whether the burden is reasonably appropriate and adapted.[175]

Other justices, however, may be more deferential than former Chief Justice Mason. Chief Justice Brennan used the same deferential standard for examining whether a law violated a limitation on power that he used for finding a law within power—"whether the operation of the law `is capable of being reasonably considered to be appropriate and adapted to achieve'" the appropriate purpose.[176]

Justice Gaudron initially agreed with Justice Mason that the High Court should decide for itself if constitutional limits had been exceeded,[177] and Justice Toohey joined Justice Deane in saying that a law whose character is that of a law with respect to the prohibition or control of some or all communications relating to government demands a reasonably necessary standard.[178] These Justices did not defer in assessing the constitutional issues in *ACTV*, *Theophanous*, and

---

when he found the law regulating registration of immigration agents proportionate in *Cunliffe*. *See* Cunliffe v. Commonwealth (Austl. 1994) 182 C.L.R. 272, 380-84 (Toohey, J., dissenting).

170. *See* Kruger v. Commonwealth, 146 A.L.R. at 245-46; Levy v. Victoria (Austl. 1997) 146 A.L.R. 248, 252 (Brennan, C.J.).

171. Kruger v. Commonwealth, 146 A.L.R. at 207 (Gaudron, J.); Levy v. Victoria, 146 A.L.R. at 270-71 (Gaudron, J.).

172. Cunliffe v. Commonwealth, 182 C.L.R. at 300.

173. *Id.*

174. *Id.* (emphasis added).

175. *Id.*

176. *Id.* at 324 (Brennan, J.) (adopting the standard stated by Justice Deane in Richardson v. Forestry Comm'n (Austl. 1988) 164 C.L.R. 261, 311 (Deane, J., dissenting)).

177. *Id.* at 387-88.

178. Australian Capital Television Pty. Ltd. v. Commonwealth (Austl. 1992) 177 C.L.R. 106, 169 (Deane and Toohey, JJ.).

Stephens. Nevertheless, Justices Toohey and Gaudron took a deferential view of the law in *Langer* when the government claimed that the challenged statute actually enhanced the democratic process. Prior decisions established that deference was appropriate for determining whether a law was within the power of Parliament to make election laws, but Justices Toohey and Gaudron gave the same deference to Parliament when discussing whether the law violated the implied freedom of political discussion. They supported the statute on the ground that it was "reasonably capable of being viewed as appropriate and adapted to furthering or enhancing the democratic process."[179] Whether these Justices have changed their position and intend to follow Chief Justice Brennan[180] in using such a deferential standard in all cases, or whether their deference is limited to laws purporting to enhance the political process, remains an open question. On the one hand, Justice Gaudron indicated in *Levy* that the standard, "reasonably capable of being regarded as appropriate," was a standard for determining whether a law was an exercise of a constitutionally granted power; it was less stringent than the one she preferred in the context of constitutional freedoms, and she suggested that it would be inappropriate for laws directly regulating religion or political communication.[181] In that light, her opinion in *Langer* was based on the assumption that the laws promoted rather than impaired the democratic process.[182] Therefore, the appropriate standard was one to determine whether it might be said to further the democratic process, an issue of characterization, because the implied freedom would by definition not be invoked. On the other hand, the political advertising restrictions Justice Gaudron struck down in *ACTV* were alleged to enhance the democratic process.[183]

4. *Summary*

In relation to the free exercise of religion, behavior dictated by religious belief, freedom of speech, the communication of ideas, the suppression of religiously motivated behavior or of ideas is an improper ground for regulation. The issue under the Australian Constitution's clauses on free exercise and establish-

---

179. Langer v. Commonwealth (Austl. 1996) 134 A.L.R. 400, 418 (Toohey and Gaudron, JJ.). Justice Gummow did not commit himself on the standard, but he did say in upholding the statute that the implied freedom "does not facilitate or protect that which is intended to weaken or deplete an essential component of the system of representative government." *Id.* at 431 (Gummow, J.).

180. Justice Brennan also voted in favor of the law because the impairment was "reasonably capable of being viewed as appropriate and adapted to the achieving of a legitimate legislative purpose and the impairment is merely incidental to the achievement of that purpose." *Id.* at 405-06 (Brennan, C.J.).

