

WHAT HAPPENED WHEN *DOGS* TASTED *LEMON*?

AUSTRALIAN REFLECTIONS ON THE CONTEMPORARY
RELEVANCE OF CHIEF JUSTICE BURGER'S
OPINION IN *LEMON V. KURTZMAN*

Paul T. Babie

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*This article offers Australian reflections on the fiftieth anniversary of Chief Justice Warren E. Burger's opinion in *Lemon v. Kurtzman*, demonstrating that while its relevance in the United States may be waning, its legacy lives on in Australia. Parts of the Australian Constitution were expressly modelled by its framers on the United States Constitution; most notably, the religion clauses are almost identical to those found in Article VI, Clause 3, and in the First Amendment. Throughout Australia's federal history, its final appellate court, the High Court, has grappled with the extent to which it can rely upon American constitutional experience in interpreting the Constitution. A 1981 challenge to government funding for non-government religious schools brought by the Australian Council for the Defence of Government Schools (often referred to by its acronym, "DOGS") raised that question in relation to the Australian establishment clause. In resolving the challenge, in what has ever after been known in Australia as the DOGS Case, the High Court considered *Lemon*, and the three-prong test enunciated by Chief Justice Burger for use in determining the extent to which government may constitutionally engage with religion pursuant to the First Amendment. The article presents an exploration of and reflection on the Australian legacy of *Lemon*, and its author, Chief Justice Burger. The legacy runs both ways—of *Lemon* for DOGS and Australia, and, perhaps surprisingly and a bit presumptuously, of DOGS for *Lemon* and the United States. On the fiftieth anniversary of *Lemon*, and the fortieth of DOGS, the article responds to the question: What happened when DOGS tasted *Lemon*?*

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INTRODUCTION

Professor Josh Blackman, of the South Texas College of Law, recently wrote that Chief Justice Warren Burger “may be the least influential member of the Burger Court. In modern-day discussions about constitutional law, he barely registers. Justice Blackmun wrote *Roe*. Justice Powell wrote the *Bakke* concurrence. Justice Rehnquist led the federalism revolution. Justice Stevens led the Court’s liberal wing for decades.”¹

What about *Lemon v. Kurtzman*?² Controversy swirls around the Court’s treatment of the establishment clause and its three-prong test for determining the constitutionality of government assistance for religion in that case;³ yet the fact of dissention alone must surely cement *Lemon*’s place as among the most significant of the Court’s pronouncements. But more than that, the “*Lemon* test” has endured for fifty years as a core component of First Amendment jurisprudence.⁴ Together, the controversy and the ongoing importance of the test give *Lemon*, and so Chief Justice Burger, a lasting place in the American pantheon of constitutional jurisprudence.

Many others have written about *Lemon* and its attendant controversy as part of its fiftieth anniversary in 2021.⁵ This article will not add to that literature. Instead, while the days of Chief Justice Burger’s *Lemon* legacy in American law may be numbered,⁶ here I show how it nonetheless retains some relevance not only to contemporary US establishment clause jurisprudence—most recently in the Supreme Court decisions in *Espinoza v. Montana Department of Revenue*⁷ and in *Carson v. Makin*⁸—but also, and

¹ Josh Blackman, *Will Chief Justice Burger’s Official Biography Ever Arrive?*, THE VOLOKH CONSPIRACY (August 31, 2021) <https://reason.com/volokh/2021/08/31/will-chief-justice-burgers-official-biography-ever-arrive/>.

² *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

³ See, e.g., William E. Thro & Charles J. Russo, *Lemon v. Kurtzman: Reflections on a Constitutional Catastrophe*, CANOPY FORUM (November 1, 2021) <https://canopyforum.org/2021/11/01/lemon-v-kurtzman-reflections-on-a-constitutional-catastrophe/>.

⁴ See ROBERT S. ALLEY, THE CONSTITUTION & RELIGION: LEADING SUPREME COURT CASES ON CHURCH AND STATE, 82-96 (1999); Herbert M. Kritzer & Mark J. Richards, *Jurisprudential Regimes and Supreme Court Decisionmaking: The Lemon Regime and Establishment Clause Cases*, 37(4) LAW & SOC. REV. 827 (2003).

⁵ See, e.g., Thro & Russo, *supra* note 3.

⁶ See Justice Gorsuch’s sustained criticism in a concurring opinion in *Shurtleff v. Boston*, 596 U. S. ____ (2022). It is widely expected that the Court will adopt that criticism explicitly so as to overturn *Lemon* in its pending decision in *Kennedy v. Bremerton School District*, No. 21-418.

⁷ *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020).

⁸ *Carson v. Makin*, 596 U. S. ____ (2022). See also, *The Supreme Court Seems Ready to Poke a Hole in the Church-State Wall*, THE ECONOMIST (December 11, 2021), <https://www.economist.com/united-states/2021/12/09/the-supreme-court-seems-ready-to->

much more importantly, beyond American borders in what might seem a most unexpected way. It forms an important component of the interpretation given by the High Court of Australia (the Australian equivalent to the Supreme Court of the United States) to the establishment clause found in the Australian Constitution. For that reason, Chief Justice Burger, and *Lemon*, has an odd yet enduring Australian legacy found in the High Court's decision in *Attorney-General (Vic); Ex Rel Black v Commonwealth*.⁹

I pause here to make three preliminary points. First, to explain the title of this article. While I say more about it in Part IV, *Attorney-General (Vic); Ex Rel Black v Commonwealth* involved a challenge brought by an advocacy group known as the Australian Council for the Defence of Government Schools, or, as it more commonly known by its acronym, 'DOGS'.¹⁰ That acronym has been used ever since as the name of the case. Today, one need only mention the *DOGS Case* and it will be immediately understood by any Australian lawyer to be a reference to *Attorney-General (Vic); Ex Rel Black v Commonwealth*; indeed, the case is so-called even in formal judicial and academic documents.¹¹ Hence, the title, and the question I address in this article: What happened when *DOGS* tasted *Lemon*? I am of course referring to Australian *DOGS*! Second, in 2021, *Lemon* and *DOGS* both marked important anniversaries: the former its fiftieth, the latter its fortieth; yet, notwithstanding the passage of time, in an area of law that moves quickly, both remain important statements of the law concerning establishment in their respective jurisdictions. Third, Chief Justice Burger's three-prong test in *Lemon* inextricably links the American and the Australian constitutions, not simply comparatively, but in a substantive way, giving that jurist an enduring legacy, not only within the United States, but also beyond its borders, and for the constitution of another nation.

Those preliminary points made, I want to do four things in this article. First, to provide the briefest of refreshers to *Lemon* and its significance in American Constitutional jurisprudence. Second, to compare the religion clauses found in the two constitutions. Third, to examine the High Court's decision in *DOGS*. Fourth, to offer concluding reflections on the Australian legacy of *Lemon*, and, perhaps surprisingly, the American legacy of *DOGS*.

poke-a-hole-in-the-church-state-wall.

