MAKING SENSE OF RELIGION AND THE CONSTITUTION: A FRESH START FOR SECTION 116

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The High Court is not often called upon to decide civil liberties questions under the Constitution, and so, for example, usually examines federal legislative power as it impacts upon the States or other branches of the federal government rather than upon citizens. As such, the Court has developed a methodological approach best suited to its more familiar constitutional work, one which peers through a federalism rather than a civil liberties lens.

That approach is found wanting when the Court turns to unfamiliar kinds of constitutional provisions. This article will focus on s 116 and will argue that the existing approach to that section is unsupported by principle. The Court has lamented the obscurity of the provision while attempting valiantly to discern its meaning and define its application using unsuitable tools: characterization and text-based legalism. The result has been to confirm the impression of its strangeness.

The process of characterization used to establish whether a law is one 'with respect to' an enumerated subject matter of federal legislative power in s 51 requires, first, that the meaning of the subject matter be identified and secondly, that the Court decide whether the law is one with respect to that defined subject matter.[1] Where a law operates on its face on the activity or thing which is the core of the subject matter, then legislative motive, even as discerned from the law itself, and practical effect are generally irrelevant.[2] For example, a law imposing environmental conditions on the grant of export licences remains a law with respect to overseas trade and commerce even though its apparent purpose is not so much the regulation of that commerce as protection of the environment, which is not a discrete subject matter of federal power.[3] Equally, an invalid law generally regulating the hair length of people in Australia is not made valid in its application to aliens merely because the federal legislature may make laws with respect to aliens; the law is general on its face, displaying no connection with aliens, and so cannot be preserved as a law with respect to aliens.

This article suggests that the characterization technique which looks at a law on its face in this way in not appropriate to s 116 and that, because the High Court has merely assumed that its traditional methodology will suffice in interpreting s 116, without addressing other possibilities, the case law on

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1 See generally L Zines, *The High Court and the Constitution* (3rd ed, Sydney, Butterworths, 1992), pp 16–33.

2 Id pp 25–6.

3 See *Murphyores Incorporated Pty Ltd* v *The Commonwealth* (1976) 136 CLR 1.

the section is inconsistent with its function in the Australian constitutional structure. The assumption that s 116 is concerned primarily with legislative power rather than civil rights has led the Court to apply it by examining a challenged law on its face rather than as it affects citizens in practice. The text of s 116 neither supports this assumption nor provides an alternative method. In these circumstances, it becomes necessary to investigate the background and formation of s 116 and reorient its interpretation. Identification of the conception underlying the section is put forward as a sounder basis for approaching the interpretive task, and one suited to replacing the legalism which imbues the case law.[4]

The article argues that the impulse animating s 116 is the preservation of neutrality in the federal government's relations with religion so that full membership of a pluralistic community is not dependent on religious positions and divisions are not created along religious lines.

JUDICIAL INTERPRETATION OF SECTION 116

Section 116 is in these terms:

> 'The Commonwealth shall not make any law [(i)] for establishing any religion, or [(ii)] for imposing any religious observance, or [(iii)] for prohibiting the free exercise of any religion, and [(iv)] no religious test shall be required as a qualification for any office or public trust under the Commonwealth.'

The major textual arguments can be outlined by comparison with the American provisions, which are drawn upon below.[5]

The first and third clauses of s 116 have their American companions in these words of the First Amendment:

> 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .'

The fourth clause follows cl 3 of Art VI of the United States Constitution:

> '[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.'

The second clause has no corresponding American provision. Similarly, the preamble to the Australian Constitution contains words without American equivalents:

> 'WHEREAS the people . . ., humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth . . .'

[4] A similar methodology is employed in the American context by A M Adams & C J Emmerich, 'A Heritage of Religious Liberty' (1989) 137 *U Pa L Rev* 1559, isolating the 'core value' and 'animating principles' of the American religion clauses.

[5] The major cases are conveniently discussed by N K F O'Neill, 'Constitutional Human Rights in Australia' (1987) 17 *FL Rev* 85, 100–12.

One significant difference concerns the respective ambits of s 116 and the First Amendment. In the United States, the religion clauses apply to the States by virtue of the due process clause of the Fourteenth Amendment.[6] In Australia, a referendum in 1988 proposing a constitutional amendment to this effect failed.[7]

Secondly, the framework surrounding the provisions is notably different. The First Amendment heads a comprehensive Bill of Rights and the religion clauses are its opening words. Section 116 is placed incongruously in a chapter towards the end of the Australian Constitution entitled 'The States', although it makes no reference to the States. This sense of incongruity has come to epitomize s 116 and to be reflected in its interpretation.

Frequently, however, it has been more subtle differences which have attracted judicial attention. For example, s 116 speaks of a law 'for establishing' any religion or 'for prohibiting' its free exercise, while the First Amendment uses the form 'respecting an establishment . . . or prohibiting . . . free exercise'. Australian courts have emphasized the word 'for', arguing that it demands an inquiry into legislative purpose while 'respecting' looks only to a connection between law and subject matter. It is more difficult to show that a law is made 'for' a particular purpose than to show that it merely has a connection with a given subject matter. Similarly, s 116 contains four clauses which, it is said, must each have been intended to have some purpose. To construe one clause broadly, especially the establishment clause, could render the others redundant.

The leading case on the free exercise clause, the *Jehovah's Witnesses* case,[8] stands only for the narrow proposition that a person cannot seek to overthrow the constitutional system of government in the name of religion, hardly a surprising result. Despite differences in approach, all justices rigorously analysed the text of s 116. Latham C J toyed with an attempt to identify the purpose of the unfamiliar constitutional provision at the outset, favouring a flexible test of 'undue infringement' of religious freedom, but ultimately fell back on traditional textual arguments to produce a test of a kind familiar from the characterization process: could the law fairly be regarded as one to protect the existence of the community rather than one for prohibiting the free exercise of religion? Similarly, Starke J looked to what laws are 'reasonably necessary . . . in the interests of the social order', McTiernan J looked to the 'real object' of the law and Williams J envisaged a process of characterizing laws as 'ordinary secular laws' with only an 'indirect effect' on religion.

The Court attempted to discern the 'purpose', 'object' or 'effect' of the law primarily from the face of the law itself rather than by considering its impact on those it affected. It followed a familiar approach, finding virtually

[6] The religious test provision of ArtVI of the United States Constitution applies only to the federal government. But state religious tests have been examined under the free exercise and establishment clauses.

[7] *Constitution Alteration (Rights and Freedoms) Act* 1988.

[8] *Adelaide Company of Jehovah's Witnesses Inc* v *The Commonwealth* (1943) 67 CLR 116.

superfluous support in the section's use of the word 'for'.[9] Yet by speaking at once of legislative powers and protected freedoms, the guarantees of s 116 become merely a lacuna in federal legislative power, a power which is limited only when the purpose of making a law is to prohibit the free exercise of religion.

The establishment clause has met a similar fate. Since 1964, the federal government has made financial grants to the States, conditioned upon being used solely for educational purposes, but not for erecting buildings whose principal objects include provision of facilities for religious worship.[10] The funds are passed on by the States, subject to the conditions, to churches for use in church schools. In 1980, the federal action was challenged unsuccessfully under the establishment clause.[11]

Again the Court saw the clause as an anomaly whose secrets could be discovered only by a rigorous examination of its text. And again the outcome was a test demanding characterization of the impugned law on its face. Only Murphy J dissented, insisting that s 116 must be read with all the generality which its words admit, as are grants of legislative power. Murphy J emphasized that '[g]reat rights are often expressed in simple phrases'[12]. Section 116 was not 'a clause in a tenancy agreement' but 'a great constitutional guarantee of freedom of and from religion'.[13]

The premise that the establishment clause is a limitation on federal power rather than a guarantee of personal freedom guides the Court in a remorseless dissection of the text to produce a test considering only whether a law is one 'for' a forbidden establishment. If the clause were construed as a guarantee of civil liberty, the focus might shift from such a characterization of a law to its impact on the citizen. By again seeing an individual liberty merely as the obverse of federal power, the Court obscures this possibility.

More recently, the *Church of the New Faith* case[14], which concerns s 116 only indirectly, is significant for the approach of the Court in addressing the question of religious liberty. The issue was whether the Church of Scientology was a 'religious or public benevolent institution' exempt from pay-roll tax.

Mason ACJ and Brennan J noted that '[f]reedom of religion, the paradigm freedom of conscience, is of the essence of a free society'; as such, a definition of religion has the 'chief function' of marking out the scope of that freedom, and 'affects the scope and operation of s 116 . . . and identifies the subject-

[9] Normally a law is regarded as being with respect to a given subject matter if it has an incidental (but not simply remote) effect on that subject matter. However, under the free exercise clause, the question asked has been whether the 'purpose' of the law is to prohibit religion. As such, an 'incidental' effect is beyond the purpose which is the focus of inquiry.

[10] See New South Wales Anti-Distrimination Board *Discrimination and Religious Conviction* (1984), pp 296–300; P H Lane, 'Commonwealth Reimbursement for Fees at Non State Schools' (1964) 38 ALJ 130.

[11] *Attorney-General (Vict); Ex rel Black* v *The Commonwealth* (1981) 146 CLR 559.

[12] Id p 623.

[13] Ibid

[14] *The Church of the New Faith* v *Commissioner of Pay-roll Tax (Vict)* (1983) 154 CLR 120.

matters which other laws are presumed not to intend to affect'.[15] They stressed that minority religions stood 'in need of especial protection', citing the opinion of Latham C J in *Jehovah's Witnesses*, and continued:

> 'Protection is accorded to preserve the dignity and freedom of each man so that he may adhere to any religion of his choosing or to none . . . [T]he variety of religious beliefs which are within the area of legal immunity is not restricted.'[16]

Although not a constitutional case, the emphasis in *Church of the New Faith* on the rights of the individual, rather than the scope of legislative power, reveals an outlook on religious freedom which may point towards a fresh understanding of s 116.

