Taking Seriously the Free Exercise of Religion under the Australian Constitution

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Abstract

This article argues that the current (or at least assumed) approach to interpreting the s 116 free exercise of religion clause in the *Australian Constitution* needs to be reconsidered. There is a widespread belief that 'for' connotes a narrow and binary purpose test when employed in s 116. That test is drawn from a rationale that relates to the specific context of the establishment clause. However, unlike establishment, a binary test of purpose is insufficient to do justice to the complex ways in which law may interact with the free exercise of religion. We suggest that the relevant test for the free exercise clause must consider the legal and practical effect of a law to ascertain whether it has a constitutionally obnoxious purpose. We outline an analytical framework to assess whether a law that infringes the free exercise clause is constitutionally justified, which considers whether the law is appropriate and adapted to serve a legitimate end. This framework provides the tools needed to perform a justification analysis that transparently ventilates and evaluates the competing rights and interests in play in a manner that is sufficiently context-sensitive. Importantly, it builds on the High Court of Australia's existing free exercise jurisprudence and reflects orthodox constitutional principle.

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I Introduction

It is well known that the few rights contained in the *Australian Constitution* have been interpreted narrowly by the High Court of Australia.[1] Among the casualties of the Court's narrow approach is s 116, the provision that purportedly protects the free exercise of religion ('the free exercise clause'). In 1981, Stephen J wrote that s 116 'is a constitutional provision of high importance';[2] however, that promise that has not been realised in the course of its interpretation. Section 116 provides as follows:

> The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

Several tendencies are evident in the few High Court cases that have considered the free exercise clause. The prohibition contained in s 116 is 'not, in form, a constitutional guarantee of the rights of individuals', but a limitation on federal legislative power.[3] There is a widely held assumption that 'for' connotes a purpose test which is narrow and binary when employed in s 116. That is, s 116 will only invalidate laws that have the purpose of establishing a religion, imposing a religious observance, or prohibiting the free exercise of religion.[4] But laws which have the effect of inhibiting the free exercise of religion will not infringe s 116, provided that was not their purpose.[5] It has also been held that freedom of religion is not absolute, but may be limited by other considerations or interests,[6] such that in practice other interests will readily prevail over the free exercise of religion. Finally, the free exercise clause does not protect a person from being required to do something which is forbidden by his or her religion.[7]

In this article we argue that the current (or at least assumed) approach to interpreting the free exercise clause needs to be reconsidered. That approach has made the clause of little or no effect in practice, having never been invoked to invalidate a Commonwealth law, and thereby affording little protection to the free exercise of religion.[8] The principal source of this narrowness is the purpose test, which has been drawn from a rationale and conception which relates to the establishment clause and is assumed to apply to the interpretation of the free exercise

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1 George Williams, 'Civil Liberties and the *Constitution* — A Question of Interpretation' (1994) 5(2) *Public Law Review* 82, 90.

2 *A-G (Vic) (Ex rel Black) v Commonwealth* (1981) 146 CLR 559, 610 ('*DOGS Case*').

3 Ibid 605, 609 (Stephen J), 615–16 (Mason J), 652–3 (Wilson J).

4 *Hoxton Park Resident Action Group Inc v Liverpool City Council* (2016) 344 ALR 101, 121 [96], 122 [105], 130 [145] (Beazley P, Basten JA and Macfarlan JA agreeing) ('*Hoxton Park*'); Luke Beck, *Religious Freedom and the Australian Constitution: Origins and Future* (Routledge, 2018) 97; Carolyn Evans, 'Religion' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 1033, 1048–9; Suri Ratnapala and Jonathan Crowe, *Australian Constitutional Law: Foundations and Theory* (Oxford University Press, 3rd ed, 2012) 411.

5 *Kruger v Commonwealth* (1997) 190 CLR 1 ('*Kruger*').

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

7 *Krygger v Williams* (1912) 15 CLR 366, 369 ('*Krygger*').

8 Carolyn Evans, *Legal Protection of Religious Freedom in Australia* (Federation Press, 2012) 87.

clause. However, despite the common use of the term 'for' in both clauses, there are fundamental differences between establishment and free exercise.

First, it is either the case or it is not that a religion is established by law as the national or state religion. There are not degrees of establishment. By contrast, the free exercise of religion may be infringed to a greater or lesser extent; there are degrees of infringement of freedom of religion. Second, freedom of religion is a fundamental human right, whereas the prohibition on establishment is not for a rights-protective purpose.[9] The free exercise clause is concerned with 'the impact of a law on the fundamental human rights of individual citizens', while the establishment clause is concerned with the relationship between religion and the state.[10] These considerations support an 'assertive reading' of the free exercise clause.[11]

Third, as noted in *Adelaide Company of Jehovah's Witnesses v Commonwealth* ('*Jehovah's Witnesses Case*'), freedom of religion is not absolute, but must accommodate, and sometimes give way to, other rights and interests. It cannot be the case that: on the one hand, any invocation of religion exempts a person from obedience to the law; or on the other, any invocation of a competing interest overrides religion. Identifying precisely this middle ground, and how religion may be balanced against other legitimate interests, is a matter of controversy.[12] This is not the case for establishment, which is an absolute prohibition that does not permit of exceptions: there are no countervailing considerations that may make it legitimate to establish a religion as the national religion in certain circumstances.

There are thus fundamental differences between laws establishing a religion and laws that infringe the free exercise of religion. This suggests that it is not appropriate to apply an interpretive test, in relation to the free exercise clause, that is drawn from considerations relating to the establishment clause. Whether a binary test of purpose is appropriate in relation to establishment, it is not a suitable test for the free exercise clause. Unlike establishment, there are questions of balance, judgement and proportionality that apply in relation to the freedom of religion. It might be, for example, that a law infringes the free exercise of religion in order to further a legitimate purpose or interest, but does so in an excessively burdensome way. A simplistic binary test of purpose is insufficient to do justice to the complex ways in which law may interact with the exercise of religion.

We argue that a satisfactory test for whether legislation impermissibly infringes the free exercise clause must take this into account, and ought not to be the same as the test which applies in relation to the establishment clause. In order to do so, we build on the insights of Gaudron J and Gummow J in *Kruger v Commonwealth* who considered that the reasonably appropriate and adapted test was apposite in the free exercise context.[13] To suggest that a proper justification analysis

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9 *DOGS Case* (n 2) 603 (Gibbs J).

10 Alex Deagon, 'Liberal Assumptions in Section 116 Cases and Implications for Religious Freedom' (2018) 46(1) *Federal Law Review* 113, 123.

11 Peter Hanks, Frances Gordon and Graeme Hill, *Constitutional Law in Australia* (LexisNexis, 4th ed, 2018) 683.

12 See, eg, Expert Panel, Parliament of Australia, *Religious Freedom Review* (Report, May 2018) ch 4.

13 *Kruger* (n 5) 131–2 (Gaudron J), 160–1 (Gummow J).

should be undertaken in this s 116 context is not novel. But identifying important strands of proportionality-style reasoning in the High Court's *existing* free exercise jurisprudence that has been hitherto overlooked is novel. That is the significance of our account. Our analysis then moves to outline frameworks of justification that provide the analytical tools to transparently determine whether a law that infringes the free exercise clause is constitutionally justified; and does so in a manner that is sufficiently context-sensitive.

In Part II we examine the early cases on the free exercise of religion, arguing that the first case to be decided in relation to the free exercise clause, *Krygger v Williams*,[14] has been taken to stand for a much narrower proposition than the facts and ratio decidendi of the case warrant. *Krygger* in fact stands for the proposition that s 116 does not protect the free exercise by a person of an activity that could not possibly be forbidden by the doctrines of his (or her) religion. Griffith CJ's more contentious views in that case about the scope of s 116[15] must be understood in that light.

We also examine the *Jehovah's Witnesses Case*, and note that the Court did not adopt a binary purpose test. Rather, Latham CJ considered that the purpose of a law was one factor that may be taken into account in determining whether the law infringed s 116, but not the sole factor.[16] Further, Latham CJ also recognised that freedom of religion is not absolute and there might be competing interests that counterbalance, and potentially override, religion, which invites a judgment as to the weighting of different rights and interests in relation to the free exercise of religion, rather than a binary question of legislative purpose.[17]

Part III considers the principal case that has been taken to be authority for use of the purpose test in the context of s 116: *Attorney-General (Vic) (Ex rel Black) v Commonwealth* ('*DOGS Case*').[18] That decision concerned the establishment clause rather than the free exercise clause, and those judges who did adopt a narrow and binary test of purpose did so on the basis of reasoning that reflects the nature of establishment rather than free exercise.[19] Those considerations do not readily translate to the interpretation of the free exercise clause.

The significance of *Kruger* is considered in Part IV. In that case, the High Court left the door open to considering, when determining legislative purpose, the practical effect of a statute, such that the purpose of a statute as determined solely from its terms cannot be considered the determinant of constitutional validity. Indeed, the only judges who gave the relevant test any consideration made clear that if determined facts were before the Court, it would be necessary to consider the legal operation *and* practical effect of a law to ascertain whether it had *a* purpose that was constitutionally obnoxious.[20]

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14 *Krygger* (n 7).
15 Ibid 369.
16 *Jehovah's Witnesses Case* (n 6) 132.
17 Ibid 126–33.
18 *DOGS Case* (n 2).
19 Ibid 579, 582 (Barwick CJ).
20 *Kruger* (n 5) 131–2 (Gaudron J), 160–1 (Gummow J).