⁹ *Attorney-General (Vic); Ex Rel Black v. Commonwealth* (hereinafter "*DOGS Case*") (1981) 146 C.L.R.

¹⁰ *Id.* at 575.

¹¹ On the name of the Australian Council for the Defense of Government Schools (DOGS) and the High Court decision, see Press Release 746, DOGS: Australian Council for the Defense of Government Schools Promoting Public Education, *Freedom of Religion is Protected by Section 116: Read Murphy's Dissenting Judgement DOGS Case 1981*. See also Paul Babie, *National Security and the Free Exercise Guarantee of Section 116: Time for a Judicial Interpretive Update*, 45(3) FED. L. REV. 351 (2017).

I. LEMON: A REFRESHER

Let's remind ourselves, very briefly, about what happened in *Lemon*, and of its American legacy. At the outset, one is struck by the fact that the Supreme Court comparatively recently expounded what has become the controlling test for the judicial application of the First Amendment establishment clause. Whereas one might have expected the matter to have been fully resolved in the immediate post-ratification, or immediate post-Bill of Rights period, in fact, for almost a century and half, *Reynolds v. United States*¹² represented the only significant treatment of the religion clauses by the Supreme Court. Not until those clauses of the First Amendment were incorporated into the Fourteenth Amendment and applied to the states in the 1940s did the Court give them sustained attention.¹³ Thus, one can be forgiven for thinking that *Lemon*, decided in 1971, comes rather late in the game as an attempt to settle what today constitutes one of the dominant themes of American life: religious freedom. And, as we will see, *Lemon*'s timing in relation to Australia's federal history will be important when we turn to its legacy there.

Lemon involved two separate challenges, one to Pennsylvania's *Nonpublic Elementary and Secondary Education Act*,¹⁴ which allowed the Superintendent of Public Schools to supplement the salaries of mainly Roman Catholic private elementary school teachers who taught using public school textbooks and curricular materials, and the other to Rhode Island's *Salary Supplement Act*,¹⁵ which allowed for a salary supplement to be paid to teachers in nonpublic schools in which the average per-pupil expenditure on secular education was below the average in public schools. The Supreme Court found both statutes violated the establishment clause on the basis that "the cumulative impact of the entire relationship arising under the statutes involves excessive entanglement between government and religion."¹⁶

Chief Justice Burger delivered the opinion of the Court, enunciating what has come to be known as the *Lemon* test, since used to determine purported violations of the establishment clause. The test has three prongs, synthesized by Chief Justice Burger from the Court's earlier establishment clause jurisprudence: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither

¹² *Reynolds v. United States*, 98 U.S. 145 (1878).

¹³ Mark David Hall, *Jeffersonian Walls and Madisonian Lines: The Supreme Court's Use of History in Religion Clause Cases*, 85 OR. L. REV. 563, 570 (2006).

¹⁴ Tit. no. 24 PA. CONS. STAT., §§ 5601-5609 (Supp. 1971) (repealed 1977).

¹⁵ R.I. GEN. LAWS § 16-51-1 to 16-51-9 (2001) (repealed 1980).

¹⁶ *Lemon*, 403 U.S. at 611-25.

advances nor inhibits religion...; finally, the statute must not foster ‘an excessive government entanglement with religion.’”¹⁷ The test has since been widely recognized as adopting a “separation thesis” in the interpretation of the First Amendment, an approach requiring “that to the greatest extent possible government and religion should be separated. The government should be, as much as possible, secular; religion should be entirely in the private realm of society.”¹⁸

Two theories stand in contrast to separation: neutrality, and accommodation. The former posits “that the government must be neutral toward religion; that is, the government cannot favor religion over secularism or one religion over others”;¹⁹ the latter that “the Establishment Clause [should be interpreted] to recognize the importance of religion in society and to accommodate its presence in government. Specifically...the government violates the Establishment Clause only if it literally establishes a church, coerces religious participation, or favors one religion over others in its award of benefits.”²⁰ The belief that it adopted strict separation comprises the lasting significance of *Lemon*, and of Chief Justice Burger’s authorship of its test. That legacy continues today, most recently in the Supreme Court’s decisions in *Espinoza v. Montana Department of Revenue*²¹ and in *Carson v. Makin*.²² Yet, that legacy may be waning—Justice Gorsuch subjected *Lemon* to extended criticism in a concurring opinion in the recent Supreme decision in *Shurtleff v. Boston*,²³ and it is expected that the Court will reject it entirely in its pending decision in *Kennedy v. Bremerton School District*.²⁴ But what has any of that got to do with Australia? The answer lies in the religion clauses of the two constitutions: Article VI, Clause 3, and the First Amendment of the American, and s. 116 of the Australian.

¹⁷ *Id.* at 612-13 (citing *Walz v. Tax Comm’n of City of New York*, 397 U.S. 664, 674 (1970)) (other internal citations omitted).

¹⁸ HOWARD GILLMAN & ERWIN CHEREMINSKY, *THE RELIGION CLAUSES: THE CASE FOR SEPARATING CHURCH AND STATE* 46 (2020).

¹⁹ *Id.* at 48.

²⁰ *Id.* at 51-52.

²¹ *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020).

²² *Carson v. Makin*, 596 U. S. ____ (2022); see also *The Supreme Court Seems Ready to Poke a Hole in the Church-State Wall*, *supra* note 8.

²³ *Shurtleff v. Boston*, 596 U. S. ____ (2022).

²⁴ *Kennedy v. Bremerton School District*, No. 21-418. Docket information available at <https://www.supremecourt.gov/docket/docketfiles/html/public/21-418.html>.

II. RELIGION CLAUSES

Compare the language used in the two Constitutions. Article VI, Clause 3, of the American Constitution reads “no religious test shall ever be required as a qualification to any office or public trust under the United States”,²⁵ and the First Amendment adds “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”.²⁶ Now compare s. 116 of the Australian Constitution: “The Commonwealth [the federal government] 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.”²⁷ Two initial points can be made. First, the difference in wording, specifically, the use of the word “respecting” in the American, and “for” in the Australian; it may seem minor, but as we will see, almost everything turns on that difference. And, second, the Fourteenth Amendment has been used to extend or incorporate both Article VI, Clause 3 and the First Amendment to the states;²⁸ s. 116, however, applies only to Australia’s federal (Commonwealth) government, there being neither express application in the text itself, nor the functional equivalent to the Fourteenth Amendment in the Australian Constitution.²⁹

Aside from the words “respecting” and “for” and the difference in application to the states, though, the language of the two Constitutions with respect to religious freedom strikes one as remarkably similar. This is less surprising than it might otherwise seem. The Australian framers were well-versed in American history and law, especially that of its Constitution. J.A. La Nauze, author of the seminal and still authoritative history of the framing of the Australian Constitution, wrote this of Andrew Inglis Clark, the most influential of the framers:

He had profoundly admired American institutions from his youth.... He was a federalist, as in more or less vague sense [the framers] all were; but unlike most of them he had closely studied, in scholarly literature and in the judgments of the

²⁵ U.S. CONST. art. VI, cl. 3.