181. Levy v. Victoria (Austl. 1997) 146 A.L.R. 248, 270 (Gaudron, J.).

182. Langer v. Commonwealth, 134 A.L.R. at 418-19 (Gaudron, J.).

183. Australian Capital Television Pty. Ltd. v. Commonwealth, 177 C.L.R. at 118 (oral argument of G. Griffith Q.C., Solicitor-General for the Commonwealth).

ment of religion is whether a law has a forbidden objective.[184] The law's purpose is also central to the constitutional implication of freedom of political discussion. Speech regulation must not be based on disagreement with an idea or fear that the idea would lead to bad results if widely accepted and democratically adopted. But, the incidental impact on religious exercise or speech from action taken for legitimate reasons would not abridge either the free exercise of religion or freedom of speech if those freedoms mean only that certain grounds for governmental action are not legitimate. The High Court examines challenged laws to determine if the means which impact on speech are proportionate to the legitimate end the law is supposed to serve. In the future, the High Court will probably apply a "reasonably proportionate" test to any law of general application[185] impairing the free exercise of religion as well. It is consistent with a "purpose" analysis of the right involved, but it could be more accurate and effective in protecting that right than a direct inquiry into purpose. Indeed, the standard of reasonable proportionality may be close to the United States test, which requires an important or substantial interest unrelated to the suppression of free expression and no more impairment of First Amendment freedoms than is essential to further that interest.[186] Both standards offer an approach to a purpose-oriented analysis that gives religion and speech real protection while allowing government to fulfill its legitimate functions. At the same time, both raise concerns that a deferential application of the standard could allow inappropriate laws to survive.

III. THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

The United States Supreme Court is beginning to focus on the purpose of the law in applying the First Amendment to the Constitution. This has led the Supreme Court to exempt generally applicable laws from First Amendment scrutiny. Congress reacted to the impact of these decisions in the free exercise area with the Religious Freedom Restoration Act,[187] which the Supreme Court in turn invalidated.[188] The jurisprudence remains unsettled in establishment clause and free speech areas.

A. *Free Exercise of Religion*

The word "for" in Section 116 of the Australian Constitution, which forbids the Commonwealth making any law "*for* establishing any religion . . . or *for*

184. *See* Kruger v. Commonwealth (Austl. 1997) 146 A.L.R. 126, 138 (Brennan, C.J.).

185. A generally applicable law is a provision of law, whether statutory or common law, regulating behavior that is usually engaged in for reasons other than the expression of ideas or the exercise of religion. Thus, drug and alcohol restrictions, limits on polygamy, and prohibitions against cruelty to animals are generally applicable laws. A regulation of kneeling before a railing and consuming wine and wafers served by another would not be a generally applicable law because that behavior is usually engaged in for religious purposes.

186. *See* United States v. O'Brien, 391 U.S. 367, 377 (1968).

187. 42 U.S.C. § 2000bb (1994).

188. *See* City of Boerne v. Flores, 117 S. Ct. 2157, 2172 (1997).

prohibiting the free exercise of any religion,"[189] supports the High Court's focus on whether the purpose of government action was to prohibit free exercise. The First Amendment to the United States Constitution seems to forbid laws that have that effect, regardless of their purpose.[190] Nevertheless, decisions by the United States Supreme Court offer little more protection for religious exercise than those of the Australian High Court.

1. *The Cases*

Early United States Supreme Court decisions interpreting the free exercise clause of the First Amendment insisted that religious belief did not excuse violations of the general criminal law.[191] Later decisions afforded religious belief protection from general laws. In 1963, the Supreme Court invalidated the denial of unemployment benefits to a person who was unavailable to work on Saturday because of her religious beliefs. In *Sherbert v. Verner*,[192] the Supreme Court said that the state needed to show a "compelling interest" to justify the application of the unemployment law to this situation.[193] The high point of the Court's solicitude for religious expression was *Wisconsin v. Yoder*,[194] where it held that Wisconsin could not require Amish children to attend school beyond the eighth grade.[195] The subsequent decisions of the Supreme Court outside the unemployment benefits context rejected free exercise claims on the grounds that the burden on religion was insufficient to trigger the test or that the test was met.[196]

Free exercise clause interpretation has now largely returned to its earliest form as a result of the 1990 decision *Employment Division v. Smith*.[197] In that case, Alfred Smith and Galen Black were fired from their jobs with a drug rehabilitation organization in Oregon because they had consumed peyote.[198] Smith and Black sued to obtain unemployment compensation, claiming that

---

189. AUSTL. CONST. ch. V, § 116 (emphasis added).

190. U.S. CONST. amend. I. ("Congress shall make no law *respecting* an establishment of religion . . . or *abridging* the freedom of speech . . . .") (emphasis added).

191. *See, e.g.*, Reynolds v. United States, 98 U.S. 145, 166-67 (1878) ("Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land . . . .").