Finally, in Part V we outline analytical frameworks of justification that would allow judges to consider and reconcile — in a principled, transparent manner — religious freedom and other legitimate interests and legislative goals that necessarily arise in the free exercise context. In the context of its recent jurisprudence on the implied freedom of political communication, the High Court has adopted two different approaches to justification: calibrated scrutiny and structured proportionality. We consider that both recognise the constitutional necessity of a justification analysis that is appropriately context-sensitive and case-specific. They provide frameworks to assess constitutional justification having regard to the extent of the impact on religious free exercise, the importance of the law's purpose and whether the measures adopted to secure it are reasonable and proportionate in the relevant (factual and legal) circumstances. Our account is consistent in this regard with arguments made by other scholars that the High Court may or should adopt the reasonably appropriate and adapted test when applying the free exercise clause.[21] In doing so, it ensures that the free exercise of religion under the *Australian Constitution* is taken seriously.

II Free Exercise Jurisprudence: Insights and Oversights

In this Part, we consider the early cases on the free exercise clause, namely *Krygger* and the *Jehovah's Witnesses Case*. Neither of these cases held that improper purpose is the 'touchstone for invalidity' under s 116.[22] We argue that *Krygger* has been taken to stand for a much broader proposition than the decision warrants, and that its correct interpretation is a much narrower one. We also argue that the *Jehovah's Witnesses Case* contains important observations that demonstrate an awareness of how competing rights, interests and values may be legislatively implicated in the free exercise context.

A Krygger v Williams*: Requiring a Man to do Something Not Forbidden by his Religion*

The first case to consider s 116 was *Krygger*, which concerned an alleged conscientious objection to compulsory military service.[23] The *Defence Act 1903* (Cth) ('*Defence Act*') required all male inhabitants of Australia who had resided in Australia for six months to attend military training. Mr Krygger refused to participate in this training on the basis that this was contrary to his religious beliefs and, as a consequence, was convicted of an offence under the Act in the Ballarat Court of Petty Sessions. His appeal to the High Court included grounds that the

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[21] Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 571; Nicholas Aroney, Peter Gerangelos, Sarah Murray and James Stellios, *The Constitution of the Commonwealth of Australia: History, Principle and Interpretation* (Cambridge University Press, 2015) 354; George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 269; Luke Beck, 'Clear and Emphatic: The Separation of Church and State under the Australian Constitution' (2008) 27(2) *University of Tasmania Law Review* 161, 184–5; Luke Beck, *Australian Constitutional Law: Concepts and Cases* (Cambridge University Press, 2019); Deagon (n 10) 136.

[22] Luke Beck, 'The Case against Improper Purpose as the Touchstone for Invalidity under Section 116 of the *Australian Constitution*' (2016) 44(3) *Federal Law Review* 505, 508.

[23] *Krygger* (n 7).

relevant provisions of the *Defence Act* were contrary to s 116 of the *Australian Constitution* and therefore invalid.[24]

In one of the most dismissive judgments in the Court's history, Griffith CJ and Barton J rejected Mr Krygger's claim that s 116 exempted him from compulsory military service under the *Defence Act*. Their Honours' reasons, which were delivered on the day of the hearing, barely extended to two pages apiece, and they did not even consider it necessary to hear the respondent's argument.[25] Barton J thought that the appellant's argument was 'as thin as anything of the kind that has come before us'.[26]

In the course of this judgment Griffith CJ made the following comments about the scope of the free exercise clause:

> It may be that a law requiring a man to do an act which his religion forbids would be objectionable on moral grounds, but it does not come within the prohibition of sec. 116, and the justification for a refusal to obey a law of that kind must be found elsewhere. The constitutional objection entirely fails.[27]

These comments have led many to view this case as standing for a very narrow view of s 116. In the *Jehovah's Witnesses Case*, Latham CJ held that

> it was held in *Krygger v. Williams* that a person who is forbidden by the doctrines of his religion to bear arms is not thereby exempted or excused from undergoing the military training and rendering the personal service required by the *Defence Act* 1903-1910; and that the provisions of the Act imposing obligations on all male inhabitants of the Commonwealth in respect to military training do not prohibit the free exercise of any religion, and, therefore, are not an infringement of s. 116 of the Constitution.[28]

Other commentators interpret the case in a similar fashion.[29] According to Pannam, on Griffith CJ's interpretation, the only thing which could infringe s 116 'would be a denial of the right to attend a religious ceremony or attaching some penalty to the exercise of this right'.[30] In the words of another commentator, '[f]or the early High Court, religion began and ended at the church door.'[31]

These interpretations, however, misunderstand the true ratio decidendi of the decision. *Krygger* in fact stands for a much more limited, and uncontentious, proposition, namely that s 116 does not protect the free exercise by a person of an activity that *could not possibly* be forbidden by the doctrines of his (or her) religion. An examination of the legislation and their Honours' reasons explains why this is so.

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24 Ibid 368.

25 Griffith CJ commenced his judgment by stating: 'We heard Mr. McArthur [counsel for the respondent] not because we had any doubt about the matter, but because the appellant seems to treat the matter as a more serious one than I am disposed to do': *Krygger* (n 7) 369.

26 *Krygger* (n 7) 373.

27 Ibid 369.

28 *Jehovah's Witnesses Case* (n 6) 133.

29 See Gonzalo Villalta Puig and Steven Tudor, 'To the Advancement of Thy Glory? A Constitutional and Policy Critique of Parliamentary Prayers' (2009) 20(1) *Public Law Review* 56, 61–2.

30 Clifford L Pannam, 'Travelling Section 116 with a US Road Map' (1963) 4(1) *Melbourne University Law Review* 41, 68.

31 Joshua Puls, 'The Wall of Separation: Section 116, the First Amendment and Constitutional Religious Guarantees' (1998) 26(1) *Federal Law Review* 139, 142, citing Pannam (n 30) 68.

As noted above, the *Defence Act* contained a requirement that all male inhabitants of Australia who had resided in Australia for six months must render the 'personal service' required by the Act, but it also contained provisions accommodating those with conscientious objections. The Act provided that those with religious and conscientious beliefs that did not allow them to bear arms were to be trained, as far as possible, in non-combatant duties, and during a time of war were to be placed in non-combatant roles. Although exempt in this way from combat roles and training, persons with conscientious or religious objections were nevertheless required to undergo training (in non-combatant duties),[32] and in a time of war would be allotted non-combatant duties, such as in the medical corps.

These provisions enable the reason for their Honours' dismissiveness to be more readily appreciated. If Mr Krygger's religious objections were based on pacifist convictions, then those objections could only extend to being trained in and participating in *combatant* duties. Mr Krygger had objected to military training on the basis that this was contrary to the 'Word of God', citing Matthew 5:39: 'if thine enemy smite thee on the one cheek turn to him the other also',[33] which thus proscribes violence and retaliation. However, being trained in a non-combatant role such as a medic could not possibly be against those convictions: he would be trained 'not to take life but to save it'.[34] As Griffith CJ said: 'The real objection taken by the appellant is not to being trained so as to become efficient for taking life, but to being trained so that in time of war he may be competent to assist in saving life, and that is called a conscientious objection.'[35]

Given the accommodation afforded to such objectors, 'to base a refusal to be trained in *non-combatant duties* upon conscientious grounds is absurd'.[36] Barton J's reasons were to like effect.[37] Accordingly, *Krygger* does not stand for the proposition that, as later put by Latham CJ, 'a person who is forbidden by the doctrines of his religion to bear arms is not thereby exempted or excused from undergoing the military training'.[38] Rather, it stands for the proposition that, where a person's religion could not be construed so as to forbid him or her from undergoing training in non-combatant duties, s 116 does not operate to prevent that person from being required to undergo such training. That is unlikely to be a contentious proposition.

Given that this was the basis of their Honours' dismissiveness, it is difficult to understand Griffith CJ's observation that 'a law requiring a man to do an act which his religion forbids … does not come within the prohibition of sec. 116'.[39] Indeed, on this interpretation it is difficult to see what substantive operation the free exercise clause would have. Arguably, the better view would be to see this observation as irrelevant to the question at hand, and, given that it did not attract the support of the other member of the Court, to regard it as entirely obiter dicta. As Griffith CJ himself said immediately prior to this statement, '[t]o require a man to do a thing which has

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32 *Krygger* (n 7) 370 (Griffith CJ), 371–2 (Barton J).
33 Ibid 367.
34 Ibid 370 (Griffith CJ).
35 Ibid.
36 Ibid 371 (emphasis added).
37 Ibid 372–3.
38 *Jehovah's Witnesses Case* (n 6) 133.
39 *Krygger* (n 7) 369.

nothing at all to do with religion is not prohibiting him from a free exercise of religion.'[40] Rather than standing for a broad proposition about the narrowness of the free exercise clause, *Krygger* is best seen as reflecting the idiosyncrasies of the appellant's refusal to attend military training in non-combatant duties.

