

THE AUSTRALIAN CONSTITUTION'S RELIGIOUS TESTS CLAUSE AS AN ANTI-DISCRIMINATION PROVISION

LUKE BECK*

I INTRODUCTION

Imagine that a person who seeks employment in the Australian Public Service and is otherwise qualified poses a risk to national security by reason of holding extremist religious views. If the Commonwealth refuses to employ that person, would the Commonwealth's refusal contravene the religious tests clause of s 116 of the *Australian Constitution*, which states that 'no religious test shall be required as a qualification for any office or public trust under the Commonwealth'? That is the issue explored in this article.

In her book *Legal Protection of Religious Freedom in Australia*, Carolyn Evans describes the religious tests clause as an anti-discrimination provision, which 'provides some protection against religious discrimination in one area of employment'.¹ British and American scholars have also recognised that a 'religious test' is discrimination on the ground of religion,² as have the Supreme Courts of the United Kingdom and United States.³ Evans, however, does not develop the point or pursue the implications of recognising the Australian religious tests clause as an anti-discrimination provision.

* Lecturer, School of Law, Western Sydney University.

- 1 Carolyn Evans, *Legal Protection of Religious Freedom in Australia* (Federation Press, 2012) 141.
- 2 Russell Sandberg, *Law and Religion* (Cambridge University Press, 2011) 162; Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford University Press, 2010) 131; Thomas R Haggard, *Understanding Employment Discrimination Law* (Lexis Nexis, 2nd ed, 2009) 24; Marcel Stüssi, *Models of Religious Freedom: Switzerland, the United States and Syria by Analytical, Methodological and Eclectic Representation* (LIT Verlag, 2012) 196; Steven G Calabresi and Julie T Rickert, 'Originalism and Sex Discrimination' (2011) 90 *Texas Law Review* 1, 98; Jethro K Lieberman, *A Practical Companion to the Constitution: How the Supreme Court Has Ruled on Issues from Abortion to Zoning* (University of California Press, 1999) 165; Gerard V Bradley, 'The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself' (1987) 37 *Case Western Reserve Law Review* 674, 696; James E Wood, "'No Religious Test Shall Ever Be Required": Reflections on the Bicentennial of the US Constitution' (1987) 29 *Journal of Church and State* 199, 201. The drafters of the *United States Constitution*, which includes a prohibition on religious tests on which the Australian clause is based, referred to religious tests as discrimination: Debate in the North Carolina Ratifying Convention (30 July 1788) (James Iredell), in Phillip B Kurland and Ralph Lerner (eds) *The Founders' Constitution* (University of Chicago Press, 1987) vol 5, 90; see also Paul Leicester Ford (ed), *Essays on the Constitution of the United States, Published During its Discussion by the People: 1787–1788* (Historical Printing Club, 1892) 169.
- 3 *R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and others* [2009] All ER (D) 163 (Dec), [34] (Lord Phillips P), [184] (Lord Clarke J), [231] (Lord Rodger J), [250] (Lord Brown J); *In re Summers*, 325 US 561, 571 (1945); *McDaniel v Paty*, *et al*, 435 US 618, 631–2 (1978). See also *Ho Ah Kow v Nunan*, 12 F Cas 252, 256 (Cir Crt D Cal, 1879).

This article argues that the religious tests clause should be conceived of as an anti-discrimination provision embracing a distinction between direct and indirect religious tests equivalent to the distinction between direct and indirect discrimination in other bodies of law. In other words, this article argues that a religious test exists where there is discrimination, either directly or indirectly, on the ground of religion. This approach to understanding the concept of a 'religious test' offers a coherent and principled way to exclude individuals holding dangerous religious beliefs from Commonwealth employment in a way that does not contravene s 116 of the *Constitution*.

The article begins in Part II by describing the problem of excluding dangerous religious beliefs from general protections of religion. The description focuses particularly on the demands of national security and how the problem manifests in the context of the religious tests clause. In particular, Part II provides a definition of 'dangerous religious beliefs': a particular religious belief is dangerous if it is the driving motivation for an act of serious violence or an intention to commit an act of serious violence. Determining the motivation for conduct is a familiar task in law and Part II discusses Australian case law dealing with individuals holding dangerous religious beliefs to demonstrate how the definition can be applied in a principled manner.

Part III of the article examines and critiques the only consideration of the problem in the academic literature, which suggests that the religious tests clause should be read as subject to a limited exception such that religious tests may be imposed for Commonwealth positions where this is necessary or justified in the circumstances. That approach involves a form of external balancing. Part III argues that the 'exception approach' is constitutionally unsatisfactory because it has no persuasive rationale and contradicts the cardinal principle of constitutional law that the text of the *Constitution* is binding. In Part IV, the article explains how a functionalist comparative law inquiry, of the type the High Court has often engaged in, allows insights to be drawn from other bodies of law to understand the concept of a 'religious test'.

The article then turns to developing the argument that the religious tests clause should be understood as an anti-discrimination provision. Parts V to VIII consider what insights concerning the concept of a 'religious test' can be drawn from how various bodies of law deal with the problem of excluding dangerous religious beliefs from general protections of religion. In Part V, the article examines how American constitutional jurisprudence deals with the problem of individuals holding dangerous religious beliefs and what insights that jurisprudence offers for understanding the Australian religious tests clause. Part VI considers how the problem of excluding individuals holding dangerous religious beliefs from general protections of religion is dealt with in international human rights law and the insights offered by that body of jurisprudence. In Part VII, the article examines how Australian statutory anti-discrimination law addresses the problem and what insights that body of law offers. Part VIII examines Australian constitutional prohibitions on discrimination and what insights the jurisprudence concerning those prohibitions offers for understanding the religious tests clause.

The common insight to be drawn from the bodies of law that Parts V to VIII consider is that understanding the concept of a 'religious test' as discrimination on the ground of religion offers a coherent analytical framework for understanding the concept of a 'religious test'. That framework involves a distinction between direct and indirect discrimination and employs internal balancing rather than external balancing, an analytical device which avoids contracting the constitutional text. That framework offers a principled way of excluding persons holding dangerous religious beliefs from general protections of religion.

In Part IX, the article argues that a distinction between direct and indirect religious tests, equivalent to the distinction between direct and indirect discrimination, should be adopted for the purposes of the religious tests clause of s 116 of the *Constitution*. The distinction provides a principled analytical framework for understanding the concept of a 'religious test'. Part IX also explains how this approach is consistent with history. In more practical terms, Part IX also explains a methodology for determining whether an indirect religious test exists. Part X offers some concluding comments and emphasises that while the 'exception' approach to the problem works, the anti-discrimination approach works better because the analysis it requires is more structured and tied to principle.

II THE PROBLEM OF DANGEROUS RELIGIOUS BELIEFS

The literature clearly shows that religious beliefs can prompt acts of serious violence, or prompt an intention to commit acts of serious violence, and that belief in violence can be a sincerely held religious belief.⁴ For example, in *Terror in the Mind of God: The Global Rise of Religious Violence*, the sociologist and religious