PROBLEMS WITH CURRENT APPROACHES

It is first necessary to seek a justification within the Constitution for the Court's preconception of s 116 as a regulator of federal power calling for judicial characterization of impugned laws, rather than as a guarantee of individual rights regardless of the characterization of those laws. The difficulty is that any guarantee of individual liberty is also at least a prohibition against certain kinds of laws.[17] The text alone does not suggest whether or not s 116 is intended to be more than this, by protecting citizens against certain kinds of treatment as well as certain kinds of laws. A law may effect adverse treatment without itself being a law of the prohibited kind.

The Court has made little attempt to justify the outlined conception. Gibbs J attempted an accommodation in the *State Aid* case by acknowledging that the free exercise clause has 'the purpose of protecting a fundamental human right'[18]; yet he asserted that there was 'no reason' to give the establishment clause 'a liberal interpretation'.[19] He did not explain how he had identified the relevant 'purpose' of each clause.

The only suggested textual support for regarding s 116 as primarily a regulator of federal power is the word 'for', supposedly denoting purpose. On this ground alone, the Court has examined the purpose of an impugned law rather than its actual effect in connection with the forbidden kinds of action.[20] Purpose has been discerned using traditional characterization techniques. However, since 'for' could mean 'in connection with' or 'to the effect that' just

[15] Id p 130.
[16] Id p 132.
[17] Similarly, the fact that s 116 does not bind the States does not mean that it is not essentially a guarantee of individual rights as against the federal government; but cf per Wilson J in the *State Aid* case, supra fn 11, p 652.
[18] Id p 603.
[19] Id
[20] This is not to deny that the inquiry into purpose may involve an examination of the legal effect or even the practical effect of the law in question, but to draw attention to the fundamental reason for the inquiry.

as it could mean 'for the purpose of',[21] this is a tenuous basis for directing the whole interpretive enterprise.

Similarly, the arguments in the *State Aid* case demonstrate that the meaning of the word 'establishing', both now and in 1900, is a matter of obscurity. Several justices remarked on the lack of underlying rationale for s 116, effectively seeking to identify the connotations of its words without the full assistance of their historical context. Their analysis reveals that case law on the establishment clause of the First Amendment was not conclusive in 1900, whatever its relevance in ascertaining the intention behind s 116.

It is not difficult to demonstrate similar alternative textual readings of other supposedly crucial words in the section. The judgments themselves are testimony to the section's possible meanings. In the face of this array of impressionistic interpretations, we must look further to understand the section's meaning. The text fails to suggest a principled rationale for its existence, but one may be sought using permissible extrinsic aids to interpretation. Not to do so risks reliance on preconceptions unsupported by the Constitution.

There is a further reason to seek an underlying conception to support interpretation of s 116. The text-based method of legalism[22] traditionally practised by the High Court, involving the strict use of legal reasoning to create an appearance of objective judicial decision-making, is increasingly under question. Recognition that the Court cannot avoid making policy decisions, regardless of the technique by which it explains its results,[23] has led to demands that the Court state explicitly the policies applied in its decisions, so that the value choices made are apparent for public appraisal.[24] Such an approach would accept that legalism is not a neutral but an arbitrary method which 'cannot achieve the level of objectivity upon which its legitimacy depends'.[25] However, this suggested method may itself fail to preserve judicial neutrality unless overarching values or policies can be discerned in the Con-

[21] The uniform use of 'for' results from a drafting admendment; see text accompanying notes 93–4.

[22] See S H Kadish, 'Judicial Review in the High Court and the United States Supreme Court' (1959) 2 MULR 127, 128–9, 151–5; R C L Moffatt, 'Philosphical Foundations of the Australian Constitutional Tradition' (1965) 5 *Syd LR* 59; G Evans, 'The High Court and the Constitution in a Changing Society', in A D Hambly & J L Goldring (eds), *Australian Lawyers and Social Change* (Sydney, Law Book Co. 1976), p 37–41, 64–73; M Coper, 'The High Court and the World of Policy' (1984) 14 *FL Rev* 294; S Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) 17 *FL Rev* 162, 175–6; B Galligan, *Politics of the High Court* (St Lucia Qld, University of Queensland Press, 1987), pp 39–40, 175; A F Mason, 'Future Directions in Australian Law' (1987) 13 *Mon ULR* 149, 155–9; Zines, supra fn 1, pp 340–7, 381–382; M H McHugh, 'The Law-making Function of the Judicial Process — Part II' (1988) 62 *ALJ* 116, p 124; G Craven, 'Cracks in the Facade of Literalism: Is There an Engineer in the House?' (1992) 18 MULR 540.

[23] See *Melbourne Corporation* v *Commonwealth* (1947) 74 CLR 31, 82; Evans, supra fn 22, pp 64–73; H Charlesworth, 'Individual Rights and the Australian High Court' (1986) 4 *Law in Context 52*, 65–6; A F Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and United States Experience' (1986) 16 *FL Rev* 1, p 5; Gageler, supra fn 22, pp 176–7; Zines, supra fn 1, pp 364–5.

[24] See Mason, supra fn 23, p 5, 27–8, and the writings referred to in fn 22.

[25] Gageler, supra fn 22, p 181.

stitution.[26] The search for such values and policies can take place in the case of s 116, so that the legalistic approach may give way in that context to explicit articulation and justification of policy and value choices.[27]

RELIGION IN EARLY AUSTRALIAN SETTLEMENT

1 New South Wales

Shortly before setting sail to establish a penal settlement in New South Wales in 1788, Governor Phillip received instructions from the English government containing hopeful words about the intended role of religion in the new colony:

> 'And it is further our royal will and pleasure that you do by all proper methods enforce a due observance of religion and good order among the inhabitants of the new settlement, and that you do take such steps for the due celebration of public worship as circumstances will permit.'[28]

George III had already appointed a chaplain for New South Wales under the Governor's direction.

Early Governors issued orders for the observance of the Sabbath and compelling 'every Description of Persons' to attend divine service,[29] meaning the Anglican service. But relations between the civil authorities and the churchmen appointed under their control were not good. While the Governors recognized a need for some moral instruction and were sympathetic to Christianity, their primary concerns were pragmatic ones involved in establishing the colony.[30]

Gradually, various religions received official recognition and support. The imperial government approved a salary for a Roman Catholic priest in 1803, and in 1819 the appointment of two further priests under government salary was approved.[31] In 1822, Governor Brisbane promised to match private contributions with public funds for building a Catholic chapel.[32]

Macquarie recommended against allowing the immigration of Methodist preachers in 1816, but allowed one to stay; a stipend for a Presbyterian minister was provided in 1825. Congregationalist ministers were permitted, as were Quakers, Baptists and missionaries.[33] While the various denominations developed their followings with official sanction, religion remained under state control and significantly reliant on state support.

[26] Id p 196.
[27] See, for example, *Cole* v *Whitfield* (1988) 165 CLR 360; *Street* v *Queensland Bar Association* (1989) 168 CLR 461; Zines, supra fn 1, p 361.
[28] *Historical Records of Australia* I, i, 14.
[29] 29 November 1799 and 1 March 1804; see J Woolmington (ed), *Religion in Early Australia* (Stanmore, NSW, Cassell Australia, 1976), 2–4.
[30] See J Barrett, *That Better Country: The Religious Aspect of Life in Eastern Australia, 1835–1850*, (Victoria, Melbourne University Press, 1966) pp 11–2.
[31] See generally Woolmington, supra fn 29, pp 30–4.
[32] Id pp 36–7.
[33] See generally Woolmington, supra fn 29, pp 46–62; Barrett, supra fn 30, p 13.

Governor Bourke warned in 1833 of the danger of a 'dominant and endowed Church' in New South Wales, pointing to the presence in the colony of persons 'of all religious persuasions'.[34] He approved of government aid for churches during their early years, but looked forward to a time when the churches would 'roll off State support like saturated leeches'.[35] While his emphasis was on the 'principal Christian Churches in the Colony', Bourke seemed willing to extend aid to Dissenters and Jews.

Accordingly, Bourke proposed the *Church Act* 1836[36], providing public funds to match private contributions for the building of churches, chapels and ministers' dwellings, up to a set limit, and state stipends for ministers of religion based on the size of their respective congregations.[37] Funding was available for 'any denomination of Christians', but Barrett stated that:

> 'No recognized denomination was excluded from government benefits if they were asked for, and the acceptance of this principle of religious equality was probably more important to the colonial community than the aid itself.'[38]

The Act endorsed the concept of religious tolerance, and the special legal status of the Church of England was replaced by a notion of equality. Given the diverse denominational fabric of colonial society by this state and the earlier arrangements for assisting religion, the Act's mechanism for distributing financial assistance seemed to reflect a belief in religious equality.[39] The state had become actively religious in a non-sectarian way; by 1841 eight per cent of the New South Wales budget was spent on financial aid to religion.[40]

Religious tolerance was based largely on a concern for religion. All the major denominations 'believed that equality furthered the cause of Christianity, and certainly it furthered the immediate progress of their respective Churches'.[41] However, the manner of distribution of state aid to religion ultimately became controversial, leading to the abandonment of state aid. Moreover, increasing dissatisfaction with the education system and calls for generally available public schooling regardless of religious affiliations gradu-

[34] Letter to Lord Stanley, 30 September 1833, *Historical Records of Australia* I, xvii, 224–30.

