

The 1981 Australian High Court Constitutional Coup and its consequences

Wednesday, July 27, 2005

Max Wallace

In 1981 there was a constitutional coup in Australia. The Court decided there is no separation of church and state in Australia. The effects of this decision have been much worse than the Whitlam sacking in 1975. At least Whitlam had a chance to be re-elected. In 1981 no newspaper understood or reported on what the High Court had done and academia was asleep at the wheel. Also, while conservative constitutional lawyers have to an extent muddied the waters concerning the constitutionality of the Whitlam sacking, there is nothing they can say to argue there *is* separation of church and state in Australia – and they never have.

The case was the State Aid or Defence of Government Schools case. In order to explain this allegation and link it to the current surge in the phenomenon of religion in Australian politics it is necessary to sketch some history.

In the nineteenth Century Australian colonial governments were fairly secular. In particular there was a reluctance to fund religious, mainly Catholic, schools. Towards Federation there were debates as to where religion would fit in the Constitution. Eventually s.116 was drafted and it was clearly based on the US First Amendment, which states 'Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof ...

At roughly the same time the Australian founding fathers were wrestling with the draft of s.116 there was intense political activity in France that led to the formal separation of church and state in 1905 by legislation.

The Australian Constitution was formalised in 1901 - four years before the French legislation.

S.116 states that '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 for any office or public trust under the Commonwealth.'

Critically, there is no mention of separation of church and state in those words. The question was not directly addressed until the 1981 State Aid case. In the US, the First Amendment's implied separation was recognised in the 1947 Everson case. It prevented religious school funding as had many of the various US state constitutions since the nineteenth Century, and it had other consequences.

The first event that provoked the State Aid case was the decision by Sir Robert Menzies to break with tradition and give some financial aid to Catholic schools in the 1950s. The Whitlam Government in the 1970s went much further and extended aid.

By that time a movement had arisen against state aid: the Defence of Government Schools led by a Protestant Dissenter, Ray Nilsen whose group believed religion would be compromised by State funding. There was widespread support for the movement from parents and teachers who saw the funding of mainly Catholic schools as a threat to their future viability.

It took nearly twenty five years before the movement achieved the legal right to go to the High Court to fight the case. What has not been recognised is that this case was a fork in the road for Australian democracy. If the Court decided for the plaintiffs they would have recognised that s.116 meant separation of church and state in Australia, a separation that would have made religious school funding unconstitutional, as in the US. It would have taken Australia to a more open, more democratic society. Lionel Murphy alone saw the link between the First Amendment and s.116.



Thanks to [Peter Nicholson](http://www.nicholson.com.au) at the Australian

The other six judges either saw an opportunity to close off the democratic option or they decided the case in the only way they knew. The only question that remains open here is the extent of their intentionality. But either way it was a coup. Here were six men steeped in the black letter law of the British legal tradition deciding whether Australia was a US-style democracy. There was no way they were going to put republican democracy before the interests of what they stood for: Constitutional Monarchy. Eventually, they were all Knighted by the Queen. In relation to the critical question of separation of church and state here is what two of them said:

Justice Wilson: 'the fact is that s.116 is a denial legislative power to the Commonwealth and no more ... The provision therefore cannot answer the description of a law which guarantees within Australia the separation of church and state.'

Justice Stephen said s.116 ' ... cannot readily be viewed as the repository of some broad statement of principle concerning the separation of church and state, from which may be distilled the detailed

consequences of such separation.'

Believe it or not, the Court partly focused on the prepositions 'for' and 'any' in s.116 to distinguish the Australian section from its American predecessor to justify their decision.

Twenty five years later we can see the consequences of this decision: parents of private school students are getting the best education secular taxpayers money can buy. Private school parents at the same time are paying onerous fees which are higher than they need be as there is no accountability for the tax exempt income of the religions that run the schools. Public schools, as you will know, face perennial inadequate funding and the consequences of that have been dramatic for many schools and teachers.

Equally importantly, the State Aid decision choked off the possibility for the public's political education. It prevented an American/French style culture of debate about the inter-action of religions and the state from emerging. It kept us in the dark. Of course, for other reasons, the US is now on the constitutional brink of losing its last shred of credibility: its separation of powers between the executive and the judiciary, as it is expressed by Court support for separation of church and state.

So how come no one has argued this before? If you read Manning Clark there is nothing about separation of church and state. Also, the concept is almost totally absent from Australian academic and political discourse. For example, in Marion Maddox's otherwise excellent, recently published, *God Under Howard*, the State Aid case is not discussed. But the Respondent in the case on behalf of the Government, as Treasurer, was none other than - John Winston Howard.