4 See, eg, M Brooke Rogers et al, 'The Role of Religious Fundamentalism in Terrorist Violence: A Social Psychological Analysis' (2007) 19 *International Review of Psychiatry* 253; Veronica Ward and Richard Sherlock (eds), *Religion and Terrorism: The Use of Violence in Abrahamic Monotheism* (Lexington Books, 2014); Bruce Hoffman, "'Holy Terror': The Implications of Terrorism Motivated by a Religious Imperative' (1995) 18 *Studies in Conflict & Terrorism* 271; David C Rapoport, 'Sacred Terror: A Contemporary Example from Islam' in Walter Reich (ed), *Origins of Terrorism: Psychologies, Ideologies, Theologies, States of Mind* (Johns Hopkins University Press, 1990); D C Rapoport, 'Why Does Religious Messianism Produce Terror?' in Paul Wilkinson and Alasdair M Stewart (eds), *Contemporary Research on Terrorism* (Aberdeen University Press, 1987); Mark Juergensmeyer, Margo Kitts and Michael Jerryson (eds), *The Oxford Handbook of Religion and Violence* (Oxford University Press, 2013); Nicholas F Gier, *The Origins of Religious Violence: An Asian Perspective* (Lexington Books, 2014); Jonathan Sacks, *Not in God's Name: Confronting Religious Violence* (Hodder & Stoughton, 2015); Hector Avalos, *Fighting Words: The Origins of Religious Violence* (Prometheus Books, 2005); John Renard (ed), *Fighting Words: Religion, Violence, and the Interpretation of Sacred Texts* (University of California Press, 2012); Barry Cooper, *New Political Religions, or an Analysis of Modern Terrorism* (University of Missouri Press, 2004); Charles Kimball, *When Religion Becomes Lethal* (John Wiley & Sons, 2011); Charles Selengut, *Sacred Fury: Understanding Religious Violence* (Rowman & Littlefield, 2008); Mark Juergensmeyer and Margo Kitts (eds), *Princeton Readings in Religion and Violence* (Princeton University Press, 2011); Heather S Gregg, 'Defining and Distinguishing Secular and Religious Terrorism' (2014) 8(2) *Perspectives on Terrorism* 36; Jon Pahl, 'Violence from Religious Groups' in Wilhelm Heitmeyer and John Hagan (eds), *International Handbook of Violence Research* (Kluwer Academic Publishers, 2003) 323; Volkhard Krech, 'Sacrifice and Holy War: A Study of Religion and Violence' in Wilhelm Heitmeyer and John Hagan (eds), *International Handbook of Violence Research* (Kluwer Academic Publishers, 2003) 1005.

studies scholar Mark Juergensmeyer presents a series of case studies of acts of terrorism perpetrated by individuals belonging to six different faith traditions. Based on those case studies, including interviews with the perpetrators, as well as on broader scholarship, Juergensmeyer explains ‘religious terrorism’ as ‘public acts of violence ... for which religion has provided the motivation, the justification, the organization, and the world view’.⁵

It is useful to explain at the outset what the expression ‘dangerous religious belief’ means. For the purposes of this article, a ‘dangerous religious belief’ is any religious belief that (i) prompts the individual holding the belief to commit an act of serious violence, (ii) prompts an intention to commit an act of serious violence or (iii) that causes a person to be a risk to national security in the sense that an adverse security assessment might be made in respect of that person under Part IV of the *Australian Security Intelligence Organisation Act 1979* (Cth).⁶ Whilst there may be an element of impressionistic reasoning involved in the analysis, the factual analysis involved in this definition is of a type often applied by Australian courts and tribunals.

At present, a significant number of Australians hold religious beliefs of a kind meeting the definition of ‘dangerous religious belief’ given above. For example, in *BLBS and Director-General of Security*, the Security Division of the Administrative Appeals Tribunal upheld a decision made by the Australian Security Intelligence Organisation (‘ASIO’) to issue an adverse security assessment against an individual and a subsequent decision of the Minister for Foreign Affairs to cancel that individual’s passport on the basis of that adverse security assessment. The facts on which the adverse security assessment was issued included that the individual ‘had maintained associations with persons of security concern and was likely to share their view that violence was acceptable to achieve a ... religious end’.⁷ Similarly, in *CXQY and Director-General of Security*, the Security Division of the Administrative Appeals Tribunal upheld a decision to

5 Mark Juergensmeyer, *Terror in the Mind of God: The Global Rise of Religious Violence* (University of California Press, 3rd ed, 2013) 7.

6 These assessments are amenable to merits review in the Security Division of the Administrative Appeals Tribunal (*Australian Security Intelligence Organisation Act 1979* (Cth) s 54) and to judicial review in the courts. These assessments determine whether, in the opinion of ASIO, a person poses a risk to ‘security’. ‘Security’ is defined by *Australian Security Intelligence Organisation Act 1979* (Cth) s 4 as

- (a) the protection of, and of the people of, the Commonwealth and the several States and Territories from:
 - (i) espionage;
 - (ii) sabotage;
 - (iii) politically motivated violence;
 - (iv) promotion of communal violence;
 - (v) attacks on Australia’s defence system; or
 - (vi) acts of foreign interference;
 whether directed from, or committed within, Australia or not; and
- (aa) the protection of Australia’s territorial and border integrity from serious threats; and
- (b) the carrying out of Australia’s responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in paragraph (aa).

7 *Re BLBS and Director-General of Security* (2013) 137 ALD 196, [111] (‘BLBS’).

issue an adverse security assessment. The adverse security assessment had been issued because ASIO 'assessed that CXQY holds an extremist interpretation of Islam and is likely to engage in activities prejudicial to security'.⁸

The criminal law relating to terrorism also provides examples of Australians with religious beliefs of type that give rise to intentions or attempts to commit serious acts of violence. Part of the definition of 'terrorist act' in the Commonwealth *Criminal Code* is 'the intention of advancing a ... religious ... cause'.⁹ In *Fattal v The Queen*, the Victorian Court of Appeal upheld convictions for conspiring to do acts in preparation for, or planning, a terrorist act, contrary to the *Criminal Code Act 1995* (Cth). The case concerned a plot to detonate a bomb at the Holsworthy Army Barracks in Sydney. The sentencing judge described the co-conspirator's religious beliefs as including an 'obligation to oppose and deal with those [the co-conspirators] describe as infidels, being persons who are not of the Muslim faith or those of the Muslim faith who do not observe the faith in what [the co-conspirators] perceive as an appropriate manner, or adhere to the strong and fundamentalist views that [the co-conspirators] all hold'.¹⁰ In respect of one of the offenders, the Court of Appeal held that 'there was a large amount of evidence which implied that, at all relevant times, El Sayed's intention was most certainly to advance Islam through violence'.¹¹

ASIO's 2014–15 *Report to Parliament* also notes the threat posed by individuals in Australia who hold religious beliefs meeting the definition of 'dangerous religious belief' given above. The report noted that ASIO had '400 higher-priority counter-terrorism investigations at the end of the reporting period' and commented that '[s]ome of those returning [from participating in hostilities in the Middle East] are likely to exhibit a reinforced commitment to violent jihad ... Some will be inured to the use of extreme violence ... A persistent risk is that these individuals will refocus their commitment to violent extremism into planning an attack in Australia'.¹²

As the discussion of the above cases shows, the inquiry as to whether an individual holds dangerous religious beliefs focuses on the particular religious beliefs of a particular individual, which may differ from those of other members of the broader religion or faith tradition to which the individual belongs. The inquiry does not involve an assessment of whether an entire religion or faith tradition is dangerous. The co-conspirators in *Fattal*, for example, were found to hold dangerous religious beliefs that were not shared by other adherents of the Islamic faith, but those beliefs were, nevertheless, sincerely held religious beliefs on the part of the co-conspirators.

8 *Re CXQY and Director-General of Security* (2013) 62 AAR 386, [1] ('CXQY').

9 *Criminal Code Act 1995* (Cth) ss 100.1 (definition of 'terrorist act'), 101.1.

10 *R v Fattal* [2011] VSC 681, [11].

11 *Fattal v The Queen* [2013] VSCA 276, [64].

12 Australian Security Intelligence Service, *ASIO Report to Parliament 2014–15* (2015) 3–4, <<https://www.asio.gov.au/sites/default/files/ASIOReportToParliament2014-15.pdf>>.