[35] Quoted by J S Gregory, *Church and State: Changing Government Policies Towards Religion in Australia* (Victoria, Cassell Australia, 1973), p 15.

[36] 7 Will IV c3; see *Canterbury Municipal Council* v *Moslem Alawy Society Ltd* (1985) 1 NSWLR 525, 537–8.

[37] A similar arrangement was inaugurated in Van Diemen's Land in 1837.

[38] Supra fn 30, pp 38–9. Until 1839 only the three major Christian denominations (Anglican, Catholic and Presbyterian) received aid under the Act, but Methodists and Baptists later received smaller amounts: see R Border, *Church and State in Australia 1788–1872*, (London, SPCK, 1962), p 93.

[39] Barrett, supra fn 30, p 41.

[40] Id pp 46–7. See also Gregory, supra fn 35, p 13.

[41] M Roe, *Quest for Authority in Eastern Australia 1835–1851*, (NSW, Halstead Press, 1965) p 133.

ally undermined church control of education. Public schools were established, although state aid to denominational schools initially continued.[42]

2 Victoria and Queensland

After Victoria separated from New South Wales in 1851, it provided greatly increased state aid to religion, limited explicitly to Christian churches. Gregory describes the motivating political forces as sectarian rather than secular at this time. But concern about religious preferences soon grew.[43]

Victoria, Queensland and New South Wales eventually instituted general public education systems and abolished state aid to church schools.[44] State aid to religion had been abolished in Queensland in 1860.[45] In Barrett's view, these reforms did not indicate any 'new scorn of religion in private and community life'.[46] Gregory agrees that the Victorian system of 'compulsory, free and secular' public education was not a sectarian measure against the growing Catholic influence in Victorian education, but was intended to end sectarian divisions.[47] The cessation of state aid in Victoria in 1870 pleased the Presbyterians and Wesleyans and elicted little objection from Roman Catholics and Anglicans; Gregory asserts that reform was motivated by 'a determination to make the State, in action and in law, the symbol of a common citizenship'.[48]

The reforms did not evidence state hostility toward religion. The most 'secular' was the new Victorian system, but even there school buildings could be used outside school hours for any lawful purpose and a weekly half-hour of religious instruction was allowed from 1883.[49] However, school materials were severely expurgated to remove religious subject matter.[50] The New South Wales system was less strict, providing some religious instruction by public teachers, from which parents could withdraw their children. Further, one hour could be set aside daily for instruction by visiting clergy using special classrooms.[51]

[42] *Barrett*, supra fn 30, pp 111–4. A similar development occurred in Tasmania: id pp 115–136.

[43] So, the Victorian Legislative Council decided not to open its sessions with prayers and the Constitution made ministers of religion ineligible for membership of Parliament. See generally Gregory, supra fn 35, pp 47–67. Prayers were introduced in the Legislative Council in 1856, but not in the Legislative Assembly until 1928.

[44] Public education systems were established in 1872 in Victoria, 1875 in Queensland and 1880 in New South Wales. State aid to church schools was formally abolished in 1870, 1875 and 1883 respectively.

[45] See PC Gawne, 'State Aid to Religion and Primary Education in Queensland, 1860' (1976) 9 *Journal of Religious History* 50; R Lawson, 'The Political Influence of the Churches in Brisbane in the 1890s' (1972) 2 *Journal of Religious History* 144.

[46] Supra fn 30, p 205.

[47] Supra fn 35, p 140. On destructive sectarianism in Victoria at this time, see G R Quaife, 'Religion in Colonial Politics: State Aid and Sectarianism in Victoria 1856', (1978) 10 *Journal of Religious History* 178.

[48] Supra fn 35, p 123, 118.

[49] Id pp 144–5, 185.

[50] Id pp 172–4.

[51] See W Phillips, *Defending 'A Christian County'* (St Lucia, Qld, University of Queensland Press, 1981), 208–11.

The colonists evidently wished to avoid the sectarian divisions which were exacerbated by the appearance of state preference for one denomination over others. Although there were advocates for a stricter separation, the abolition of state aid appeared as a response to practical difficulties encountered in the previous system. The colonial governments were not distancing themselves from religion by any impenetrable wall of separation:

> 'Church and State in New South Wales were tied, not by one cord, but by several slender threads; although one might be cut or weakened others remained.'[52]

Victoria had cut more threads than New South Wales, but the general picture was not radically different. Church/state interaction was accepted. In 1863 Victoria exempted churches and minister's residences from local property taxes.[53] By 1899, the Catholic Church successfully had Queensland state scholarships extended from public to church schools.[54] Church influence continued through Sunday observance laws, which were enforced strictly, for example by punishing theatre owners for opening on Sunday.[55] Controversy surrounded the opening of art galleries, the giving of public lectures and concerts and the Sunday operations of government trains.[56]

3 South Australia

South Australia was founded in 1836 as an ambitious exercise in 'civil liberty, social opportunity and equality for all religions'.[57] The colony displayed great religious zeal, but the principle of liberal equality was practised with enthusiasm, just as in New South Wales, Victoria, Queensland and Tasmania:

> 'To a large proportion of the settlers, irrespective of denomination or the intensity of their interest in religion, [religious liberty] meant the absence of any politically dominant church such as they had left behind in England . . . Denominations were to be equal in the eyes of the state, with no favours shown and a fair field for all.'[58]

Religious diversity was again encouraged to allow room for religion to breathe, free of sectarian struggles for state favours.

South Australia also experienced repeated controversies over state aid. Pike concludes that the dominant ideals there in the 1850s were equality and

[52] Id p 206; cf Gregory, supra fn 35, pp 161–5.
[53] 27 Vict c176, s 181; see Gregory, supra fn 35, p 203.
[54] See Lawson, supra fn 45, p 159.
[55] See W Phillips, 'The Churches and the Sunday Question in Sydney in the 1880s' (1970) 6 *Journal of Religious History* 41. In 1890 the Supreme Court of New South Wales dismissed a defence argument that the laws could not apply because there was no established Church in New South Wales; the Court was not concerned that the laws might nonetheless be religiously motivated. Indeed, in 1894 Christianity was declared to be part of the common law of New South Wales: *R* v *Darling* (1884) 5 LR (NSW) 405, 411.
[56] See Phillips, supra fn 51, pp 171–193.
[57] D Pike, *Paradise of Dissent: South Australia 1829–1857*, (2nd ed, Melbourne, Melbourne University Press, 1967) p 3.
[58] Id p 249.

individualism, carrying with them an antipathy towards denominational exclusivity and Church interference in politics.[59] This anti-sectarian endorsement of religion encapsulates the dominant mood of the remainder of the century throughout Australia.

FORMATION OF SECTION 116

Meanwhile, the central issues in the federation debate concerned economics and the political balance between the new federal government and States; questions of religious freedom and Church/state relations were hardly addressed.[60]

Representatives of the six Australian colonies and New Zealand agreed in 1890 to invite their Parliaments to appoint delegates to discuss federation. Before the ensuing convention in Sydney in 1891,[61] Tasmanian Attorney-General Inglis Clark prepared a draft constitution drawn mainly from United States and Canadian sources.[62] Believing that religious organizations tended to subvert civil as well as personal religious liberty,[63] Clark included the following clauses:

> '46. The Federal Parliament shall not make any law for the establishment or support of any religion, or for the purpose of giving any preferential recognition to any religion, or for prohibiting the free exercise of any religion.
>
> . . .
>
> 81. No [State] shall make any law prohibiting the free exercise of any religion.'[64]

The Convention appointed a drafting committee which accepted cl 81 but omitted cl 46 as unnecessary since the Commonwealth was thought incapable of legislating about religion in any event.[65] The Convention agreed[66] and the resulting draft was submitted to colonial legislatures for approval.

However, internal politics intervened and public interest in federation declined. It may be questioned how great public interest had been anyway;

[59] Id pp 202–3.

[60] See generally: J A La Nauze, *The Making of the Australian Commonwealth* (1972); W G McMinn, *A Constitutional History of Australia* (Melbourne, Oxford University Press, 1979), pp 92–118.

[61] The delegates were selected directly by the colonial legislatures: see La Nauze, supra fn 60, p 22.

[62] See generally: J Reynolds, 'A I Clark's American Sympathies and his Influence on Australian Federation' (1958) 32 ALJ 62; J M Neasey, 'Andrew Inglis Clark Senior and Australian Federation' (1969) 15 *Australian Journal of Politics and History* no 2, 1.

[63] R G Ely, 'Andrew Inglis Clark and Church-State Separation' (1975) 8 *Journal of Religious History* 271, 273–4.

[64] See Reynolds, supra fn 62, p 71. It is unclear why Clark did not regard an establishment or support clause as necessary at state level.

[65] See R G Ely, *Unto God and Caesar: Religious Issues in the Emerging Commonwealth 1891–1906* (Melbourne, Melbourne University Press, 1976), p 1.

[66] *Official Record of the Debates of the Australasian Federal Convention* (rep. 1986) (hereafter 'Debates'), vol ii at 962. The Convention appears to have passed over the issue without discussion: id p 883.

certainly the envisaged procedures involved only very indirect popular input into the new Constitution.[67] Ultimately the Premiers agreed in 1895 to the popular election of delegates to another Convention to draft a new Constitution for submission for popular ratification. The necessary laws were enacted by all colonies except Queensland.[68]

Ten delegates from each of the five participating colonies were chosen and the drafting process recommenced in Adelaide in 1897. La Nauze detects a 'distinct change of tone' since 1891 in favour of democratic ideals.[69] Moreover, by this time religion had become a larger question.