192. Sherbert v. Verner, 374 U.S. 398 (1963).

193. *Id.* at 406.

194. Wisconsin v. Yoder, 406 U.S. 205 (1972).

195. *Id.* at 234.

196. *See, e.g.*, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 458 (1988) (stating that the United States government may permit timber harvesting and road construction through a portion of national forest traditionally used for religious purposes); Goldman v. Weinberger, 475 U.S. 503, 506-10 (1986) (holding that uniform military law may be applied to prohibit wearing of yarmulke in doors); United States v. Lee, 455 U.S. 252, 259-60 (1982) (ruling that an Amish employer is required to participate in the social security system).

197. Employment Div. v. Smith, 494 U.S. 872 (1990).

198. *Id.* at 874.

denial prohibited the free exercise of their religion, because peyote use was an essential sacrament of the Native American Church.[199] Given American concerns over drug use, it is not surprising that they lost. Justice Sandra Day O'Connor's concurring opinion stated that the state had a sufficiently compelling interest in drug law enforcement to prohibit drug use, even for religious purposes.[200] Justice O'Connor did not join the majority opinion, however, because they took a much more controversial route to the same result.[201] Justice Antonin Scalia's majority opinion suggested that neutral laws of general applicability were immune from a First Amendment challenge.[202] He compared the drug law to a general tax and stated, "[I]f prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[203]

Despite Justice O'Connor's belief that neutral laws of general applicability have no "talismanic" immunity from scrutiny under the First Amendment,[204] the Court has continued to assert that "[i]n addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."[205]

Thus, the United States Supreme Court, like the Australian High Court, focuses its inquiry on the objective of a law that affects the free exercise of religion. If the impact on free exercise is only incidental, the law will be upheld. But generally applicable drug laws may bar sacramental peyote use as effectively as a law that forbids only the religious use. The failure to consider the impact of the law, the importance of the government's interest and whether the law needs to apply to religious conduct to secure that interest, threatens to allow harm to religious expression without furthering the legitimate interests of the government.

---

199. *Id.*

200. *Id.* at 906.

201. *Id.* at 891.

202. *Id.* at 879. The content neutral law is, for these purposes, a law whose application does not turn on the religious or communicative aspect of the behavior. A law that forbids interference with the military may be of general application because most interference will result from actions that are not primarily the expression of the ideas such as destruction of an ammunition dump or of files and records. But, if the determination of the existence of a law violation requires the court to examine the content of the words—a speech against military operations to determine whether they violate the policy of the law—the law is not content neutral.

203. *Id.* at 878. In *Barnes v. Glen Theater, Inc.*, Justice Scalia explained his *Smith* opinion. Barnes v. Glen Theater, Inc., 501 U.S. 560, 579 (1991) (Scalia, J., concurring). He characterized *Smith* as holding "that general laws not specifically targeted at religious practices did not require heightened First Amendment scrutiny even though they diminished some people's ability to practice their religion." *Id.*

204. Employment Div. v. Smith, 494 U.S. at 901 (O'Connor, J., concurring).

205. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993).

2. *The Religious Freedom Restoration Act*

Problems with immunizing generally applicable laws from First Amendment free exercise scrutiny spawned a political solution in the United States. Mainstream religions perceived *Smith* to be an attack on religious freedom and combined with new and splinter groups to lobby for legislative protection of their interests.[206] They believed that *Smith* devalued religious acts and threatened their own practices.[207] Prior decisions, which had protected pacifists that refused to make weapons and Sabbatarians that refused to work on Saturday, now appeared vulnerable.[208] Congress responded to these concerns with The Religious Freedom Restoration Act,[209] which attempted to restore the prior law by requiring a compelling interest to justify any substantial burden on religion imposed by the state.[210]

Recently, in *City of Boerne v. Flores*,[211] the Supreme Court invalidated the Act.[212] The majority held that Congress lacks power to affect the substance of a constitutional right, and that Congress went beyond what was appropriate as a remedy.[213] The three dissenters, Justices Sandra Day O'Connor, Stephen Breyer, and David Souter objected to the majority's failure to reconsider the correctness of *Smith*, and would have set the case for reargument.[214] Despite the decision in *Boerne*, the political response may some day inspire the Supreme Court to revise its judicial views on religion, recognizing that immunity from scrutiny is not a healthy response to any law affecting basic human rights.[215]

B. *Establishment of Religion*

Unlike Australia, the United States Supreme Court refused to limit its establishment clause analysis to the purpose of the action. In *Everson v. Board of Education*,[216] the Supreme Court initially wrote of the "wall between church and

---

206. Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 FORDHAM L. REV. 883, 895-96 (1994).

