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Chief Justice Dixon on Judicial Integrity: Lessons for Judges when Interpreting Constitutions

ABSTRACT

During World War II, Justice Dixon (as he then was) of the Australian High Court served as the Australian ambassador to the United States. During that time, he further developed his deep friendship with Justice Frankfurter of the U.S. Supreme Court and established many other contacts in the law. Those contacts led to several invitations to speak to U.S. lawyers and at U.S. law schools about the similarities and differences between the judicial method and the constitutional law of the two countries. While it is well known that

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the decision of the Australian framers not to include a bill of rights in the Australian Constitution has led to a more sparing use of the power of judicial review, even though those framers followed the U.S. template in many other respects, the deeper consequences of greater Australian deference to the legislature are not as well understood.

In this Article, I suggest that Chief Justice Dixon considered that judicial virtue did not allow any judge to follow his own lights when precedent, established custom, or constitutional convention dictated a contrary result. In later Parts of the Article, I relate Chief Justice Dixon's famous 1952 statement about "strict and complete legalism" to both judicial integrity and freedom of religion at common law. I suggest that Chief Justice Dixon's primary concern when he became Chief Justice was not to talk about judicial method but rather to signal judicial virtue to all Australian judges, present and future. Not only does Chief Justice Dixon provide lessons for Australian judges but for judges everywhere grappling with these issues, including those in the United States. Chief Justice Dixon was feted in the 1950s U.S. legal world, but his relevance goes beyond mere flattery—there is substantive value for all judges in what he had to say.

I, therefore, identify the common law of religious liberty that Australia inherited from England and suggest that some contemporary appellate courts have sought to impose their own views on the parties rather than to apply the established common law. I also suggest that Chief Justice Dixon's understanding of the common law origins of Australia's Constitution means that there is still considerable room for the High Court to push back against legislation that is inconsistent with established common law principles.

These comparative Australian insights about the origins and nature of religious freedom and the nature of judicial integrity will interest American attorneys and law students because they show the different directions in which the law can evolve despite the same common law and constitutional foundations.

INTRODUCTION

In the third scene of the first Act of *Hamlet*, Shakespeare has Polonius give his departing son, Laertes, the following life advice:

> This above all: to thine own self be true,
> And it must follow, as the night the day,
> Thou canst not then be false to any man.
> Farewell, my blessing season this in thee![1]

Though Polonius was counseling Laertes to consider the long-term and possibly eternal good of his character as he made decisions in the future, there was irony in the counsel since his son had lived a prodigal life before that departure.

In this Article, I propose that when Sir Owen Dixon gave his famous speech about strict legal interpretation when he became Chief Justice of the High Court of Australia, he was really counseling Australia's present and future judges about personal judicial integrity and Australia's common law tradition. The relevant paragraphs from that speech are these:

> Federalism means a demarcation of powers and this casts upon the Court a responsibility of deciding whether legislation is within the boundaries of allotted powers. Unfortunately that responsibility is very widely misunderstood, largely by the popular use and misuse of terms which are not applicable, and it is not sufficiently recognised that the Court's sole function is to interpret a constitutional description of power or restraint upon power and say whether a given measure falls on one side of a line consequently drawn or on the other, and that it has nothing whatever to do with the merits or demerits of the measure.
>
> Such a function has led us all I think to believe that close adherence to legal reasoning is the only way to maintain the confidence of all parties in federal conflicts. It may be that the Court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism.[2]

I suggest that his intention was not to extol either legalism or literalism as the primary aspect of either judicial integrity or the Australian common law tradition. And I explain why I do not believe Chief Justice Dixon would have thought a religious discrimination act necessary to protect religious freedom in the Commonwealth or the Australian states since the Australian Constitution was premised on an established common law right of religious freedom.

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1 WILLIAM SHAKESPEARE, HAMLET act 1, sc. 3, ll. 564–67.

2 Sir Owen Dixon, Address on Taking Office of Chief Justice of the High Court, *in* JESTING PILATE AND OTHER PAPERS AND ADDRESSES 289 (Susan Crennan & William Gummow eds., 3d ed. 2019). *See also Swearing in of Sir Owen Dixon as Chief Justice* (1952) 85 CLR xi, xiii–xiv (Austl.).

Though Justice William Gummow has observed that Chief Justice Dixon's judgments have not all stood the test of time, I propose that Sir Owen would not have expected them all to have survived since he considered that the common law tradition moves forward like a Bedouin caravan crossing the desert. But I do think Chief Justice Dixon would have hoped that Australia's future judges would have been true to his version of Dworkin's herculean judge. But just what were and are the attributes of Chief Justice Dixon's Hercules?

In Part I, I explain why I think Chief Justice Dixon was talking about judicial integrity and not directly about either legalism or literalism when he gave that speech in 1952. I discuss those comments in light of the debates about judicial activism that have taken place in Australia since 1992, prompted in part by his 1952 speech. I also ponder Chief Justice Dixon's likely assessment of controversial, later decisions by the Australian High Court in the *Tasmanian Dam Case* and the 1992 decisions of the Mason Court in *Mabo [No. 2]*, *Australian Capital Television*, *Nationwide News*, and *Dietrich*. While I suggest that Chief Justice Dixon would have deplored the outcome in the *Tasmanian Dam Case* despite its accord with Prime Minister Hawke's campaign in the then recent federal election, I do not think Chief Justice Dixon would have been uncomfortable with the outcome in *Mabo [No. 2]* or the discovery of an implied freedom of political communication, found between the lines of the Constitution despite his supposed obsession with legalism. Rather, if Chief Justice Dixon heard the common law arguments in *Mabo [No. 2]* and the implied freedom advocacy in the *Australian Capital Television* and *Nationwide News* cases, I think he would have agreed and added that these discoveries accorded with the common law tradition from which the ideas in the Australian Constitution were drawn. But I think he would have dissented in *Dietrich*.

In Part II, I suggest that Australia inherited a history of protecting religious liberty at common law despite deference to parliamentary supremacy. I briefly trace the religious persecutions of the Tudor and Stuart monarchs and even the persecution during Cromwell's Commonwealth; but I note the improved treatment of all religious believers, except Catholics, after William and Mary were invited to take the throne at the end of the seventeenth century. I observe thereafter, a reluctant acceptance that even Catholics were entitled to freedom of conscience during the reforms of the 1830s. I suggest that evolution saw a tolerance of free exercise of religion settle in Australia well enough that the federation framers denied that Australia should

have one established religion or that any religious practice, which did no "Millsian" harm, should be proscribed.

In Part III, I suggest that three Australian judgments, which engage with religious liberty in light of recent antidiscrimination statutes, do not adequately balance that religious liberty tradition against new antidiscrimination laws, considering the common law tradition upon which Chief Justice Dixon believed the Australian Constitution was predicated. The absence of any mention of religious freedom in those statutes does not mean that our established common law religious freedom should be ignored or sidelined by judges, despite the advent of later statutes. Positive restatements of common law rights are not and should not be necessary to preserve them, especially since the "principle of legality" holds that only clear and unambiguous positive language or necessary implication can remove common law rights. I also suggest that these three judgments manifest an antipathy toward religious belief and practice that Chief Justice Dixon would have deplored given the standards of judicial integrity attributed to him in Part I. Though I might have chosen kinder examples, the three decisions I have chosen to highlight are those handed down in *Sunol v Collier [No. 2]*,[3] *Christian Youth Camps v Cobaw*,[4] and in the *Sydney Beth Din Case*.[5]

My point in these criticisms is that Chief Justice Dixon believed judges in the common law tradition are obliged to make decisions that accord with that tradition rather than their own assessment of what would be best for contemporary society. Chief Justice Dixon's insights are also relevant to contemporary judicial decision-making in the United States. I suggest that Chief Justice Dixon would say that citizens are entitled to expect their judges to make decisions against their own inclinations when that is necessary for reasons of judicial integrity. The fact that Chief Justice Dixon made decisions in accord with the common law tradition, even when they went against the grain for him personally, is the primary reason why many commentators rate him as the finest judge Australia has produced.[6] While there were certainly black letter antidiscrimination statutes in place, which enabled the

3 *Sunol v Collier [No. 2]* (2012) 289 ALR 128. The facts of these three cases are detailed in Part III.

4 *Christian Youth Camps v Cobaw* (2014) 308 ALR 615.

5 *Ulman v Live Group Pty Ltd* (*Beth Din Case*) (2018) 367 ALR 95.