The development of religion as an issue in the federal movement is traced by Ely.[70] At a convention held in Bathurst in 1896 to generate popular support for federation, an attempt to record agreement to the invocation of divine assistance for the federal project was unsuccessful. However, in 1897 the New South Wales Council of Churches, representing the major Protestant denominations, sought recognition in the Constitution of God as the supreme ruler of the world and ultimate source of law.[71] On the other hand, the new Seventh Day Adventist religion opposed such recognition, fearing that it could lead to national laws forcing its adherents not to work on Sundays. More generally, they opposed the mixing of religion and the state:

> '[E]ach has its particular sphere and . . . the realm of one is in no sense the realm of the other . . . [W]e are opposed to anything and everything tending towards a union of religion and the civil power'.[72]

Public discussion forced the 1897 Convention to consider the recognition question. In early April, John Quick unsuccessfully moved to amend the preamble by referring to the invocation of divine providence.[73] Later, Patrick Glynn noted a popular consensus that the Constitution should recognize the existence of God and moved an appropriate amendment. Barton warned of the potential for dissension that such recognition would create and the motion was quickly lost.[74]

Although the decision was ultimately reversed, Barton's speech opposing recognition appears to express the Convention's mood about the proper role of religion in the Constitution:

> 'The whole mode of government, the whole province of the State, is secular. The whole business that is transacted by any community — however deeply Christian, unless it has an established church, unless religion is interwoven expressly and professedly with all its actions — is secular business as distinguished from religious business. The whole duty is to render unto Caesar the things that are Caesar's, and unto God the things that are God's. That is

[67] See generally La Nauze, supra fn 60, pp 87–90; McMinn, supra fn 60, pp 106–8.
[68] See generally La Nauze, supra fn 60, pp 90–2; McMinn, supra fn 60, pp 109–10. Western Australia appointed its delegates by Parliament.
[69] La Nauze, supra fn 60, p 120.
[70] Supra fn 65, pp 1–30.
[71] Id p 21.
[72] Id p 29, and generally pp 26–30.
[73] Id pp 31–2. See also La Nauze, supra fn 60, 128.
[74] *Debates*, vol iii at 1184–9. See Ely, supra fn 65, pp 33–5; La Nauze, supra fn 60, p 159.

> the line of division maintained in every State in which there is not a predominant church government which dictates to all civil institutions. In these colonies, where State aid to religion has long been abolished, this line of demarcation is most definitely observed, and there is no justification for inserting into your secular documents of State provisions or expressions which refer to matters best dealt with by the churches . . . I should like to see debate avoided on a matter of this sort . . . [N]o irreligious feeling must be attributed to those who, not agreeing with the proposal, claim as strong a right to maintain their religious convictions and express them at the proper time. We ought to avoid a long debate, and have no division. The best plan which can be adopted as to a proposal of this kind, which is so likely to create dissension foreign to the objects of any church, or any Christian community, is that secular expressions should be left to secular matters while prayer should be left to its proper place.'[75]

Barton wanted to protect religion as much as the state. Religion was best respected by acknowledging the right to its free exercise unimpeded by the state, while at the same time the community was entitled to expect the state not to show preference for one form of religion over another, which would provoke sectarian dissension and subvert the right to free exercise.

In the resulting draft, the free exercise clause binding the States was the only provision concerning religion. However, debate about the role of religion in the federation resumed, and the colonial legislatures all demanded recognition of religion in the preamble. This had become essential to popular support of the Bill. La Nauze notes:

> 'The churches . . . had been busy, and those prepared to ignore them would be poor politicians.'[76]

The religion question was therefore addressed afresh when the Convention resumed in August. In the meantime, Higgins had become the 'agent and ally in the Convention'[77] of the Seventh Day Adventists' campaign against recognition. Fearing that a reference to religion in the preamble could indicate an implicit federal power to make laws respecting religion, he demanded 'proper safeguards' to prevent 'religious oppression',[78] and intended to propose amending the free exercise clause to read:

> 'A State shall not, nor shall the Commonwealth, make any law prohibiting the free exercise of any religion, or imposing any religious test or observance.'[79]

In February 1898 he decided to drop the reference to religious tests and add a prohibition on establishment of religion at federal and State levels, asserting

[75] *Debates*, vol iii at 1187–8.

[76] Supra fn 60, p 166. See also Ely, supra fn 39, pp 45–7. The *Sydney Morning Herald* had mentioned the popular consensus and non-specific nature of the proposed recognition in an editorial announcing its changed position in support of recognition on 10th July 1897. However, the Seventh Day Adventists warned against recognition as 'the thin edge of the wedge towards perpetuating religious strife, and the next step will be in the direction of an established religion with State Aid.' (Id p 47).

[77] Ely, supra fn 65, p 55.

[78] Id pp 58–9.

[79] Id p 55.

that the previous versions did not provide adequate protection and that the establishment language was 'not idle in the eyes of a number of people whose votes we should like to secure for the Constitution'.[80] Again, this reflects concerns about the popular reception of the draft constitution.

Perhaps fearing the Convention's hostility to perceived assaults on States' rights, Higgins ultimately agreed that the clause should apply only to the Commonwealth. However, his concern about alienation of non-religious voters was not shared by other delegates. His amendments were rejected and then the entire clause was struck out as unnecessary; Higgins failed to demonstrate any real danger of federal religious legislation.[81]

On 2nd March, Glynn again proposed recognition of religion in the preamble.[82] The delegates had received petitions both for and against recognition and were aware that it was an important issue to many who would soon be voting on the Constitution. Glynn described his proposed words, 'humbly relying on the blessing of Almighty God', as 'simple and unsectarian'[83], and a 'pledge of religious toleration'.[84] Higgins opposed recognition without proper safeguards, wanting 'power to pass religious laws' to be reserved to the States'.[85]

Glynn's motion succeeded without a division. The reasons later given by Glynn and another leading delegate, Bernhard Wise, confirm the motivation behind the change. Glynn noted his success in his diary and added:

> 'It was chiefly intended to secure greater support from a large number of voters, who believe in the efficacy for good of this formal Act of reverence and faith.'[86]

Wise stated that the amending words added little, but that 'we put them in, as we thought, because they were a just satisfaction of a certain sentiment'.[87]

The amendment prompted Higgins to try again to insert 'proper safeguards'. His suggestion was this:

> 'The Commonwealth shall not make any law prohibiting the free exercise of any religion, or for the establishment of any religion, or imposing any religious observance, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.'[88]

This time the Convention decided that the measure was not entirely futile

[80] *Debates*, vol iii p 654; see also p 663.
[81] Id pp 654–7, 658–64. See also Ely, supra fn 65, pp 63–7; La Nauze, supra fn 60, pp 228–9.
[82] *Debates*, vol v p 1732.
[83] Id
[84] Id p 1733. Quick thought the words 'most universal' and capable of being subscribed to 'even by Mahomedans': p 1736. The theistic nature of the reference is not mentioned.
[85] Id p 1734, 1735. Barton agreed on the second point: p 1738.
[86] Quoted in La Nauze, supra fn 60, p 226. Glynn stated that the amendment would 'recommend the Constitution to thousands to whom the rest of its provisions may for ever be a sealed book': *Debates*, vol v p 1732.
[87] *Debates*, vol v p 1773.
[88] Id p 1769.

because it could attract support from non-religious voters or from voters whose religions were marginalized.[89] Quick and Garran were perplexed:

> 'No logical or constitutional reasons have been stated why such a negation of power which had never been granted and which, therefore, could never be legally exercised, was introduced into the instrument of Government. It does not appear that its necessity has ever been demonstrated. Still, that was one of the grounds on which Mr. H. B. Higgins asked the Convention of 1898 to adopt the section'.[90]

Finally, the drafting committee made slight changes to produce what is now s 116.[91] Here the word 'for' in the establishment clause entered the free exercise and observance clauses as well. The aim seems merely to have been uniform phrasing, although Barton explained the amended section by reference to the ensured protection of States' rights, which if anything, suggests a broader prohibition at federal level.[92] Unfortunately, however, the reasons for this change, subsequently of considerable importance, are not recorded.

The Convention seems temporarily to have discarded its focus on federal relations and turned its attention to the individuals to be governed under the new arrangements, even if only to secure their assent to the scheme rather than through any loftier sentiments. In this way, the idealism of Clark and Higgins was replaced by a calculated pragmatism. But the popular influence on the drafting of s 116 and the preamble helps to explain why s 116 bears such an anomalous appearance in the Constitution.

A CONCEPTION OF SECTION 116

1 Neutrality, Participation and Autonomy

Two distinct themes appear from the historical materials. First, through the nineteenth century there was public debate about government's relations with religion. Attempts to ensure religious harmony through state aid had provoked sectarian disputes and by 1900 aid had been stopped. On the other hand, the resulting separation of Church and state was flexible. Several colonies retained religious instruction in public schools and religiously based laws such as Sabbath observance statutes were preserved. Rather than a strict

[89] Wise argued that 'a very large body of people' was alarmed that 'the agitation' for the insertion in the preamble of the religious wording was evidence of 'an ulterior design on the part of some people in the community to give the Commonwealth power to interfere with religious observances': id p 1773. Symon thought that the section would assist in 'securing every vote possible' for the Constitution: p 1776.

[90] J Quick & R R Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) (Sydney, Legal Books, 1976) p 952, discussed by Ely, supra fn 65, pp 91–4. The argument seems to question the need for the First Amendment on the grounds that Congress lacks power to make laws respecting religion; but the American experience before 1900, although limited, should have warned of the Australian federal legislature similarly making laws respecting religion, especially since Congress had done so without any reference to God in its Constitution.