207. *Id.* at 897.

208. *See generally* Thomas v. Review Bd., 450 U.S. 707 (1981) (stating that an individual was entitled to unemployment benefits when he quit for religious reasons after learning that the steel which he was engaged in producing was used for producing armaments); Sherbert v. Verner, 374 U.S. 398 (1963) (holding that Sabbatarian was entitled to unemployment benefits when fired for refusing to work on Saturday).

209. The Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (1994).

210. *Id.* § 2000bb(b)(1).

211. City of Boerne v. Flores, 117 S. Ct. 2157 (1997).

212. *Id.* at 2172.

213. *Id.*

214. *Id.* at 2186 (Souter, J., dissenting).

215. *See* David Bogen, *Generally Applicable Laws and the First Amendment*, 26 SW. U. L. REV. 201, 204 (1997).

216. Everson v. Board of Educ., 330 U.S. 1 (1947).

state."[217] In *School District v. Schempp*,[218] the Supreme Court said "to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[219] The Supreme Court has also expressed concerns with laws whose administration entangled the government with religion. In *Lemon v. Kurtzman*,[220] the Court announced a three-part test that required challenged legislation to: 1) have a secular legislative purpose; 2) have a principal or primary effect that neither advances nor inhibits religion; and 3) not foster an excessive government entanglement with religion.[221]

While "purpose" rears its head in *Lemon*, it is only a portion of that test. The primary effect of the law is a separate part of the test, and the law's effect, rather than purpose, is more likely to cause it to run afoul of the Establishment Clause. When construing a statute, a court often looks to the purpose of a law to determine what effect they should give it.[222] When determining whether the law's purpose is legitimate, the analysis is reversed; the Court uses the law's effect to determine its purpose.

The "purpose" of legislation is not the conflicting desires of those who voted for it, but instead the end which it serves. Under normal circumstances, the statute's objective is to achieve an effect. Laws, however, have multiple effects. "Purpose" analysis distinguishes among those effects to select some as objectives and others as incidental consequences. It is essentially a fictional notion derived from the possible aims of legislation, as determined by its likely effects and actual effects, and refined by consideration of the normal significance of those effects and alternative means to produce them.[223] Although the existence of a secular effect opens up the possibility of a secular purpose for a law, the primary or principal effect of a law is the best evidence of its purpose. To the extent that "purpose" contains a fictional intent notion, a court might find a secular purpose despite a primary religious effect, but the primary effect test prevents the court from resting on a fiction. At the same time, the *Lemon* test does not help much in the actual determination of purpose or in determining whether an effect is "principal or primary" or subsidiary and secondary.[224]

---

217. *Id.* at 16 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)) (internal quotes omitted).

218. School Dist. v. Schempp, 374 U.S. 203 (1963).

219. *Id.* at 222.

220. Lemon v. Kurtzman, 403 U.S. 602 (1971).

221. *Id.* at 612-13.

222. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rule or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 400 (1950).

223. The purpose of a statute will be one or more of its likely or actual effects. Effects that are normally undesirable, such as expense, will not usually be the law's objective. Similarly, beneficial effects may be excluded from the purpose where they could be achieved more easily by alternative means or they appear minor in comparison with other benefits of the law. Purpose is even more complex than this quick reference to important factors suggests and is the subject of rich literature. *Id.* at 400-01.

224. Lemon v. Kurtzman, 403 U.S. at 612-13.

In *Agostini v. Felton*,[225] the Supreme Court reaffirmed the *Lemon* test while providing evidence of problems in its application.[226] The Supreme Court reversed a prior decision[227] and permitted New York to send public school teachers into parochial schools to provide remedial education.[228] Justice O'Connor's majority opinion said that while the Supreme Court's general principles had not changed, it had changed its understanding of the criteria used to assess whether aid to religion has an impermissible effect.[229] Justice O'Connor wrote that the Supreme Court no longer followed a presumption that placement of public employees in parochial schools inevitably leads to state-sponsored indoctrination or constitutes a symbolic union between government and religion.[230] Justice O'Connor stated that the "entanglement" test from *Lemon* was simply an aspect of the inquiry into a statute's effect to advance or inhibit religion.[231] The key issue for the majority was whether the program had the effect of advancing religion, and they concluded that the program "does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement."[232]

Justice O'Connor also said that the program could not be reasonably viewed as an endorsement of religion.[233] The endorsement test permits the

---

225. Agostini v. Felton, 117 S. Ct. 1997 (1997).

226. *Id.* at 2016-19.