6 PHILLIP AYRES, OWEN DIXON 335 (2003).

justices in these cases to consider an antireligious position,[7] none of those statutes dictated that common law freedom of religion should be overridden since that was protected in our common law, which was locked in once the Australian Constitution was settled, subject only to clear and unambiguous statutory amendment. I believe that Chief Justice Dixon would have expected the judges in these cases to have drawn from the ocean of common law materials that had prevented our founders from creating Australia as a religious state when they decided not to include a bill of rights in the Australian Constitution. At federation, it was expected that judges and politicians would respect individual and institutional religious freedom—at least until a legislature decided to positively proscribe the practices of certain religions with statutes, as they had done in the bad, old Tudor and Stuart days, before that persecution began to be washed away by Cromwell's revolution.

I
CHIEF JUSTICE DIXON ON JUDICIAL INTEGRITY

Chief Justice Dixon's remarks about strict legalism on becoming Chief Justice in 1952, and about judicial method before that, have mostly been discussed in arguments about originalist and progressive approaches to constitutional interpretation. While I acknowledge that context, my point in this Article is to suggest that Chief Justice Dixon's focus in his accession speech in 1952 was not about judicial method at all, though he had addressed that subject elsewhere on a number of occasions.[8] Rather, his primary intent in those remarks as the new Chief Justice was to signal judicial virtue to all the judges in the land—judges present and judges future. If his accession speech is read in that context, he was insisting that it was not right for any judge to follow his own lights when there existed a strong body of precedent, established custom, or constitutional convention to the contrary. While Chief Justice Dixon thoroughly understood the choices and the evolutionary changes judges must make to common law precedents when faced with

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7 Australia's first antidiscrimination statute was passed in South Australia in 1966 (the Prohibition of Discrimination Act) but did not refer to religious discrimination. There was no mention of religious discrimination in Victoria's Equal Opportunity Act of 1977 or the Anti-Discrimination Act of 1999, though some exemptions were provided to avoid offending the susceptibilities of some religions. *See Prohibition of Discrimination Act 1996* (SA), *Equal Opportunity Act 1977* (Vic), *Anti-Discrimination Act 1999* (NSW).

8 *E.g.*, Dixon, *supra* note 2, at 113–23 (address was originally delivered at Yale University in September 1955 when Chief Justice Dixon received the Howland Memorial Prize).

unprecedented fact scenarios, abrupt change was the province of the democratically elected legislature and could hopefully be accomplished with statutory precision.

But more context for Chief Justice Dixon's views about judicial integrity must be provided. For though some have suggested that his emphasis on "strict legalism" shows that he did not understand or adequately acknowledge the choices judges face,[9] his insistence that even the Australian Constitution was a common law document[10] says otherwise. He knew that the unwritten English Constitution relied upon the common law in a different way than the Australian Constitution.[11] In part, that was because it was unwritten. It had evolved and operated in a unitary system. But despite the doctrine of parliamentary supremacy, the actors and institutions which functioned within it were still constrained by both political considerations and the common law. While Australia's constitutional arrangements were different, and the Commonwealth Parliament was not supreme, political considerations and the common law still operated to constrain both the legislature and the executive. Constitutional questions were to be resolved within the context of the whole law, which included the common law. Justice Susan Crennan says that Justice Dixon clearly anticipated an implied nationhood power,[12] but he also expressly said that the Menzies' government was constrained by a presumption that the government (legislature and executive) would follow the rule of law.[13] Chief Justice Dixon's majority judgment in the *Communist Party Case* made the strength of that unwritten presumption very clear when it struck down the Communist Party Dissolution Act of 1951 and the Dixon majority was democratically upheld by the electorate when the Menzies government tried to reverse that majority after the fact.[14]

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9 For example, Leslie Zines in his 2002 Byers Memorial Lecture referred to Chief Justice Gleeson's "resurrect[ion]" of "Sir Owen Dixon's remarks . . . as a model to be followed" though they needed to "be more explicit in acknowledging choices open to them." Leslie Zines, Legalism, Realism and Judicial Rhetoric in Constitutional Law, Sir Maurice Byers Lecture (Oct. 16, 2002), *in* J. N.S.W. BAR ASSOC., Summer 2002, at 17. *See also* THE BYERS LECTURES 2000–2012, at 48 (Perram & Pepper eds., Federation Press 2013) (referring to MURRAY GLEESON, THE RULE OF LAW AND THE CONSTITUTION 85, 97–99 (2000)).

10 Dixon, *supra* note 2, at 203.

11 *Id.* at 170–73.

12 *Id.* at 24.

13 *Id.* at 27–28.

14 After the High Court struck down this Commonwealth legislation, Menzies as Prime Minister called a snap election with the election slogan, "Menzies or Moscow," and coupled it with a referendum to add a new clause to the Australian Constitution, which would allow

The reason that Chief Justice Dixon was talking about judicial integrity when he referenced "strict legalism" in his accession speech was a consequence of that *Communist Party Case* context. Helen Irving said that "[t]he *Communist Party Case* was, effectively, the threshold over which Dixon stepped into the Chief's seat."[15] For though Prime Minister Menzies was disappointed with this decision, and though he had passed over Justice Dixon for Chief Justice in the past,[16] again as Helen Irving says, "no one—press or politician—blamed the Court"[17] for the decision. Prime Minister Menzies went even further and endorsed those judges. He said, "The High Court Judges are men of great integrity . . . As lawyers they have simply declared the law of the Constitution."[18] And then, as if to prove he bore Justice Dixon no ill will and meant what he had said in Parliament about the Justice's integrity, Prime Minister Menzies appointed him Chief Justice thirteen months after the election, once Sir John Latham retired.[19] It is also clear from this context, absent the griping about High Court judicial activism since the 1992 decisions in *Mabo [No. 2]*, *Australian Capital Television*, *Nationwide News*, and *Dietrich*, that there were many decisions premised on implications in the Constitution before Sir Anthony Mason became Chief Justice. Chief Justice Dixon not only approved of those decisions—he was the author of a number of them.[20]

That returns us to the question of what he meant when he made his accession reference to "strict legalism" as the new Chief Justice in 1952.[21]

All the judges who heard the address knew what Prime Minister Menzies had said about Justice Dixon's integrity. They also knew that Justice Dixon (not yet Chief Justice) was the author of the judgment that had struck down the Communist Party Dissolution Act of 1951.

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the federal government to overturn the High Court's decision in the *Communist Party Case*. The Prime Minister won the snap election, but his effort to change the Constitution was unsuccessful. GEORGE WILLIAMS ET AL., BLACKSHIELD & WILLIAMS AUSTRALIAN CONSTITUTIONAL LAW & THEORY 962 (7th ed. 2018).

15 Helen Irving, *The Dixon Court*, *in* THE HIGH COURT, THE CONSTITUTION AND AUSTRALIAN POLITICS 183 (Rosalind Dixon & George Williams eds., 2015).

16 *Id.*

17 *Id.*

18 *Id.* (quoting Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 1951, 366 (Robert Menzies, Prime Minister)).

19 *Sir Owen Dixon New Chief Justice of High Court*, THE CANBERRA TIMES (Apr. 3, 1952), https://trove.nla.gov.au/newspaper/article/2852133 [https://perma.cc/J2PX-RPCN].

20 Zines, *supra* note 9, at 14.

21 *See* Dixon, *supra* note 2.

No one at the time suggested that was judicial activism even though Justice Dixon had written:

> [T]he Constitution . . . is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as, for example, in separating the judicial power from other functions of government, others of which are simply assumed. Among these I think it may fairly be said that the rule of law forms an assumption.[22]

Australian judges also knew that the Prime Minister, who had practiced constitutional law himself before he turned to politics, had not denigrated the decision as any form of judicial overreach even though it had interfered with his legislative plans and had seen him lose the following campaign to amend the Constitution.[23] When he gave that speech, Chief Justice Dixon was simply recommending a judicial course that would see present and future judges in Australia credited as people of integrity as he had been, because they were demonstrably impartial in their fidelity to the traditions of the common law. His repeated references to "strict legalism" acknowledged that present and future Australian judges would develop that law, but he exhorted them to continue to do so impartially from existing legal materials in accordance with the established traditions of the common law.

What would Chief Justice Dixon have made of the 1992 decisions of the Mason Court noted above, which have led to charges of judicial treason?[24] I have not carefully analyzed all the decisions he wrote during his thirty-five years on the High Court. However, I think he would have wrestled with the *Tasmanian Dam Case* decision[25] nine years earlier because it was inconsistent with that state autonomy, which he emphasized many times and particularly in the *Melbourne Corporation* decision.[26] However, in light of the McNeil research upon which the *Mabo [No. 2]* decision rested,[27] and despite Chief Justice

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22 *Australian Communist Party v Commonwealth* (*Communist Party Case*) (1951) 83 CLR 1, 193.