²⁶ U.S. CONST. amend. I.

²⁷ Australian CONST. s. 116.

²⁸ *Torcaso v. Watkins*, 367 U.S. 488 (1961); *Silverman v. Campbell*, 486 SE.2d 1, 326 S.C. 208 (1997); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Everson v. Board of Education*, 330 U.S. 1 (1947); *School Dist. of Abington Tp. v. Schempp*, 374 U.S. 203 (1963).

²⁹ See Paul T. Babie, *Adelaide Company of Jehovah’s Witnesses v The Commonwealth: Balancing Free Exercise and Public Order in LAW AND RELIGION IN THE COMMONWEALTH: THE EVOLUTION OF CASE LAW 105-122* (Renae Barker, Paul Babie, and Neil Foster (eds.), 2022).

United States Supreme Court, the growth and operation of the Constitution of the greatest of all federations.³⁰

Inglis Clark was not only one of the principal exponents for the use of American experience in the drafting of the Australian Constitution, but also for putting that experience to use in the drafting of s. 116 itself. Again, La Nauze: ““Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...”; so ran the First Amendment of the American Constitution. Inglis Clark was bound to appropriate or adapt such an admirable provision....” While Inglis Clark was responsible for the American appropriation, it was Henry Bournes Higgins, another framer, who adapted it for use in the version of s. 116 ultimately accepted in the Constitution.³¹ The point, though, is this: the Australian language closely parallels the American because the framers of the former were enamored of the model found in the latter.

This brief history provides a partial explanation for why the *DOGS case* matters: it is the first, and to date, the only decision of the High Court to consider the meaning of the establishment clause found in s. 116. Unlike the expansive interpretation given to the religion clauses of the American Constitution in an extensive jurisprudence stretching over the 200 years of American federal history,³² one finds not only a paucity of treatment of the Australian clauses, but also, and much more significantly, in the few cases which do consider it, the High Court interprets s. 116 extremely narrowly. In fact, only a handful of High Court decisions in over 120 years of Australia’s federal history address any of the guarantees found in s. 116. *Krygger v. Williams*,³³ *Adelaide Co. of Jehovah’s Witnesses Inc. v. Commonwealth*,³⁴ and *Kruger v. Commonwealth*³⁵ are the only cases to provide guidance on the free exercise clause.³⁶ *Williams v. Commonwealth*³⁷ considers, briefly and unhelpfully, the religious tests provision, and there is no judicial guidance at all on the meaning of imposing a religious observance. Only *DOGS* interprets and applies the establishment guarantee.

³⁰ J.A. LA NAUZE, *THE MAKING OF THE AUSTRALIAN CONSTITUTION* 13 (1972); *see also* RICHARD ELY, *UNTO GOD AND CAESAR: RELIGIOUS ISSUES IN THE EMERGING COMMONWEALTH 1891-1906* (1976).

³¹ LA NAUZE, *supra* note 30, at 228-9.

³² *See* GILLMAN & CHEMERINSKY, *supra* note 18.

³³ *Krygger v. Williams* (1912) 15 C.L.R. 366 (Austl.).

³⁴ *Adelaide Co. of Jehovah’s Witnesses Inc. v. Commonwealth* (1943) 67 C.L.R. 116 (Austl.).

³⁵ *Kruger v. Commonwealth* (1997) 190 C.L.R. 1 (Austl.).

³⁶ *See* Paul Babie and Neville Rochow, *Feels Like Déjà Vu: An Australian Bill of Rights and Religious Freedom*, *BYU L. Rev.* 821 (2010).

³⁷ *Williams v. Commonwealth* (2012) 248 C.L.R. 156 (Austl.).

And the connection with the American Constitution? One would expect, given the similar language, indeed, the appropriation and adaptation of the American text, that those cases which do address s. 116 would place heavy reliance not only on American history, but also, and perhaps more importantly, on American jurisprudence, especially that of the Supreme Court. Quite the contrary. While some use has been made of that political and legal history, the reliance is neither fawning nor unqualified. Only *Adelaide Co of Jehovah's Witnesses* engaged in a sustained treatment of American precedent, and in doing so, drew a distinction between judicial interpretation pre- and post-Australian federation in 1900. In other words, those US Supreme Court decisions decided prior to 1900 were taken to be known to the framers, and so could tell judicial officers interpreting the Australian Constitution something about what might have been in the minds of the framers in drafting relevant clauses, while those American decisions post-1900 would not have been known and so would not apply to interpretations of the Australian text.³⁸

DOGS is so important, then, because it is one of the very few cases where the High Court engages critically with the American jurisprudence, not merely as a guide to what the establishment clause means, but more generally as to what the Australian Constitution itself means. In this sense, *DOGS* is perhaps *the* prototypically “American” case in the Australian Constitutional pantheon. It is, above all else, a case concerning the extent to which American Constitutional experience, text, and law applies to the Australian context. What, then, did the High Court say in *DOGS*?

III. HIGH COURT OF AUSTRALIA

In this section, I review the facts of *DOGS* and the judgments delivered by the members of the High Court. A preliminary point before I proceed. To those familiar with the American tradition of a majority and a minority opinion in the Supreme Court, the Australian tradition of *seriatim* opinion writing—each justice writing a separate judgment or opinion—jars.³⁹ Still, it is possible to discern in the *DOGS* judgments a majority and a minority position.

³⁸ *Adelaide Co. of Jehovah's Witnesses Inc.*, *supra* note 34, at 127–31 (Latham, C.J.), 154, 5 (Starke, J.). *See also* Babie, *supra* note 29; Paul T. Babie, *Ancestor Worship, Living Trees, and Free Exercise in the Australian Constitution*, CANOPY FORUM (October 2, 2020) <https://canopyforum.org/2020/10/02/ancestor-worship-living-trees-and-free-exercise-in-the-australian-constitution/>

³⁹ *Cf.* Karl M. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L. REV. 186 (1959).