It is possible that individuals holding religious beliefs that prompt acts of serious violence, or an intention to commit acts of serious violence, or that cause a person to pose a risk to national security may seek Commonwealth employment. Indeed, individuals allegedly holding dangerous religious beliefs, in this sense, have in fact sought employment in the Australian Public Service before. The problem presented itself directly to the High Court in *Church of Scientology v Woodward*,¹³ a case raising the religious tests clause of s 116. Woodward was Director-General of ASIO. The plaintiff alleged that Woodward caused or permitted ASIO to communicate security assessments to Commonwealth Ministers concerning a number of individuals who were employed, or were proposed to be employed, by the Commonwealth. Those security assessments characterised the individuals concerned as ‘security risks’ by reason of nothing more than their membership of the Church of Scientology and being practising Scientologists.¹⁴ The plaintiff argued that Woodward had thereby caused or permitted ASIO to require a religious test as a qualification for an office or public trust under the Commonwealth.¹⁵

The problem is clear on these facts. The reason why the individuals concerned were denied Commonwealth employment can be traced to their religious beliefs. Indeed, one scholar has suggested that a ‘blatant’ religious test is involved on the facts of *Woodward*.¹⁶ It is important to emphasise that religious belief was central in all the cases mentioned above. The convictions in *Fattal* were secured because of the religious motivations of the co-conspirators. The adverse security assessments in *BLBS* and *CXQY* were issued because of the individuals’ particular religious beliefs. The security assessments in *Woodward* were also issued because of the individuals’ particular religious beliefs. It would be artificial and wrong to say that the adverse security assessments were issued because of the view taken by ASIO that the individuals posed a threat to national security and not because of their religious beliefs. It is precisely because of the individuals’ particular religious beliefs that ASIO formed the view that the individuals posed a risk to national security.¹⁷

In the event, the High Court avoided addressing the problem in *Woodward*. Justice Aickin struck out the claim on a technicality. He explained that ‘[t]he allegation,

13 (1979) 154 CLR 79 (*‘Woodward’*). The case was decided on 9 November 1979 and was reported as an appendix to the later case *Church of Scientology Inc v Woodward* (1982) 154 CLR 25 which dealt with other issues.

14 (1979) 154 CLR 79, 81.

15 Ibid 81, 82.

16 Reid Grant Mortensen, *The Secular Commonwealth: Constitutional Government, Law and Religion* (PhD Thesis, University of Queensland, 1995) 285.

17 To hold otherwise would be equivalent to holding that religion plays no role in the case of a Sikh man who is dismissed from a police service for failing to comply with a dress code concerning hats. As, for example, the House of Lords recognised in *Mandla v Dowell Lee* [1983] 2 AC 548, a discrimination case, and the High Court of Australia recognised in *Street v Queensland Bar Association* (1989) 168 CLR 461, the reason a Sikh man does not comply with a dress code requirement to wear a hat is precisely because of his religious beliefs, which include an obligation to wear a turban. *Street v Queensland Bar Association* (1989) 168 CLR 461, 488: ‘So to forbid all persons from wearing a turban is on its face a prohibition applicable to all persons without distinction, but in effect is a discrimination based upon religious grounds because its only impact will fall upon adherents of a creed or religion which requires the wearing of turbans.’

as spelt out in the particulars, seems really to be that the Commonwealth itself required a religious test, but that does not particularize the allegation in [the statement of claim] itself ... The provision of information to a prospective employer cannot be regarded as the imposition of a religious test *by the provider of the information*.¹⁸ The plaintiffs should have pleaded that the Commonwealth itself had imposed a religious test relying on the ASIO security assessments to implement that test.

If there was a religious test at issue in *Woodward*, then the religious tests clause might have an unreasonable or perverse operation in some cases. It might prevent the Commonwealth from denying employment to the 400 individuals noted in ASIO's report to Parliament or the applicants involved in *BLBS* and *CXQY*. The situation of those individuals appears similar to the situation of the individuals involved in *Woodward*.

The starting assumption of this article is that there must be a principled solution to the problem: as some American judges have said, a constitution is not a suicide pact,¹⁹ and as Latham CJ said in *Adelaide Company of Jehovah's Witnesses Incorporated v Commonwealth*, a case concerning the free exercise clause of s 116, '[t]he complete protection of all religious beliefs might result in the disappearance of organized society, because some religious beliefs, as already indicated, regard the existence of organized society as essentially evil'.²⁰ In short, the general problem is one of finding a principled way to exclude dangerous religious beliefs from general protections for religious belief. In the context of the religious tests clause of s 116 of the *Constitution*, the specific problem is one of finding a principled way to exclude individuals holding dangerous religious beliefs from its scope.

III THE EXCEPTION APPROACH TO THE PROBLEM AND WHY IT CANNOT BE ACCEPTED

The problem with which this article is concerned has been considered only once before in the academic literature on s 116. Reid Mortensen advanced what might be called the 'exception approach' to the problem in the context of developing a theory of secular government that is appropriate in conditions of religious pluralism. Mortensen discusses s 116 of the *Constitution* as part of that broader project, and that discussion in turn includes a brief analysis of the problem of

18 (1979) 154 CLR 79, 83 (emphasis added). This conclusion was criticised in Leslie Glick, 'Church of Scientology Inc v Mr Justice Woodward' (1980) 11 *Federal Law Review* 102, 107 on the basis that 'surely it is open to argue that the proper interpretation of those words in section 116 [ie the religious tests clause] is that no instrumentality of the Commonwealth should participate in any steps which impose a religious test as part of the qualification'.

19 *Terminiello v City of Chicago*, 337 US 1, 36 (1949): 'There is danger that, if the court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact'; *Kennedy v Mendoza-Martinez*, 372 US 144, 160 (1963): 'while the Constitution protects against invasions of individual rights, it is not a suicide pact'.

20 (1943) 67 CLR 116, 126.

excluding dangerous religious beliefs from the scope of the religious tests clause.²¹ Before turning to argue that the concept of a religious test should be understood as discrimination on the ground of religion, it is useful to examine the exception approach and its rationale.

The exception approach is to say that ‘the Commonwealth might be able to legitimise action that constitutes a *prima facie* invalid religious test by proving its necessity for the effective enforcement of security rights that makes the exercise of other liberties possible’.²² Mortensen also uses the formulation ‘prove that an exception was justified’.²³ It is not necessary to explore the distinction, if any, between the concepts ‘necessary’ and ‘justified’ for the purposes of this article since the article argues that any exception to the religious tests clause is constitutionally unsatisfactory. Mortensen does not consider any alternative approaches to the problem.

Mortensen offers two interrelated rationales for the exception approach, neither of which are persuasive. Those rationales — an analogy with the free exercise clause of s 116 and a claim of consistency with general constitutional principle — will be considered in turn.

A Analogy with the Free Exercise Clause Rationale

The first rationale is an argument that the exception approach is consistent with the approach of the High Court to the free exercise clause of s 116, which provides that ‘[t]he Commonwealth shall not make any law ... for prohibiting the free exercise of any religion’. Mortensen writes that ‘as in the process of free exercise clause enquiry, [the exception approach] shifts the evidential onus to government to prove that an exception to the usual protections of the test clause is justified, but only in the proven circumstances of this particular case’.²⁴

The analogy with the free exercise clause of s 116 is unpersuasive because in none of the cases in which the High Court has considered the free exercise clause was there an endorsement of any principle or doctrine that would contradict the text of the *Constitution* or permit the ‘usual protections’ of the clause to be disappplied.

In contrast to the High Court’s reasoning in the free exercise clause cases discussed below, the proposition that there is an exception to the prohibition on religious tests does not have a textual anchor. As Mortensen acknowledges, the exception approach contradicts the constitutional text. It is an ‘exception to the usual protections of the test clause’.²⁵ The principal benefit of the exception approach Mortensen argues is that it ‘openly recognises the religious test, and

21 It should be emphasised that Mortensen’s analysis of the problem with which this article is concerned was very much tangential to the principal focus of his work. Deeper analysis of the issues involved was beyond the scope of his concerns.

22 Mortensen, above 16, 288.

23 Ibid 285, 288.

24 Ibid 288.

25 Ibid.

does not establish a binding precedent that could allow government effectively to concede preferences to majoritarian religious groups in other cases that were less challenging to security rights'.²⁶ This, however, is the principal reason why the approach is constitutionally unsatisfactory. By openly recognising and permitting a religious test, the approach contradicts the text of the *Constitution*.