B Jehovah's Witnesses Case*: Balancing Religion with Other Legitimate Interests*

The *Jehovah's Witnesses Case* concerned the banning or prohibiting of the incorporated association the Jehovah's Witnesses during the Second World War.[41] The Jehovah's Witnesses believed and publicly taught that all earthly political governments were agents of Satan; as such, they remained neutral and would not interfere in war between nations. The Governor-General made a declaration that certain bodies including the Jehovah's Witnesses were 'prejudicial to the defence of the Commonwealth and the efficient prosecution of the war'[42] and confiscated their property. The Jehovah's Witnesses brought an action claiming, among other things, that the regulations which authorised those actions were contrary to s 116 of the *Australian Constitution*.[43]

The High Court unanimously held that s 116 did not prevent the Commonwealth from enacting laws to restrain the activities of a body whose existence is 'prejudicial to the defence of the Commonwealth or the efficient prosecution of the war', where the activities of the body are founded upon the religious views of its members. The most nuanced and considered judgment was delivered by Latham CJ, who noted that s 116 is an overriding provision which 'prevails over and limits all provisions which give power to make laws'.[44] Latham CJ noted the key difficulty that exists in relation to the protection of the free exercise of religion:

> Can any person, by describing (and honestly describing) his beliefs and practices as religious exempt himself from obedience to the law? Does s. 116 protect any religious belief or any religious practice, irrespective of the political or social effect of that belief or practice?[45]

That is, were there to be an absolute protection for religious freedom such that the holding of sincere religious belief exempts a person from obedience to any law, atrocities such as robbery and murder (practices of the Thugs of India), and immolating a widow upon her husband's funeral pyre (a Hindu practice) could be perpetrated in the name of religion and the result would be anarchy.[46] On the other hand, s 116 is necessary to protect the religion of minorities, especially unpopular minorities, given that the majority can look after itself.[47]

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40 Ibid 369.
41 *Jehovah's Witnesses Case* (n 6).
42 Ibid 118.
43 Ibid 119.
44 Ibid 123.
45 Ibid 126.
46 Ibid 125, 131.
47 Ibid 124.

Latham CJ examined the United States ('US') jurisprudence, noting that those cases held that the protection accorded to religion is not absolute, and 'did not involve a dispensation from obedience to a general law of the land which was not directed against religion'.[48] As such, freedom of religion must be balanced in relation to other legitimate interests and legislative goals. According to Latham CJ, the approach of the US courts was to consider whether 'the freedom of religion has been *unduly* infringed by some particular legislative provision',[49] which strikes an appropriate balance between according 'a real measure of practical protection to religion' and not 'involving the community in anarchy'.[50]

Latham CJ considered that it would be desirable to adopt such an approach in Australia, however, it was possible to decide the case on a narrower basis. Section 116 existed within the context of a Constitution that necessarily assumes the continued existence of the community, which therefore enables the Commonwealth to legislate to defend both external and internal threats to its existence:

> It is consistent with the maintenance of religious liberty for the State to restrain actions and courses of conduct which are inconsistent with the maintenance of civil government or prejudicial to the continued existence of the community.[51]

Latham CJ also noted that the word 'for' 'shows that the purpose of the legislation in question may properly be taken into account in determining whether or not it is a law of the prohibited character'.[52]

The remaining judges were content to decide the case on a similar basis, holding that freedom of religion is not absolute, that society has the right to protect itself from threats to its existence, and that the enactment of laws which preserve the safety and continued existence of the nation are not an infringement of s 116.[53] Section 116 therefore needs to be read within the context of the *Australian Constitution* as a whole.

The *Jehovah's Witnesses Case* recognises that the free exercise of religion is not absolute, but competing rights, interests and values exist alongside freedom of religion. This is consistent with the recognition under international human rights law that the exercise of religion may be limited. However, by contrast with the approach taken in relation to s 116, international law imposes a very high threshold on the imposition of limitations on the manifestation of religion,[54] allowing such limitations in narrowly prescribed ways; namely, where they are 'necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'.[55]

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48 Ibid 129.
49 Ibid 131 (emphasis in original).
50 Ibid.
51 Ibid.
52 Ibid 132.
53 Ibid 149–50 (Rich J), 154–5 (Starke J), 157 (McTiernan J), 159–60 (Williams J).
54 See also Human Rights Committee, *General Comment 27: The Right to Freedom of Movement (Article 12)*, 67th sess, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) [11], [14]; Human Rights Committee, *General Comment 34: Freedoms of Opinion and Expression (Article 19)*, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011) [22].
55 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18(3); Nicholas Aroney and Benjamin B Saunders,

Navigating the difficulties thrown up by free exercise requires charting a middle ground between adequately protecting freedom of religion, especially the rights of minorities, and also not providing religious adherents with a general dispensation from obedience to the law. Latham CJ's judgment in the *Jehovah's Witnesses Case* shows one way this might be achieved: namely, by following the US, which, as noted above, asks whether a legislative provision *unduly* infringes the free exercise of religion. This invites questions of proportionality — a consideration of the policy goal to be achieved by the legislation and the extent of its impact on free exercise of religion.

However, in the circumstances of the case it was unnecessary to lay down detailed prescriptions about how to balance religion against other legitimate interests. Given the wartime context, the issue for the judges was the safety and very existence of the Commonwealth, which represents the most extreme example of a legitimate countervailing interest. It is not surprising that the concern to defend against threats to the continued existence of the Commonwealth readily prevailed over religious freedom. The *Jehovah's Witnesses Case* 'stands only for the narrow proposition that a person cannot seek to overthrow the constitutional system of government in the name of religion', which is hardly a surprising result.[56] In those circumstances, there was no need to consider whether the regulations unduly infringed the free exercise of religion or engage in a balancing of religion in relation to other interests. The *Jehovah's Witnesses Case*, therefore, does not directly speak to how religious freedom may be balanced against legitimate interests that are of less pressing concern than the continued existence of the nation. It should also be noted that the decision is not an endorsement of the view that other legitimate interests necessarily, and in all cases, prevail over religion.

The decision also demonstrates the contrast between the establishment and free exercise clauses of s 116. Unlike freedom of religion, the prohibition on establishment is an absolute prohibition, not permitting of exceptions. There are no countervailing rights or interests that might make establishment legitimate. As a result, the appropriate test for determining whether legislation infringes the establishment clause ought to be very different from that which determines whether the free exercise clause has been infringed.

III The *DOGS Case* and the Purpose Test

The *DOGS Case* is significant. It was, for example, cited by Brennan CJ in *Kruger* as authority for the purpose test to be used in the free exercise context.[57] In the *DOGS Case*, the High Court held that legislation that provided financial assistance to non-government schools, including religious schools, in the Australian States, the Australian Capital Territory and the Northern Territory, did not infringe the

'Freedom of Religion' in Matthew Groves, Janina Boughey and Dan Meagher (eds), *The Legal Protection of Rights in Australia* (Hart Publishing, 2019) 285, 287–90; Paul M Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge University Press, 2005) 292–338.

[56] Stephen McLeish, 'Making Sense of Religion and the Constitution: A Fresh Start for Section 116' (1992) 18(2) *Monash University Law Review* 207, 209.

[57] *Kruger* (n 5) 40, 160, citing *DOGS Case* (n 2) 579, 615–16, 653.

establishment clause in s 116.[58] The Court held that establishing a religion meant constituting a religion or religious body as an officially recognised state church or religion.[59]

Although it has been cited as authority for a narrow and binary test of purpose, the *DOGS Case* does not, in fact, provide a clear majority in favour of such a test. Only Barwick CJ, Mason J and Wilson J expressly adopted this purposive interpretation of the establishment clause.[60] Gibbs J considered that any legislation that 'has the purpose *or effect* of setting up any religion or religious body as a state religion or a state church' would infringe s 116.[61] Stephen J considered that establishing means 'the constituting of a religion as an officially recognized State religion',[62] and noted that the establishment clause 'does not describe a prohibited law's impact upon the citizen but its effect upon religion',[63] thus arguably directing attention to the effect, rather than the purpose, of a law. Aickin J agreed with both Gibbs J and Mason J,[64] despite the differing interpretations adopted by those judges, and Murphy J dissented, arguing for a much broader conception of establishment as enshrining a broad principle of freedom of and from religion.[65]

Another important aspect of the *DOGS Case* is that the decision concerned the establishment clause rather than the free exercise clause, and the reasoning in favour of the purposive interpretation specifically reflects the nature of establishment. In an important passage, Barwick CJ said that

> in the interpretation and application of s. 116, the establishment of religion must be found to be the object of the making of the law. Further, because the whole expression is '*for* establishing any religion', the law to satisfy the description must have that objective as its express and, as I think, single purpose.[66]

Immediately following this text, Barwick CJ explained the logic of this test:

> [i]ndeed, a law establishing a religion could scarcely do so as an incident of some other and principal objective. In my opinion, a law which establishes a religion will inevitably do so expressly and directly and not, as it were, constructively.[67]

This interpretation of s 116 is consistent with his Honour's view that establishing a religion means 'the entrenchment of a religion as a feature of and identified with the body politic',[68] thus placing the Commonwealth under an obligation 'to patronize, protect and promote the established religion'.[69] Following such an interpretation, it would not be possible to establish a religion by accident, or as incidental to the fulfilment of some other legislative purpose; the legislature would need to expressly