A. Australian DOGS...

As with *Lemon*, the *DOGS Case* involved a challenge to government financial assistance provided to non-government religious schools. Justice Gibbs explained that “[t]hroughout Australia primary and secondary education is compulsory for all children below a specified age. Pupils may receive that education either at government schools or at non-government schools. Most of the non-government schools are church schools, and of those most are Roman Catholic.”⁴⁰ While schools in the latter category derive income from private sources, both the states (and territories) and the Commonwealth provide additional financial assistance to such schools. Commonwealth assistance to schools⁴¹ formed the basis of the challenge brought by DOGS,⁴² which argued that the establishment guarantee in s. 116 limited the legislative power of the Commonwealth so to provide grants to religious schools.⁴³

B. Taste Lemon

Unlike the Supreme Court of the United States, only seven justices constitute the High Court of Australia. Of the seven who heard the *DOGS Case*, six wrote judgments, making it difficult to determine its precise controlling principle. Two things, though, can be said. First, because of *seriatim* opinion writing, in which one chooses between judgments on the basis of authorial stature, the case may be one of the more authoritative of the High Court’s constitutional pronouncements, with three Chief Justices not only sitting on the appeal, but also writing judgments—Sir Garfield Barwick, who was Chief at the time of the case, Sir Harry Gibbs, who would succeed Sir Garfield to serve as Chief from 1981 to 1987, and Sir Anthony Mason, who would serve as Chief, following Chief Justice Gibbs, from 1987 to 1995.

Second, the vagaries of *seriatim* opinion writing notwithstanding, the result was clear: 6-1 in favor of the Commonwealth, with the majority five justices combining on two primary conclusions: (i) that American jurisprudence is relevant to the interpretation of the Australian Constitution only to the extent that a position is discernible pre-federation (1900); and, (ii)

⁴⁰ *DOGS Case*, *supra* note 9, at 587 (Gibbs, J.).

⁴¹ As provided for in *States Grants (Schools) Acts 1972-1976* (Cth.) (Austl.); *States Grants (Schools Assistance) Act 1976-1979* (Cth) (Austl.); *Schools Commission Act 1973* (Cth); *Independent Schools (Loans Guarantee) Act 1969* (Cth) (Austl.); *DOGS Case*, *supra* note 9, at 588 (Gibbs, J.) (providing a detailed analysis of the relevant provisions of the legislation), 636 (Wilson, J.).

⁴² *DOGS Case*, *supra* note 9, at 588 (Gibbs, J.), 636 (Wilson, J.).

⁴³ *Id.* at 636 (Wilson, J.).

that the test for determining violations of the establishment clause involves determining whether the impugned Commonwealth legislation creates a national or state church. Aside from those general conclusions, however, we need to look at the judgments separately to determine how each justice arrived there. I divide that analysis between the five majority judgments of Chief Justice Barwick and Justices Gibbs, Stephen, Mason, and Wilson, and the dissent of Justice Murphy.

1. *Majority: Accommodation* – Chief Justice Barwick and Justices Gibbs and Mason wrote judgments in which they agreed with Justice Wilson in relation to the test for determining establishment; Justice Aickin concurred with both Justices Gibbs and Mason. As a general statement of the law, together with Justice Stephen, the majority position is one which considers and rejects *Lemon*'s separation thesis, treating it instead as allowing for accommodation. Only Justice Murphy dissented, adopting a *Lemon*-infused separation thesis. I consider each judgment in turn.

(a). *Chief Justice Barwick* – Chief Justice Barwick's judgment divides neatly into the two primary issues addressed by the High Court: the use of American constitutional materials, and the interpretation of the establishment clause. Addressing the former, Barwick CJ found that the text of the Australian constitution is always controlling and that similar or even identical language in the American text or its construction by the American judiciary is rarely if ever helpful; moreover, any relevance weakens when the texts begin to diverge.⁴⁴ Yet, "[i]n the case of ambiguous language in [the Australian] text, language reasonably capable of bearing more than one meaning, a consideration of the American text and of its judicial interpretation, particularly that which preceded the expression of the Australian text, may assist to determine which of those meanings the language of our text should bear."⁴⁵ As I suggested earlier, the question turned on the difference between "respecting" in the First Amendment and "for" in s. 116. For Barwick CJ, there was no ambiguity: "what the former may fairly embrace, quite clearly the latter cannot".⁴⁶ Thus, "s. 116...[is] quite unambiguous and [so there is] no need to attempt to give it meaning by analogy of, or by derivation from, that of the [American] Bill of Rights or from the interpretations it had received."⁴⁷

We may look at this another way, though. Chief Justice Barwick's close reading and narrow interpretation of s. 116 represents a reaction to the implications of *Lemon*, which was put to the High Court, and so it had to be determined whether the three-prong test bore any relevance to determining

⁴⁴ *Id.* at 578 (Barwick, C.J.).

⁴⁵ *Id.*

⁴⁶ *Id.* at 579.

⁴⁷ *Id.*

whether Commonwealth assistance was permissible. And so, without actually naming it, Chief Justice Barwick was responding, *sub silentio*, to *Lemon* and Chief Justice Burger. For the former, *Lemon* was not determinative. Instead, 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. Indeed, 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.⁴⁸

Is this not another way of putting the first prong of *Lemon*—whether the law has a secular legislative purpose? Establishing a religion “involves its adoption as an institution of the Commonwealth, part of the Commonwealth “establishment”.”⁴⁹ And while the Commonwealth establishment, by either primary or subsidiary laws, of any of the Christian churches, for instance, would fall afoul of s. 116, that was not what was happening in *DOGS*.⁵⁰ Instead, “the absence of any prohibition upon the giving of aid to or encouragement of religion from the entire collocation of s. 116 is eloquent”⁵¹ in clearly providing that aid and encouragement are not establishment. Crucially, then, the former power in the Commonwealth is plenary, and so constitutionally permissible, while the latter is not.

In *DOGS*, the assistance was provided to religious schools, but its use was expressly limited to the educational, not religious activities of those schools.⁵² That was not enough to contravene s. 116. But what about “a law which in operation may indirectly enable a church to further the practice of religion”?⁵³ That, too, for Barwick CJ “is a long way away from a law to establish religion as that language properly understood would require it to be if the law were to be in breach of s. 116. ... The law must be a law for it, i.e., intended and designed to set up the religion as an institution of the Commonwealth.”⁵⁴ For Barwick CJ, the test of establishment cannot be found in *Lemon*’s separation thesis; rather, s 116 permits accommodation, allowing any support or assistance short of instituting a religion as part of the Commonwealth “establishment”.

⁴⁸ *Id.*

⁴⁹ *Id.* at 582.

⁵⁰ *Id.* at 580-81.

⁵¹ *Id.* at 582.

⁵² *Id.*

⁵³ *Id.* at 583.

⁵⁴ *Id.*

(b). *Justice Gibbs* – Like Chief Justice Barwick, Justice Gibbs, following a lengthy review of the words “for establishing any religion”, concluded that s. 116 prohibits Commonwealth attempts “to constitute a particular religion or religious body as a state religion or state church.”⁵⁵ The importance of Justice Gibbs’s judgment, though, lies in the attention given to the use of American authority in interpreting the Australian Constitution, and in this case, s. 116.