The leading case on the free exercise clause of s 116 is *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth*.²⁷ The case concerned the confiscation of property under the *National Security (Subversive Associations) Regulations 1940* (Cth) ('*Regulations*'). In Adelaide, members of the Jehovah's Witnesses faith publicised, by various means, their belief that the British Empire and other organised political bodies, including the Australian government, were organs of Satan. They also publicised their belief that they must not involve themselves in military conflicts. Under the relevant legislation, the Adelaide Company of Jehovah's Witnesses Inc was declared to be prejudicial to the defence of the Commonwealth and the efficient prosecution of the war. A Commonwealth officer took possession and occupied premises belonging to that association.

In the High Court, the Adelaide Company of Jehovah's Witnesses argued that the *Regulations* and declaration contravened the free exercise clause of s 116. That argument was rejected. The reasoning of the judges in the case on the free exercise clause issue had a textual anchor and thus did not contradict the text of the provision.²⁸ The reasoning was tied to the words 'free exercise'. Chief Justice Latham explained that '[t]he word "free" is used in many senses, and the meaning of the word varies almost indefinitely with the context'.²⁹ In the context of a provision like s 116, Latham CJ said it meant freedom within a system of civilised government.³⁰ Justice Starke explained that 'liberty and freedom in an organized community are relative and not absolute terms'.³¹ To similar effect was Williams J's conclusion that subversive activities could not fall within the meaning of the phrase 'free exercise of religion'.³² In short, the court held that actions prejudicial to the ongoing existence of society could not be characterised as the 'free exercise of any religion'.³³ It followed that the *Regulations* and declaration did not violate s 116.

26 Ibid.

27 (1943) 67 CLR 116.

28 Cf Rich J: *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 149–50, '[F]reedom of religion is not absolute. It is subject to powers and restrictions of government essential to the preservation of the community ... Any competition between governmental powers and liberty under the Constitution can be reconciled and made compatible'.

29 (1943) 67 CLR 116, 126.

30 Ibid 131–2.

31 Ibid 154.

32 Ibid 159–61.

33 Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21 *Melbourne University Law Review* 1, 11 describes, in passing, the case as involving an 'exception' to the guarantee. Kirk was using the term 'exception' in a very loose sense to make the point that the provision was not interpreted as 'an absolute guarantee' rather than to suggest that the High Court's decision contradicted the text of the provision: at 10.

In this case, the judges did not concede, and indeed rejected, that there had been any interference with the ‘free exercise of religion’. The court adopted a form of what might be called internal balancing to determine whether there had been any interference with the free exercise of religion in the first place. The ‘usual protections’ of the clause were not disappplied. By contrast, the exception approach requires a concession as to the existence of a religious test. It calls for what might be called external balancing where the demands of the prohibition s 116, which the High Court has described as ‘clear and emphatic in its command’,³⁴ may be weighed against matters external to the provision. This approach has no textual anchor in the provision.

In *Kruger v Commonwealth*, the High Court also adopted a textually focussed approach and did not entertain the idea that it was possible to disapply the clause.³⁵ The case was a challenge to the legislative scheme that brought about the stolen generations in the Northern Territory. The plaintiffs claimed to have been taken from their families as children or to have had their children taken from them between 1925 and 1949. In the High Court, the plaintiffs alleged that the legislative regime prohibited the free exercise of religion. The essential claim was that the legal framework prevented Aboriginal children who had been removed from their families from learning, observing, practising and participating in the religion of their family and community, prevented Aboriginal parents and families from passing on rites and secrets of their religion and prevented all of them from associating for religious purposes.³⁶

The High Court unanimously rejected the s 116 claim. In broad terms, the High Court reached this decision in two ways. Brennan CJ, Dawson and McHugh JJ all held that s 116 did not restrict the territories power,³⁷ and accordingly, the legal framework in question was not subject to s 116.³⁸ Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ all held that the legislation did not have the purpose of prohibiting the free exercise of religion, purpose being considered the criterion of validity as a consequence of s 116’s use of the word ‘for’ in the free exercise clause.³⁹ The word ‘for’ does not appear in the religious tests clause of s 116.

It follows that an analogy with the free exercise clause does not provide support for any exception approach to the religious tests clause. Free exercise jurisprudence does not allow for a finding of validity in the face of a concession that there has been a prohibition of the free exercise of religion. It does not involve external balancing and it does not permit disapplying s 116.

34 *A-G (Vic) ex rel Black v Commonwealth* (1981) 146 CLR 559, 649.

35 (1997) 190 CLR 1.

36 *Ibid* 14.

37 *Constitution* s 122: ‘The Parliament may make laws for the government of any territory’.

38 *Kruger v Commonwealth* (1997) 190 CLR 1, 42–4 (Brennan CJ), 60 (Dawson J), 142 (McHugh J).

39 *Ibid* 40 (Brennan CJ), 60–1 (Dawson J), 86 (Toohey J), 133–4 (Gaudron J), 160–1 (Gummow J). For a discussion of purpose as a criterion of validity arising from the use of the word ‘for’ in s 116 see Anthony Gray, ‘Section 116 of the *Australian Constitution* and Dress Restrictions’ (2011) 16 *Deakin Law Review* 293, 311–12; Luke Beck, ‘Clear and Emphatic: The Separation of Church and State under the *Australian Constitution*’ (2008) 27 *University of Tasmania Law Review* 161, 168–70.

B Consistency with General Constitutional Principle Rationale

The second rationale offered for the exception approach is that the approach is consistent with general constitutional principle. Mortensen argues that the religious tests clause ‘reinforces the central assumption of secular government that the citizen’s religion is not, *ipso facto*, an indication of disloyalty, divided loyalty or an inability to contribute to the common good’.⁴⁰ As a result, the clause ‘helps to realise the principle of religious equality by incorporating this assumption in the political constitution’.⁴¹ Applying this principle to reach the doctrinal position that there is an exception to the prohibition enacted by the religious tests clause, Mortensen writes:

Since the test clause helps to realise the principle of equal religious liberty, it is likely to embody the same limits on the protection of religious conceptions and practices as the free exercise clause. Thus, the Commonwealth might be able to legitimise action that constitutes a *prima facie* invalid religious test by proving its necessity for the effective enforcement of security rights that makes the exercise of other liberties possible.⁴²

For present purposes, it may be assumed that the religious tests clause has the religious equality purpose Mortensen attributes to it.⁴³ However, any such purpose does not justify the creation of an exception to the express terms of the religious tests clause. As Jack Balkin explains, using an American constitutional example, underlying principles and purposes cannot be invoked to contradict the constitutional text:

suppose that a principle underlying the Second Amendment’s right to bear arms is the promotion of public safety. One can promote public safety in many ways, however, including confiscating all privately held arms from the citizenry. Nevertheless, that would contradict the textual grant of a right to bear arms and so it is not a permissible application of the underlying principle.⁴⁴

Likewise, it is not a permissible application of the principle that Mortensen suggests underlies the religious tests clause of s 116 to permit religious tests in limited circumstances. The exception approach is a form of external balancing that involves contradicting the constitutional text.

40 Mortensen, above 16, 287.

41 *Ibid.*

42 *Ibid.* 288.

43 There is some support in the case law that s 116 has this purpose. See, eg, *Adelaide Company of Jehovah’s Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 126 (Latham CJ): ‘Section 116, however, is based upon the principle that religion should, for political purposes, be regarded as irrelevant. It assumes that citizens of all religions can be good citizens, and that accordingly there is no justification in the interests of the community for prohibiting the free exercise of any religion.’

44 Jack M Balkin, *Living Originalism* (Harvard University Press, 2011) 271, citing Randy E Barnett, ‘Underlying Principles’ (2007) 24 *Constitutional Commentary* 405, 412–13. The Second Amendment to the *United States Constitution* states: ‘A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.’