227. *Id.* at 2019 (overruling Aguilar v. Felton, 437 U.S. 402 (1985)).

228. *Id.* at 2018-19.

229. *Id.* at 2010.

230. *Id.*

231. *Id.* at 2015.

232. *Id.* at 2016.

233. *Id.* The endorsement test identified by Justice O'Connor has received increasing support. *See* Capitol Square Review & Advisory Bd. v. Pinette, 115 S. Ct. 2440 (1995) (holding that the Board could not prohibit a private group from placing a cross in a location used as a public forum). Justice O'Connor stated:

> [W]hen the reasonable observer would view a government practice as endorsing religion, I believe it is our *duty* to hold the practice invalid. . . . Governmental intent cannot control, and not all state policies are permissible under the Religion Clauses simply because they are neutral in form.
>
> Where the government's operation of a public forum has the effect of endorsing religion, even if the governmental actor neither intends nor actively encourages that result, . . . the Establishment Clause is violated.

Id. at 2454 (O'Connor, J., concurring) (citations omitted).

Justices Souter and Breyer joined O'Connor's opinion in *Capital Square*, and Justice Stevens seemed to adopt an endorsement test as well. Justice Stevens stated, "if a reasonable person could perceive a government endorsement of religion from a private display, then the State may not allow its property to be used as a forum for that display." *Id.* at 2466 (Stevens, J., dissenting). The Justices differed on whether the determination of endorsement should be governed by the standard of a reasonable observer with specific knowledge of the facts surrounding the action and community context or by a reasonable person who might have less knowledge of the facts.

Supreme Court to say that it is applying essentially objective tests rather than seeking to divine "intent" or "purpose." Nevertheless, the primary objective of a government action that appears to endorse religion is likely to support that religion, and a government action whose objective is to support religion will appear to endorse it. Thus, under this test, the Supreme Court avoids the briar patch of governmental intent, while assuring that laws whose objective is to establish religion will fall.

Justice Souter dissented in *Agostini* on the grounds that the program directly subsidized religion and could reasonably be viewed as an endorsement.[234] Four justices agreed in the dissent that the program breached the principle that the state cannot provide direct and substantial aid to religious institutions even if the criteria for such aid is not religious.[235]

While the generally applicable law is not exempt from establishment clause analysis, it will rarely fail under the current majority's test. Where the law does not distinguish religion from secular matters, it is unlikely the government will appear to be endorsing religion. The law is likely to have a secular purpose and affect religion only incidentally. Nevertheless, it remains theoretically possible for a litigant to persuade the Supreme Court that the generality of the law was a mask for supporting religion. The unmasking would demonstrate both religious purpose and endorsement.

C. *Freedom of Speech*

The question of justification for exempting generally applicable laws from First Amendment scrutiny may soon apply to controversies regarding the freedom of speech, as well as, the free exercise of religion. The law is currently in a state of confusion, but two cases suggest that free exercise analysis may soon be applied to free speech.

1. *The Conflict in the Cases on Generally Applicable Laws*

In *Barnes v. Glen Theatre, Inc.*,[236] Glen Theatre, the Kitty Kat Lounge, and dancers Darlene Miller and Gayle Sutro challenged a state law that forbade public nudity.[237] Chief Justice Rehnquist's plurality opinion began by stating that nude dancing was an expression protected by the constitutional guarantee of freedom of speech.[238] Eight of the Justices applied a four-part test to determine whether the state law was constitutional: 1) is the law within the constitutional power of government; 2) does the law further an important or substantial governmental interest; 3) is the governmental interest unrelated to the suppression of expression; and 4) is the incidental restriction on the alleged First Amendment

234. Agostini v. Felton, 117 S. Ct. at 2019-22 (Souter, J., joined by Stevens and Ginsburg, JJ., dissenting).

235. *Id.* at 2022-25 (Souter, J., joined by Breyer, Ginsburg, and Stevens, JJ., dissenting).

236. Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991).

237. *Id.* at 562-63.