Now the possibility is there that the new religions can use their exponentially growing tax exempt wealth to fund political parties, in the American way, albeit indirectly and possibly legally, to transform the face of Australian politics forever by influencing the outcomes of elections.

Since the election of the Howard Government in 1996 a string of decisions have favoured and enriched religions starting with the abolition of the Commonwealth Employment Service in favour of US-style faith based organisations. If separation of church and state had been formalised in 1981 these decisions may not have been possible

I write these words in France having just spoken at a conference celebrating the 1905 legislation separating church and state. If there is a central difference between our two countries it is this: historical events and the debate surrounding the French legislation helped to educate enough of the public about the necessity for separation and state neutrality towards religion. A solid block of votes has mostly excised religious influence from government. Australians have little or no idea about

separation even though our culture is secular and church attendance is low, as in France.

If we do not legislate to introduce separation of church and state in Australia, at both levels of government, we will remain what we are: secretive soft theocracies being overtaken by politically motivated religious parties who want to impose their will on us by undoing progressive legislation, coercing our culture towards fundamentalist 'values', with the ending of a woman's right to abortion on their long term agenda. They will use the weight of their tax exempt income as they have in the US.

But this is not just a 'left' issue. As government minister, Joe Hockey, said in the Parliament on 21 August 2002:

'I do not believe, as do some of my colleagues, that it is the role of government to preach and legislate morality. This is not a church and I am not standing in a pulpit. As an elected representative of the Australian people, it is not my role to exclusively impose my values on others ... this Parliament is not for moralistic crusades.'

(For the commercial revolt against religious privileges see Business Review Weekly 24-30 March 2005 and subsequent issues.)

I suggest the idea of legislating for separation of church and state in any Australian jurisdiction would give citizens concerned about what is happening about religions' involvement in politics, an issue around which to coalesce. The debate would lead to questions too long ignored that demand answers. For example, what would separation legislation seek to achieve in republican terms? And, if political parties are *not* in favour of legislating for separation of church and state, what are their *reasons*?

I invite your response.

About the author

Max Wallace is a Canberra academic. His book, *The Purple Economy: secular essays on material and ideational culture*, is forthcoming.

Published Comments

What's your opinion? Tell us what you think by adding a comment to offer feedback on this story.

Hallelujah, Max, if you will excuse the expression. The tragedy of the State Aid case cannot be overstated. Philosophically, politically and socially the fall out has been, and will continue to be, toxic. We have already basically excluded a sizeable percentage of our kids from equal participation in the workforce, economy and, therefore, the good life. We are so busy building a class system, aided and abetted by, not just a cynical and self interested government, but churches and their schools, that the idea of succeeding on merit is now just that, an idea, rarely a reality. All of us will reap the whirlwind on this one. And I agree, the ramifications of no separation of powers will spread much further than schools.

I keep waiting for a Christain leader, somewhere (and I believe Vinnies have done it) to denounce the absolute unfairness of our education system.

I often wonder, if Jesus returned to earth (and I'm not a Christian) would he visit Kings or Abbotsleigh or Geelong Grammar? Or would he go to Liverpool Public, Nepean High and Bidwill?

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Max the law is an ass. Separation of powers has no force or effect if it is not supported by the community and the state apparatus. Any challenge to be sustained would require enormous resources and long legal cases. As one can see in the US the media is so dominant that the state can get away with murder - literally. The hypocrisy is so blatant as to be sickening. Add to that the stacking of the High Court means there will always be a way out for those who want to retain the status quo.

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One of the problems with the issue of governement money for non-government schools is that since the 1880s there have always been so many issues and agendas, some acknowledged and some either unacknowledged or denied. In the 1880s many Protestans, Baptists and evangelicals especially were against state aid because they saw the need for a break between church and state. Some were against them because they were anti-Catholic. The Catholics wanted their own schools. Some of their reasons were genuinely religious. Some were social; there's no better way to form a community than to have a fight and to have an obvious enemy. Some were ethnic and had a lot to do with what was going on in Ireland at the time. Migrant minorites still open their own schools to keep their languages, customs and ethnic identity alive and so that their young will 'marry in'.

Ironically many of those who were fiercely against Catholic schools from 1880 until the 1970s now use the political gains(?) Catholics made to have their own Christian schools or evangelical schools. Of course they are aided by the government's ideology of privatisation. It is an interesting lesson in unintended outcomes. I was a student at a very inadequate Catholic school in the NSW country in the 1950s. We had poorly trained teachers, often bad teaching and seriously inadequate facilities. For many of my contemporaries it was a high price to pay for being a member of a community.