C Analogy with s 117

A potential rationale in favour of the exception approach that Mortensen does not consider is an analogy with s 117. That provision prohibits discrimination by a state against residents of other states.⁴⁵ In *Street v Queensland Bar Association*, the leading case on s 117, Brennan J noted that s 117 ‘is not expressed to be subject to any qualification or exception’.⁴⁶ In obiter remarks, Brennan J stated ‘it is clear that there must be some exception to a general application of its terms’.⁴⁷

For Brennan J, the provision ‘is qualified only by necessary implication from the Constitution itself ... Nothing less than the need to preserve the institutions of government and their ability to function can justify the erection by a government of a barrier to the legal and social unity of the Australian people’.⁴⁸ For McHugh J, the test is also one of ‘necessary implication from the assumptions and structure of the Constitution’.⁴⁹ An obvious example would be that residents of Victoria cannot rely on s 117 to complain that they are denied a right to vote in elections for the Parliament of New South Wales.

On this approach, a form of external balancing must be undertaken. The demands of s 117 are to be balanced against necessary implications from the *Constitution* concerning the autonomy of the states. Whilst Mortensen’s exception approach also involves a form of external balancing, an analogy with s 117 does not support the exception approach to the religious tests clause of s 116. There are two reasons for this. First, in *Street* the external balancing involves balancing constitutional demands against other constitutional demands. What is involved is perhaps a contradiction of the text of s 117 but not any contradiction of the *Constitution* as a whole. What is involved is reading and giving effect to the *Constitution* as a coherent whole: in other words, seeking to reconcile apparently inconsistent constitutional demands. The exception approach to the religious tests clause seeks to balance the constitutional demands of s 116 against ‘effective enforcement of security rights that makes the exercise of other liberties possible’.⁵⁰ Perhaps the executive power of the Commonwealth,⁵¹ and the legislative power to make laws with respect to defence,⁵² provide some support for the idea of security rights, but this is far less grounded in the text and structure of the *Constitution* than are the ‘necessary implications’ against which s 117 is balanced.

The second reason why an analogy with s 117 does not support the exception approach to the religious tests clause is that there is good reason to suppose that

45 *Constitution* s 117: ‘A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.’

46 (1989) 168 CLR 461, 512 (*Street*).

47 *Ibid*.

48 *Ibid* 512–13.

49 *Ibid* 584.

50 Mortensen, above n 16, 288.

51 *Constitution* s 61.

52 *Constitution* s 51(vi).

the external balancing approach to s 117 is in fact wrong. In *Street*, Gaudron J rejected the idea that there could be any exception to s 117 and explained that the concerns the external balancing approach seeks to address can be resolved in another way. Gaudron J explained that '[j]ust as the legal concept of discrimination does not extend to different treatment appropriate to a relevant difference, so too, the absence of a right or entitlement does not constitute a disability if the right or entitlement is appropriate to a relevant difference'.⁵³ In other words, for Gaudron J, to deny a resident of Victoria a right to vote in elections for the Parliament of New South Wales is not discrimination or a disability on the basis of state residency. Mason CJ similarly commented that 'I doubt that such an exclusion would amount to a disability or discrimination within the section'.⁵⁴ The absence of that right is reasonably capable of being seen as appropriate and adapted to a constitutional purpose. Gaudron J uses a form of internal balancing to resolve the concern in a way that does not involve contradicting the text of s 117. It is this kind of internal balancing approach that this article ultimately argues should govern the religious tests clause of s 116.

Indeed, Brennan J seems really to favour the internal balancing approach outlined by Gaudron J. Brennan J commented that examples that fall within what he called an exception, 'may not amount to discrimination at all'.⁵⁵

More significantly, the internal balancing approach appears to have commanded majority support after *Street*. In *Sweedman v Transport Accident Commission*, Gleeson CJ, Gummow, Kirby and Hayne JJ indicated that the conception of discrimination understood in non-s 117 contexts would be applied in the s 117 context.⁵⁶ They cited a case, endorsing the concept of discrimination outlined in *Austin v Commonwealth*,⁵⁷ which involves internal balancing: 'discrimination' is 'the unequal treatment of equals or the equal treatment of those who are not equals, where the differential treatment and unequal outcome is not the product of a distinction which is appropriate and adapted to the attainment of a proper objective'.⁵⁸ It follows that an analogy with s 117 does not support the exception approach to the religious tests clause of s 116.

D The Exception Approach is Unsatisfactory

In summary, the exception approach advocated by Mortensen to the problem is unsatisfactory. Although at first blush it appears to be a workable solution to the problem, it has no persuasive rationale and it contradicts a cardinal principle of constitutional law: the binding nature of the constitutional text. Having rejected the only suggested solution to the problem in the existing literature, the article

53 *Street* (1989) 168 CLR 461, 572.

54 *Ibid* 492.

55 *Ibid* 513.

56 (2006) 226 CLR 362, 409 ('*Sweedman*').

57 (2003) 215 CLR 185, 247 [118].

58 *Sweedman* (2006) 226 CLR 362, citing *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vic)* (2004) 220 CLR 388, 423–4.

now turns to developing a more satisfactory solution. That solution involves the internal balancing approach described above.

IV DEVISING A SATISFACTORY SOLUTION TO THE PROBLEM

If it is constitutionally unsatisfactory to ‘read in’ a limited exception to the religious tests clause or to engage in external balancing, how then can a satisfactory solution to the problem of excluding dangerous religious beliefs from the protection of the religious tests clause of s 116 be devised? The approach of this article is to look to how other bodies of law deal with the issue of excluding dangerous religious beliefs from general protections of religion. The purpose of this exercise is to draw insights about the meaning of the concept of a ‘religious test’ to inform the interpretation of that concept as it appears in the context of s 116 of the *Constitution*.

This approach is consistent with High Court practice. Cheryl Saunders explains that the ‘High Court has always referred relatively freely to the law of other jurisdictions in dealing with questions of both constitutional and non-constitutional law’.⁵⁹ The particular comparative interpretative approach of this article is described in the literature as ‘functionalist’.⁶⁰ It ‘identifies the different ways in which common problems can be addressed and suggests that societies can improve their institutions by learning from each other in this way’.⁶¹ The High Court has engaged in a functionalist use of foreign law on multiple occasions.⁶² For example, as Amelia Simpson points out, in *Street* the High Court looked to discrimination jurisprudence in American, Canadian and European courts in developing its approach to the prohibition against discrimination against interstate residents in s 117 of the *Constitution*.⁶³ In that case, Gaudron J also referred to the jurisprudence surrounding Australian anti-discrimination statutes to inform

59 Cheryl Saunders, *The Constitution of Australia: A Contextual Analysis* (Hart Publishing, 2011) 102. In a recent empirical study of the High Court’s practice of referring to foreign decisions in constitutional cases, Cheryl Saunders and Adrienne Stone report that ‘during the period 2000–08, the High Court of Australia adjudicated 193 constitutional cases in 99 of which, representing 51.30 per cent, foreign precedents were cited’: Cheryl Saunders and Adrienne Stone, ‘Reference to Foreign Precedents by the Australian High Court: A Matter of Method’ in Tania Groppi and Marie-Claire Ponthorea (eds), *The Use of Foreign Precedents by Constitutional Judges* (Hart Publishing, 2013) 13, 37. For the period 2009–12, Elisa Arcioni and Andrew McLeod report that the High Court decided 42 constitutional cases and referred to foreign (or European) cases in 37 of them: Elisa Arcioni and Andrew McLeod, ‘Cautious but Engaged — An Empirical Study of the Australian High Court’s Use of Foreign and International Materials in Constitutional Cases’ (2014) 42 *International Journal of Legal Information* 437, 449.

60 Mark Tushnet, ‘The Possibilities of Comparative Constitutional Law’ (1999) 108 *Yale Law Journal* 1225, 1238–69.

61 Nicholas Aroney, ‘Comparative Law in Australian Constitutional Jurisprudence’ (2007) 26 *University of Queensland Law Journal* 317, 322.

62 *Ibid* 323.