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58 See also *Hoxton Park* (n 4).
59 *DOGS Case* (n 2) 582 (Barwick CJ), 597 (Gibbs J), 605 (Stephen J), 616 (Mason J), 653 (Wilson J).
60 Ibid 579, 615–16, 653.
61 Ibid 604 (emphasis added).
62 Ibid 605.
63 Ibid.
64 Ibid 635.
65 Ibid 623.
66 Ibid 579 (emphasis in original).
67 Ibid.
68 Ibid 582.
69 Ibid.

establish a religion in this sense. By way of example, the statute establishing the Christian religion in England provided: 'be it enacted, by authority of this present Parliament, that the king, our sovereign lord, his heirs and successors, kings of this realm, shall be taken, accepted, and reputed the only supreme head in earth of the Church of England'.[70]

Barwick CJ's view of establishment has the consequence that it is either the case or it is not that a religion is established as the national or state religion: there are not degrees of establishment. It is true that a combination of statutes, taken together, may yield the conclusion that a religion is established; establishment therefore 'has no single characteristic but, rather, is the sum total of all the mutual relations for the time being existing according to law between Church and State'.[71] However, it is the totality of the arrangements that constitutes establishment, and one or more of those arrangements taken in isolation do not amount to partial establishments of religion. Thus, forms of public recognition or support for religion, such as funding for religious schools and parliamentary prayers, which do not have the purpose of identifying a religion with the body politic,[72] are not partial establishments of religion. Those who advocate for a more separationist approach to the establishment clause, especially that it should prevent all forms of governmental support for or involvement in religion,[73] are urging a fundamentally different conception of establishment than that adopted by the High Court in the *DOGS Case*.[74]

In sum, according to Barwick CJ's approach, a religion is either established or it is not, and a law establishing a religion will do so 'expressly and directly'.[75] The purpose test, which invites the Court to determine whether a law, alone or in combination with other laws, evidences a purpose of establishing religion, is consistent with this view of establishment. This, however, is not the case with respect to the free exercise clause. Unlike establishment, the free exercise of religion may be limited in many ways and to different degrees. The free exercise of religion may be affected by a law that infringes upon a person's beliefs or conscience, 'inhibits their acts of worship or of religious speech, press, or association',[76] commands them to do, or not do, something that conflicts with the demands of their faith, or by singling out in a discriminatory way 'their activity, organization, or property for duties or exclusions that the government has not imposed on other similarly situated individuals or groups'.[77] Further, laws that are not specifically intended to limit the free exercise of religion may, nevertheless, have such an impact.

This suggests that the considerations that have led the High Court to adopt a binary purpose test for the establishment clause are not apposite in relation to the free exercise clause. A more satisfactory test for the free exercise clause would recognise that laws may curtail freedom of religion even if that is not their purpose

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70 *Act of Supremacy 1534*, 26 Hen VIII, c 1.
71 *DOGS Case* (n 2) 607 (Stephen J).
72 Ibid 582 (Barwick CJ).
73 See, eg, Beck, 'Clear and Emphatic' (n 21).
74 See, eg, *DOGS Case* (n 2) 623 (Murphy J).
75 Ibid 579.
76 John Witte Jr and Joel A Nichols, *Religion and the American Constitutional Experiment* (Oxford University Press, 4th ed, 2016) 118.
77 Ibid.

and consider the differing extents to which the free exercise of religion may be affected by legislation. Something of the difference between the matters to which the establishment and free exercise clauses are directed was captured by Gibbs J when his Honour noted that 'the establishment clause imposes a fetter on legislative power, and unlike the words which forbid the making of any law prohibiting the free exercise of any religion, does not do so for the purpose of protecting a fundamental human right'.[78]

Another important feature of the reasoning in the *DOGS Case* is that the interpretation of s 116 was determined by reference to, and in contradistinction to, the US equivalent, with several judges highlighting the difference in wording between s 116 and the First Amendment. The First Amendment to the *United States Constitution* provides that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof'. The equivalent clauses of the *Australian Constitution* provide that '[t]he Commonwealth shall not make any law for establishing any religion, … or for prohibiting the free exercise of any religion'. The use of the word 'respecting' in the First Amendment, while s 116 uses the narrower term 'for', was considered to be an important difference by Barwick CJ, Mason and Wilson JJ, who thought that the latter term conveyed purpose.[79]

There are two problems with this reasoning. First, the word 'for' has a wide range of meanings, which include 'in respect of or with reference to' as well as purposive meanings,[80] and is therefore capable of bearing a meaning equivalent to the word 'respecting' as employed in the *United States Constitution*.[81] The view of Barwick CJ, Mason and Wilson JJ is only a valid interpretive technique if the framers of the *Australian Constitution* drafted s 116 with the *United States Constitution* in mind, and consciously adopted more restrictive wording. That, however, is unlikely to be the case. Following an analysis of the drafting and adoption of s 116, Beck has recently argued that

> the precise language of section 116 was not the result of a careful drafting choice. Indeed, neither Clark nor Higgins were particularly thoughtful in their choice of language, and neither the 1891 Australasian Convention nor the 1897−8 Federal Convention carefully considered and debated the precise language of the provision. The language used in section 116 is rather haphazard.[82]

Second, even if this reasoning has any validity in relation to the establishment clause, it is inapplicable in relation to the free exercise clause. The US First Amendment prohibits Congress from making any law 'prohibiting the free exercise' of religion, while s 116 prohibits the Commonwealth from making any law 'for prohibiting the free exercise of any religion'. The difference in wording is so slight, such that a sharp contrast cannot be drawn between the two clauses.

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78 *DOGS Case* (n 2) 603.
79 Ibid 579, 615–16, 653.
80 *The Australian Oxford Dictionary* (Oxford University Press, 2nd ed, 2004) 486, listing over 20 definitions.
81 *DOGS Case* (n 2) 622 (Murphy J), quoting *Lamshed v Lake* (1958) 99 CLR 132, 141 (Dixon CJ).
82 Beck, *Religious Freedom and the Australian Constitution* (n 4) 97. See also Beck, 'The Case against Improper Purpose as the Touchstone for Invalidity' (n 22) 514.

A final aspect of the decision in the *DOGS Case* worth noting is the interrelation between the four clauses of s 116, which contrasts with the position in the US. An important difference between the US and Australian provisions is that s 116 is, in its terms, more extensive than the equivalent provisions in the *United States Constitution*, containing a prohibition on imposing religious observances.[83] As a result, given the more extensive interpretation afforded to the establishment clause, measures that in Australia would infringe the religious observance clause of s 116, in the US would be held to infringe the establishment clause. This has implications for the interpretation and interrelation of the four clauses of s 116. As Wilson J noted, if the establishment clause is to be understood as erecting a 'wall of separation'[84] between church and state similar to the US approach, the effect would be to swallow the other clauses of s 116, 'leaving nothing to be contributed by the remaining clauses'.[85]

IV The Significance of *Kruger*

Kruger involved a challenge to ss 6, 7, 16 and 67 of the *Aboriginals Ordinance 1918* (NT), which was made pursuant to powers conferred by the *Northern Territory Acceptance Act 1910* (Cth).[86] This Commonwealth law was enacted pursuant to the 'territories power' in s 122 of the *Australian Constitution*. The impugned sections authorised the Chief Protector of Aborigines in the Northern Territory

> at any time to undertake the care, custody, or control of any aboriginal or half-caste, if, in his opinion it is necessary or desirable in the interests of the aboriginal or half-caste for him to do so, and for that purpose may enter any premises where the aboriginal or half-caste is or is supposed to be, and may take him into his custody'.[87]

In addition, the Chief Protector was authorised to keep any Aboriginal or half-caste

> within the boundaries of any reserve or aboriginal institution or to be removed to and kept within the boundaries of any reserve or aboriginal institution, or to be removed from one reserve or aboriginal institution to another reserve or aboriginal institution, and to be kept therein'.[88]

It was, moreover, an offence for an Aboriginal or half-caste to resist this containment or refuse to be removed to facilitate it.[89]

The plaintiffs said that the forcible removal and detention of Aboriginal children in the Northern Territory between 1925 and 1960 was undertaken pursuant to the *Aboriginals Ordinance 1918* (NT). But they argued, unsuccessfully, that its key sections were invalid for breaching a range of constitutional principles including the separation of powers, legal equality, freedom of movement and association and

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83 The First Amendment contains establishment and free exercise clauses, and art VI states that 'no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States', in similar terms to the fourth clause of s 116: 'and no religious test shall be required as a qualification for any office or public trust under the Commonwealth'.

84 *DOGS Case* (n 2) 654–5.

85 Ibid.

86 *Kruger* (n 5) 33.

87 *Aboriginals Ordinance 1918* (NT) s 6(1).

88 Ibid s 16(1).

89 Ibid s 16(2).

the free exercise of religion.[90] The gist of the s 116 argument was that the forcible removal and detention made it impossible for those Aboriginals affected to undertake the free exercise of their religion. While that argument did not succeed, the Court's free exercise reasoning in *Kruger* is significant.[91] It offers the most detailed contemporary treatment of the free exercise clause and, at first, appears to adopt the same narrow, binary purpose test that is applied in the establishment context. Yet there were two specific aspects of the case that, necessarily, qualify its significance for our free exercise jurisprudence.