Justice Gibbs addressed expressly what Barwick CJ had only implied: the plaintiffs’ argument that because it was closely modelled on the First Amendment, s. 116 must have been intended by the framers to hold the same meaning as had been applied to the American text by the Supreme Court of the United States prior to Australian federation in 1900 and, more importantly, that “United States decisions since that date provide a useful guide to the meaning of the section.”⁵⁶ Federation demarcates when it might be appropriate to make use of American precedent: any judicial interpretations pre-1900 could be assumed to have been in the minds of the framers, and so form part of what was meant by the words they used in the constitutional text, while anything after that date clearly was not, and so potentially carries limited value in interpreting the Australian text. So far so clear.

A problem immediately presents itself, however; before 1900, the Supreme Court of the United States had yet to say that the First Amendment prohibited “Congress to give aid, financial or otherwise, to one or more religious bodies”;⁵⁷ nor had American commentators treated the establishment clause as containing that prohibition.⁵⁸ Not until *Everson v. Board of Education*,⁵⁹ in 1947, would the Court state that position, although failing to provide a test. It was *Lemon*, in 1971, when the Court finally got around to providing a test.⁶⁰ Could it be used to determine *DOGS*?

Before answering that question, Justice Gibbs considered two differences between the texts which militated against the use of post-1900 American authority.⁶¹ First, as noted above, the Australian Constitution contains nothing like the American Fourteenth Amendment allowing for the extension of s. 116 to the states.⁶² The Australian position remains much as the pre-Fourteenth

⁵⁵ *Id.* at 598.

⁵⁶ *Id.*

⁵⁷ *Id.* at 599, citing *Reynolds v. United States*, 98 U.S. 145 (1878); *Bradfield v. Roberts*, 175 U.S. 291 (1899).

⁵⁸ *DOGS Case*, *supra* note 9, at 601 (Gibbs, J.), citing THOMAS M. COOLEY, *GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN UNITED STATES OF AMERICA* 24-5 (3rd ed., 1898).

⁵⁹ *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) (Black, J.).

⁶⁰ *DOGS Case*, *supra* note 9, at 600 (Gibbs, J.) (citing *Tilton v. Richardson*, 403 U.S. 672 (1971), as a precursor to *Lemon*, 403 U.S. at 602).

⁶¹ *DOGS Case*, *supra* note 9, at 598-99.

⁶² *Id.* at 599.

Amendment position in the United States—the establishment clause prevented only infringements by the federal government. This has been the source of some controversy in the United States itself, with some commentators arguing that the Establishment Clause was intended to prevent only the federal government establishing a national religion which would bind the states, and that it did not create an individual right, against the federal or the state governments.⁶³ Of course, incorporation assumed the applicability of the First Amendment as an individual right, both as against the federal government and as against the states.⁶⁴ In any case, this, along with the different words used in the two texts and the two divergent histories of development “provide reasons why the American decisions as to the meaning of the First Amendment do not necessarily provide any safe guide to the meaning of s. 116.”⁶⁵

So, could *Lemon*, clearly a post-1900 interpretation of the American establishment clause, provide any assistance? Yes and no. The only member of the *DOGS* High Court expressly to name *Lemon*, Justice Gibbs wrote of it that “although the Supreme Court has evolved a test for the constitutionality of statutes affording aid to church schools, there have been strongly expressed differences of opinion as to the result of the application of that test in particular cases.”⁶⁶ Having quoted Chief Justice Burger’s three-prong *Lemon* test,⁶⁷ Justice Gibbs continued that “this third element [“excessive entanglement”] is of comparatively recent origin.”⁶⁸ As it had in *Lemon*, the resolution of *DOGS* turned on that controversial third prong. But Justice Gibbs concluded that it:

finds no support in the words of the establishment clause in s. 116. It would serve no useful purpose for me to discuss the cases on both sides of the *borderline*, in which the Supreme Court has considered the validity of legislative provisions which authorize the giving of financial aid to church schools,

⁶³ This has emerged in Justice Clarence Thomas’s interpretation of the Establishment Clause as a federalism provision, aimed at preventing federal establishment of a church in the states, and which therefore resists Fourteenth Amendment incorporation: see *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (Thomas, J., concurring); *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004) (Thomas, J., concurring); *Utah Highway Patrol Association v. American Atheists*, 565 U.S. 994 (2011) (Thomas, J., dissenting from the denial of certiorari).

⁶⁴ See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103(7) HARV. L. REV. 1409 (1990); *Abington v. Schempp*, 374 U.S. 203 (1963) (Brennan, J., concurring); *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004) (Thomas, J., concurring).

⁶⁵ *DOGS Case*, *supra* note 9, at 599 (Gibbs, J.).

⁶⁶ *Id.* at 602.

⁶⁷ *Id.*

⁶⁸ *Id.* (citing *Roemer v. Maryland Board of Public Works*, 426 U.S. 736, 767-8 (1976) (White and Rehnquist, JJ.) as having been critical of the third prong).

*but it is clear that the Supreme Court has not taken the view that the establishment clause entirely forbids the grant of any financial aid to church schools.*⁶⁹

Justice Gibbs reviewed cases which fell on both sides of the borderline, some which allowed the giving of financial aid to church schools, and some which did not.⁷⁰ But Justice Gibbs appears to reject the applicability of the strict separation assumed by so many American commentators to be inherent in the *Lemon* test, and especially its third prong, in favor of an accommodationist line to be drawn using that third prong, with the task of the Court being that of deciding on which side of that line a particular case might fall. And Justice Gibbs notes that not all American cases which might involve interaction, cooperation, or support necessarily constitute entanglement so as to be violative of the establishment clause. For Justice Gibbs, what appears separationist is in fact accommodationist.

In Justice Gibbs's view, the Australian establishment clause, too, marks out a borderline which must be crossed before the Commonwealth can be said to be acting constitutionally impermissibly. Thus, s. 116 "mean[s] that the Commonwealth Parliament shall not make any law for conferring on a particular religion or religious body the position of a state (or national) religion or church",⁷¹ and it "may be a question of degree whether a law is one for establishing a religion."⁷² To determine that, Justice Gibbs rejects the *direct* application of *Lemon* to the Australian establishment clause, and instead, implicitly adopts its tenor, with a crucial modification to the third prong, thereby shifting it from a separationist to an accommodationist stance:

If it be assumed that in some schools religious and secular teachings are so *pervasively intermingled* that the giving of aid to the school is an aid to the religion, and if it be further assumed that some religions, which conduct more schools than others, will receive more aid than others, it still does not follow that any religion is established by the legislation.⁷³

Thus, rather than excessive government entanglement, when used in Australia, the test is one of "pervasive intermingling," with the possibility that any given case may fall on either side of that boundary, in some cases constituting pervasive intermingling, and thus, unconstitutionality, and in others, entirely permissible intermingling.

⁶⁹ *DOGS Case*, *supra* note 9, at 602 (Gibbs, J.) (emphasis added).