63 Amelia Simpson, ‘Grounding the High Court’s Modern Section 92 Jurisprudence: The Case for Improper Purpose as the Touchstone’ (2005) 33 *Federal Law Review* 445, 448 n 8.

her interpretation of the concept of 'discrimination' in the context of s 117.⁶⁴ The methodology employed in this article is to look to what relevant insights might be drawn from other bodies of law.

V THE PROBLEM IN UNITED STATES CONSTITUTIONAL LAW

A *The American Religious Tests Clause*

The religious tests clause of s 116 of the *Australian Constitution* is taken from the *United States Constitution*.⁶⁵ Article VI of the *United States Constitution* provides in part that 'no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States'.⁶⁶ In theory, the same problem regarding unreasonable or perverse consequences if dangerous religious beliefs are not excluded from the general protection for religion arises under the American religious tests clause as it does under the Australian religious tests clause. In practice, however, the problem has never arisen in litigation and therefore the United States Supreme Court has not had to develop any doctrinal solution to it that may inform Australian doctrine.

Indeed, the United States Supreme Court has never decided any case at all on the basis of the religious tests clause of the *United States Constitution* because such cases are also captured by the two religion clauses of the First Amendment, which provide: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof'. In *Torcaso v Watkins*,⁶⁷ the United States Supreme Court considered the validity of a provision in the *Maryland Constitution* that provided 'no religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God'.⁶⁸ Consistent with that provision, it was a requirement for notaries public in Maryland to declare their belief in the existence of God. The Supreme Court held that such a requirement violated the establishment clause of the First Amendment of the *United States Constitution*, which is binding on the

64 *Street* (1989) 168 CLR 461, 466.

65 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 2 March 1898, 1769 (Henry Bournes Higgins): 'I may state that most of this clause [ie s 116], with regard to the making of laws, is already in the American Constitution ... In the original Constitution you will find also a clause to the effect that there is to be no religious test required as a qualification for any post or office.'

66 In full, the third clause of art VI of the *United States Constitution* provides: 'The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States'.

67 367 US 488 (1961).

68 *Maryland Constitution* art 37.

states by reason of the ‘incorporation’ doctrine of the Fourteenth Amendment.⁶⁹ In a footnote, the Court said that because the case was being decided on those grounds, ‘we find it unnecessary to consider appellant’s contention that this provision [the religious tests clause of the *United States Constitution*] applies to state as well as federal offices’.⁷⁰ Religious tests may also violate other provisions of the *United States Constitution*.⁷¹

Similarly, American scholarship does not seem to have addressed the problem. Indeed, in contrast to the wealth of scholarship concerning the religion clauses of the First Amendment, there is such a dearth of scholarship concerning the religious tests clause of the *United States Constitution* that one scholar has described the clause as ‘forgotten’.⁷²

Despite the religious tests clause of s 116 having an American analogue, there is no American solution to the problem of unreasonable or perverse consequences arising from the American religious tests clause to inform the development of Australian doctrine.

B The Equal Protection Clause

Other parts of American constitutional law, most notably equal protection clause jurisprudence, offer insights into finding a principled way to exclude dangerous religious beliefs from general protections for religion. Section 1 of the Fourteenth Amendment provides in part that no State shall deny to any person within its jurisdiction ‘the equal protection of the laws’.⁷³ The equal protection clause applies generally, including in the government employment context.⁷⁴ Whilst the

69 See, eg, *Cantwell v Connecticut*, 310 US 296 (1940); *Everson v Board of Education of the Township of Ewing*, 330 US 1 (1947).

70 367 US 488, 489 n 1 (Black J for Warren CJ, Black, Douglas, Clark, Brennan, Whittaker and Stewart JJ) (1961).

71 See, eg, *Cummings v Missouri*, 71 US 277 (1866) (political test oath held to be ex post facto law); *Ex parte Garland*, 71 US 333 (1866) (political test oath held to operate as bill of attainder); *Wieman v Updegraff*, 344 US 183 (1952) (political test oath held to violate due process clause); *Speiser v Randall*, 357 US 513 (1958) (political test oath held to violate due process clause); *Nicholson v Board of Commissioners of the Alabama State Bar Association*, 338 F Supp 48 (MD Ala, 1972) (religious oath requirement for admission to Bar violates free exercise clause); *Kirkley v Maryland*, 381 F Supp 327 (D Md, 1974) (clergy disqualification provision violates free exercise clause); *Voswinkel v City of Charlotte*, 495 F Supp 588 (WD NC, 1980) (requirement that a police chaplain be a minister of religion involves a religious test and violates the First Amendment); *Oxford v Beaumont Independent School District*, 224 F Supp 2d 1099 (ED Tex, 2002) (school program whereby clergy volunteers discuss welfare issues with students violates First Amendment because of clergy only recruitment policy).

72 Daniel L Dreisbach, ‘The Constitution’s Forgotten Religion Clause: Reflections on the Article VI Religious Test Ban’ (1996) 38 *Journal of Church and State* 261.

73 *United States Constitution* amend XIV § 1: ‘All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.’

74 For an overview of equal protection law in the government employment context see, eg, John E Nowak and Ronald D Rotunda, *Constitutional Law* (West, 8th ed, 2009) 1215–18.

equal protection clause is expressed to apply only to the states, the United States Supreme Court has held that the 'due process' clause of the Fifth Amendment,⁷⁵ which binds the United States, contains content equivalent to the equal protection clause.⁷⁶

Equal protection jurisprudence is about discriminatory classifications.⁷⁷ It is a constitutional anti-discrimination law. Any law that unjustifiably draws a distinction among different classes of people is susceptible to challenge under equal protection principles. The existence of a classification can be established in two ways. The first is that the classification appears on the face of the law. For example, in the famous school segregation case of *Brown v Board of Education*, the impugned policy expressly prohibited black children from attending particular schools.⁷⁸ The second way of establishing the existence of a classification is by demonstrating that a law that is neutral on its face has a discriminatory impact and a discriminatory purpose. For example, the 1886 case of *Yick Wo v Hopkins* involved a challenge to an ordinance prohibiting the operation of commercial laundries otherwise than in brick or stone buildings.⁷⁹ Whilst on its face the ordinance did not involve any classifications, the intention was to put Chinese-operated laundries out of business, since those laundries mostly operated out of wooden buildings. It had a discriminatory impact and a discriminatory purpose.

The existence of a classification does not of itself invalidate a law under the equal protection clause. The classification will be subject to 'scrutiny' by the courts. If the law does not pass scrutiny it will be invalid. There are generally accepted to be three levels or tiers of scrutiny or standards of review. The first, and most demanding, is strict scrutiny. Under this standard, a law will be valid only if it is shown to be necessary to achieve a compelling governmental purpose. The second tier is intermediate scrutiny, under which a law will be valid if it is substantially related to an important governmental purpose. The third, and minimum, level of scrutiny is the rational basis test. Under the rational basis test, a law will be valid if it is rationally related to a legitimate governmental purpose.

There is a wealth of case law and scholarship dealing with determining which tier of scrutiny is applicable to particular categories of cases, how to determine what are legitimate governmental purposes, what the standards of scrutiny mean

75 *United States Constitution* amend V: 'No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.'

76 *Bolling v Sharpe*, 347 US 497, 499 (1954).

77 For overviews of equal protection clause jurisprudence see, eg, Erwin Chemerinsky, *Constitutional Law: Principles and Policies* (Wolters Kluwer, 5th ed, 2015) ch 9; John E Nowak and Ronald D Rotunda, *Principles of Constitutional Law* (West, 3rd ed, 2007) ch 14.

78 347 US 483, 495 (1954). The case overturned the 'separate but equal' doctrine, which had permitted states to segregate their school systems on the basis of race, with the court holding that '[s]eparate educational facilities are inherently unequal'.