[91] *Debates* vol v pp 2439–44, 2463, 2474.

[92] Id p 2474.

insistence on the state as a secular entity, the emphasis was on the state avoiding involvement with religion which would encourage sectarian divisions in the community, especially in the political sphere. The absence of religious rivalry was thought necessary for the benefit of civil society, the institution of religion, and citizens in the pursuit of their religious and secular activites. Avoidance of state preferences would therefore help to preserve the religious autonomy of the people.

This theme of anti-sectarianism was evident in the Convention debates, against a background of bitter debates within the colonies, resulting in widespread agreement that colonial governments should not favour any religion over others. Barton, who saw s 116 as unnecessary, spoke of modern 'liberal and tolerant ideas', disinclination 'to maintain any religion', the growing 'divorce between Church and State' and the absence of 'fear of a recurrence of either the ideas or the methods of former days with respect to these colonies'.[93] It is unclear whether this last reference was to the very early days of New South Wales settlement or to the more recent public debates over state aid to religion; it was at least a reference to sectarian bitterness. Wise, who supported the section, feared a revival of sectarian controversy.[94] Whatever he meant by 'proper safeguards', Higgins was intending to ensure some kind of religious equality at the federal level, and this appears to have been understood as the general purpose of the clause. Seen in this light, s 116 was added to restore the equilibrium upset by the successful campaign for amendment of the preamble.

The force of the reference to Almighty God in the preamble was more psychological than legal; it could not truly be interpreted as evidence of an implied federal power to make laws with respect to religion. Yet it was felt that without s 116 the Constitution would be built on an explicitly religious foundation. To this extent, the insertion of s 116 was an exercise in symbolism to reassure those concerned about government interference with or imposition of religion. But a symbolic statement limiting hypothetical federal power may legitimately have effect should the federal power become real rather than imaginary. In this case, it has become apparent that the federal government can make laws impacting on religion, for example by using the power to make conditional grants to the States (s 96), the taxation power (s 51(ii)), the marriage and divorce powers (s 51(xxi) and (xxii)), the immigration power (s 51(xxvii)) and the Territories power (s 122).

The second theme which emerges is that religion had come to be regarded as a personal matter with which the state should not interfere. This appears especially in support for voluntary donations to replace state aid, perhaps responding to the early attempts legally to enforce religious observance. The desire was to protect religion as much as to avoid sectarian rivalry at the public level. Although it was felt that the community as a whole should have a religious character, past experience suggested that this was hindered rather than helped by state involvement. Churches were better suited to developing

[93] Id p 1771.
[94] Id pp 1773–4.

religion by working with their congregations away from the distractions and distortions of politics. The resistance to government dictation concerning religion seems undiminished since Governor Bourke's reforms ended the preferential treatment enjoyed by the Church of England.

Both these themes appear in the otherwise prosaic context for the adoption of the amended preamble and s 116, namely appeal to the perceptions of the public whose votes the Convention delegates required. The recurrent argument was that parts of the community would feel excluded, and their support jeopardized, if either amendment were not made. In one sense, the drafting of the religion clauses resembles an exercise in cynical expediency and dealmaking rather than the enactment of a profound vision about Church and state in the new federation. But it is highly significant that the delegates were seeking a balance in matters of religion across the community, in keeping with the historical desire to avoid sectarian disputes in public life, and also that the focus of concern was the sense of exclusion from the new political community which it was feared that citizens would otherwise feel.

Professor Harrison Moore regarded State evenhandedness in religious matters as a major factor in Australia's political stability:

> 'Rarely has any group of states been so singularly marked out for political union as are the six States of Australia . . . Religious differences there are in plenty, but sectarian strife, though bitter enough, affects or interests but few. The State has been strictly unsectarian, and there has been no party of irreconcilables.'[95]

These comments are consistent with the suggestion that s 116 was intended to keep the federal government 'strictly unsectarian'. Indeed. Moore thought the section might prevent 'appropriations in aid of religious bodies'.[96]

Accepting that these were the concerns of the delegates and the 'subject to which that language [of s 116] was directed'[97], we may conclude that underlying s 116 there exists a general conception of state neutrality toward religion, reflected both in the avoidance of religious preferences and in respect for the autonomy of individuals in matters of religion, especially as participants in the wider community. It will be convenient to use the term 'neutrality' to embrace this joint conception of neutrality, participation and autonomy.

However, what does this 'neutrality' mean in practice? It will be argued below that recent American jurisprudence concerning the kind of neutrality the United States Constitution demands in this area is a useful starting point for an Australian approach responding to the animating principles of s 116. By this means, we may seek to flesh out the identified conception and give meaning to the text.

It is convenient first to consider the role of non-religion, meaning the absence of, rather than hostility to, religion. 'Neutrality' then requires

[95] W H Moore, *The Constitution of the Commonwealth of Australia* (2nd ed 1910), p 55.
[96] Id p 287.
[97] *Cole* v *Whitfield*, supra fn 27, p 385.

meaning in the context of the establishment and free exercise clauses. We must consider what qualifications to the absolute guarantee of free exercise of religion 'neutrality' requires. A related question will be what kinds of accommodation of religion neutrality demands and how this can be reconciled with the requirements of neutrality under the establishment clause.

2 Non-Religion and the Question of Defining Religion

Where, therefore, might non-religion fit into the outlined conception of s 116, assuming that a starting definition of religion could be agreed upon? It will appear that the way in which non-religion is treated under s 116 can make it unnecessary to give precise meaning to the idea of religion, because in some respects the section will have the same operation whether religion or non-religion is involved.

In *Jehovah's Witnesses*, Latham C J saw the guarantee of free exercise of religion as encompassing a guaranteed right not to exercise a religion. Between religions, it is clear that the right freely to exercise one religion necessitates the freedom not to exercise another. But such a corollary is less obvious when the comparison is between religion and something which is not religion. Theoretically, one might imagine a right to the free exercise of one of a range of 'religions', while denying any right to choose outside the range.

It has been argued that the philosophy of the United States Constitution is not necessarily secular, that its religion clauses recognize the spiritual element in people and address 'fundamental questions regarding human nature, human destiny and other such realities'[98]. Specifically, a distinctly religious function has been identified as the basis of a core value of religious liberty, derived principally from historical sources:

> '[R]eligion occupies a special constitutional status because it plays an essential role in shaping public and private virtue; it provides transcendent values and a degree of moral legitimacy not provided by other social forces; it shapes and holds people together through the most trying of times; it recognizes a domain for the conscience beyond the control of the state; and it stands, along with other mediating institutions, as a check on government power.'[99]

However, there are textual and substantive difficulties with maintaining such a view of s 116. First, the exercise of a chosen religion is arguably not really 'free' if it is compulsory to select something religious in the first place; the freedom to exercise moves toward an obligation to exercise a religion,[100] and the compelled selection of a religion might even constitute establishment. However, there must be some limitation on this freedom, if 'religion' is to

[98] J Mansfield, 'The Religion Clauses of the First Amendment and the Philosophy of the Constitution' (1984) 72 *Calif L Rev* 847, 904.

[99] Adams & Emmerich, supra fn 4, p 1670.

[100] See C L Pannam, 'Travelling Section 116 with a U.S. Road Map' (1963) 4 MULR 41, 71. This argument is of course available in the American case also.

mean anything;[101] a balance must be struck between the preservation of the mandated freedom and the need to describe that freedom.

Secondly, the approach sits uneasily with the identified conception of neutrality, which rests on the twin notions of avoidance of religious divisions and promotion of participation in the community regardless of individual religious allegiances.[102] These aims would be countered rather than advanced if s 116 were interpreted to entrench religion in a preferred place, thus creating divisions between religion and non-religion and conferring special advantage on holders of religious belief. Division on the basis of religion may take place when the state denies freedom not to believe and attempts to privilege religion just as it may when freedom of belief is denied altogether. The perceived imbalance created by the words of recognition in the preamble was redressed for just this reason.

Section 116 must therefore encompass some right of free exercise of non-religious belief. It must also protect against the establishment of religion in general (as distinct from any single religion). As Murphy J observed in the *State Aid* case[103], it would be very strange if government could support two religions but not one. Equally, establishment of all religions would contravene s 116. Further, the 'establishment' of non-religion of some kind is bound to prohibit the free exercise of religion. It is therefore convenient to speak loosely of a prohibition on the establishment of non-religion also. The meaning of 'establish' is considered further below.

Therefore, what kind of non-religion is protected by s 116? Since non-religion is protected only as a corollary of the protection of religion, the primary need is to understand what is special to constitutional law about the idea of religion, so that the word in s 116 may be read to facilitate analogies to circumstances where non-religious beliefs demand protection. For example, the fact that a religious person believes in some divinely-inspired precept does not necessarily make the absence of that belief in a non-religious person an object of special concern. It is something about the religious nature of the belief which must be identified.

Similarly, it seems inadequate to focus on the notion of transcendent reality or divine inspiration common to many religions.[104] Although this might be the essence of the religion concerned, it is not necessarily the essence of the constitutional protection. If it were, then religions lacking notions of transcendent reality or divine inspiration would not qualify for protection.

Latham C J also warned in *Jehovah's Witnesses* that minority religions were

[101] *Jehovah's Witnesses*, supra fn 8, p 126, 149–50, 155, 157, 159–60.

[102] McConnell argues that the framers of the American establishment clause deliberately chose not to protect freedom of conscience as well as freedom of religious belief: M W McConnell, 'The Origins and Historical Understanding of Free Exercise of Religion' (1990) 103 *Harv L Rev* 1409, 1492–8. No such choice was confronted in Australia. On the problems of distinguishing religion and non-religious conscience, see: D A J Richards, *Toleration and the Constitution* (1986), pp 136–46; R Dworkin, *Taking Rights Seriously* (London, Duckworth, 1977), pp 200–1.