⁷⁰ *Id.* (citing *Tilton v. Richardson*, 403 U.S. 672 (1971); *Hunt v. McNair*, 413 U.S. 734 (1973); *Roemer v. Maryland Board of Public Works*, 426 U.S. 736 (1976); *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646 (1980)).

⁷¹ *DOGS Case*, *supra* note 9, at 604 (Gibbs, J.).

⁷² *Id.*

⁷³ *Id.*

(c). *Justice Stephen* – Justice Stephen delivered a short judgment reviewing Australia’s colonial history, concluding that pre-Federation the colonies provided support for religion, with no strict wall of separation.⁷⁴ Nothing in the pre-1900 American experience subverted Justice Stephen’s conclusion that accommodation was what the Australian framers had intended.⁷⁵

The key to the use of *Lemon*, though, as we have seen, involves post-1900 American authority. In considering its use, Justice Stephen placed great emphasis on the difference between the American “respecting” and the Australian “for”. By way of example, Justice Stephen wrote that “a law which did no more than require all places of entertainment to be closed on Sundays would not be a law “for” imposing any religious observance, whereas it might well be one “respecting” the imposition of some religious observance.” As such, “the difference of wording, and the effect attributed to “respecting” in the American decisions of the [20th] century deprive those modern decisions of value in the interpretation of s. 116.”⁷⁶ Justice Stephen, therefore, followed the majority accommodationist line, concluding that, at most, s. 116 prohibits only “the setting up of a national church and the favouring of one church over another,” and not the “grant [of] nondiscriminatory financial aid to churches or church schools.”⁷⁷

(d). *Justice Mason* – As had the other members of the majority, Justice Mason held that the Australian establishment clause prohibits only the establishment or recognition of a religion or a church as a national institution, and that determining if the Commonwealth had done so involved asking whether “the concession to one church of favours, titles and advantages [is]...of so special a kind that it enables us to say that by virtue of the concession the religion has become established as a national institution, as, for example, by becoming the official religion of the State.”⁷⁸

On the use of American materials, Justice Mason found that it was the pre-1900 “interpretation [of the American Constitution] which the framers of our Constitution would have had in mind when they framed s. 116”.⁷⁹ Because the meaning of the establishment clause pre-1900 was easily ascertainable, there was no reason to expand upon a limitation of legislative power which might be found in the post-1900 American materials, which in any case were interpretations of similar but not identical wording—again, the difference between “respecting” and “for”:⁸⁰

⁷⁴ *Id.* at 609 (Stephen, J.).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 610.

⁷⁸ *Id.* at 612 (Mason, J.).

⁷⁹ *Id.* at 614.

⁸⁰ *Id.* at 616.

Consequently, the content of the prohibition against establishment of religion should not be expanded by reference to a more extensive interpretation given to similar words in the First Amendment by judicial decisions pronounced since 1900, assuming, without deciding, that those decisions have such an effect.⁸¹

In short, Justice Mason considered the Australian establishment clause to be narrower than that found in the First Amendment⁸² and, for that reason, post-1900 American experience was of little value in interpreting s. 116. Using that narrower interpretation, Justice Mason concluded, “it is altogether too much to say that a law which gives financial aid to churches generally, to be expended on education, is a law for establishing religion...as we understand the expression.”⁸³

(e). *Justice Wilson* – Along with Justice Gibbs, Justice Wilson was the second member of the High Court to make express use of *Lemon*. Unlike Justice Gibbs, however, who both cited the case and quoted Chief Justice Burger’s test, Justice Wilson did neither. Instead, he expressly used *Lemon*’s ‘entanglement’ language but failed to cite the case itself. Justice Wilson took this approach in exercising the caution which Justice Gibbs expressed in *Australian Conservation Foundation Inc. v. The Commonwealth of Australia*, decided the year before *DOGS*:

Although we naturally regard the decisions of the Supreme Court of the United States with the greatest respect, it must never be forgotten that they are often given against a different constitutional, legal and social background from that which exists in Australia.⁸⁴

In Justice Wilson’s view, as a consequence of the use of “for” rather than “respecting”,⁸⁵ Justice Gibbs’s caution had direct application in *DOGS*.⁸⁶ As had the other members of the majority, the word “for”, in Justice Wilson’s view:

infer[ed] a legislative intent to adopt a narrow notion of establishment, namely, that which requires statutory recognition of a religion as a national institution...[E]stablishment involves the deliberate selection of one [religion] to be preferred from among others, resulting in a reciprocal

⁸¹ *Id.* at 615.

⁸² *Id.* at 616.

⁸³ *Id.*

⁸⁴ *Australian Conservation Foundation Inc. v. Commonwealth* (1980) 146 C.L.R. 493, 530 (Gibbs, J.) (Austl.).

⁸⁵ *DOGS Case*, *supra* note 9, at 653 (Gibbs, J.).

⁸⁶ *Id.* at 652.

relationship between church and state which confers and imposes rights and duties upon both parties.⁸⁷

Justice Wilson thus concluded that in *DOGS* no impermissible government involvement in religion existed. In stating that result, one senses the essence of *Lemon*:

No doubt there were alternative methods of implementing the scheme that could have been chosen, and that would have occasioned less “*entanglement*” of Commonwealth officers with the representatives of non-government schools. But, in any event, the association between government and school is not based in religion. The fact that many administrators of non-government schools may be church administrators as well does not spell an *entanglement* of government with religion. The sole purpose of the collaboration is the pursuit of an educational goal.⁸⁸

Justice Wilson’s use of “entanglement” is redolent of *Lemon*. Yet, this conclusion does not mean that no Commonwealth involvement could ever cross the line into an impermissible form of entanglement; it only means that that had not occurred in *DOGS*. Justice Wilson’s judgment establishes a test which allows for involvement, but not so far as to become entanglement between the state and religion.

2. *Justice Murphy’s Dissent: Separation* – The principal point of difference between the majority and Justice Murphy’s dissent in *DOGS* centers on the use of American experience in determining the meaning of the Australian Constitution. For Justice Murphy, American text and interpretation is expressly relevant to Australian interpretation. Yet, given *Lemon*’s strong separationist thesis—at least as it has been understood in the American setting—it is odd that Justice Murphy fails even to cite it. Nonetheless, using American materials, Justice Murphy implicitly adopts the separationist reading of *Lemon* endorsed judicially and in scholarship and concludes that any government support for religion is constitutionally impermissible.

Of greatest interest, then, are Justice Murphy’s views on the Australian use of American authority. Following a lengthy review and comparison of the language used in the First Amendment and s. 116, and of the history of the former’s interpretation in the United States pre-1900, Justice Murphy concluded that American authority supports separation as the meaning of s. 116.⁸⁹ Excoriating the other members of the Court, Justice Murphy wrote that:

⁸⁷ *Id.* at 653.

⁸⁸ *Id.* at 657 (emphasis added).