I expect that some of the judges had more than one agenda when they supported money for Catholic schools. I'd have loved them to have been around in 1950. I didn't choose the school I went to; Catholic parents didn't really choose either in the 1950s. There was enormous social pressure on them that is hard to imagine now. If I were a judge I'd vote to give all kids a fair chance at an education no matter what their parents were in thrall to, especially if the parents were like mine and were uneducated themselves. It is the kids from educationally deprived homes where parents don't know what to choose, and really have no choice that I care most about.

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An excellent piece of work, max, except for two points where I think you've gone off the track a ways. From my vantage point of working for the Anglican Church (Diocese of Perth) I know of no financial benefit derived by the Church from the schools which bear the label "Anglican" - not from fees, nor from government funding, nor from trust funds.

The same has to be said for church-based employment programs. The contract terms simply do not allow transfers to the auspicing bodies.

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It is interesting to speculate on future developments in this area. Will the government be even handed or will it demand more accountability from Muslim Schools than from Christian Evangelical schools. We have heard precious little about the 'Catch the Fire' religious vilification case that went to VCAT and was won by the Muslim protagonists. The Christian right was talking about trying to have the Religious Vilification laws rescinded but everything has gone very quiet recently. Surely this can be nothing to do with the London bombing?

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The government demands virtually no accountability from private schools, despite the extremely high public subsidies many receive -up to 90% of their income in some cases. They must teach the curriculum and obey the law, that's about it. We have a weird system that says such schools are private when it comes to who they will educate, what rules and regulations they will implement, but public when it comes to the handing out of money. All schools that receive public money should be equally accountable and subject to open public scrutiny, not just those called "public" schools. That is another failure of State Aid, the current govt has deregulated the private sector as if they were actually private. They are not, they are govt subsidised.

As I have pointed out in past articles on NM, virtually no other organisations receive so much public money (\$2-3 million pa in some cases) with so little accountability. Private schools and State Aid have become sacred cows, and the most disadvantaged kids in our community are the ones who are paying the price.

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Many thanks to those who reponded to my article. Some very brief reponses: (1) To Howard Hodgens. Separation of church and state could be achieved by legislation. The point at the Federal level would be to override the finding in the State Aid case. At the State level, as there is no mention of religion in their constitutions, there is nothing to prevent the legislation and appeal to the courts against it, would, one would think, be futile. The Territories have Self-Government Acts and the legal situation there could be more complex. (2) Graham English. I deal with this q. at some length in my book. Briefly, the Catholic Church acts like a corporation world wide. It seeks to socialise costs and privatise profits. It socialises costs by persuading governments by political means that they should subsidise Catholic schools. It privatises profits by its exemptions from taxation. The point is to maximise its income. When Catholic schools systems were started in Australia and New Zealand they were started without government assistance. That is also true in 37 American states where they do not receive assistance (with qualifications) to this day. Briefly, these schools could have been funded by the Vatican when they started to run down but that is not how the corporation works. It pressures governments, as I say, politically, and if that does not work, it pressures Catholic parents to pay, as in the US. But there is more: when they get the \$12B from the Australian Government each year they distribute it in ways that are not transparent. Hence 'poor' Catholic schools alongside the elite. As Jane Caro says, there is no accountability. Also, when they were crying poor in the 1950s they were simultaneously running commercial Magdalen Laundries in Aust/NZ where girls and women were kept in unpaid servitude. All the profits unaccountable and tax exempt. It's likely they would have also had other sources of income as they are now the largest property holders in Australia. What

*they say and what they do. There should be no 'poor' schools of any kind. Despite their policy of church-state separation, the French Govt does subsidise Catholic schools but with strings attached. (3) Theo Mackaay. A possible explanation for Anglican schools operating independently could be, as in the example above, a lack of transparency in the way funding is distributed. Your example does not seem to square with other examples to the contrary. The Anglican Church is a multi billion dollar organisation. How they spend their money is clear in some instances and importantly, the Anglicans have said they would support the creation of a Charities Commission while the Catholic Church opposes it. (See www.cdi.gov.au)(4) Jo Lewis. There should be no religious vilification laws as religion is not a special case. Defamation law reform could protect their interests. On current politics, after London, see Polly Toynbee, *The Guardian*, 'In the name of God', 22 July 2005. (5) Jane Caro. Second contribution speaks to Theo's doubts. Both contributions gratefully accepted.*

Sunday, July 31, 2005