[103] Supra fn 11, p 623.

[104] But cf S Ingber, 'Religion or Ideology: A Needed Clarification of the Religion Clauses' (1989) 41 *Stan L Rev* 233, 285–6.

in special need of protection, which suggests that we should avoid seeking a definition by reference to generally accepted notions of religion.[105] At best, such a process approximates the average of the range of available perspectives. At worst, it imposes the defining agent's own perspective of what matters about religion.[106] On the other hand, to emphasize the differing perspectives as to what constitutes religion might become hopelessly indeterminate, or at least completely subjective.[107]

But once it is accepted that some kind of non-religion is treated in the same way as religion, the distinction which matters is between what is the object of constitutional concern and what is not.[108] It is suggested that there is an identifiable kind of non-religion, conveniently called 'quasi-religion', which is analogous to religion in that it concerns the same notions of autonomy and self-identity implicated by religion. The argument is that a belief about fundamental reality and the nature of a person's existence may be so deeply personal, so integral in the self-definition of an individual, as to be analogous to what is ordinarily thought of as religious belief. This 'quasi-religion' is more than a set of strongly held likes and dislikes; it involves basic values and the beliefs and rules of conduct which flow from those values. A person who regards war as wrong because he or she is opposed to the taking of human life in any circumstances may well have such a quasi-religious belief, while someone who opposes a particular war solely on economic or strategic grounds probably does not. Similarly, a very strong belief in the desirability of accumulating personal wealth is only a quasi-religious belief if it explains to the person who holds it something fundamental and personal about the nature of existence and reality. The idea of 'quasi-religion' is suggested by and takes shape from the application of the conception of neutrality to the establishment and free exercise clauses below.

Resort to a 'secular analogue' which looks only to the existence of personal moral codes, whether or not founded on a core of fundamental belief, is too broad to supply a helpful conception of non-religion as an area of constitutional concern. For example, one American writer argues that statutes which accommodate religious beliefs and practices by allowing employees time away from work for religious reasons endorse religion at the expense of non-religion by telling 'non-religious workers that their reasons are less

[105] This is the approach of K Greenawalt, 'Religion as a Concept in Constitutional Law' (1984) 72 *Calif L Rev* 753 and of Wilson and Deane J J in *Church of the New Faith*, supra fn 14, p 173.

[106] Mason A C J and Brennan J accept the inadequacy of this method of definition in *Church of the New Faith*, supra fn 14, p 133; see also per Murphy J, p 159. They also note that a 'court cannot be assured that the meaning of writings said to be of religious significance is the meaning which the ordinary reader [rather than an adherent] would attribute to them': p 129.

[107] Murphy J appeared to adopt such a subjective meaning in *Church of the New Faith*, id p 151.

[108] Sadurski explains how the idea of neutrality itself overcomes the major definitional problems by its commitment to a liberal secular state: W Sadurski, 'On Legal Definitions of "Religion" ' (1989) 63 ALJ 834, 840.

urgent'.[109] But unless those reasons are at the defining core of personality, about fundamental beliefs and reality, they are less urgent; those who hold them suffer no exclusionary denial of their central value systems, and their cases do not demand constitutional protection.[110]

A broad notion of religion has been advanced in the United States:

> 'Deeply personal and often unprovable assumptions about the nature of reality and the meaning of life guide the thoughts and actions of every individual, not just those who believe in God or attend a recognized church.'[111]

The consequent view of constitutional protection has a clear parallel in the Australian conception identified above:

> '[The Constitution] provides a framework within which all citizens, regardless of their religious opinions, can compete for leadership of the political community'.[112]

Prior to leadership of the political community, rights of membership and active participation in that community demand protection. Thus Latham C J emphasizes in *Jehovah's Witnesses* that s 116 'assumes that citizens of all religions can be good citizens' and is therefore 'based upon the principle that religion should, for political purposes, be regarded as irrelevant'.[113]

Accordingly, religion (including 'quasi-religion') is best considered as a set of deeply personal and fundamental beliefs or assumptions about the nature of reality and existence. The purpose of s 116 is to respect the right of individuals to maintain such beliefs and assumptions, preventing the emergence of disputes based upon them in the political community. The interests of that community require that religion be a personal matter in which the state does not take sides.

[109] D R Dow, 'Toward a Theory of the Establishment Clause' (1988) 56 *U Mo Kan Ci L Rev* 491, 504.

[110] Dow points out (id 499–500) that some United States Supreme Court opinions have recognized a generalized protection of conscience in religion cases: see *Welsh* v *United States* (1969) 398 U.S. 333, 360; *Gillett* v *United States* (1971) 401 US 437, 454. These opinions seem to involve ideas roughly similar to the quasi-religious kind of non-religion, rather than a simpler personal moral code.

[111] G R Govert, 'Something There Is that Doesn't Love a Wall: Reflections on the History of North Carolina's Religious Test for Public Office' (1986) 64 *NCL Rev* 1071, 1089.

[112] Id p 1094. See also K L Karst, 'Paths to Belonging: The Constitution and Cultural Identity (1986) 64 *NCL Rev* 303, 306.

[113] Supra fn 8, p 126. More generally, Deane J has said that
> 'the provisions of the Constitution should properly be viewed as ultimately concerned with the governance and protection of the people from whom the artificial entities called Commonwealth and States derive their authority':
University of Wollongong v *Metwally* (1984) 158 CLR 447, p 477. See also Mason, supra fn 23, p 24; Gageler, supra fn 23, p 171. Professor Zines sees this as a possible future defining direction for the High Court: L Zines, 'The Commonwealth' (1990) 6 *Aust Bar Rev* 257, 266.

3 Neutrality and the Establishment Clause

Applying the concept of neutrality to give meaning to the establishment clause immediately raises its own difficulties. On one view, the only kind of government neutrality in matters of religion (and quasi-religion) is a rigid separation between Church and state, prohibiting all state assistance of religion and perhaps even forbidding the clergy from holding public office.[114] But this would constitute hostility toward religion; if the state provides free secular schooling but no aid to church schools, then religious parents must pay higher fees for their children to attend church schools, even to the extent that those schools teach non-religious subject matter.[115] It can plausibly be replied that a religious approach to education will pervade all teaching at a Church school; but a set of fundamental quasi-religious beliefs is equally likely to pervade much of the teaching at a non-religious school. Although measurement of these kinds of influence is fraught with difficulty, some comparison can still be attempted.[116] It is only where there is no quasi-religious analogue to the religious aspect of Church education that no aid should be provided to the Church school. Neutrality on this view demands, in other words, that Church schools be supported except to the extent that their activities are religious, or their facilites are used for purposes which are religious, in a way lacking any quasi-religious parallel. So, a Church building lacks secular analogues, as does the salary of a school chaplain (except to the extent that a non-religious school is provided with a salaried counsellor, who will impart quasi-religious values through counselling, much as a chaplain would impart religious values).

Sadurski[117] sees strict separation as the only escape from an 'unattractive dilemma' between favouring religion at the expense of non-religion and expanding the definition of religion to include secular beliefs. But once it is accepted that non-religion itself has aspects which are quasi-religious, which it is the purpose of s 116 to protect, the dilemma vanishes. Religion is *not* favoured at the expense of this 'quasi-religion', only at the expense of beliefs or ideas which are not fundamental to a person's view of reality and existence. Nor is 'quasi-religion' or non-religion subsumed within the definition of religion. Instead, the understanding of religion as an area of constitutional concern provides the essential starting-point for understanding both quasi-religion and non-religion.

[114] Kurland suggested that neutrality demands that government not use religion as a basis of classification for the attraction of legal consequences: P Kurland, 'Of Church and State and the Supreme Court' (1961) 29 *U Chi L Rev* 1. However, avoiding all religious classifications is often clearly not neutral in its effect; for example, when all people are required to wear a certain uniform, this impedes the religiously-motivated wearing of different uniforms and so amounts to a preference against those religions. See further M W McConnell, 'Accommodation of Religion' (1985) *Sup Ct Rev* 1, 8–13.

[115] See further McConnell, supra fn 114, pp 13–4.

[116] The United States Supreme Court has applied a rule of equal access to funding and a no religious use restriction in the context of government financial support for religious organizations: see *Mueller* v *Allen* (1983) 463 U.S. 388; *Bowen* v *Kendrick* (1988) 487 US 589. See G S Buchanan, 'Governmental Aid to Religious Entities: The Total Subsidy Position Prevails' (1989) 58 *Fordham L Rev* 53, 75–85.

[117] See W Sadurski, 'Neutrality of Law Towards Religion' (1990) 12 *Syd LR* 421, 452.

However, even if neutrality can be achieved without resorting to strict separation, we must still be able to identify what is neutral in a given situation. As Sadurski points out:

> 'To describe a practice as neutral, with respect to conflicting moral (and religious) conceptions, we must imagine a baseline of action (or non-action) by a neutral agent (here: the government) which establishes, as it were, a normal situation, by reference to which all departures from the baseline may be judged as non-neutral.'[118]

He finds the answer in determining neutrality by reference to our views of what is 'normal', arguing that the 'consideration of "neutrality" is established by a baseline of normalcy, the departure from which calls for a redressing action by that very government which caused the disturbance in the first place.'[119] Once the idea of quasi-religion is introduced, we should look at the treatment of quasi-religion and other religions to determine whether neutrality is present. Sadurski explains that a 'moment of silence' in government schools is not neutral, since it 'is not normal, usual practice for non-religious people to 'meditate' collectively and regularly in public fora'.[120] In other terms, to the holders of quasi-religious values and beliefs the moment of silence may have no fundamental meaning at all (indeed, it may appear as a purely religious ritual).[121] Conversely, the fact that churches receive assistance from public fire brigades should not be seen as support for religion; although there is no exactly corresponding support of quasi-religion (which generally lacks equivalents to churches), the property of holders of quasi-religious values and beliefs is also given fire protection. All are treated equally regardless of how the central beliefs are manifested.