⁸⁹ *Id.* at 620-31.

the United States' decisions on the establishment clause should be followed. The arguments for departing from them (based on the trifles of differences in wording between the United States and the Australian establishment clauses) are hair-splitting, and not consistent with the broad approach which should be taken to constitutional guarantees of freedom. Even if the United States' decisions were set aside, the considerations to which I have referred show that the same interpretation is reached by applying ordinary constitutional principles of interpretation.⁹⁰

Importantly, while other members of the High Court failed to do so, Justice Murphy reads the two main provisions of s. 116, the establishment and the free exercise guarantees, as individual rights and that, as such, they ought to be construed together. By doing so, Justice Murphy concluded that the Australian and the American establishment clauses were the same. From this followed the impermissibility of the Commonwealth funding in *DOGS*.⁹¹ But this,

does not assert or deny the value of religion (including religious teaching). It secures its free exercise, but denies that the Commonwealth can support religion in any way whatsoever. The Commonwealth cannot be concerned with religious teaching – that is entirely private. Section 116 recognizes that an essential condition of religious liberty is that religion be unaided by the Commonwealth.⁹²

Justice Murphy concluded with the strongest statement possible on the nexus between American experience and Australian interpretation, and what that might mean for the protection afforded by the Australian version of the establishment clause:

A reading of s. 116 that the prohibition against “any law for establishing any religion” does not prohibit a law which sponsors or supports religions, but prohibits only laws for the setting up of a national church or religion, or alternatively prohibits only preferential sponsorship or support of one or more religions, makes a mockery of s. 116. Jefferson warned against this tendency. “Our peculiar security is the possession of a written Constitution. Let us not make it a blank paper by construction.” We should heed his warning.⁹³

⁹⁰ *Id.* at 632.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 633, citing THOMAS JEFFERSON, WRITINGS 506 (Washington ed., 1859).

Unfortunately, having taken so strong a stance on the use of American precedent, Justice Murphy omitted expressly to say that what Chief Justice Burger had written only ten years previously reached precisely the same conclusion. We might wish he had done so. Yet, in its full-throated support both for the use of American precedent, and for strict separation, *Lemon* is so clearly at work that it need hardly have been stated. We might say Justice Murphy implicitly adopts the *Lemon* entanglement test; but we might just as easily say that he expressly adopted it.

IV. SO, WHAT HAPPENED WHEN AUSTRALIAN *DOGS* TASTED *LEMON*?

So, what *did* happen when *DOGS* tasted *Lemon*? There are two legacies, one for Australia, and, in fact, what might come as a surprise for Americans, one for the United States.

A. *The Legacy of Lemon for Australia*

The legacy of *Lemon* in Australia can be divided between its judicial invocation, and its treatment in the scholarly literature.

1. *Judicial* – The Australian judicial legacy can itself be broken into two parts: methodological—concerning the use of American constitutional experience—and substantive—the test adopted for determining the constitutionality of government involvement with religion.

(a). *Methodological: The Use of American Constitutional Experience* – The similarity in wording between the two establishment clauses raises the question whether *Lemon* might be used to assist in interpreting and applying the Australian text. And that opens the larger methodological question concerning the use of American experience in Australian constitutional adjudication generally. For the majority, that question seemed easy enough to resolve: all five justices took the view that the boundary line is 1900, or the date which divides pre- from post-Australian federation. As we saw, in each of those judgments, the justices made clear that both the text of the American Constitution and its interpretations pre-1900 would have been in the minds of the Australian framers, but that any changes or interpretations after that date would not form part of that background meaning to the Australian text. Justice Murphy, in dissent, characterized the majority's concerns with the difference between the words "respecting" and "for" as "trifles" and "hair-splitting".⁹⁴ He would use all American precedent, both pre- and post-1900.

Of course, for the majority, there were no relevant American precedents in the pre-1900 period, *Lemon* falling well outside. Thus, *Lemon*

⁹⁴ *Id.* at 632.

was not directly relevant to resolving the dispute in *DOGS*. Yet, what *DOGS* does establish is a general methodological principle for the use of American experience in interpreting the Australian Constitution. If one accepts Justice Murphy's dissent, it may even be possible that that methodological scope could be greatly expanded. Such a development remains possible,⁹⁵ although as yet unrealized.

(b). *Substantive: The Test for Establishment* – Notwithstanding that it could not be used directly to settle the dispute in *DOGS*, whether they say so or not, there is little doubt that each of the five majority justices responded to *Lemon*, substantively, in their interpretation of the Australian establishment clause. As we know, two of those justices, Gibbs and Wilson, expressly referred to *Lemon*, in the sense that they considered the test, and especially its third prong—entanglement—as establishing the Australian position.

The resulting test in *DOGS* requires for a finding of unconstitutionality a Commonwealth attempt to establish or favor one church as the state or national religion, or to constitute it as a part of the national establishment. This is meant to place a boundary between permissible and impermissible government involvement. Justice Gibbs called the boundary “pervasive intermingling”, Justice Wilson simply used *Lemon*'s “entanglement”. In so doing, the majority converts what is widely thought to be the separationist meaning of *Lemon* into an accommodationist test, all with the deft use of the words “pervasive intermingling” or “entanglement” and demonstrating that the Supreme Court of the United States itself has treated the latter word the same way, some cases falling on one side of the boundary, some on the other. That may be the very thing that *Lemon* itself was doing: establishing not a strict line, but a flexible boundary; “excessive government entanglement” surely suggests that it is only that entanglement which is excessive that falls afoul of the Constitutional prohibition. Using what appears a strict separationist test, interaction or cooperation with and support for religious education is, therefore, in Australia, constitutionally permissible, short of pervasive intermingling or excessive entanglement.

Lemon seems, then, having been tasted and found to be somewhat sour by *DOGS*, nonetheless to find a place in Australian law, in three ways. First, it is expressly adverted to, through Justice Gibbs's citation of the case and modification of the third prong by substituting “pervasive intermingling”; or in Justice Wilson's adoption of the language of that prong, without citing the case or the test itself. Second, it is impliedly accepted, as seems the case in the judgments of Chief Justice Barwick and Justices Mason and Stephen (who, in any case, seem to agree with either or both of Justices Gibbs and Wilson). And, third, it ought not to be forgotten that while Justice Murphy

⁹⁵ See *Kruger v Commonwealth* (1997) 190 C.L.R. 1, 134 (Gaudron, J.) (Austl.).

failed to cite *Lemon*, his acceptance of post-1900 American experience suggests he was aware of it, and he certainly adopted the separationist line which most American commentators see in the three-prong test.

In short, the position in Australia is clearly not foreign to *Lemon*: constitutionally impermissible government involvement in religion is a matter of how much entanglement/pervasive intermingling is too much. But how much entanglement/pervasive intermingling in Australia is too much—when does it cross Justice Gibbs’ boundary? No one knows. Because *DOGS* is the only Australian case ever to consider the establishment clause, we have no accumulation of factual scenarios, such as Justice Gibbs found in the post-*Lemon* American jurisprudence, to show what Commonwealth conduct falls on either side of the line. All we do know is that some Commonwealth support for religious education is constitutionally permissible.