A *The Territories Power Context and Absence of Determined Facts*

The first aspect that qualifies the significance of *Kruger* was the threshold issue of whether s 122 was subject to s 116 and its directive that the Commonwealth shall make no law 'for prohibiting the free exercise of any religion'. Dawson J (with whom McHugh J agreed) held that it was not.[92] Both judges, as a consequence, did not consider the free exercise issue. Dawson J did, however, add that 'if I am wrong in that conclusion, I would agree with Gummow J, for the reasons given by him, that the 1918 Ordinance contains nothing which would enable it to be said that it is a law for prohibiting the free exercise of any religion'.[93] Therefore, there was limited consideration of s 116, which qualifies the significance of *Kruger* for purposes of the free exercise clause.

The second, more important, issue concerned the manner in which *Kruger* was framed for consideration by the High Court. Relevantly, there was no determination of facts before the Court capable of substantiating the plaintiff's argument that the *effect* of the 1918 Ordinance was to prohibit the free exercise of their religion. That was procedurally unusual, as Dawson J observed:

> Brennan CJ, whilst recognising that, as a general rule, it is inappropriate to reserve any point of law for the opinion of the Full Court before a determination of the facts which evoke consideration of that point of law or of the facts on which the answer to the question reserved may depend, held that the manifest preponderance of convenience required such a course to be taken in these cases.[94]

This was, arguably, critical for the determination of the free exercise issue. Without facts, the only possible way of discerning the law's purpose was to consider the *terms* of the 1918 Ordinance, which authorised the removal and detention of any 'Aboriginal or half-caste'. And as Brennan CJ noted, 'this [wa]s a power which in terms [wa]s conferred to serve the interests of those whose care, custody or control might be undertaken. It [wa]s not a power to be exercised adversely to those individual interests'.[95] That is, the terms of the impugned sections disclosed a purpose that was not constitutionally obnoxious, even if, '[i]n retrospect, many would say that the risk of a child suffering mental harm by being kept away from its

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90 *Kruger* (n 5) 3–6.
91 Ibid 40 (Brennan CJ), 86 (Toohey J), 134 (Gaurdon J), 161 (Gummow J).
92 Ibid 60 (Dawson J), 142 (McHugh J).
93 Ibid 60–1 (Dawson J).
94 Ibid 48–9 (footnote omitted).
95 Ibid 35–6.

mother or family was too great to permit even a well-intentioned policy of separation to be implemented'.[96] It explains why (and how) Brennan CJ dismissed the free exercise issue as follows: 'To attract invalidity under s 116, a law must have the purpose of achieving an object which s 116 forbids. None of the impugned laws has such a purpose'.[97] As noted, one authority cited for this proposition was the judgment of Barwick CJ in the *DOGS Case*.[98] Yet, as we explained above, the narrow and binary test of purpose that Barwick CJ applied there was limited to the specific context of the establishment clause.[99] That being so, it is far from clear that Brennan CJ was proposing that the same kind of purpose test was to be applied to the free exercise clause, though in the specific *legal* context in *Kruger* it was sufficient to identify the law's constitutionally permissible purpose.

The absence of determined facts was central also to the free exercise reasoning of the rest of the Court in *Kruger*. Toohey J, for example, said

> [i]t may well be that an effect of the Ordinance was to impair, even prohibit the spiritual beliefs and practices of the Aboriginal people in the Northern Territory, though this is something that could only be demonstrated by evidence. But I am unable to discern in the language of the Ordinance such a purpose'.[100]

Gummow J recognised the law's 'effect, as a practical matter',[101] but held that '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'.[102] And Gaudron J, to similar effect, said 'the question whether the Ordinance authorised acts which prevented the free exercise of religion involves factual issues which cannot presently be determined'.[103] So, without determined facts before them, it was only possible for Brennan CJ, Toohey J, Gaudron J and Gummow J to consider the *legal effect* of the Ordinance in order to assess its compatibility with the free exercise clause. In other words, the *terms* of the law had to disclose the constitutionally obnoxious purpose.

B *Free Exercise as a Constitutional Guarantee*

1 *Determining a Law's Practical Operation*

The analysis above raises the important question that if facts were available in *Kruger* to demonstrate the asserted practical effect of the law, what test might the Court have applied? Gaudron J was unequivocal: 'The use of the word "for" indicates that purpose is the criterion and the sole criterion selected by s 116 for invalidity'.[104] Yet her Honour stated that save for the establishment clause — for the

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96 Ibid 40.
97 Ibid (footnote omitted).
98 Ibid, where the relevant authority is cited at n 188 of the judgment.
99 See Part III above.
100 *Kruger* (n 5) 86.
101 Ibid 161.
102 Ibid.
103 Ibid 132.
104 Ibid 40, 132.

reasons we detailed above[105] — 's 116 is not, in terms, directed to laws the express and single purpose of which offends one or other of its proscriptions. Rather, its terms are sufficiently wide to encompass any law which has *a* proscribed purpose.'[106] As a consequence, Gaudron J rejected the view that s 116 applies 'only to laws which, in terms, ban religious practices or otherwise prohibit the free exercise of religion'.[107] In doing so, her Honour noted that as the Commonwealth has no power to legislate with respect to religion, a law which, in terms, prohibits the free exercise of religion would be invalid on orthodox characterisation grounds.[108] That being so — and if it is to perform a meaningful role — these 'textual' and 'contextual' considerations provide 'powerful support for the view that s 116 was intended to extend to laws which operate to prevent the free exercise of religion, not merely those which, in terms, ban it'.[109] Moreover, there is a 'need to construe constitutional guarantees liberally, even limited guarantees of the kind effected by s 116'[110] and 'it is inconsistent with established principle to interpret constitutional guarantees "pedantically" so that they may be circumvented by legislative provisions which purport to do indirectly what cannot be done directly'.[111] The upshot for Gaudron J is that 's 116 extends to provisions which authorise acts which prevent the free exercise of religion, not merely provisions which operate of their own force to prevent that exercise'.[112]

2 *The Methodological Significance of the Analogy with Section 92*

Of equal significance, in our view, were the brief and more circumspect observations made in this regard in *Kruger* by Gummow J (with whom Dawson J agreed if s 122 was subject to s 116). Gummow J said '[t]he use of the preposition "for"' in the free exercise clause 'directs attention to the objective or purpose of the law in issue'.[113] But in this context '"[p]urpose" refers not to underlying motive but to the end or object the legislation serves'.[114] Purpose is, then, an objective concept; and whether a law has a constitutionally obnoxious purpose (among others that may be legitimate) may only become apparent once the application of interpretive principle has determined a statute's legal and practical operation.[115] That is the doctrinal significance of the following statement regarding the free exercise clause:

> It may be that a particular law is disclosed as having a purpose prohibited by s 116 only upon consideration of extraneous matters indicating a concealed means or circuitous device to attain that end, and that it is permissible to apply s 116 in that fashion. But these can only be matters for another day.[116]

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105 See Part III above.
106 *Kruger* (n 5) 133 (emphasis in original).
107 Ibid 131.
108 Ibid.
109 Ibid. See also *Hoxton Park* (n 4) 118–9 [83]–[84] (Beazley P).
110 *Kruger* (n 5) 131 (footnotes omitted).
111 Ibid.
112 Ibid 132.
113 Ibid 160.
114 Ibid (footnote omitted).
115 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 57 (Brennan J).
116 *Kruger* (n 5) 161 (Gummow J) (footnote omitted).

As noted, the absence of determined facts made it a matter 'for another day'. Importantly for present purposes, Gummow J cited relevant passages from two cases as authority for the above proposition: *Cole v Whitfield* and *Castlemaine Tooheys Ltd v South Australia.*[117] The cited passage from *Cole v Whitfield* rejected earlier s 92 doctrine that drew an 'unsatisfactory' distinction 'between burdens which are direct and immediate (proscribed) and those that are indirect, consequential and remote (not proscribed)'.[118] Further, the Court considered it problematic that the earlier doctrine looked 'to the legal operation of the law rather than to its practical operation or its economic consequences', which opened the way 'to circumvention by means of legislative device'.[119]

The relevant pages cited from *Castlemaine Tooheys* consider the problem of how the High Court should approach legislation 'which attempts on its face to solve pressing social problems',[120] but in its practical operation offends the s 92 guarantee. The majority held that the freedom of interstate and intrastate trade protected by s 92 of the *Australian Constitution* 'must submit to such regulation as may be necessary or appropriate and adapted either to the protection of the community from a real danger or threat to its welfare or to the enhancement of its welfare'.[121] The Court held that such laws would not infringe s 92, provided they satisfied the following test: 'legislative measures which are appropriate and adapted to the resolution of those problems would be consistent with s. 92 so long as any burden imposed on interstate trade was incidental and not disproportionate to their achievement.'[122]

The doctrinal and methodological significance of these passages for the free exercise clause is clear. A constitutional right, freedom or principle cannot be circumvented by legislative device. To that end, the High Court must examine a statute's legal operation, as well as its practical effect, in order to determine whether it has a constitutionally obnoxious purpose.[123] 'A law may be found to be enacted for the prohibited purpose by reference to its meaning or by reference to its effect'.[124] This interpretive proposition — made by Brennan J in the s 92 context — was endorsed by Gummow J in *APLA Ltd v Legal Services Commissioner (NSW)* when his Honour observed that 'in speaking in this context of the object or purpose of the law in question, what is posited is an objective inquiry answered by reference to the

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117 *Kruger* (n 5) 161 n 632 citing *Cole v Whitfield* (1988) 165 CLR 360; *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 ('*Castlemaine Tooheys*').