Turning to American consideration of departures from neutrality, as that term is applied in First Amendment jurisprudence, in 1971 the United States Supreme Court laid down the *Lemon* test for the establishment clause.[122] The court inquires whether the challenged law has 'a secular legislative purpose'. If so, then 'its principal or primary effect' must be 'one which neither advances nor inhibits religion'. Finally, the statute must not foster 'an excessive government entanglement with religion'. A law may be impaled on any of these three prongs.

However, the test presents difficulties.[123] First, it is not self-evident that

[118] Id p 433. See also B I Bittker, 'Churches, Taxes and the Constitution' (1969) 78 *Yale LJ* 1285, 1287–1304; C R Sunstein, 'Lochner's Legacy' (1987) 87 *Colum L Rev* 873; L H Tribe, 'The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics' (1989) 103 *Harv L Rev* 1; M Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (1990), eg p 377.

[119] Supra fn 117, p 434.

[120] Id p 435.

[121] Of course, the moment of silence may also be used for quasi-religious reflection, but the point is that the ritual of taking part in such an occasion is not itself quasi-religious, it is religious.

[122] *Lemon v Kurtzman* (1971) 403 US 602, 612–3.

[123] For the view that the test favours majority religions, see M W McConnell, 'The Selective Funding Problem: Abortions and Religious Schools' (1991) 104 *Harv L Rev* 989, 1043–4.

neutrality demands an absence of 'entanglement'.[124] Indeed, a refusal to become involved could constitute a discriminatory denial of assistance. So, a law granting tax exemption to the income of churches used for charitable purposes, but excluding income from real estate and that used for political purposes, may require 'entanglement' in the form of government inspection of church accounts. To deny exemption to churches, while providing it to secular charities, would amount to preferential treatment of quasi-religious values represented by those charities, thereby burdening the free exercise of religion and contravening neutrality.

The second prong of the *Lemon* test is also troublesome. The problem of where to begin the inquiry into neutrality was demonstrated in *Corporation of the Presiding Bishop of the Church of Jesus Chirst of Latter-Day Saints v Amos*[125], a challenge to an exemption from civil rights laws for religious organizations. A majority of the Court found the exemption merely facilitative of religion; the law had not done anything to 'advance' religion.[126] This assumed a background in which churches could claim exemption from civil rights laws on religious grounds; the government merely allowed this situation to continue. In contrast, in *Larkin v Grendel's Den, Inc*[127], the Court struck down a law allowing churches to veto liquor licence applications. Here the assumed starting-point was that this power did not exist, but was affirmatively granted by the challenged law; as such, the law impermissibly advanced religion. It is best to avoid a test which conceals the fact that neutrality may depend on the choice of starting-point.

The Supreme Court has recently considered two alternatives to the *Lemon* test. In *Lynch* v *Donnelly*[128] O'Connor J said:

> 'The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. Government can run afoul of that prohibition in two principal ways. One is excessive entanglement with religious institutions, which may interfere with the independence of the institutions, give the institutions access to government or governmental powers not fully shared by nonadherents of the religion, and foster the creation of political constituencies defined along religious lines. The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.'

Reasons for suspicion of entanglement as a distinct test have already been

[124] But cf J T Valauri, 'The Concept of Neutrality in Establishment Clause Doctrine' (1986) 48 *U Pitt L Rev* 83, arguing that neutrality entails both non-involvement and impartiality: 89–90.

[125] (1987) 483 US 327.

[126] O'Connor J with whom Blackmun J agreed, found the distinction between 'allowing' the advancement of religion and directly advancing religion 'to obscure far more than to enlighten': id p 347.

[127] (1982) 454 US 116.

[128] (1984) 465 US 668, 687–8.

stated. We should therefore regard the first of O'Connor J's 'principal ways' as a specific instance of the second.

The idea of endorsement responds to the concern of s 116 that religion be irrelevant in the political community; people should not feel excluded, or included, because of their religious (or quasi-religious) beliefs or values. The evil of 'establishing' a religion can then be seen to lie in the exclusion effected. But how is 'endorsement' to be measured? In *Amos*, O'Connor J speaks of an objective observer acquainted with the relevant law's text, legislative history and implementation.[129] It is not clear whether this 'observer' should be an adherent of the allegedly disfavoured religion. If so, then we risk favouring that religion by the built-in subjectivity of the 'objective' observer. If not, then the disfavour may be reflected or exacerbated in the application of the test, for example by characterizing the complaint as trivial.[130]

The endorsement test has been supported for its shift in emphasis,[131] but the standpoint problem remains. One suggestion is the adoption of a 'reasonable humanist standpoint'.[132] But this is a quasi-religious view which disfavours religion. Another alternative would consider the views of *any* reasonable observer, on the grounds that reasonable observers can reasonably disagree with one another.[133] This approach requires assessment of who is reasonable, but since a number of observers is postulated, that determination becomes less vital. This may therefore be the most workable solution. The problem here should not be overstated; after all, the law makes determinations of mental competence and sanity which involve similar problems of standpoint, reasonableness and objectivity.

Subject to this concern, Justice O'Connor's test has the attraction for

[129] Supra fn 125, p 348; see also *Estate of Thornton* v *Caldor, Inc* (1985) 472 US 703, 712.

[130] See J M Lewis & M L Vild, 'A Controversial Twist of Lemon: The Endorsement Test as the New Establishment Clause Standard' (1990) 65 *Notre Dame L Rev* 671, 688–90. This arguably happened in *Lynch* itself: see N Dorsen & C Sims, 'The Nativity Scene Case: An Error of Judgment (1985) *U Ill L Rev* 837, pp 857–60; L H Tribe, *American Constitutional Law*, (2nd ed, 1988), p 1293; Tribe, supra fn 118, p 39. For fuller discussion of the problems of perspective, see Minow, supra fn 118, pp 60–3. For the argument that greater vigilance is needed when a minority religion is allegedly disfavoured, see S Titshaw, 'Sharpening the Prongs of the Establishment Clause: Applying Stricter Scrutiny to Majority Religions' (1989) 23 *Ga L Rev* 1085, esp 1112–9. This view had the apparent support of Latham C J in *Jehovah's Witnesses* and Mason A C J and Brennan J in *Church of the New Faith*. See also W Sadurski, 'Judicial Protection of Minorities: The Lessons of Footnote Four' (1988) 17 *Anglo-Am L Rev* 163; W Sadurski, 'Last Among Equals: Minorities and Australian Judge-Made Law' (1989) 63 ALJ 474.

[131] See A H Loewy, 'Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight' (1986) 64 *NCL Rev* 1049; C S Nesbit, 'Country of Allegheny v ACLU: Justice O'Connor's Endorsement Test' (1990) 68 *NCL Rev* 590, 608. But cf D E Lively, 'The Establishment Clause: Lost Soul of the First Amendment' (1989) 50 *Ohio St LJ* 681, advocating a broader focus on the question of entanglement and the divisive potential of a law insensitive to pluralistic values. Although the latter concern is that of O'Connor J, as a discrete focus of inquiry it seems unhelpfully vague.

[132] Titshaw, supra fn 130, pp 1124–7.

[133] See Lewis & Vild, supra fn 130, pp 693–4. This approach also seems best to address the problem that different observers have different ideas about neutrality itself; see Valauri, supra fn 124.

Australian purposes of concentrating on the imperative of neutrality respecting religion in a pluralist political community. The notions of endorsement, exclusion and inclusion are especially relevant given the conception of s 116 which is concerned about the citizen's sense of belonging in the broader community (reflected by the desire that voters support the Constitution in 1900).

A second alternative test, proposed by Justice Kennedy, in *County of Allegheny* v *ACLU*[134], asks whether the government has used coercive means, including proselytization, to encourage support for religion or participation in religious activity. However, coercion is no more objective a standard than endorsement. One person may feel deprived of freedom to make an independent decision in circumstances where another feels no pressure at all.[135] Moreover, when deciding whether an offered benefit is coercive, one must consider the propriety of the offer itself; every choice in the face of an offer cannot sensibly be regarded as the object of free will, or for that matter of coercion.[136] For these reasons, and since the idea of coercion is less responsive to the concern for participation and inclusion behind s 116, this approach seems less promising.

4 Neutrality and the Free Exercise Clause

The conception of equal participation in the community regardless of religious differences is confronted by a tension within the free exercise clause. On the one hand, equal participation demands that exceptions be made to generally applicable laws to alleviate 'burdens' (however defined), accommodate the needs of religion and ensure inclusion in the political community. On the other hand, such treatment begins to appear preferential and resemble establishment. Criteria are therefore needed to determine to what extent accommodation is required. The answer to this question under the free exercise clause will meet the demands of neutrality under the establishment clause; if accommodation is required by the free exercise clause, then it serves the purpose of inclusion rather than exclusion and thereby enhances neutrality. Somebody may always be displaced when room is made to include an outsider, but the message is one of equalizing neutral treatment, not preferential endorsement of the accommodated religion, and there is therefore no forbidden establishment.[137] As Souter J explained in *Lee* v *Weisman*:

> 'In everyday life, we routinely accommodate religious beliefs that we do not share . . . In so acting, we express respect for, but not endorsement of, the

[134] (1989) 492 US 573.