2. *Scholarly* – Australian scholars have extended the narrow outcome of *DOGS*, treating it as constitutionalizing widespread interaction and cooperation between the Commonwealth (and even the state) governments and religion. In contemporary Australia, it is axiomatic that rather than a strict and impenetrable wall of separation between the government and religion, what exists in Australia is a “semi-permeable membrane”⁹⁶ or an “imaginary wall” between the two spheres.⁹⁷ Peter Macfarlane and Simon Fisher write that “metaphorically, the flow of Commonwealth largesse to religious institutions is permitted; what is blocked is the reverse passage of religious entanglement with Commonwealth affairs.”⁹⁸ And so, again, we see the essence of *Lemon*—the language of “entanglement”—entering the Australian vernacular, albeit allowing for engagement between the government and religion. Few Australians would have it any other way.⁹⁹

B. The Legacy of DOGS for the United States

It may come as a surprise, and perhaps as a bit presumptuous, for an Australian to suggest that a decision of the High Court of Australia might provide lessons for the United States. But *Lemon* has become part of the Australian legal landscape, and for that reason, the way in which it has been used here might be edifying for the country that gave us so much of our constitutional conceptual design and language. I suggest, then, that the

⁹⁶ PETER MACFARLANE & SIMON FISHER, *CHURCHES, CLERGY AND THE LAW* 32 (1996).

⁹⁷ TOM FRAME, *CHURCH AND STATE: AUSTRALIA’S IMAGINARY WALL* 7-9, 103-4 (2006).

⁹⁸ MACFARLANE & FISHER, *supra* note 96, at 613; *see also* FRAME, *supra* note 97.

⁹⁹ *See, e.g.*, John Warhurst, *Testing the Relationship Between Church and State*, *THE CANBERRA TIMES* (August 22, 2019),

<https://www.canberratimes.com.au/story/6341210/testing-the-relationship-between-church-and-state/#>.

Australian legacy bears significance for an American audience, too, for it tells us all something important about what Chief Justice Burger and the Supreme Court was trying to do in *Lemon*.

Often overlooked in the American scholarship, *Lemon* shows a judiciary willing to be creative with an indeterminate text,¹⁰⁰ and bold enough to craft a test which would allow judges to put vague words into practice in the concrete setting of a dispute concerning the extent of allowable governmental involvement with religion. The court sought a balance between the interests of the individual to be free in exercising religion, and the state, the collective, in its right to be free from a state-imposed religion. What *Lemon* gave to the Australian High Court, then, was a form of permission to be as creative and as bold—to take up the gauntlet thrown down by the Australian version of the American religion clauses, and to craft its own approach for making workable the vague words of establishment found in s. 116.

But why does this lesson of *DOGS* matter for the United States and for Americans? For two reasons. First, it shows that the *Lemon* test *need not* be, indeed, it *is not* a strict separation test. Instead, it establishes Justice Gibbs' boundary line, which involves asking which side of that line government action falls. How to determine the line, and where cases fall? Justice Gibbs demonstrated that we can determine where a given set of facts falls in relation to the boundary between government and religion through considering the precedents, case by case. Over time, the accretion of those resolutions to establishment disputes will allow the boundary to be established with greater precision, and allow judges to determine on which side of that line novel sets of facts fall.¹⁰¹ Justice Gibbs looked at the American post-*Lemon* precedents and concluded that the establishment clause can countenance some accommodation. No strict wall is set by the entanglement test. On the contrary, dare we say it, perhaps a semi-permeable membrane exists in the United States, too, just as it does in Australia. Even if that is less evident in constitutional jurisprudence, it is surely much more so in the wider American socio-cultural context.¹⁰²

¹⁰⁰ On just how much the interaction between an indeterminate constitutional text and the judiciary can play a role in the development of a nation, see REXFORD G. TUGWELL, *THE EMERGING CONSTITUTION* (1974).

¹⁰¹ On the importance of reading cases in chronological order to determine legal rules and the lines they draw, see KARL N. LEWELLYN, *THE BRAMBLE BUSH: THE CLASSIC LECTURES ON THE LAW AND LAW SCHOOL* (2008 [1930]).

¹⁰² Dalia Fahmy, *8 facts about religion and government in the United States*, PEW RESEARCH CENTER (July 16, 2020) <https://www.pewresearch.org/fact-tank/2020/07/16/8-facts-about-religion-and-government-in-the-united-states/>

And, second, as I write, the United States is riven with acrimonious disagreement over governmental responses to the COVID-19 pandemic—a public health crisis that pits the individual’s liberty to be free from state-sanctioned approaches to treating the problem against the protection of the collective, the community, and the state’s obligation to protect all citizens.¹⁰³ The Supreme Court recently joined this debate, blocking a federal vaccine-or-testing mandate for large employers, while allowing a limited mandate requiring vaccination of health care workers in federally funded facilities.¹⁰⁴ The COVID-19 pandemic is but one of many contemporary challenges facing the United States. Some involve religion, many do not. All seem to arrive at the Supreme Court sooner or later. Deciding such cases requires a balancing of the competing interests; as the justices probed in their questioning in the vaccine mandate cases, the question is “who decides?”¹⁰⁵ by which they meant, the government (community), or the individual? In considering such clashes, the Court would do well to remember, and could do worse than using the creative and bold approach to balancing those interests taken by Chief Justice Burger in *Lemon*, as adapted by the High Court of Australia in *DOGS*. That is the legacy of *Lemon* and of Chief Justice Burger for modern America. Perhaps it *is* presumptuous of me to say it, but America may need Australian *DOGS* to see it.

* * *

¹⁰³ In fact, in the increasingly heated debate about government responses to the pandemic, Australia has been singled out by some American politicians as taking a far too collectively orientated approach at the expense of person liberty. See Blake Hounshell & Leah Askarinam, *Why Trump and DeSantis Are Talking About Australia*, NEW YORK TIMES (January 18, 2022). <https://www.nytimes.com/2022/01/18/us/politics/trump-desantis-covid-australia.html>.

¹⁰⁴ *NFIB v. OSHA*, 595 U. S. ____ (2022); *Biden v. Missouri*, 595 U. S. ____ (2022).

¹⁰⁵ *NFIB v. OSHA*, 595 U. S. ____ (2022) at 1 (Gorsuch, J., with whom Thomas and Alito, JJ. join, concurring), 1 (Breyer, Sotomayor, and Kagan, JJ., dissenting); *Biden v. Missouri*, 595 U. S. ____ (2022). See also JEFFREY S. SUTTON, WHO DECIDES? STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION (2021).