23 WILLIAMS ET AL., *supra* note 14, at 962. *See also* Irving, *supra* note 15, at 181, 183–84.

24 Michael Kirby, *Judicial Activism: A Riposte to the Counter-Reformation*, 11 OTAGO L. REV. 1, 2 (2005) (referring to T. Campbell, *Judicial Activism: Justice of Treason*, 10 OTAGO L. REV. 307 (2003)).

25 *Commonwealth v Tasmania* (*Tasmanian Dam Case*) (1983) 158 CLR 1.

26 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.

27 *See generally* KENT MCNEIL, COMMON LAW ABORIGINAL TITLE (1989) (which was referred to twenty-two times by the High Court justices in their judgments in *Mabo v Queensland [No. 2]* (1992) 175 CLR 1).

Dixon's alleged sympathies as a White Australian,[28] I think he would have accepted that decision as corrective of a line of authority that had been shown to be completely inconsistent with decisions made about the laws of First Nations' people elsewhere in the British Commonwealth, and thus, as an appropriate common law development.

What about the implied freedom of political communication, which critics say the High Court invented in the *Australian Capital Television* and *Nationwide News* decisions? As I have already explained, the foundation of his own decision in the *Communist Party Case* was an assumption he had identified in the common law materials upon which the Constitution was premised. Given that the Hawke government had legislated to curtail Lou Davis's freedom of political communication during Australia's bicentennial celebrations,[29] and could conceivably do so again using clear and unambiguous language, I think Chief Justice Dixon would have congratulated his 1992 colleagues in putting that well established common law freedom beyond the reach of the legislature forevermore as they did when they found that political communication was protected by implication in the Australian Constitution.

Chief Justice Dixon would likely not have concurred with the *Dietrich* decision if he was a Justice on the High Court at the time it was made. I think both as a puisne High Court Judge and as the Chief Justice, Dixon would have seen that decision as a bridge too far. Australia ratified the International Covenant on Civil and Political Rights of 1966 (ICCPR) in 1980.[30] And while that international instrument did require states parties to protect the rights of persons accused of crime in a new and more comprehensive way, those newly expressed human rights did not have a historical foundation in the English and Australian common law when the Australian colonies were federated in 1900.[31] While a search of common law materials might

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28 William Shrubb, *Sir Owen Dixon's 130th Birthday*, RULE OF L. EDUC. CTR. (Apr. 28, 2016), https://www.ruleoflaw.org.au/sir-owen-dixons-130th-birthday/ [https://perma.cc/LAA8-RZ2H].

29 *Australia Bicentennial Authority Act 1980* (Cth).

30 JOINT STANDING COMM. ON FOREIGN AFFS., DEF. & TRADE, PARLIAMENT OF AUSTL., INTERIM REPORT: LEGAL FOUNDATIONS OF RELIGIOUS FREEDOM IN AUSTRALIA ch. 2 (2019).

31 The decision of the Australian constitutional framers not to follow the U.S. model and include a bill of rights has been the subject of considerable commentary. The reasons for that decision include a wish to retain the British notion of parliamentary rather than judicial sovereignty, and a racist wish to deny Australia's First Nations' peoples the right to vote

have identified a judicial obligation to protect persons accused of crime who could not obtain legal representation through no fault of their own, I think Chief Justice Dixon would have balked at the suggestion that he could make a decision which would bind the Commonwealth to comply with an international instrument that had not been domesticated[32] and which would at the same time require the Commonwealth to fund legal aid programs. I think he would have seen both of those ideas as the province of the legislature.

But what of religious freedom? Was religious liberty an established common law right that the Australian framers expected the judges and politicians to protect as a matter of course—and which did not therefore need to be formally protected in the Constitution?

II
RELIGIOUS FREEDOM AT COMMON LAW

A. Religious Freedom in English and Australian History

As a preliminary matter, it must be conceded that the Australian framers did include a version of the First Amendment to the U.S. Constitution as section 116 of the Australian Constitution.[33] But while the U.S. provision was intended as part of those founders' efforts to protect freedom of religion and speech at a time when the English persecution of nonconformists was at the top of all minds, that was not the reason Henry Higgins proposed that similar language be used in Australia. Higgins's purpose was to assuage the concern of atheists in Victoria after Patrick Glynn had convinced the delegates at the Adelaide session of the 1897 Australasian Federation debates to include recognition of Almighty God in the Australian Constitution's Preamble.[34] Those Victorian atheists feared that Australia might

that was part of the reason for the constitutional amendments, which followed the U.S. Civil War. *See also* GEORGE WILLIAMS & DAVID HUME, HUMAN RIGHTS UNDER THE AUSTRALIAN CONSTITUTION 67–69 (2d ed. 2013).

32 *Chow Hung Ching v The King* (1948) 77 CLR 449, 478 (stating that the ratifying of a treaty committed only externally and had "no legal effect upon the rights and duties of the subjects of the Crown").

33 *Australia Constitution* s 116 ("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.").

34 *See, e.g.*, Christian Bergmann, *The Catholic Who Influenced the Constitution of Australia*, CATH. ARCHDIOCESE OF MELB. (Jan. 25, 2022), https://melbournecatholic.org/news/the-catholic-who-influenced-the-constitution [https://perma.cc/7XLB-CSUS].

become a religious country, and Higgins's steps were taken to ensure that Australia would remain a nonconfessional state. Higgins initially proposed that the American wording be adjusted so that neither the Commonwealth nor the future states could pass laws establishing religion or prohibiting its free exercise. However, he compromised closer to the original American language, which excluded the states from those prohibitions, so that the states, but not the Commonwealth, would be able to regulate harmful religious exercise by statute.[35] The consequence was that section 116 of the Australian Constitution was never designed to protect religious freedom. Mostly that was because the Australian framers did not think they needed American-style bill of rights protections to save them from their governments—because they did not believe their political leaders would abrogate their common law freedoms, and even if they did, the framers naively expected their judges to be able to stop them from doing so.[36] But were the Australian framers justified in believing their religious liberty was protected by the common law?

The English common law in 1900 was a complex mix of custom, convention, and statutory reform. The custom and convention included the liberty first promised to the Church in Magna Carta in response to King John's overreaching in the early thirteenth century.[37] But the statutory overlays were a much more recent response to religious persecution[38] following the Reformation, which had overflowed from Europe into England during the reign of Henry VIII.

Before the 1830s, England was not a pleasant or safe place to live if someone did not follow the religion of the monarch. And the atmosphere had become markedly worse after King Henry VIII wanted

35 For more detail on the drafting of both the United States and Australian versions of this clause, see A. KEITH THOMPSON, *Religious Freedom Has Always Been About Including Minorities*, *in* INCLUSION, EXCLUSION AND RELIGIOUS FREEDOM IN CONTEMPORARY AUSTRALIA 210–21 (Michael Quinlan & A. Keith Thompson eds., 2021).

36 *See, e.g.*, Rosalind Dixon, *An Australian (Partial) Bill of Rights*, 14 INT'L J. CONST. L. 80 (2016).

37 For discussion of the nature of the liberties of the Church which were protected in the Magna Carta, see generally A. Keith Thompson, *The Liberties of the Church and the City of London in the Magna Carta*, 18 ECCLESIASTICAL L.J. 271 (2016) (published in England following the 800th anniversary of the Magna Carta).

38 For further discussion of how ancient statutes and judicial decisions interacted to create the common law of England, see generally A. KEITH THOMPSON, RELIGIOUS CONFESSION PRIVILEGE AT COMMON LAW chs. 2, 3 (Brill 2011). *See also* Mark Leeming, *Penalties in Australia, the United Kingdom and Singapore – Storm-Warnings, Statutes and Style*, 51 AUSTL. BAR REV. 377–90 (2022).

to divorce the Spanish princess, Catherine of Aragon.[39] Though he sought to remain silent, the former Lord Chancellor Thomas More lost his head because he would not positively support the King's wish for a divorce or his separation of the English Church from Rome.[40] When Catherine's daughter Mary ascended the throne, she conducted a bloody purge worthy of the French revolutionaries 140 years later.[41] Many officials lost their heads in England including the Archbishop of Canterbury, Thomas Cranmer.[42] And Elizabeth I was only marginally more kind to religious dissent. She made it treason for anyone who was a Catholic to remain in England,[43] though she did not prosecute her antireligious laws as zealously as her half sister. The Gunpowder Plot in 1605 was a hotheaded Catholic reaction to yet more persecution when it became obvious that the nervous new Scottish king (James I) was not going to relax Elizabeth's anti-Catholic strictures, even though his wife was Catholic.[44] To ensure that the English did not rebel, James I moved to make it clear he was going to be an even tougher Protestant than Elizabeth I had been.[45] And, as is well known, some of his subjects, who were no longer prepared to suffer in silence, fled to the more neutral low countries and then to America, aboard the Mayflower in pursuit of religious freedom and their dream of a righteous city on a hill in New England.[46]

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39 *See, e.g.*, JOHN COFFEY, PERSECUTION AND TOLERATION IN PROTESTANT ENGLAND 1588–1689, at 99 (1st ed. 2000).