[135] The perils of applying a coercion test are made clear by the divergent opinions in *Lee v Weisman* (1992) 120 L Ed 2d 467.

[136] See K M Sullivan, 'Unconstitutional Conditions' (1989) 102 *Harv L Rev* 1413, esp 1442ff; Tribe, supra fn 118, eg p 37.

[137] The value of neutrality is overriding in s 116; both the principle and the section favour religions which are tolerant of alternative religions or opposed to official sponsorship of religion (for instance, the Seventh Day Adventist religion which advocated the measure); see M Galanter, 'Religious Freedoms in the United States: A Turning Point? (1966) *Wis L Rev* 217, 289–90.

fundamental values of others. We act without expressing a position on the theological merit of those values or of religious belief in general, and no one perceives us to have taken such a position.

The government may act likewise. . . . [A]ccommodating religion reveals nothing beyond a recognition that general rules can unnecessarily offend the religious conscience when they offend the conscience of secular society not at all.'[138]

Neutrality under the free exercise clause has two major components. First, there is a requirement of accommodation of religious beliefs and practices, so that exclusion from participation in the general community is not effected on religious grounds. Secondly, the state must not act to impede the autonomy of individuals making and pursuing religious (and quasi-religious) choices. In each case, s 116 forbids laws which prohibit the free exercise of religion, either by failing to make appropriate allowances for religion or by improperly burdening it.

The extent to which exercise of religion must be 'free' in this sense depends on the weight which is given to notions of autonomy within competing ideas of the democratic process. Clearly there must be limits to the need for laws to accommodate religious differences, and not all 'religious' reasons should confer exemption for individuals from generally applicable laws. But a balance must be struck which preserves the autonomy and upholds the neutrality with which s 116 is concerned.

In *Jehovah's Witnesses*, the High Court was acutely conscious of the disruptive potential of a broad exemption from federal laws on religious grounds. Ultimately the Court decided only that the free exercise clause was subject to the overriding need to preserve the existence of the community itself, although some Justices also spoke generally of 'the interests of the social order', and the primacy of 'ordinary secular laws'.[139] The suggestion was that unless a law was directed at interference with religious freedom it would not contravene s 116; even a law so directed could be justified if the target was a religious practice regarded as criminal by the 'ordinary' community.

This majoritarian emphasis sits uncomfortably with the significant expansion in religious and ethnic diversity which has since occurred in Australia.[140] Mason C J has recognized this in a broader context:

'Our evolving concept of the democratic process is moving beyond an exclusive emphasis on parliamentary supremacy and majority will. It embraces a notion of responsible government which respects the fundamental rights and dignity of the individual . . . The proper function of the courts is to protect and safeguard this vision of the democratic process.'[141]

The United State Supreme Court has recently expressed a different

[138] Supra fn 135, p 507.
[139] See supra fn 8, p 155, 160.
[140] Australians practise over eighty religions, (although it is unclear how this is defined here); see B Gaze & M Jones, *Law, Liberty and Australian Democracy* (Sydney, Law Book Co, 1990), p 437.
[141] A F Mason, 'Future Directions in Australian Law' (1987) 13 *Mon ULR* 149, 163.

opinion. In *Employment Division* v *Smith*[142], Scalia J argued that the granting of a 'nondiscriminatory religious-practice exemption' was a matter not for courts but for legislatures:

> 'It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.'

But the 'unavoidable consequence of democratic government' is only unavoidable if the chosen conception of democratic government so insists. A majoritarian conception has the stated consequence, but if s 116 is to guarantee the participation of citizens in the community regardless of religious beliefs an opposite consequence is dictated, whereby the courts are especially vigilant to prevent the majority from using its legislative powers to prefer its own religious (or quasi-religious) beliefs.

The Supreme Court formerly accepted the need for such vigilance, holding in *Sherbert* v *Verner*[143] that a burden on the free exercise of religion must be justified by a compelling state interest. Accordingly, a Seventh Day Adventist, denied unemployment benefits after being dismissed for refusing to work on her Sabbath, a Saturday, successfully obtained benefits under a free exercise challenge. The Court found that extending benefits in these circumstances merely reflected the governmental obligation of neutrality toward religious differences. The Court conducted the weighing process later condemned by Scalia J in *Smith*.

Although *Sherbert* is more sympathetic to the expressed conception of s 116 than *Smith*, the weighing process it involves is rather unusual for Australian constitutional courts. But the High Court has faced a similar issue in determining the limits on the guarantee in s 92 that interstate trade and commerce shall be 'absolutely free'. Since the task under the free exercise clause is also to determine the bounds of the word 'free', this experience is valuable.

The accepted test under s 92 is whether an impugned law discriminates against interstate trade and commerce, as distinct from intrastate trade and commerce, in a protectionist sense.[144] A law must be directed at a legitimate object, be appropriate and adapted to the achievement of that object and not impose a burden on interstate trade and commerce disproportionate to its attainment.[145] This approach, referring both to the legal operation of the law and its practical effect,[146] readily lends itself to the situation where the court must decide whether there has been a discriminatory departure from neutrality in the treatment of religion (and quasi-religion). The notion of

[142] 110 S Ct 1595, 1606; (1990) 108 L Ed 2d 876, 893.
[143] (1963) 374 US 398.
[144] *Cole* v *Whitfield*, supra fn 27, p 394, 398, 407–8.
[145] *Castlemaine Tooheys Ltd* v *South Australia* (1990) 169 CLR 436, 473–4.
[146] *Cole* v *Whitfield*, supra fn 27, p 399.

protectionism also has a close relation to the conception of neutrality outlined for s 116.[147]

This test also introduces flexibility to the idea of 'burden' (meaning a prohibition on *free* exercise). The proportionality requirement means that all burdens may potentially be subject to the free exercise clause, if the government advances a sufficiently weak reason for imposing them. The free exercise of religion may be prohibited in many different ways, including direct compulsion, the denial of a benefit, the imposition of an unreasonable obligation to choose, and government interference in religious activities. However, the Supreme Court has suggested that some kind of coercion must be shown. In *Lyng* v *Northwest Indian Cemetery Protective Association*[148], the government proposed to build a road which would irreparably damage sacred areas which were an integral part of American Indian religious belief systems, 'virtually destroy[ing] the ... Indians' ability to practice their religion'[149]. O'Connor J held that the government did not need to justify the incidental effects of its programs 'which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs'.[150] Similarly, the government action had not denied any person 'an equal share of the rights, benefits, and privileges enjoyed by other citizens'.[151]

This focus upon coercion and government action is troubling for reasons already given in the discussion about coercion and neutrality.[152] The government should not be excused from justifying (beyond the mere rationality of its action) the destruction of a religion. Building a road is inevitably a legitimate government object, in the absence of bad faith. Subjecting the proposal to higher scrutiny would involve examining whether the road could be built by alternative means which would alleviate the burden; if so, then this would suggest that the chosen means was disproportionate to the object, but this would in turn depend on the reasonableness of the alternative. Although such issues of reasonableness are ordinarily left to the legislature, the Constitution here requires that the courts exercise supervision in the interests of religious neutrality.

147 For a similar but lengthier argument, see M W McConnell & R A Posner, 'An Economic Approach to Issues of Religious Freedom' (1989) 56 *U Chi L Rev* 1. The authors conclude (at 60):

> 'Freedom of religion can be understood as a constitutionally prescribed free market for religious belief, and this makes economic understanding of the workings of free markets and the effects of government intervention (whether regulation or subsidy) pertinent to interpretation of religious cases. Since religion is a market (albeit a "deregulated" one) with close and unbreakable connections to many other markets in which government intervention is commonplace, absolute separation ... is therefore not a serious alternative. A comprehensive form of neutrality — of identifying and eliminating subsidies and taxes, disproportionate burdens and benefits — is the more promising route for protecting religious freedom, and economics a helpful guide.'

148 (1988) 485 US 439.

149 Id p 451.

150 Id p 450.

151 Id p 449.

152 See text supra, eg accompanying notes 114–5, 134–6.

The proportionality requirement reduces the importance of defining burdens, but some definition remains necessary. The considerations about reasonable or objective observers under the endorsement test for the establishment clause apply here also. Just as endorsement and exclusion are matters of impression dependent on the perspective from which they are judged, so is the imposition of a burden. We might therefore decide whether a burden is placed on the free exercise of religion by reference to the viewpoints of hypothetical reasonable observers who may disagree among themselves.[153]

In the shoes of such observers, the court would try to assess how severe the supposed burden would be on the victim and whether those reasonable people upon whom the burden did not lie would expect to be spared analogous burdens in relation to their own situations. If they would not expect to be so spared, then the imposition on religion could not be regarded as a 'burden' because it would be an imposition of a kind which reasonable people would tolerate, perhaps even notwithstanding that it impeded their religious (or quasi-religious) beliefs or activities in a manner out of proportion to the attainment of its objectives. In this way, trivial impositions would not be the subject of scrutiny under the free exercise clause. To the extent that the reasonable observers would expect to be spared the imposition, the law would be required to pass the proportionality test.

CONCLUSION

The intention of this article has been to add shape to the proposed conception of s 116. As such, it is not suggested that all the interpretive difficulties are overcome or even addressed. However, the conception of s 116 points the arguments which the text produces in certain relatively clear directions. If those directions are followed, we may expect a coherent approach to the section to emerge.

[153] For example, acute paranoia about the imposition of religious burdens should not require constitutional examination of the impugned law. Similarly, Tribe imagines a reasonable non-adherent 'based on the judges' notion of what is reasonable and what is hypersensitive': supra fn 130, p 1293.