118 *Cole v Whitfield* (n 117) 401 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

119 Ibid.

120 *Castlemaine Tooheys* (n 117) 169 CLR 436, 472 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

121 Ibid.

122 Ibid 473.

123 See James Stellios, *Zines' The High Court and the Constitution* (Federation Press, 6th ed, 2015) 613.

124 *Nationwide News Pty Ltd v Wills* (n 115) 57 (Brennan J). See also *Hoxton Park* (n 4) 122 [104]–[105] (Beazley P); *Street v Queensland Bar Association* (1989) 168 CLR 461, 487–8 where Mason CJ stated in the context of s 117 of the *Australian Constitution* that:

> It would make little sense to deal with laws which have a discriminatory purpose and leave untouched laws which have a discriminatory effect…An examination of the effect of the relevant law is both necessary to avoid depriving s. 117 of practical effect and consistent with its emphasis upon the position of the individual.

meaning of the law or to its effect'.[125] Should this orthodox interpretive process identify a prohibited purpose, the statute may still be valid if the impact on the constitutionally protected activity (that is, interstate free trade, free exercise of religion) 'is incidental and not disproportionate to the achievement of those [other, legitimate] objects'.[126] The citation of these authorities by Gummow J in *Kruger* is significant, suggesting that applying such an approach to the free exercise clause of s 116 would be appropriate. In this suggestion, we see that the Court's *existing* free exercise jurisprudence contains important strands of proportionality-style reasoning.

Kruger is significant, then, for the free exercise clause, but probably not for the reasons hitherto assumed.[127] It does favour a purpose test in order to determine when a law is for prohibiting the free exercise of any religion. But it is not authority for the proposition that the test endorsed is the same (narrow and binary) one used in the establishment context. Indeed, only two of the six judges (Gaudron J and Gummow J) in *Kruger* gave any consideration at all to the kind of purpose test to be applied in the free exercise context; and both made clear that — if determined facts were before the Court — it would be necessary to consider the legal operation *and* practical effect of a law to ascertain whether it had *a* purpose that was constitutionally obnoxious. This approach to the characterisation of laws said to infringe the free exercise clause is orthodox and, as a consequence, takes seriously the 'fundamental human right' that this limitation on Commonwealth legislative power operates to protect.[128] In doing so, it provides, in our view, an appropriate and principled way to determine whether a purpose of a Commonwealth law is to prohibit the free exercise of any religion.

Even so, as Gaudron J and Gummow J both recognised, a law that infringes the free exercise clause (on their interpretive approach) may still be valid. That is appropriate, of course, as the constitutional protection offered to religious free exercise cannot always trump other competing rights and interests. That was Latham CJ's important insight in the *Jehovah's Witnesses Case*. Yet how a court might consider and reconcile these competing rights and interests — once a law is found prima facie to offend the free exercise clause — was not explained in that case and only touched on in *Kruger*. It is to this important doctrinal and methodological issue that we now turn.

V Constitutional Justification

In this Part, we consider analytical frameworks of justification that could transparently ventilate and evaluate the competing rights and interests in the free exercise context. Currently, there is no settled test for determining whether a law is

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[125] *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 394. See also *Brown v Tasmania* (2017) 261 CLR 328, 432 (Gordon J) ('*Brown*'); Beck, 'The Case against Improper Purpose as the Touchstone for Invalidity' (n 22) 523–7.

[126] *Castlemaine Tooheys* (n 117) 474 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

[127] See, for example, Beck and Evans, who assumed that *Kruger* decided that only the purpose, not the effect, of a law is relevant to a free exercise inquiry pursuant to s 116: Beck, *Religious Freedom and the Australian Constitution* (n 4) 96–7; Evans (n 4) 1048.

[128] *DOGS Case* (n 2) 603 (Gibbs J).

invalid under the free exercise clause.[129] But if a law is found to infringe the free exercise clause on the interpretive approach we endorsed in Part IV, the Commonwealth must offer another, legitimate purpose that, in the relevant context, justifies the infringement. As the High Court has noted in the context of the implied freedom, 'the identification of the statutory purpose…is arrived at by the ordinary processes of statutory construction'.[130] 'The object or purpose will sometimes be stated in the text of the law and will sometimes emerge from the context'.[131] In terms of contemporary interpretive principle, the statutory object or purpose 'refer[s] to the intended practical operation of the law or to what the law is designed to achieve in fact'.[132] In order to assess the merit or otherwise of that justification, the High Court requires an analytical framework.

A *The Need for a Justification Analysis Framework*

A justification analysis framework must, in our view, identify the extent of the infringement, assess the importance of the law's purpose and determine whether the measures adopted to secure it are constitutionally justified in the circumstances and in light of the right infringed. Importantly, also, the judicial reasoning to that end must be context-sensitive (factual, legal, historical) and undertaken in a manner that transparently ventilates and evaluates the competing rights and interests in play.

In *Kruger*, Gaudron J and Gummow J each provided important doctrinal insights that may assist in this regard. Gaudron J, for example, analogised the free exercise clause with the implied freedom of political communication and considered that the latter's reasonably appropriate and adapted test was apposite in the former context as well.[133] Relevantly, her Honour noted that if the Commonwealth in *Kruger* were to argue that the law's

> purpose of protecting and preserving Aboriginal people was unconnected with the purpose of prohibiting the free exercise of religion, a question might arise…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.[134]

Gummow J, on the other hand and as noted above, cited seminal s 92 jurisprudence by way of doctrinal analogy. Yet, importantly, in the pages his Honour cited from *Castlemaine Tooheys*, the High Court adopted and applied a similar (reasonably appropriate and adapted) test in that constitutional context as well:

> [T]he validity of the 1986 legislation rests on the proposition that the legislative regime is appropriate and adapted to the protection of the

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129 Beck, 'Clear and Emphatic' (n 21) 184.

130 *Unions NSW v New South Wales* (2013) 252 CLR 530, 557 [50] (French CJ, Hayne, Crennan, Kiefel and Bell JJ) ('*Unions NSW*').

131 *McCloy v New South Wales* (2015) 257 CLR 178, 232 [132] (Gageler J) ('*McCloy*').

132 *Work Health Authority v Outback Ballooning Pty* Ltd (2019) 266 CLR 428, 459 [72] (Gageler J).

133 *Kruger* (n 5) 133–4; On the capacity of the implied freedom of political communication to provide protection for communication regarding freedom of religion or belief, see Paul T Babie, 'The Ethos of Protection for Freedom of Religion or Belief in Australian Law' (2020) 47(1) *University of Western Australia Law Review* 64, 80–3.

134 *Kruger* (n 5) 134.

> environment in South Australia from the litter problem and to the conservation of the State's finite energy resources and that its impact on interstate trade is incidental and not disproportionate to the achievement of those objects.[135]

We consider that, when determining whether a law infringes the free exercise of religion protected by s 116, there is a strong case for applying a test modelled on the reasonably appropriate and adapted test applied in these other constitutional contexts.[136] That proposition, as noted above, is not novel. Yet the extent to which such an approach is embedded within the Court's existing free exercise jurisprudence does not appear to have been fully appreciated. Such a test could be used to identify and assess whether a Commonwealth law that prohibits the free exercise of any religion is, nevertheless, constitutionally justified and therefore valid.

To adopt such an approach would involve a departure from a focus on the purpose of the law as evident solely from its terms. Consistent with much of the authority on s 116, the Court would be permitted to examine both the purpose and the practical effect of the law to determine if the law prohibits the free exercise of religion. This would recognise that the free exercise of religion is not absolute, but (as with freedom of interstate trade, commerce and intercourse) 'must submit to such regulation as may be necessary or appropriate and adapted either to the protection of the community from a real danger or threat to its welfare or to the enhancement of its welfare'.[137]

B *Towards a Suitable Test of Justification in the Free Exercise Context*

The High Court requires a suitable test of justification in order to determine whether a law is appropriate and adapted to serve a legitimate end notwithstanding its detrimental effect on the free exercise of religion. This would involve considering the extent of the impact of the burden on the free exercise of religion and whether the means adopted by the law are proportionate to the end sought to be achieved.[138] Where the legislation has a 'direct and substantial' impact on the free exercise of religion, a convincing justification will be required.[139]

This is similar to the approach employed by the High Court when considering whether a law infringes the implied freedom of political communication. As established in *Lange v Australian Broadcasting Corporation*,[140] and modified in

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135 *Castlemaine Tooheys* (n 117) 473–4 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

136 In its most recent s 92 decision, the High Court stated that 'reasonable necessity' was the relevant test to be applied when undertaking the justification analysis necessary to assess whether a law that burdened s 92 was, nevertheless, valid for pursuing a legitimate (non-discriminatory) purpose. Three judges (Kiefel CJ and Keane J, Edelman J) said that the justification analysis should be undertaken using the framework of structured proportionality. Two judges (Gageler J and Gordon J) said the test of 'reasonable necessity' should not be supplemented or supplanted by structured proportionality: see *Palmer v Western Australia* (2021) 388 ALR 180, 193 (Kiefel CJ and Keane J), 246–8 (Edelman J), 212–16 (Gageler J), 225–9 (Gordon J) ('*Palmer*').