40 *See, e.g.*, RICHARD MARIUS, THOMAS MORE: A BIOGRAPHY 461–514 (1999).

41 Eric Norman Simons, *Mary I, Queen of England*, ENCYCLOPEDIA BRITANNICA (Oct. 19, 2023), https://www.britannica.com/biography/Mary-I [https://perma.cc/44N9-C66J].

42 DIARMAID MACCULLOCH, THOMAS CRANMER: A LIFE 603–04 (1998).

43 Act Against Jesuits and Seminarists 1585, 27 Eliz. 1 c. 2 (Eng.) (making it treason for any priest to come to or remain in England).

44 ANTONIA FRASER, THE GUNPOWDER PLOT, TERROR AND FAITH IN 1605, at 45–82 (Weidenfeld & Nicolson 1996).

45 *Id.* King James cultivated the English Catholic hope that he would convert to Catholicism, but "[t]his belief [had] absolutely no basis in reality." *Id.* at 19–22, 45. He also believed in the tolerance of diverse religious opinion including tolerance of Catholics if they "remained quiet," *id.* at 63, but Catholic hopes of better treatment began to fade when various Catholics were arrested in July 1603 for involvement in the Bye and Main Plots. *Id.* at 76–77. This reaction should not have been a surprise, since Father Hill had been imprisoned six weeks earlier during the new king's ceremonial journey from Edinburgh to London following his request "for the full removal of all the penal laws against his co-religionists." *Id.* at xxxv. Any hope of tolerance was completely exploded in November 1605 when the Gunpowder Plot was uncovered. *Id.* at 230–56.

46 *See The Mayflower Story*, MAYFLOWER 400, https://www.mayflower400leiden.com /education/the-mayflower-story/ [https://perma.cc/H5UM-9A5M] (describing the story of

Though the story of Cromwell's Commonwealth is normally told in political terms—Charles I followed his father in insisting on his divine right as king and would not keep promises he made to Parliament when they met his funding requests—Cromwell's revolution also had significant religious freedom tones. After the Tudors and the early Stuart kings, England was no longer divided into two simple religious parts—Anglican and Catholic. There were all manner of other Protestants, including followers of Knox and Calvin—Wesleyans, Puritans, and Quakers among others. Under Cromwell, the Puritans had ascendancy, but that ascendancy was wound back far enough after the Restoration of the Monarchy that the Puritans and the Anglicans were again the subject of persecution. Many of the complaints against James II in the 1689 Bill of Rights were sourced in his reinstatement of Catholic practices, including their right to bear arms when that right was denied to Protestants. And one of the most famous conditions of William and Mary's joint ascension to the throne was a requirement of their promise that no Roman Catholic could ever again sit upon the English throne. The Act of Settlement[47] reinforced that promise and added that anyone who married a Roman Catholic could not sit on the throne either. That provision was not repealed until the Perth Agreement of 2011, which came into effect on March 26, 2015.

Anti-Catholic feeling following the Gunpowder Plot and the Restoration of the Monarchy did not subside in England until the end of the eighteenth century. That meant Roman Catholics were not afforded religious tolerance until the Catholic Relief Acts of 1778 and 1791 allowed them to purchase land, join the army, and worship freely. Thereafter the Catholic Emancipation Act of 1829 allowed them to sit in Parliament, vote in elections, and hold public office, including as officers of the court so that they could again practice law. Those changes were inherited in Australian law at the same time as they took effect in England. They are a part of the reason why the American First Amendment words, which were copied into the Australian Constitution, do not mean the same thing as they do in the United States. Australia had not been colonized by people seeking religious freedom. Australia was colonized by people who had inherited religious freedom and who did not need to rebel against an executive and legislature that were proscribing their freedoms and persecuting the most harmless of religious practices.

Separatist nonconforming Protestants who first fled to the Netherlands in 1607 and then, thirteen years later, joined with further English colleagues and sailed to America in 1620).

47 The Act of Settlement 1701, 12 & 13 Will. 3 c. 2 (Eng.).

As I have already summarized, section 116 of the Australian Constitution was not prepared or intended as a guarantee of religious liberty. It was primarily intended to ensure that the new Australian Commonwealth would never feature a religious establishment. The English reforms, which reached a crescendo in the 1830s, had enabled an uneasy religious peace to settle in the Christian parts of the British Commonwealth.[48]

The nature of that uneasy peace has been well-documented in Australian constitutional history. Most minorities kept to themselves and stayed silent, except for the Jehovah's Witnesses. Edgar Krygger's assertion in 1912 that compulsory military training interfered with his "free exercise of religion" under section 116 of the Constitution was summarily dismissed when he appealed to the High Court. Chief Justice Griffiths and Justice Barton both agreed that requiring military training did not prohibit the free exercise of religion because Mr. Krygger could still pray and worship if he did the required military training drills.[49] This narrow interpretation of section 116 continued in World War II when the Adelaide Company of Jehovah's Witnesses had the dissolution of their legal entity and the forfeiture of their property overturned. It was not because those actions interfered with their "free exercise of religion" under section 116. Rather, it was because those actions overreached the government's legislative and executive defense power under section 51(vi) of the Constitution. Chief Justice Latham observed that no one could claim exemption from obedience to general law in Australia on grounds of religious belief[50] even though he conceded that section 116 was required "to protect the religion (or

48 *See, e.g.*, Steward J. Brown, *Providential Empire? The Established Church of England and the Nineteenth Century British Empire in India*, 54 STUD. CHURCH HIST. 225 (2018) (explaining that the early English colonizers believed that they had been providentially ordained to Christianize the subcontinent, which was not connected with efforts to reintegrate Catholics into English society at home); Belmekki Belkacem, *The Impact of British Rule on the Indian Muslim Community in the Nineteenth Century*, 28 REVISTA DE FILOLOGÍA INGLESA 27 (2007) (explaining that the British colonization necessarily suppressed the Islam of the displaced Mughal rulers). Note that the oppression continued in India where the colonial authorities never considered allowing conscience protections for Hindus and Muslims, but that is a story beyond the scope of this Article.

49 *Krygger v Williams* (1912) 15 CLR 366, 369 (opinion of Griffiths CJ), 372 (opinion of Barton J).

50 *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 125.

absence of religion) of minorities, and in particular, of unpopular minorities."[51]

B. Chief Justice Dixon's View of Religious Freedom

John Gava conducted a fairly complete survey of all Chief Justice Dixon's High Court cases that involved the law of contract to determine whether Chief Justice Dixon was true to his assertion that a judge with integrity will decide cases according to common law and statute, despite any personal inclinations in other directions.[52] Justice Dixon (as he then was) did opine that there was no religious confession privilege in Australia unless created by statute in *McGuinness v Attorney-General of Victoria*,[53] though without the benefit of counsel submissions on that point since that case was about the privilege of a newspaper journalist.[54] However, Justice Dixon did consider some of the common law materials about religious freedom in his judgment in *Wylde v Attorney-General (NSW)* (at the relation of Ashelford).[55]

The four High Court justices who heard the case regretted that the *Wylde Case* was ever brought.[56] Justice Williams wrote:

> I have found this appeal difficult and distasteful, difficult because a civil court ha[d] to adjudicate in a suit which involve[d] questions of ecclesiastical law with which it [was] not familiar, and distasteful because it is unfortunate that a suit of this sort should have reached a civil court at all.[57]

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51 *Id.* at 124.

52 *See, e.g.*, John Gava, *Another Blast from the Past or Why the Left Should Embrace Strict Legalism*, 27 MELB. U. L. REV. 186 (2003); John Gava, Sir Owen Dixon: A Strict and Complete Legalist? His Contract Decisions Examined (2011) (Ph.D. thesis, University of Adelaide) (on file with Adelaide Research & Scholarship) ("[W]ith two relatively minor exceptions, Dixon did decide his contract decisions in conformity with his self-proclaimed strict and complete legalism."); John Gava, *When Dixon Nodded: Further Studies of Sir Owen Dixon's Contracts Jurisprudence*, 33 SYDNEY L. REV. 157 (2011).

53 *McGuinness v A-G (Vic)* (1940) 63 CLR 73.

54 For more detailed consideration of the common law materials, see generally THOMPSON, *supra* note 38.

55 *Wylde v A-G (NSW)* (1948) 78 CLR 224.