79 118 US 356 (1886).

and how the process of scrutiny should be undertaken.⁸⁰ For the purposes of this article, it is unnecessary to explore those issues. What is relevant for the purposes of this article is the fact that equal protection clause type analysis might plausibly be applied to the problem typified by the facts of *Woodward*.⁸¹ In practice, equal protection analysis is not often applied to cases involving religion, which tend to be argued only under the First Amendment.⁸²

Classifications analysis offers insights for the Australian religious tests clause. Applying American classifications analysis to the facts of *Woodward*, it might be considered that there is no religious classification in the first place. The requirement not to pose a threat to national security as a condition of government employment is neutral on its face in terms of religion, and so there is no direct religious classification. The existence of an indirect classification requires not only a discriminatory impact, which could be established by showing that adherents of Scientology (assuming ASIO's analysis at the time of the case is accurate) cannot satisfy that requirement, but also a discriminatory purpose.⁸³ It is unlikely that the requirement that government employees not pose a threat to national security was adopted for discriminatory reasons. It follows that should a case factually similar to *Woodward* come before the American courts in an equal protection clause action, there would be no finding of constitutional invalidity. The reason for that result would be that the facts do not involve any religious classification. If an equal protection clause-style anti-discrimination reading of the Australian religious tests clause were adopted, by parity of reasoning it follows that there is no direct or indirect religious test involved on the facts of *Woodward*.

In distinguishing between direct and indirect classifications, equal protection clause jurisprudence appears to provide an analytical tool that solves the problem of excluding dangerous religious beliefs from the protection of the Australian religious tests clause. A more detailed discussion of the benefits of distinguishing between direct and indirect religious tests will be provided below. The article now turns to consider how international human rights law deals with the problem of excluding dangerous religious beliefs a general protection for religion.

80 For a recent overview of equal protection doctrine see William D Araiza, *Enforcing the Equal Protection Clause: Congressional Power, Judicial Doctrine, and Constitutional Law* (NYU Press, 2016).

81 (1979) 154 CLR 79.

82 See, eg, Steven G Calabresi and Abe Salander, 'Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers' (2013) 65 *Florida Law Review* 909; Susan Gellman and Susan Looper-Friedman, 'Thou Shalt Use the Equal Protection Clause for Religion Cases (Not Just the Establishment Clause)' (2008) 10 *University of Pennsylvania Journal of Constitutional Law* 665. See also Patrick M Garry, 'Applying an Equal Protection Methodology to Speech and Religion Cases' in Anne Richardson Oakes (ed), *Controversies in Equal Protection Cases in America: Race, Gender and Sexual Orientation* (Ashgate, 2015) 259.

83 See, eg, *Washington v Davis*, 426 US 229 (1976); *Personnel Administrator of Massachusetts v Feeney*, 442 US 256 (1979); *McCleskey v Kemp*, 481 US 279 (1987).

VI HOW INTERNATIONAL HUMAN RIGHTS LAW SOLVES THE PROBLEM

International human rights law is another body of law that confronts the issue of excluding dangerous religious beliefs from general protections for religion. It offers a similar insight to that offered by American equal protection jurisprudence suggesting that adopting an anti-discrimination reading of the religious tests clause, including the distinction between direct and indirect religious tests, is a principled solution to the problem with which this article is concerned. The discussion here is limited to the *International Covenant on Civil and Political Rights 1966* ('*ICCPR*'),⁸⁴ since that is a treaty to which Australia is a party. Most relevant to the question of religious tests for government employment is art 26 of the *ICCPR*.

Article 26 is, like the Australian religious tests clause, expressed as being absolute.⁸⁵ The approach under art 26 to excluding individuals holding dangerous religious beliefs from the general non-discrimination protection is textually-based. The Human Rights Committee's *General Comment 18*,⁸⁶ which considers art 26, defines 'discrimination' to mean 'any distinction, exclusion, restriction or preference which is based on any ground such as ... religion ... and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms'.⁸⁷

Whilst this general definition might appear absolute in its terms, the Human Rights Committee's position is more nuanced. *General Comment 18* concludes by explaining '[f]inally, the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant'.⁸⁸

The essential analytical device under art 26 indicated by *General Comment 18* is to hold that differential treatment, on reasonable and objective criteria and that has a legitimate purpose, is not discrimination. It involves a form of internal

84 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

85 The provision is absolute in ordinary circumstances. In extraordinary circumstances, it is not absolute. Article 4(1) of the *ICCPR* permits derogations from this absolute prohibition '[i]n time of public emergency which threatens the life of the nation'. The provision states

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

There is no provision of the *Australian Constitution* similar to art 4(1) of the *ICCPR* permitting the suspension of provisions such as s 116.

86 Human Rights Committee, *General Comment No 18: Non-Discrimination*, 37th sess, UN Doc HRI/GEN/1/Rev.1 (10 November 1989).

87 *Ibid* [7].

88 *Ibid* [13].

balancing to reach the conclusion that discrimination does not exist, rather than a form of external balancing to justify the existence of discrimination. The cases considering art 26 and its drafting history similarly hold that only distinctions based on the relevant grounds that are not justified amount to ‘discrimination’.⁸⁹

The analytical device here involves the distinction between direct discrimination and indirect discrimination.⁹⁰ In *Althammer v Austria*, a case alleging indirect discrimination contrary to art 26, the Human Rights Committee explained the concept in these terms:

The Committee recalls that a violation of article 26 can also result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate. However, such indirect discrimination can only be said to be based on the grounds enumerated in Article 26 of the Covenant if the detrimental effects of a rule or decision exclusively or disproportionately affect persons having a particular race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, rules or decisions with such an impact do not amount to discrimination if they are based on objective and reasonable grounds.⁹¹

In that case, a group of pensioners who previously worked for the Salzburg Social Security Board complained that changes to their pension amounted to indirect discrimination. The Board had abolished a scheme whereby its current employees, and those former employees receiving a pension, also received a sum of money as a household allowance and a sum of money as a child allowance (calculated per child in a particular age range). The Board implemented a new scheme providing only a child allowance that was more generous than under the previous scheme. Because the change adversely affected pensioners (who were unlikely to have children in the relevant age range), the pensioners claimed the change amounted to indirect discrimination against them on the ground of age. The Human Rights Committee rejected the pensioners’ argument, finding that the change was also detrimental for current employees without children and that the pensioners had not shown that they were disproportionately affected.⁹² The Committee also found that the change was ‘based on objective and reasonable grounds’.⁹³

This analytical device — that differential treatment on reasonable and objective criteria adopted for a legitimate purpose is not discrimination — has purchase for the religious tests clause. The facts of *Woodward* plainly do not disclose a case of direct discrimination or a case of a direct religious test, as would be the case if the requirement for government employment were explicitly that a person must not

89 Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel, 2nd revised ed, 2005) 628–9.

90 On indirect discrimination as a concept in international law, see Dagmar Schiek, Lisa Waddington and Mark Bell (eds), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart Publishing, 2007) ch 3.

91 Human Rights Committee, *Views: Communication No 998/2001*, 78th sess, UN Doc CCPR/C/78/D/998/2001 (22 September 2003) [10.2] (*Althammer v Austria*) (citations omitted).

92 *Ibid.*

93 *Ibid.*

be an adherent of Scientology. Rather, the claim is one of indirect discrimination or an indirect religious test. It may well be open to say that the requirement not to pose a threat to national security disproportionately affects Scientologists, since on the facts (as ASIO believed them to be) all Scientologists are necessarily a threat to national security. However, the second limb of the test requires an absence of objective and reasonable grounds for the impugned requirement. A requirement not to pose a threat to national security, as defined in the *Australian Security Intelligence Organisation Act 1979*,⁹⁴ can be seen as both objective and reasonable.

This kind of analysis is similar, albeit with an important difference concerning purpose that will be discussed below, to the American equal protection clause analysis considered above. It shows that if a distinction between direct and indirect religious tests was adopted for the purposes of the religious tests clause of the *Constitution*, a solution to the problem may be found that does not require judicially-created exceptions to the express terms of the constitutional text.