238. *Id.* at 565-66.

freedoms no greater than what is essential to the furtherance of that interest.[239] The justices applying this level of scrutiny, which carefully analyzed the interests involved, split evenly on the outcome. Justice Scalia, who cast the deciding vote, argued that dancing was conduct, not speech, and that the appropriate inquiry was whether the suppression of the expressive aspect of that conduct was the object of the law.[240] In this respect, Justice Scalia applied *Smith*'s principle that a neutral law of general applicability was constitutional.[241]

The test used by the eight Justices in *Barnes* may be equivalent to the "reasonably proportionate" standard evoked in Australian cases.[242] Justice Lewis Powell used the idea of proportionality in examining the constitutionality of regulating nonmisleading lawyer advertising.[243] "Even when a communication is not misleading, the State retains some authority to regulate. But the State must assert a substantial interest and the interference with speech must be in proportion to the interest served."[244] Justice Scalia later cited Justice Powell's statement when Scalia argued that the requirement that a regulation not "burden substantially more speech than is necessary to further the government's legitimate interests"[245] did not require a showing that the law was the least restrictive alternative, but only that it was proportional:

> What our decisions require is a "'fit' between the legislature's ends and the means chosen to accomplish those ends," . . . — a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served," . . . that employs not necessarily the least restrictive means but, as we have put it in the other contexts discussed above, a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.[246]

In another recent case, Justice O'Connor said the requirement that laws regulating commercial speech can be no more extensive "than is necessary" to

---

239. *Id.* at 567 (Rehnquist, C.J., joined by O'Connor and Kennedy, JJ.). Justice Souter agreed in the four-part analysis. *Id.* at 582 (Souter, J., concurring). Justice White followed the same analysis. *See id.* at 590 (White, J., joined by Marshall, Blackmun, and Stevens, JJ., dissenting).

240. *Id.* at 576-79 (Scalia, J., concurring).

241. *Id.* at 577-78.

242. *See supra* notes 157-71 and accompanying text.

243. *See In re* R.M.J., 455 U.S. 191, 203-04 (1982) (citing Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563-64 (1980)).

244. *Id.* at 203.

245. Board of Trustees v. Fox, 492 U.S. 469, 478 (1989) (quoting from Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)).

246. *Id.* at 480 (citations omitted).

serve the governmental interest required that the law be proportionate.[247] "[T]here must be a fit between the legislature's goal and method, 'a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served.'"[248]

Justice O'Connor elaborated on the proportionality test used for commercial speech, stating that the fit between means and ends must be narrowly tailored and the scope of the restriction on speech must be reasonably targeted to address the harm intended to be regulated.[249] The regulation must carefully calculate the costs and benefits associated with the burden on speech imposed by its prohibition; less burdensome alternatives to reach the stated goal indicate the fit between means and ends may be too imprecise.[250] If alternative channels permit communication of the restrictive speech, the regulation is more likely to be considered reasonable.[251]

Justice Scalia urged a very deferential view toward the application of the proportionality standard in a variety of contexts. Justice Scalia specifically pointed to the *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*[252] decision as an example of the relevant degree of deference.[253] The Supreme Court has since rejected *Posadas* in *44 Liquormart, Inc. v. Rhode Island*,[254] requiring a closer look at the legislation and whether it is sufficiently narrowly tailored.[255]

It is not clear whether the Supreme Court will closely scrutinize and apply the concept of proportionality to generally applicable laws. Three days after its decision in *Barnes*, the Supreme Court decided *Cohen v. Cowles Media Co.*,[256] saying that a generally applicable law does not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to get and report the news.[257] Instead of nude dancing, *Cohen* involved the publication of significant information about a political campaign.[258] After the *Minneapolis Star* agreed not to reveal his identity, Daniel Cohen, an employee of the Republican candidate for governor, gave the newspaper copies of public records that showed that the Democratic candidate for lieutenant governor had been charged with unlawful assembly and had been convicted of petty theft.[259] When the paper discovered that the unlawful assembly charges concerned a protest over failure to hire minorities, and that the theft was a failure to pay for six dollars of

---

247. 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1521 (1996) (quoting Board of Trustees v. Fox, 492 U.S. at 480.

248. *Id.*

249. *Id.* (citing Florida Bar v. Went For It, Inc., 115 S. Ct. 2371, 2380-81 (1995)).

250. *Id.* (citing Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 (1993)).

251. *Id.*

252. Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986).

253. 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. at 1522.

254. 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996).

255. *Id.* at 1510-14.

256. Cohen v. Cowles Media Co., 501 U.S. 663 (1991).

257. *Id.* at 669.

258. *Id.* at 665-66.