56 Chief Justice Latham thought it regrettable that questions of doctrine and ritual had to be determined by a civil court, but in the absence of ecclesiastical courts in Australia, there was no choice. *Id.* at 271. Justice Rich said this "unhappy controversy" was not "fit . . . for a civil court." *Id.* at 273. Justice Dixon also considered that these matters should have been handled internally within the church and would have been but for the trial justice's unwise choice to consider them at all, granting injunctions following that consideration. *Id.* at 289–90, 293–94.

57 *Id.* at 297.

One senses that the four High Court justices heard the case only because the Chief Justice in Equity in the Supreme Court of New South Wales had chosen to hear it and had decided it amiss. Indeed, he had gone further and had issued injunctions preventing the Anglican Bishop of Bathurst from conducting services in accordance with the discretion afforded to him by the Australian Anglican Synod and following amended practices that had been regularly followed in the Church in England for one hundred years. While two of the four High Court justices said they were disappointed that the case had been heard in the first place,[58] all four agreed that Chief Justice Roper's injunctions intruded too far into church jurisdiction, and the injunctions were set aside.[59]

Justice Dixon said that it was unclear when the Anglican Church ceased to be established in Australia, but he noted that after 1863 no further letters patent appointing bishops in Australia were issued.[60] By that date, he thus believed the Anglican Church was like all other churches operating in Australia and was "established on a consensual basis."[61] The reason why the New South Wales Supreme Court Chief Justice in Equity had erred in *Wylde* was because the Attorney General and relators could ask the court only to determine whether the property was being used in breach of the trusts upon which it was held or not. The civil courts could not determine matters of liturgy.[62]

While Chief Justice Latham and Justice Williams found that the civil courts did have jurisdiction to determine whether the use of church property for illegal liturgical purposes breached the underlying church property trusts, they still agreed that civil court injunctions controlling church practices should not have been issued.[63] Justice Dixon's concern about the New South Wales Supreme Court's intrusion into ecclesiastical practices was sourced in his interpretation of English

58 Chief Justice Latham and Justice Williams thought the civil courts had to decide this case since there were no longer ecclesiastical law courts in Australia. *Id.* at 270–71 (opinion of Latham CJ), 297 (opinion of Williams J). Citing English decisions in the House of Lords and Privy Council, which still bound the High Court in Australia, Justices Rich and Dixon considered that Australian civil courts had no jurisdiction to decide questions involving liturgy in nonestablished churches. *Id.* at 275–76, 282–83 (opinion of Rich J), 289–90, 293, 295 (opinion of Dixon J). The Justices believed these were matters internal to the church and were governed by their consensual compact.

59 *Id.* at 272.

60 *Id.* at 286.

61 *Id.* at 286.

62 *Id.* at 289.

63 *Id.* at 272 (opinion of Latham CJ), 283 (opinion of Rich J).

common law materials that he considered binding upon the High Court. In *Attorney-General v. Gould*,[64] Lord Romilly M.R. considered that even though the English courts did have ecclesiastical jurisdiction in Anglican cases, since the Anglican Church was the established church in that country, the Court could not find

> that the manner in which a religious service [wa]s conducted amount[ed] to a breach of trust [unless] it [was] satisfied that the forms of worship depart[ed] so completely from those of the faith for which the property [wa]s held that the use of the building for the purpose [wa]s in truth a diversion of the property to another object.[65]

Justice Dixon said that was not the case in *Wylde*. Justice Dixon also observed that *Wylde* involved no diversion of property in breach of trust, as in *General Assembly of Free Church of Scotland v. Overtoun*[66] where two churches were proposing to merge. Nor did the *Wylde Case* raise a question about the correct use of trust property in a case of schism as in *Craigdallie v Aikman*.[67] "The jurisdiction of the Supreme Court [wa]s founded upon property . . . [and] the necessity of enforcing the trust,"[68] but determining questions of liturgy was a bridge too far. This case was very similar in spirit to *Cameron v Hogan*, which was decided fourteen years earlier by the High Court. In that case, the High Court would not intervene to force the Labor Party to preselect the former Premier of Victoria in his seat because the internal management of that political party was a matter of consensual compact.[69]

The point for the purposes of this Article is that Justice Dixon felt obliged to follow English precedent. He could not strike out on his own in a progressive manner inconsistent with the weight of established precedent. As a matter of judicial integrity, and as an Australian judge, he was obliged to follow a course of strict legalism. And while it is valid to observe that Chief Justice Latham and Justice Williams did not interpret those English precedents in quite the same way as Justice Dixon, Chief Justice Latham did agree with Justice Dixon's view that

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64 Attorney-General v. Gould [1860] 54 Eng. Rep. 452 (U.K.).

65 *Wylde v A-G (NSW)* (1948) 78 CLR 224, 294–95 (referring to the judgment of Lord Romilly M.R. in Attorney-General v. Gould at 456.).

66 General Assembly of Free Church of Scotland v. Overtoun [1904] AC 515 (U.K.).

67 Craigdallie v. Aikman [1820] 4 Eng. Rep. 435 (U.K.).

68 *Wylde*, 78 CLR at 295–96.

69 *Cameron v Hogan* (1934) 51 CLR 358, 383–84 (opinion of Starke J.) ("[To establish a right of relief in law or equity,] Hogan must establish some breach of contract with him, or some interference with his proprietary rights or interests. As a general rule, the Courts do not interfere in the contentions or quarrels of political parties, or, indeed, in the internal affairs of any voluntary association, society or club.").

English courts did not have jurisdiction to adjudicate matters of ecclesiastical practice. Chief Justice Latham conceded that both when he quoted Lord Halsbury from *Overtoun* noting "that a court of law has nothing to do with the soundness or unsoundness of a particular doctrine,"[70] and when he quoted Lord Davey from the same case:

> My Lords, I disclaim altogether any right in this or any other civil court of this realm to discuss the truth or reasonableness of any of the doctrines of this or any other religious association, or to say whether any of them are or are not based on a just interpretation of the language of Scripture, or whether the contradictions or antinomies between different statements of doctrine are or are not real or apparent only, or whether such contradictions do or do not proceed from an imperfect and finite conception of a perfect and infinite Being, or any similar question. The more humble, but not useless, function of the civil court is to determine whether the trusts imposed upon property by the founders of the trust are being duly observed.[71]

C. Religious Freedom in Australia in the Wake of Antidiscrimination Statutes, 1975–2022

While it became obvious to the world that natural and human rights needed further protection in the wake of the atrocities committed against individual human beings and racial groups during World War II, the positive and enforceable expression of those rights took time. The Universal Declaration of Human Rights (UDHR) in 1948 was a simple declaration, but it took eighteen more years to agree on the terms of the two Conventions after it was recognized that a single covenant would not get traction.

Australia had earlier engaged with U.S. President Franklin D. Roosevelt's evangelical proclamation of Four Freedoms on January 6, 1941.[72] While it was proposed in 1942 that the Australian Commonwealth be given power to make laws under Franklin D. Roosevelt's four new heads, the 1944 referendum that followed focused upon postwar reconstruction with no reference to freedom of

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70 *Wylde*, 78 CLR at 263 (quoting Overtoun, AC 515 at 613).

71 *Id.*

72 GEORGE WILLIAMS & DANIEL REYNOLDS, A CHARTER OF RIGHTS FOR AUSTRALIA 97 (4th ed. 2017) ("[Australia convened a] wartime constitutional convention held in Canberra, [where] it was proposed that the Commonwealth be given a series of new powers, including the power to make laws to guarantee [President Roosevelt's] 'four freedoms' . . . [which] would have given the Commonwealth the power to make laws to guarantee such rights against state legislation. This provision was not included in the proposal put to the people in the referendum held on 19 August 1944.").

religion and even then did not pass.[73] Australia's human rights reticence is also the reason why Australia's Charter membership in the United Nations did not lead to the immediate ratification of the two Human Rights Conventions in 1966, which would have formally protected religious freedom in Australia beyond the prohibition of the passage of Commonwealth laws that interfered with the free exercise of religion.[74] Later efforts by Labor Government Attorneys General to implement human rights law that would trump inconsistent state laws, including those which imposed on the free exercise of religion, also floundered.[75] The Howard Government ignored the Human Rights Commission's 1998 recommendation that the Commonwealth pass a Religious Discrimination Act and, despite appointing the Brennan Committee to advance human rights in Australia,[76] in 2009 the Rudd Government rejected its "31 recommendations . . . for improving and promoting human rights in Australia . . . [because] this would be 'divisive.'"[77]

Though Australians are said to be keen on human rights, all efforts to create a formal bill of rights following the American constitutional model—and more recently a statutory bill of rights following the dialogue model operative in New Zealand and the United Kingdom—have failed. The reasons for that failure are said to be the same as the reasons why the Australian framers chose not to implement a bill of rights at federation in 1900. First, "Australia did not need a Bill of Rights, as basic freedoms were adequately protected by the common law and by the good sense of elected representatives as constrained by the doctrine of responsible government."[78] But more recently, the

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73 *Id.* at 98. *See* GEORGE WILLIAMS, DEP'T OF THE PARLIAMENTARY LIBR., THE FEDERAL PARLIAMENT AND THE PROTECTION OF HUMAN RIGHTS 6 (2000).