137 *Castlemaine Tooheys* (n 117) 472 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

138 See Stellios (n 123) 613.

139 *McCloy* (n 131) 214 [70] (French CJ, Kiefel, Bell and Keane JJ).

140 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 ('*Lange*').

Coleman v Power[141] and *Brown v Tasmania*,[142] the question whether a law infringes the implied freedom is determined by the following questions:

1. Does the law effectively burden the freedom in its terms, operation or effect?
2. If "yes" to question 1, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative government?
3. If "yes" to question 2, is the law reasonably appropriate and adapted to advance that legitimate object?[143]

In considering the application of the reasonably appropriate and adapted test in the context of the free exercise of religion, it is useful to consider the judicial exegesis and disagreement regarding that test, which has arisen recently in the implied freedom context. Since the decisions in *Kruger* and *Castlemaine Tooheys*, the High Court has considered, in some detail, how best to understand and apply the reasonably appropriate and adapted test. It has done so primarily in the context of the implied freedom.[144]

As outlined above, there are two prior questions that must be answered in the affirmative before the reasonably appropriate and adapted test needs to be applied. On the approach taken to the implied freedom, s 116 would effectively be burdened if a law limits *any* instance of religious free exercise.[145] If so, then it is likely the High Court will require that a purpose be offered for the law that is legitimate in the sense of being compatible with the constitutional protection extended to the free exercise of any religion. An illegitimate (constitutionally obnoxious) purpose would, arguably, be one whose sole aim was to undermine the constitutional protection offered to religious free exercise.[146] Examples may include a law that simply banned a particular religious faith, disqualified its adherents from voting, or made them ineligible for otherwise available government services. On the other hand, Latham CJ in the *Jehovah's Witnesses Case* suggested that legitimate purposes included the 'maintenance of civil government'[147] and the suppression of 'propaganda tending to induce members of the armed forces to refuse duty'.[148] Other examples could include general criminal laws that target acts that are violent, abusive or otherwise harmful; and measures that are taken to secure public health, safety and order.[149]

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141 *Coleman v Power* (2004) 220 CLR 1.

142 *Brown* (n 125) 364 (Kiefel CJ, Bell and Keane JJ).

143 *McCloy* (n 131) 194 [2] (French CJ, Kiefel, Bell and Keane JJ).

144 But note also the disagreement as to the relevant test of constitutional justification to be applied in the context of s 92 in *Palmer* (n 136) and in the context of the federal franchise in *Murphy v Electoral Commissioner* (2016) 261 CLR 28 ('*Murphy*').

145 See *Monis v R* (2013) 249 CLR 92, 143–6 (Hayne J); *Unions NSW* (n 130) 555 [40] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

146 On when (and why) a purpose will be illegitimate in the context of the implied freedom see *Unions NSW* (n 130) 557–60 [50]–60].

147 *Jevovah's Witnesses* case (n 6) 131.

148 Ibid 133.

149 See eg. *Attorney-General (SA) v Adelaide City Corporation* where a council by-law that sought to protect the unimpeded use of public roads was held to be valid notwithstanding that its operation burdened the free speech and religious free exercise rights of the applicants: *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1.

It is only upon finding that a law's effective burden on religious free exercise is done in furtherance of a legitimate purpose (in the relevant constitutional sense) that one turns to the third question. In terms of this question in the implied freedom context, a majority of the High Court — Kiefel CJ, Bell J, Keane J, Nettle J and Edelman J — has adopted structured proportionality as the appropriate framework to apply the reasonably appropriate and adapted test. The latest manifestation of that test (and framework) is stated in the following terms:

> The third step of the … test is assisted by a proportionality analysis which asks whether the impugned law is 'suitable', in the sense that it has a rational connection to the purpose of the law, and 'necessary', in the sense that there is no obvious and compelling alternative, reasonably practical, means of achieving the same purpose which has a less burdensome effect on the implied freedom. If both these questions are answered in the affirmative, the question is then whether the challenged law is 'adequate in its balance'. This last criterion requires a judgment, consistently with the limits of the judicial function, as to the balance between the importance of the purpose served by the law and the extent of the restriction it imposes on the implied freedom.[150]

One important benefit of this framework is that it transparently ventilates and evaluates the competing rights and interests in order to assess whether a law that burdens freedom of communication is, nevertheless, constitutionally justified. Relevantly, as the judgment of Kiefel CJ, Bell and Keane JJ in *Clubb v Edwards* explained:

> [A] structured proportionality analysis provides the means by which rational justification for the legislative burden on the implied freedom may be analysed, and it serves to encourage transparency in reasoning to an answer. It recognises that to an extent a value judgment is required but serves to reduce the extent of it. It does not attempt to conceal what would otherwise be an impressionistic or intuitive judgment of what is 'reasonably appropriate and adapted'.[151]

This account of (and justification for) structured proportionality is offered as a suitable framework to apply the reasonably appropriate and adapted test. It could do likewise to consider and reconcile in a principled, transparent manner religious freedom and the other legitimate interests and legislative goals that necessarily arise in the free exercise context as Latham CJ noted in the *Jehovah's Witnesses Case*. But does structured proportionality provide the analytical tools to ensure that the intensity of the justification analysis undertaken is tailored according to the *extent* to which a Commonwealth law burdens the free exercise of religion? This is one important reason why Gageler J and Gordon J have rejected the use of structured proportionality in the context of the implied freedom, and indeed Australian constitutional law more generally.[152] Gageler J, for example, considers inapposite its 'one size fits all' framework where the 'standardised criteria … of "suitability" and "necessity" are … applied to every law … irrespective of the subject matter of the law and no matter how large or small, focused or incidental, that restriction on

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[150] *Clubb v Edwards* (2019) 267 CLR 171, 186 [6] (Kiefel CJ, Bell and Keane JJ). See also at 264–9 [266]–[275] (Nettle J), 329–35 [461]–[471] (Edelman J) ('*Clubb*').

[151] Ibid 202 [74] (Kiefel CJ, Bell and Keane JJ). See also 330–4 (Edelman J).

[152] See, eg, *Brown* (n 125) 376–9 (Gageler J), 462–8 (Gordon J).

political communication might be'.[153] As a consequence, Gageler J and Gordon J state that the focus (and strictness) of the justification analysis 'needs to be "calibrated to the nature and intensity of the burden"'.[154] The core idea is that not every law that burdens the relevant constitutionally-protected activity (for example, political communication, religious free exercise) 'needs to be subjected to the same intensity of judicial scrutiny'.[155] This is an important criticism that has merit to the extent that structured proportionality is incapable of being applied in a context-sensitive and case-specific manner.

We consider that Gageler J and Gordon J are right to emphasise that the *extent* to which a law burdens political communication (or religious free exercise) must be the focus and primary determinant of how the relevant justification analysis is undertaken. And the terms in which structured proportionality is stated (above) do not, at least obviously, make clear how (and where) this bedrock analytical concern is embedded. So, an important benefit of calibrated scrutiny is that the critical, threshold assessment — that is, the extent to which an impugned law burdens the constitutionally-protected activity — orients the justification analysis from the outset and informs it throughout in a manner that cleaves to the specific context of the case. 'The answer to the initial question of burden within the restated analytical framework accordingly informs the intensity of the scrutiny appropriate to be brought to bear in answering the ultimate question of justification'.[156] In *Brown*, for example, Gageler J held that the terms and operation of the law imposed 'a significant practical burden on political communication'.[157] Consequently, 'the impugned provisions demand[ed] very close scrutiny'.[158]

> The requisite [justification] analysis therefore appropriately proceeds to an examination of whether the impugned provisions might be explained as having a compelling purpose, and then to an examination of whether the burden they impose on political communication in pursuit of such a purpose might be justified as no greater than is reasonably necessary to achieve such a purpose.[159]

In this way, the essence of calibrated scrutiny is that '[e]ach case is fact-specific; each analysis is necessarily case-specific'.[160] Yet, importantly, Stone has recently argued that structured proportionality is capable of being applied in a similarly context-sensitive manner:[161] 'the variable intensity with which proportionality can be applied is one of the more commonly remarked upon features of the test'.[162]

> Precisely because proportionality is variable in its intensity, proportionality need not remove the element of judgment that was previously evident in the *Lange* [reasonably appropriate and adapted] test. On the contrary, under

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153 *McCloy* (n 131) 235 [142].
154 *Brown* (n 125) 378 [164] (Gageler J), quoting *Tajjour v New South Wales* (2014) 254 CLR 508, 580[151] (Gageler J); 460 [411] (Gordon J) quoting *Tajjour* at 579 [147].
155 *Brown* (n 125) 378 [164] (Gageler J); *Clubb* (n 150) 299–300 [369]–[371] (Gordon J).
156 Ibid 378 [165].
157 Ibid 390 [203] (Gageler J).
158 Ibid.
159 Ibid 391 [206] (Gageler J).
160 *Clubb* (n 150) 309 [403] (Gordon J) (footnote omitted).
161 Adrienne Stone, 'Proportionality and Its Alternatives' (2020) 48(1) *Federal Law Review* 123.
162 Ibid 137 (footnote omitted).