259. *Id.* at 665.

sewing materials on leaving a store during a period when the candidate had been under a great emotional strain, the paper revealed that Cohen had given them the records.[260] Not surprisingly, this revelation embarrassed Cohen's employer and Cohen was subsequently fired.[261] Cohen responded by suing the *Minneapolis Star*.[262] The newspaper contended that its decision to identify Cohen was protected by the First Amendment.[263] The Supreme Court held that Cohen might pursue a promissory estoppel action, because promissory estoppel was a rule of general application and the application to speech here was not a product of governmental choice of forbidden speech, but a result of the defendant's own promise.[264]

Justice Anthony Kennedy later noted the conflicting rationales of *Cohen* and *Barnes* and stated that "the enforcement of a generally applicable law may or may not be subject to heightened scrutiny under the First Amendment."[265]

2. *The Relationship of American Indecision to Australia*

The freedom of political discussion implied from the principle of representative government found in the Australian Constitution is unlikely to apply to topless dancing in King's Cross, but it could well apply to a journalist's revelation of a source for information about a political candidate in an election. Chief Justice Mason cited *Cohen* in his opinion in *ACTV*,[266] noting that "in the United States, despite the First Amendment, the media is subject to laws of general application."[267]

Both Australian and American judges have distinguished between laws targeted at ideas and laws that are content-neutral in regulating the means of

---

260. *Id.* at 665-66.

261. *Id.* at 666.

262. *Id.* at 665.

263. *Id.* at 668.

264. *Id.* at 669-71.

265. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 640 (1994). That same term Chief Justice Rehnquist's opinion in *Madsen v. Women's Health Center* reviewed an injunction against abortion pickets in which he stated:

> If this were a content-neutral, generally applicable statute, instead of an injunctive order, its constitutionality would be assessed under the standard set forth in *Ward v. Rock Against Racism*, and similar cases. Given that the forum around the clinic is a traditional public forum, we would determine whether the time, place and manner regulations were "narrowly tailored to serve a significant governmental interest."

Madsen v. Women's Health Ctr, 114 S. Ct. 2516, 2524 (1994) (citations omitted). But this *O'Brien*-like standard is applied to regulations of the public forum, which is quite different than the statute that is not so confined.

266. Australian Capital Television Pty. Ltd. v. Commonwealth (Austl. 1992) 177 C.L.R. 106, 143 (Mason, C.J.).

267. *Id.*

expression, noting that the former require a higher degree of justification than the latter.[268] American Courts have gone further with the suggestion in *Cohen* that the content-neutral law that is of general application requires no justification at all.[269] The only generally applicable laws challenged in Australia as violations of the implied freedom of political communication were upheld in opinions that found them appropriate and adapted to serve legitimate purposes, a test that was not thoroughly explored.[270] The High Court, therefore, remains free to decide what degree of scrutiny should be given neutral laws of general application for compatibility with the implied freedom of political discussion.

IV. GENERALLY APPLICABLE LAWS

The neutral law of general applicability has two characteristics that make it arguably immune from First Amendment concerns. The first is that it affects primarily noncommunicative secular behavior. Such a law is normally justified by an interest unrelated to the suppression of communication or religion. In other words, it carries prima facie indicia of a legitimate government concern.

The second characteristic of the neutral law of general applicability follows from the first. Since the law's object is, on its face, unrelated to religion or expression, any impact on religion or communication appears to be incidental to another purpose.

A. *The Case for Generally Applicable Laws*

The contention that these characteristics of the neutral law of general applicability immunize it from scrutiny under the First Amendment depends on one of two propositions. Either the generality proves that the social interest the law serves outweighs the individual's interest in religion or expression, or freedom is defined in terms of governmental behavior rather than the impact on the individual.

Content-neutrality and general applicability do not indicate the importance of the underlying social interest justifying the law, which may be anything from protecting grass to preventing the collapse of western civilization (assuming those two are different). If all content-neutral laws of general applicability are consistent with the free exercise of religion and freedom of speech, the slightest social interest must outweigh the injury done to religious exercise or speech. That will be true only if the generality of the law assures that the injury to the exercise of religion or freedom of speech is slight. Although the affected individual would disagree, it can be argued that society's interest in free religious exercise or free expression is not significantly impaired by the general law. People are more likely to be hurt when someone is out to get them. Where only incidental impacts on religious exercise or expression are permitted, no one need

---

268. See for example, the opinions of Justices Mason, McHugh, Deane, and Toohey in Nationwide News Pty. Ltd. v. Wills (Austl. 1992) 177 C.L.R. 1.

269. Cohen v. Cowles Media Co., 501 U.S. at 669.

270. *See, e.g.*, Langer v. Commonwealth (Austl. 1997) 134 A.L.R. 400, 405-06 (Brennan, C.J.).

fear that disagreement with their beliefs or views will result in laws against them. The particular law will not discourage speech or religious acts beyond its immediate application. The law does not affect the quality of free exercise of religion for society despite its impact on individual worshippers.