74 *Australian Constitution* s 116.

75 Lionel Murphy as Commonwealth Attorney General in the Whitlam Labor government had proposed both human rights and racial discrimination bills in 1973, but they lapsed when the Labor Party failed to gain a majority in the Senate in the 1974 double dissolution election though his *Racial Discrimination Act* (Cth) was eventually passed in 1975. WILLIAMS ET AL., *supra* note 14, at 1217–23. Lionel Bowen as Commonwealth Attorney General in the Hawke Labor government promoted four changes to the *Australian Constitution* in 1988 including one which would have made section 116 binding upon the states. But these all failed in every state and nationally. *Id.* at 1218–19.

76 Jim McGinty, *A Human Rights Act for Australia*, 12 NOTRE DAME AUSTL. L. REV. 1, 4 (2010).

77 WILLIAMS ET AL., *supra* note 14, at 1147–48. *See also* Kirsty Magarey & Roy Jordan, *Parliament and the Protection of Human Rights*, PARLIAMENT OF AUSTRALIA (Oct. 12, 2010), https://www.aph.gov.au/about_parliament/parliamentary_departments/parliamentary_library/pubs/briefingbook43p/humanrightsprotection [https://perma.cc/6XDM-N9YT].

78 WILLIAMS, *supra* note 73, at 12.

creation of a bill of rights has been rejected because that would be antidemocratic since it would move the debate about rights out of the political arena and into the hands of unelected judges.[79]

Since the Australian federal government has never been able to secure sufficient political support to legislate to protect religious freedom in a manner that accurately implements the nation's obligations under the ICCPR[80] and the 1981 Declaration on the Elimination of All Forms of Discrimination Based on Religion or Belief (Religion Declaration),[81] that freedom remains protected only by the common law as the framers intended. While that protection has not been significantly enhanced or articulated by statute,[82] it is not insignificant and cannot be abrogated, unless the Commonwealth legislature expressly sets out to take it away by clear and unambiguous words or necessary implication.[83] But there has been tentative affirmation of Chief Justice Dixon's assertion that the Australian Constitution is based on the common law and did not allow the Commonwealth Parliament to abrogate the property rights of the Communist Party in 1952—even with clear and unambiguous words.[84] In the context of a recognition of implied common law rights, the Mason Court's assertion of the implied freedom of political communication beginning in 1992 looks much more traditional than progressive, and also presents as an essential judicial response from an apex court when the legislature has begun to show a propensity to exceed its conventional bounds.

How does that apply to religious freedom? At the very least, it means that absent any clear and unambiguous statute that abrogates the religious tolerance and freedom that descended upon England before the dawn of the nineteenth century, which was apparently enhanced by Australia's ratification of the ICCPR and Religion Declaration in 1966

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79 *See, e.g.*, Senator George Brandis, *The Debate We Didn't Need to Have: The Proposal for an Australian Bill of Rights*, Address to the James Cook University Law School (Aug. 14, 2008), *in* 15 JAMES COOK U. L. REV. 24 (2008). *See generally* DON'T LEAVE US WITH THE BILL: THE CASE AGAINST AN AUSTRALIAN BILL OF RIGHTS (Julian Leeser & Ryan Haddrick eds., 2009).

80 G.A. Res. 2200A (XXI) (Dec. 16, 1966).

81 G.A. Res. 36/55 (Nov. 25, 1981).

82 However, there are significant statutory protections of religious freedom in the Sexual Discrimination Act, *Sexual Discrimination Act 1984* (Cth) (Austl.), and the Fair Work Act, *Fair Work Act 2009* (Cth) (Austl.).

83 *See, e.g.*, *Momcilovic v The Queen* (2011) 245 CLR 1, 46–52.

84 *See, e.g.*, *id.* at 46 n.217, 48, 50.

and 1981, both the Australian Constitution and all other statutes have to be interpreted in a manner that recognizes and makes place for these common law rights.

III
HOW IS RELIGIOUS FREEDOM BEING TREATED BY INTERMEDIATE AND APEX COURT JUDGES?

While there has not been a great deal of opportunity for panels of the Australian High Court to adjudicate matters of religious freedom, those panels that have considered the subject have interpreted religious freedom more narrowly than should have been the case in light of the state of religious freedom at common law.

While the Griffiths High Court's unwillingness to recognize Edward Krygger's conscientious objection to participation in compulsory military training was consistent with politically correct thought in Australia before the Great War, it was not consistent with the recognition of the conscience concerns of mainstream Christian sects (Puritans, Quakers, and Catholics) between the 1701 Settlement with William and Mary and the Age of Religious Reform in 1832. While the Adelaide Jehovah's Witnesses did better before the Latham High Court during World War II in 1943, given the Latham High Court found that the Curtin government's regulations disestablishing their legal entity were invalid,[85] those justices did not make that decision on common law religious freedom grounds as Justice Dixon might have suggested had he not been officiating as the Australian Ambassador in the United States at the time.

Religious freedom generally did better during the 1980s with significant wins in the *DOGS*[86] and *Church of the New Faith* cases.[87] However, many commentators have thought the arguments about religious freedom would have fared better than they did in *Kruger v Commonwealth* in 1997,[88] when Justices Gaudron and Gummow thought there was insufficient evidence to enable them to decide the case on religious freedom grounds. There has been little occasion for High Court consideration of religious freedom in Australia since, but there have been several cases in intermediate courts of appeal. I have

85 *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 116.

86 *A-G (Vic) (Ex Rel Black) v Commonwealth* (1981) 146 CLR 559 (defending government schools).

87 *Church of the New Faith v Commissioner for Pay-Roll Tax (Vic)* (1983) 154 CLR 120.

88 *Kruger v Commonwealth* (1997) 190 CLR 1.

chosen three of those to make the point that common law religious freedom does not do very well in Australian appellate courts in the face of a statute affirming a different right, even if that statute does not abrogate religious freedom with clear and unambiguous words or by necessary implication. I therefore suggest that these intermediate courts have erred, given the contrary weight of common law authority, and there is reason to suggest that the judges involved were not manifesting the integrity that Chief Justice Dixon said we should expect from superior court judges.

A. Sunol v Collier [No. 2] *(2012)*

A Sydney taxi driver named John Sunol had disparaged gay people on a variety of internet sites in 2007, and Henry Collier complained to the New South Wales Anti-Discrimination Board that Mr. Sunol's comments breached section 49ZT of the Anti-Discrimination Act 1977 (NSW).[89] Following a conciliation conference at which Sunol had effectively agreed to cease and desist, Sunol published further disparaging material.[90] The Board sought to register clauses 3 and 4 of the conciliation agreement under section 91A(6) of the Act so that those registered provisions could take effect as an order of the Administrative Decisions Tribunal (New South Wales). The Tribunal registered clause 3 but not clause 4, and Sunol appealed so that the matter came before the New South Wales Court of Appeal.[91] Sunol effectively claimed that to the extent that section 49ZT of the Anti-Discrimination Act 1977 (NSW) rendered his conduct unlawful, it was an exercise of legislative power that infringed the implied freedom of political communication under the Australian Constitution and was itself invalid.[92] The Court of Appeal unanimously found that section 49ZT was not invalid because, though it indeed burdened Mr. Sunol's communications, it was reasonably adapted to the achievement of the legitimate New South Wales government purpose of preventing homosexual vilification in New South Wales.[93] Though Allsop P and Basten JA acknowledged that the implied freedom of political communication must allow for communications which were insulting and even full of invective, citing Justices McHugh, Gummow, Hayne, and Kirby in *Coleman v Power*

89 *Sunol v Collier [No. 2]* (2012) 289 ALR 128.

90 *Id.* at 131.

91 *Id.* at 132.

92 *Id.* at 132–33.

93 *Id.* at 139–40 (Bathurst CJ), 143–44 (Allsop P), 147 (Basten JA).