> proportionality it is for the judge to determine whether, in all the circumstances, an available alternative means should have been preferred in light of those alternatives and the deference due to legislative judgment. Similarly, the balancing element of the test might be applied in a way that allows for the protected constitutional requirement to be subject to quite high costs before invalidity is found, or it could be applied more strictly so that invalidity follows from relatively minor costs.[163]

If so, then structured proportionality can be applied in a manner that ensures that the relevant justification analysis undertaken is context-sensitive and case specific. The intensity of the judicial scrutiny *can* be tailored according to the extent to which a Commonwealth law burdens the free exercise of religion.[164] The reasoning of the joint judgment of Kiefel CJ, Bell and Keane JJ in *Brown*, arguably, supports this proposition. There, it was found that the practical operation of the impugned law indirectly burdened political communication but did so to a 'significant extent'.[165] So, '[g]enerally speaking, the sufficiency of the justification for such a burden should be thought to require some correspondence with the extent of that burden'.[166] Within the framework of structured proportionality, the joint judgment in *Brown* tested the 'sufficiency of the justification' primarily through its assessment of whether the legislative measures adopted were 'reasonably necessary' in the circumstances.[167] This inquiry — and analytical focus — bears a close similarity to the calibrated scrutiny approach of Gageler J detailed above.

Relevantly, the assessment of whether the measures were 'reasonably necessary' was made in light of the impugned law's purpose (to exclude and deter persons from entering forestry land to protest) and the significant extent to which it infringed political communication in order to further it. Relevant also was the history of (political) protest activity in the area to which the law applied and the apparent effectiveness of another law (with the same purpose) that applied to the same area, but was far less restrictive of the implied freedom.[168] This led Kiefel CJ, Bell and Keane JJ to conclude that '[t]he measures adopted by the [law] to deter protesters effect a significant burden on the freedom of political communication. That burden has not been justified'.[169] Their Honours did so, arguably and importantly, pursuant to an analysis that was context-sensitive (factually, legally and historically) and that transparently ventilated and evaluated the competing rights and interests in legislative play.

This is not to deny that important differences exist between calibrated scrutiny and structured proportionality. As Stone notes, for example, Gageler J's analysis in *Clubb* 'identifies, in concrete ways, factors that will be relevant to the calibration of scrutiny in future similar cases'.[170] In doing so, this 'moves somewhat in the direction of a more "rule-like" approach'.[171] That is important, as flexibility

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163 Ibid 138–9.
164 See Rosalind Dixon, 'Calibrated Proportionality' (2020) 48(1) *Federal Law Review* 92, 114–16.
165 *Brown* (n 125) 367 [118] (Kiefel CJ, Bell and Keane JJ).
166 Ibid (footnote omitted).
167 Ibid 371 (Kiefel CJ, Bell and Keane JJ).
168 Ibid 371–3 (Kiefel CJ, Bell and Keane JJ).
169 Ibid 374 [152] (Kiefel CJ, Bell and Keane JJ).
170 Stone (n 161) 149–50.
171 Ibid 151.

and context-sensitivity in constitutional doctrine and method is not always or inherently a virtue:

> [R]ules provide a greater measure of predictability in their application which in turn provides greater guidance to courts, legislators and citizens. Rules may be especially important where constitutional review is highly diffuse because they provide more guidance to lower courts.[172]

That certainty, or at least predictability of outcome, is important from a rule of law perspective and especially so to those seeking to rely upon on their rights to religious free exercise.[173] But for Nettle J, an advocate of structured proportionality, the move towards a more rule-like approach is problematic. These factors 'substitute for principles of analysis capable of general application facts which in some contexts may but in others should not lead to the conclusion that an impugned law is appropriate and adapted to the achievement of a legitimate purpose'.[174] Yet these differences have not proven decisive in the context of the implied freedom.[175] The important point for present purposes is that the manner in which calibrated scrutiny and structured proportionality have been applied in the High Court demonstrates that either framework is capable of satisfactorily performing the required justification analysis in a free exercise context.

Consider *Krygger*, for example. Let us assume that on the facts the relevant law — which compelled all males who had resided in Australia for six months to attend military training — *did* require the appellant 'to do an act which his religion forbids'[176] such as, for example, where the appellant's religion prohibited participation in any form of military or war-related training. How might the application of a justification analysis have played out in that scenario?[177] On the assumed facts, the practical operation of such a law would effectively burden the religious free exercise rights of those for whom to do so is contrary to the tenets of their religious faith. Section 116 is, then, prima facie infringed. Yet the purpose of such a law — which Griffith CJ said was for 'the defence of his country'[178] through an adequately trained and prepared armed forces — was legitimate in the relevant constitutional sense. Indeed, Griffith CJ suggested that such a purpose 'is almost, if not quite, the first duty of a citizen, and there is no room for doubt that the legislature has power to enact laws to provide for making citizens competent for that duty.'[179] Is such a law 'reasonably appropriate and adapted' to advance this purpose? To legally compel a person to do something that is forbidden by their religion imposes a significant practical burden on their free exercise rights. So, to apply calibrated scrutiny, such a law must have a 'compelling purpose' (which it may have on the

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172 Ibid 150–1.

173 Thanks to one of the referees for drawing this point to our attention.

174 *Clubb* (n 150) 263 [265] (Nettle J).

175 Notwithstanding the ongoing disagreement in the High Court as to whether the reasonably appropriate and adapted test ought to be applied using calibrated scrutiny or structured proportionality, the recent cases where it is discussed have all been decided unanimously: *Murphy* (n 144); *Brown* (n 125); *Clubb* (n 150); *Comcare v Banerji* (2019) 267 CLR 373.

176 *Krygger* (n 7) 369 (Griffith CJ).

177 Thanks to one of the referees for suggesting we undertake this analysis.

178 *Krygger* (n 7) 370.

179 Ibid.

Griffith CJ account) and go no further than is 'reasonably necessary' to secure it.[180] Under structured proportionality, the law must be 'suitable' (its obligation has a clear rational connection to its purpose), 'necessary' (there being no obvious and compelling alternative in the relevant context) and 'adequate in its balance'. The law in *Krygger* carved out exemptions for conscientious objectors whose beliefs did not allow them to bear arms. But the exemption (as noted above) still required those persons to train in non-combatant duties. Under either approach, then, the critical issue would likely be whether this kind of law — which imposed an obligation, but provided a partial form of exemption — was 'reasonably necessary' or 'necessary' to secure its otherwise legitimate purpose.

Reasonable judicial minds may well differ as to that answer and so as to whether, on the assumed facts, the *Krygger* law would be constitutionally justified (pursuant to calibrated scrutiny or structured proportionality) and valid as a consequence. That is to be expected. A constitutional rights case (like *Krygger*) will often raise a number of complex issues the resolution of which may ultimately require a judge to make difficult (evaluative) judgments. Yet what is important for present purposes is that on either approach the constitutional justification of laws that effectively burden religious free exercise rights can be tested through an analysis that is sufficiently context-sensitive and case-specific. Both frameworks, in our view, provide the analytical tools necessary to ensure a justification analysis that transparently ventilates and evaluates the competing rights and interests in legislative play.

VI Conclusion

The High Court of Australia's jurisprudence on the free exercise of religion clause in s 116 is both minimal and doctrinally under-developed. These characteristics are likely related. Yet, it may also reflect the happy circumstance that in Australia many religious faiths have, for the most part, co-existed peacefully and legislation targeting religion has been rare. But when the latter has occurred, most notably during wartime, the absence of an analytical framework has not facilitated the kind of principled balancing of religion and other interests that Latham CJ observed in the *Jehovah's Witnesses Case* was inevitable in the free exercise context.

However, as we have detailed, the High Court's free exercise — and related — jurisprudence is not bereft of important doctrinal insights and, importantly, does not stand for a broad proposition regarding the narrowness of its scope. Of particular significance is the test applied to determine when a Commonwealth law is *for* prohibiting the free exercise of any religion. Our analysis has demonstrated the fallacy of the assumption that it mirrors the narrow and binary test of purpose that is used in the establishment context. Indeed, in *Kruger* — the only contemporary High Court case on the free exercise clause — the judges who considered the relevant test made clear that, ordinarily, one must determine the legal operation *and* practical effect of a law to ascertain whether it has *a* constitutionally-obnoxious purpose.

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[180] See *Brown* (n 125) 389–91 (Gageler J).

Finally, we offered analytical frameworks that judges could use to assess whether a law that infringes the free exercise clause is, nevertheless, constitutionally justified. We did so by building upon the important doctrinal insights made in this regard by Gaudron J and Gummow J in *Kruger*. In that case, it was considered that the reasonably appropriate and adapted test (used to apply the implied freedom and s 92) was apposite in the free exercise context as well. Our analysis, then, suggests that this test could be applied using either the framework of calibrated scrutiny or structured proportionality. Those frameworks provide the analytical tools needed: to perform a justification analysis that transparently ventilates and evaluates the competing rights and interests in legislative play; and to ensure that it is done in a manner that is sufficiently context-sensitive.

In *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)*, Mason ACJ and Brennan J said that '[f]reedom of religion, the paradigm freedom of conscience, is of the essence of a free society.'[181] If so, then the free exercise of religion under the *Australian Constitution* must be taken seriously. To that important end, we have offered a doctrinal account and methodological framework that builds on the High Court's existing free exercise jurisprudence and reflects orthodox constitutional principle.

[181] *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 130.