Alternatively, the free exercise of religion may be defined in terms of freedom from improper governmental action. If religious exercise is behavior impelled by religious belief, the free exercise of religion may be defined as the absence of restrictions based on disapproval of that belief. Disapproval or disagreement with the belief is not a legitimate basis for governmental action. Under this definition of freedom, as long as the impact on religious exercise is purely incidental, there is no prohibition of free exercise.

This discussion suggests that the decision of the United States Supreme Court to exempt laws of general applicability from scrutiny is prompted by the same concern for the purpose of the law that marks the Australian High Court's approach in religion cases and is visible in its decisions on the implied freedom of political discussion.

There are two major arguments in favor of the view that laws of general application do not prohibit the free exercise of religion. First, that doctrine satisfies the demand for formal equality between believers and nonbelievers, the concern for governmental neutrality between differing views. Second, it creates an objective standard that avoids the appearance of political decisions.

Challenges to the impact of laws of general application on particular religious exercises usually call for an exemption from the operation of the law for the believer. Such an exemption raises issues of formal equality; if we seek religious neutrality, society should not prefer belief to disbelief and it should not privilege the believer to engage in conduct that the nonbeliever cannot pursue. The concern for neutrality is underscored by the constitutional prohibitions on establishing religion. While there are appropriate responses to this view, it remains a powerful ground to support the position of the Supreme Court.

Further, because no one suggests an absolute immunity for religious exercise, the alternative to exempting laws of general application is to balance the value of the religious exercise against the values served by the conflicting law. Such judicial weighing exposes the Justices to criticism for arbitrary and subjective decisions. Justices, as closely attuned definitionally as Justices Deane and Toohey, parted over migration agent registration in *Cunliffe*.[271] United States Supreme Court Justices disagreed on the strength of the respective interests in *Smith*.[272] Justice Scalia stated in *Smith:*

> It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law

271. *See* Cunliffe v. Commonwealth (Austl. 1994) 182 C.L.R. 274.

272. *See* Employment Div. v. Smith, 494 U.S. 872 (1990).

> unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.[273]

B. *The Weaknesses of Immunity for Generally Applicable Laws*

The "talismanic" immunity of the law of general application, however, does not comport with the reasons offered for it. The law may be prima facie legitimate, but a closer look can reveal that the law violates the premises of free exercise.

Once a doctrine of immunity is established, clever draftsman will invoke it. Even laws of general applicability are susceptible to pretextual use. If one seeks to injure the Native American church, a general proscription of the use of hallucinogens, including peyote, will do it. It may be using an awkward instrument to accomplish the goal, like draining the lake to catch a bass, but it will be used if the Supreme Court allows. The awkwardness of using laws of general applicability to accomplish a targeted result may justify a prima facie assumption that no improper purpose was involved, but it does not justify ignoring the possibility under any theory of freedom of religion.

The exemption for laws of general application, because their impact on religion is incidental, overlooks the potential of a segmented analysis. Even though the law was justified on a neutral basis, it could have provided an exemption for applications to religious exercise. The failure to provide an exemption may have been the product of antipathy to that religion. For example, the denial of unemployment payments to an individual that refuses work is a rule of general application, but pay is granted to some persons where the refusal to work is justified. The failure to acknowledge religion as a sufficient justification for refusal to work may flow from a disregard for the importance of religion to the individual. Allowing unemployment pay where religious principles cause the refusal to work has no significant effect on the unemployment compensation system's operation. Where the interest of the state in applying a general law to religion is a weak one, the possibility that the application is a result of forbidden purpose is strong.

Accepting the idea that the objective of the law is crucial to its constitutionality, no law should be immune from review for compatibility with the Constitution. General applicability alone does not negate the possibility of an impermissible objective. The opinions of the Justices in the Australian freedom of political discussion cases have demonstrated the utility of a test of proportionality to assure that the impact of a law on speech (and religion) is entirely incidental and necessary to the accomplishment of a legitimate purpose. But proportionality alone will not resolve all questions, since the Court may differ on whether the law is proportional. Given the risk to fundamental values, the Court should scrutinize challenged laws with care rather than deferring to the surface plausibility of the state's asserted justification.

---

273. *Id.* at 890.

V. CONCLUSION

The neutrality and general applicability of a law serves as an indicia that it is compatible with the free exercise of religion and freedom of speech, but it is not a guarantee of consistency even if those human rights are viewed in terms of the legitimate and illegitimate purposes of government. Unless we demand strong reasons for restrictions that apply to religion and speech, as well as to other matters, we may find our freedoms wane.