(2004),[94] none of the appeals panel justices in *Sunol* acknowledged that Mr. Sunol's communications had a religious dimension. Nor did those justices acknowledge that religious communications were also privileged under the common law and that they may not have been abrogated by section 49ZT either clearly and unambiguously or by necessary implication. While it is possible that the freedom of religious communication was not raised by any of the parties before the Court of Appeal, and while there is a line of authority forbidding an Australian court from deciding a case on a basis that was not presented by any of the parties,[95] it is disappointing that the issue was not raised by the Court of Appeal of its own volition. That disappointment is greater since the Australian constitutional framers were so satisfied that they could rely on the courts and parliamentary representatives to protect common law rights without needing to express them in the Australian Constitution itself or in other black letter law.[96]

While the Australian framers may have been naïve in their belief that judges and politicians could be relied on to protect important common law rights, it is submitted that the *Sunol* decision demonstrates a developing pattern. In an age of abundant statutory legislation and an enlarged focus on statutory interpretation, modern Australian judges are apt to ignore common law rights, which were considered by the framers to undergird and overarch the words of the Constitution itself.

B. Christian Youth Camps v Cobaw *(2014)*

In *Christian Youth Camps*,[97] the Victorian Court of Appeal upheld the decision of Justice Hampel, vice president of the Victorian Civil and Administrative Tribunal. Justice Hampel had held that the church behind Christian Youth Camps had breached the Equal Opportunity Act 1995 (Vic) when it denied use of its Philip Island camp to Cobaw Community Health Services on conscience grounds. After an initial inquiry about renting the church facility that did not disclose Cobaw's purpose,[98] further discussion confirmed that WayOut and Cobaw would use the facility to raise awareness about and normalize homosexual lifestyles contrary to the beliefs of the church, which

94 *Id.* at 142–43 (Allsop P), 147 (Basten JA) (citing *Coleman v Power* (2004) 220 CLR 1, 54, 77–78, 91).

95 *Coleman*, 220 CLR at 1 (emphasizing Justices McHugh and Kirby's robust discussion of this issue which continued in *Combet v Commonwealth* (2005) 224 CLR 494).

96 *See also* THOMPSON, *supra* note 35, at 199.

97 *Christian Youth Camps v Cobaw* (2014) 308 ALR 615.

98 *Id.* at 689, 746.

operated the camp through its Christian Youth Camps legal entity. Both Justice Hampel and the majority in the Victorian Court of Appeal (Maxwell P and Neave JA) held that the religious freedom exemptions provided in sections 75–77 of the Act did not exempt Christian Youth Camp's decline decision because those exemptions could not have been intended by the Victorian legislature to override its primary purpose in eliminating discrimination against homosexual people on grounds of their sexual orientation.[99]

President Maxwell's majority judgment is twice surprising—and disappointing—to those familiar with Australian common law and international human rights materials where religious freedom is concerned. It is surprising because its conclusions fly in the face of established precedent and principles of statutory interpretation. It is disappointing because it is difficult to escape the conclusion, particularly in the wake of his subsequent decision in the *Pell* appeal,[100] that the author had predetermined the outcome despite the dictates of Dixonian judicial integrity.

Perhaps the most striking of President Maxwell's conclusions was that Christian Youth Camps (identified by the abbreviation CYC throughout the judgment) could not benefit from the exemptions in the legislation because it was not a body established for religious purposes.[101] He came to that conclusion despite earlier quoting the Victorian attorney general's 1995 second reading statement explaining the religious freedom exemptions in the legislation, wherein it was noted that "the government recognise[d] that it [wa]s not acceptable to compel a person to act in a way that would compromise his or her

99 *Id.* at 649–51, 658–67, 670–84 (Maxwell P), 705–12 (Neave JA).

100 The Victorian Court of Appeal's two-to-one majority decision in *Pell v The Queen* [2019] VSCA 186 (Weinberg, JA, dissenting) was unanimously overturned by the High Court in a single judgment. *Pell v The Queen* (2020) 268 CLR 123. In its unanimous judgment, the High Court clarified its earlier decision in *M v The Queen* (1994) 181 CLR 487 (itself seen by many commentators as a High Court self-correction acknowledging its error in upholding the conviction of Lindy Chamberlain), which the majority in the Victorian Court of Appeal had interpreted to justify itself in upholding an earlier jury verdict in the Victorian County Court. The High Court said in both *M* and *Pell* that under the applicable appellate legislation an appellate court was obliged to objectively weigh the evidence the jury had heard and then determine whether it supported the guilty verdict it had chosen beyond reasonable doubt rather than determine whether the jury verdict chosen was reasonably open to the jury. As in *Christian Youth Camps Case*, President Maxwell had premised his verdict on the reasonableness of the decision taken despite the weight of contrary precedent.

101 *Cobaw*, 308 ALR at 668–69.

genuinely held religious beliefs."[102] President Maxwell's conclusion was also ironic because he partially justified it with a line extracted from a 1934 judgment of Justice Dixon, which rejected President Maxwell's conclusion.[103] President Maxwell said that Justice Dixon licensed his conclusion in *Christian Youth Camps* about the scope of the exemptions in the 1995 version of the *Equal Opportunity Act* (Vic) because Justice Dixon said all the purposes of a particular religious gift "must be directly and immediately religious."[104] President Maxwell came to that conclusion even though Justice Dixon acknowledged that gifts made to propagate religious beliefs were charitable and that "the law has found a public benefit in the promotion of religion as an influence on human conduct."[105] The 2008 panel of the High Court, which clarified the Dixon point on which President Maxwell relied, found that even though Word Investments' activities were exclusively commercial and had objects which were both charitable and noncharitable, when Word distributed its profits for charitable purposes, those profits were completely deductible under Australian federal tax legislation.[106] While Justice Kirby dissented from those 2008 conclusions on policy grounds, and some commentary expected a legislative reaction,[107] the Australian government accepted the result. President Maxwell did not accept that result but instead went out of his way to avoid following established precedents despite the dictates of judicial integrity.

Justice Redlich's dissenting judgment took a traditional course. His judgment was traditional in the Dixonian sense because he applied the intention manifested by the text of the statute and was guided by

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102 *Id.* at 650.

103 *Id.* at 665 (opinion of Maxwell P) (seizing upon Justice Dixon's statement in *Roman Catholic Archbishop of Melbourne v Lawlor* (1934) 51 CLR 1). *See Roman Catholic Archbishop of Melbourne v Lawlor* (1934) 51 CLR 1, 32 (opinion of Dixon J) ("A gift made for any particular means of propagating a faith or a religious belief is charitable . . . [b]ut whether defined widely or narrowly, the purposes must be directly and immediately religious."). Justice Dixon's statement was made in a divided High Court and had been fully considered and clarified by the High Court in a four-to-one majority judgment, six years before President Maxwell handed down his decision in *Christian Youth Camps*. *See Federal Commissioner of Taxation v Word Investments* (2008) 236 CLR 204. President Maxwell knew very well because the point was at the core of the case before him and had been thoroughly argued.

104 *Cobaw*, 308 ALR at 665 (citing *Lawlor*, 51 CLR at 32).

105 *Id.*

106 *Federal Commissioner of Taxation v Word Investments Limited* (2008) 236 CLR 234, 234–35.

107 Ian Murray, Case Note, *Charity Means Business* – Commissioner of Taxation v Word Investments Ltd, 31 SYD. L. REV. 309, 310 (2009).

established precedents and conventions. In particular, he did not impose a progressive interpretation on the statutory exemptions set out by the Victorian legislature.[108] He said that the state attorney general meant it when she said the Act had been drafted to "strike a balance between . . . the right of religious freedom and the right to be free from discrimination"[109] and that the government did not intend "to compel a person" (including a corporate person like Christian Youth Camps)[110] "to act in a way that would compromise his or her genuinely held religious beliefs."[111] The context made it clear that the legislature intended to make the exemption available to the conduct of religious persons, including corporate persons in the commercial sphere.[112]

While the *Sunol* decision showed how easy it is for modern judges to ignore or overlook an established common law right, like religious freedom, when they are required to interpret a statute that references only a potentially competing right, the *Christian Youth Camps* decision shows that it is almost impossible for a legislature to use sufficiently clear and unambiguous language to prevent judges who lack Dixonian integrity from overriding traditional human rights in favor of a personally preferred progressive agenda. Despite the assertions of Chief Justice Bathurst to the contrary in an extrajudicial speech after the *Beth Din* decision in 2018,[113] it is not simply a question of reasonable minds differing about the meaning of established legal materials.[114] His decision in that case, and those of Maxwell P and Neave JA in the *Christian Youth Camps Case*, willfully ignored that "strict and complete legalism," which Chief Justice Dixon recommended to all Australian judges as a matter of judicial integrity in 1952.

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108 *Cobaw*, 308 ALR at 729–46.

109 *Id.* at 730–31 (referring to Attorney General's explanation, earlier quoted at 649, from Victorian, *Parliamentary Debates*, Legislative Assembly, 4 May 1995, 1253 (Jan Wade, Attorney-General of Victoria) (Austl.)).

110 *Id.* at 729.

111 *Id.*

112 *Id.* at 740.

113 *Ulman v Live Group Pty Ltd* (*Beth Din Case*) (2018) 367 ALR 95.

114 The Hon. Tom F. Bathurst, Chief Just. of N.S.W., Presentation at the Aloysian Law Lunch: The Place of Religious Law in a Pluralist Society (Apr. 5, 2019).

C. The Beth Din Case *(2018)*

Because I explained the legal errors made in the *Beth Din Case*[115] in an earlier publication,[116] I have not labored them in this Article. Although the *International Arbitration Act 1974* (Cth) provides that secular judges should intervene in an arbitral dispute involving a valid arbitration clause only if it is necessary to determine the arbitral tribunal, Justice Sackar in the New South Wales Supreme Court instead invited one of the parties to amend its proceedings to focus on the arbitral tribunal's alleged contempt of his court. Rather than correct that clear jurisdictional error, the New South Wales Court of Appeal upheld Justice Sackar's contempt of court decision by a two to one majority, though the Court of Appeal reduced the penalty Justice Sackar imposed. The Court of Appeal went on to make unnecessary (and it is submitted, inaccurate) statements about the scope of religious freedom in twenty-first century New South Wales. Chief Justice Bathurst then enlarged those comments about the decisions in the *Beth Din* and *Elkerton v Milecki*[117] cases in his extrajudicial lecture to the Aloysians on April 5, 2019.

Chief Justice Bathurst's subsequent comments about religious freedom included the following:

> [I]t is difficult for a pluralist society to decide how to respond to and respect the perspectives of differing religious traditions . . . . [T]he heterogeneity in the religious traditions within our society is such that it is not feasible or desirable for the law to attempt to resolve conflicts with a religious tradition by invoking an abstract "right" to religious freedom. . . .
>
> Courts . . . have the duty . . . to resolve disputes by the application of the civil law . . . . [W]here . . . courts cannot produce a satisfactory result, then it becomes a matter that calls for a political, rather than a legal, solution. . . . The existence of alternative opinion about how this balance might be achieved does not indicate . . . that the "right" to religious freedom is under threat, but rather, it indicates that a new decision might need to be made about how those considerations ought to be balanced.[118]

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115 *Beth Din Case*, 367 ALR 95.

116 Keith Thompson, *Is the Australian Judiciary Unnecessarily Interfering with Freedom of Religion?: The Sydney Beth Din Case*, 252 ST MARK'S REV. 79 (2020) (recognizing the idea of human autonomy in both the law of contract and in religious freedom in a number of international instruments, and in the *International Arbitration Act 1974* (Cth)).

117 *Elkerton v Milecki* [2018] NSWCA 141.

118 Bathurst, *supra* note 114, at paras. 9–10.

If all that Chief Justice Bathurst was doing in the *Beth Din Case* was acting to resolve the conflict "by the application of the civil law," it might be considered that he acted with judicial integrity. But since there was ample established statutory authority, which dictated that neither Justice Sackar, at first instance, nor the Court of Appeal should have taken jurisdiction to resolve that case, we must conclude that Chief Justice Bathurst chose a progressive path that lacked judicial integrity.[119] That is not the role of a secular judge in the established Australian tradition. Common law religious freedom precedent and the International Arbitration Act of 1974 (Cth) make it clear that some matters are off limits to secular judges.[120]

It is difficult to work out the difference between judicial overreach by progressive judges, which I have identified here, and the appropriate exercise of judicial authority by the High Court of Australia to constrain an Australian parliament when that is necessary to uphold the principles of (what Chief Justice Dixon called) our common law Constitution. Suffice to say that by convention, intermediate courts of appeal in Australia do not have that constraining power,[121] and it is

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119 As observed above, when the parties to an international commercial contract have specified that they wish to settle their disputes by arbitration, but there is a question as to the identity of the arbitrator they have chosen, the *International Arbitration Act of 1974* (Cth) allows a secular court to engage in the matter, but only to identify the correct arbitrator. *International Arbitration Act 1974* (Cth).

120 As the four High Court judges in the *Wylde Case* also made clear, it was not the role of secular judges to decide a religious case either. *Wylde v A-G (NSW)* (1948) 78 CLR 224. But the *Beth Din Case* did not raise religious questions, and given the clear statutory solution available under the *International Arbitration Act of 1974*, it was progressive of Chief Justice Bathurst to suggest that the religious interests of the Jewish people involved in that dispute should be resolved in a manner that broke with convention and precedent. *Beth Din Case*, 367 ALR 95.

121 *E.g.*, *R v Young* (1999) 46 NSWLR 681. Chief Justice Spigelman decided it was not open to an intermediate court of appeal in Australia to expand the categories of evidential privilege as the Supreme Court of Canada (an apex appeals court) had done in Slavutych v. Baker, [1975] 55 D.L.R. 3d 224 (Can.). *Id. See also* R v. Gruenke, [1991] 3 S.C.R. 263 (Can.); M v. Ryan, [1997] 143 D.L.R. 4th 1 (Can.); *Young*, 46 NSWLR at 698, 700. In that same case, Justice James put it this way:

> This Court should have regard to the proper role of courts in the development of the law, as discussed in the authorities referred to in the judgments of the other members of the Court and to the fact that this Court is an intermediate, and not an ultimate, court of appeal. There is only one common law in Australia, and it is not legitimate to rely on the New South Wales *Evidence Act* as a basis for changing the common law by creating a new category of public interest immunity. Any new category of public interest immunity consisting of confidential sexual assault communications

beyond the scope of this Article to work out the metes and bounds of when the High Court of Australia has and should exercise their judicial discretion and change the law. But Justice Dixon's decision to strike down the Menzies government's Communist Party Dissolution Act of 1951 and the Mason Court's 1992 affirmation of an implied freedom of political communication in the Australian Constitution confirm that the High Court does have that authority when the dictates of the common law are strong enough.

CONCLUSION

Chief Justice Dixon's idea that judicial integrity requires Australian judges to rely on established legal materials to settle disputes where they have jurisdiction has been obscured by the idea that he was obsessed with legalism and blind to the existence of implications in the Australian Constitution. He was not blind to the existence of implications in the Australian Constitution, and his authorship of the leading majority judgment in the *Communist Party Case* against the government of his friend and mentee is a strong demonstration of his awareness of those implications.

Remarkably, Prime Minister Menzies extolled Justice Dixon's integrity after his majority judgment in the *Communist Party Case* and promoted him to the office of Chief Justice of Australia thirteen months later—despite the political disappointments he suffered in consequence of Justice Dixon's decision in that case.

Sadly, religious freedom in Australia has suffered because of a lack of contemporary judicial integrity. I have demonstrated this lack of judicial integrity by briefly discussing judgments of influential appellate court judges who have made progressive decisions in the face of established common law precedent and clear and unambiguous statutory language. I do not think those justices misunderstood the background legal materials. President Maxwell in particular was assisted by competent senior counsel and heard ample and complete arguments about the applicable religious freedom materials in the *Christian Youth Camps Case*. Despite that able assistance, he went out of his way to decide against all established precedent and the clear words of the Equal Opportunity Act of 1995, as explained by the Victorian attorney general.

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would operate especially, if not exclusively, in criminal proceedings so as to diminish the rights of criminal accused.

Id. at 748.

This Article is not a criticism of the Mason Court's "discovery" of the implied freedom of political communication. I have argued that Chief Justice Dixon would have understood and commended those decisions. Like his decision in the *Communist Party Case*, the implied freedom of political communication cases was sourced in common law materials. And for that reason, though Chief Justice Dixon may have experienced some personal angst because of his alleged support for the White Australia policy,[122] he would likely also have approved of the Mason Court's *Mabo [No. 2]* decision because it relied on the common law research of Professor McNeil.[123]

This Article is a call for Australian judges generally to ponder the nature of the judicial integrity that Chief Justice Dixon embodied and extolled when the dictates of "a strict and complete legalism" oblige them to make a decision they do not like. Commentators and judges in the United States may also ponder whether progressive judicial decisions that overrule established legal materials lack integrity. While Australian jurisprudence may be interpreted to infer that a court can overrule an established line of cases if there is an older line of preferred authority, Chief Justice Dixon would not have approved of any judge striking out on her own in the face of established authority.

This Article is also a call for the High Court of Australia to pay more attention to the common law materials, which undergird and overarch the Australian Constitution, and to regularly consider and apply them when they perform constitutional interpretation. There is, of course, much more room for research about the nature of those common law constitutional materials.

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122 Shrubb, *supra* note 28.

123 MCNEIL, *supra* note 27 (Professor McNeil's book was referred to 22 times by the judges who decided the *Mabo [No. 2]* case).