VII HOW AUSTRALIAN ANTI-DISCRIMINATION LAW SOLVES THE PROBLEM

The analytical device used by Australian anti-discrimination law to exclude individuals holding dangerous religious beliefs from a general protection of religion resembles the devices discussed above employed by American equal protection clause jurisprudence and international human rights law discrimination jurisprudence. Whilst Australian statutory anti-discrimination law is not a foreign body of law, it is a body of law capable of comparative analysis in the same way as foreign law. Indeed, as noted above, Gaudron J referred to the jurisprudence surrounding Australian anti-discrimination statutes in *Street* to inform her interpretation of the concept of 'discrimination' in the context of s 117. Australian anti-discrimination statutes prohibit 'direct' discrimination and 'indirect' discrimination on various grounds (although which grounds are subject to protection varies between statutes) such as race, sex, sexual orientation, age, disability and religious belief or affiliation.⁹⁵

Whilst the wording of the relevant provision varies slightly between statutes, the general idea of direct discrimination is that the conduct in question, such as a decision not to hire a person for a job, is done on the ground of the protected attribute.⁹⁶ For example, refusing to hire a person for a job because the person is a Catholic would be direct discrimination on the ground of religion.

94 See above n 6 listing the criteria for an assessment of risk to national security.

95 The principal anti-discrimination statutes are: *Age Discrimination Act 2004* (Cth); *Disability Discrimination Act 1992* (Cth); *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Anti-Discrimination Act 1977* (NSW); *Equal Opportunity Act 2010* (Vic); *Anti-Discrimination Act 1991* (Qld); *Equal Opportunity Act 1984* (SA); *Equal Opportunity Act 1984* (WA); *Anti-Discrimination Act 1998* (Tas); *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1992* (NT).

96 Chris Ronalds and Elizabeth Raper, *Discrimination Law and Practice* (Federation Press, 4th ed, 2012) 31–4.

The general notion of indirect discrimination is that discrimination may occur where a requirement or condition appears neutral on its face but has the effect of disadvantaging a class of people identified by reference to a protected attribute.⁹⁷ A leading textbook on Australian anti-discrimination law identifies four elements that are common to all definitions of indirect discrimination in Australian anti-discrimination statutes:

1. *The imposition of a requirement or condition*: the respondent requires the complainant to comply with a requirement or condition.
2. *Disparate impact of the requirement or condition*: the requirement or condition is more easily satisfied by members of one [group identified by reference to possessing a protected attribute] than [members identified by reference to not possessing the protected attribute].
3. *Lack of justification of the requirement or condition*: the requirement or condition is not reasonable having regard to the circumstances of the case.
4. *Inability of the complainant to comply*: the complainant does not comply, or is not able to comply, with the requirement or condition.⁹⁸

The principal differences between the definitions given in the various Australian statutes 'lie in the precise description of these four elements and in the allocation of the burden of proof in relation to the third element'.⁹⁹

This analytical device for identifying the existence of discrimination does not involve any exceptions or external balancing and so presents as potentially offering insights for developing a solution to the problem of excluding individuals holding dangerous religious beliefs from the scope of the religious tests clause.¹⁰⁰ If the facts of *Woodward* presented in an Australian statutory anti-discrimination law case, it is likely that there would be no finding of indirect discrimination for the same reasons as that conclusion is reached under art 26 of the *ICCPR*.

97 An example of an Australian statutory definition of the concept is found in the *Equal Opportunity Act 2010* (Vic) s 9(1), which provides

Indirect discrimination occurs if a person imposes, or proposes to impose, a requirement, condition or practice —

- (a) that has, or is likely to have, the effect of disadvantaging persons with an attribute; and
- (b) that is not reasonable.

In broadly similar terms the *Anti-Discrimination Act 1991* (Qld) s 11(1) provides

Indirect discrimination on the basis of an attribute happens if a person imposes, or proposes to impose, a term—

- (a) with which a person with an attribute does not or is not able to comply; and
- (b) with which a higher proportion of people without the attribute comply or are able to comply; and
- (c) that is not reasonable.

98 Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination Law* (Federation Press, 2nd ed, 2014) 127 (emphasis in original) (citations omitted).

99 *Ibid.*

100 It should be noted that anti-discrimination statutes provide various exceptions to the prohibition against discrimination. However, these do not alter the analytical device for identifying the existence of discrimination. Rather, those provisions expressly permit discrimination or carve out areas from the scope of the prohibition against discrimination.

As with the other bodies of law considered above, Australian statutory anti-discrimination law suggests that adopting a distinction between direct and indirect religious tests presents a principled way of excluding individuals holding dangerous religious beliefs from the protection of the religious tests clause.

VIII AUSTRALIAN CONSTITUTIONAL PROHIBITIONS ON DISCRIMINATION

In *Bayside City Council v Telstra Corporation Ltd*, Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ noted that '[d]iscrimination is a concept that arises for consideration in a variety of constitutional and legislative contexts'.¹⁰¹ The preceding section of this article showed how statutory anti-discrimination law appears to offer insights into the problem of excluding dangerous religious beliefs from the protection of the religious tests clause. This section of the article shows that a similar insight can be drawn from constitutional prohibitions on discrimination. In other words, other constitutional prohibitions on discrimination support drawing a distinction between direct and indirect religious tests for the purposes of s 116.

A Constitutional Prohibitions on Discrimination

Simpson has catalogued various non-discrimination rules in the *Constitution*.¹⁰² She notes that three provisions expressly invoke the language of discrimination. Those provisions are ss 51(ii), 102 and 117. Section 51(ii) grants the Commonwealth Parliament power to make laws with respect to 'taxation; but so as not to discriminate between States or parts of States'. Section 102 allows the Commonwealth to 'forbid, as to railways, any preference or discrimination by any State ... if such preference or discrimination is undue and unreasonable, or unjust to any State'. Section 117 states '[a] subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State'.

Simpson also identifies three other provisions as concerned with the concept of discrimination or a closely related concept.¹⁰³ The first of those provisions is the power in s 51(iii) to make laws with respect to 'bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth'. The others are the command in s 88 that '[u]niform duties of customs shall be imposed within two years after the establishment of the Commonwealth', and the requirement of s 99 that '[t]he Commonwealth shall not,

101 (2004) 216 CLR 595, 629.

102 Amelia Simpson, 'The High Court's Conception of Discrimination: Origins, Applications, and Implications' (2007) 29 *Sydney Law Review* 263, 264–6.

103 *Ibid* 265.

by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof’.

B The Constitutional Conception of Discrimination

Simpson goes beyond simply cataloguing various examples of constitutional non-discrimination rules. She argues that a ‘universal conception’ of discrimination is evident in the High Court’s constitutional jurisprudence.¹⁰⁴ Simpson traces the universal conception of discrimination to the judgment of Gaudron J in *Street* considering s 117 of the *Constitution*.¹⁰⁵ In that case, Gaudron J explained that discrimination consists of ‘treatment that is not appropriate to a relevant difference’.¹⁰⁶ Whether treatment is appropriate to a relevant difference requires considering ‘whether the different treatment is reasonably capable of being seen as appropriate and adapted to a relevant difference’.¹⁰⁷ Subsequent to *Street*, Simpson explains that a passage concerning s 92 from Gaudron and McHugh JJ’s judgment in *Castlemaine Tooheys Ltd v South Australia*,¹⁰⁸ is ‘invoked routinely as the definitive articulation of discrimination’s essence’.¹⁰⁹ The relevant passage states

it is possible to identify the general features of a discriminatory law. A law is discriminatory if it operates by reference to a distinction which some overriding law decrees to be irrelevant or by reference to a distinction which is in fact irrelevant to the object to be attained; a law is discriminatory if, although it operates by reference to a relevant distinction, the different treatment thereby assigned is not appropriate and adapted to the difference or differences which support that distinction. A law is also discriminatory if, although there is a relevant difference, it proceeds as though there is no such difference, or, in other words, if it treats equally things that are unequal — unless, perhaps, there is no practical basis for differentiation.¹¹⁰

Simpson explains that the High Court has continued in subsequent cases ‘to promote [the] universal conception of discrimination’.¹¹¹ Simpson identifies two elements to the minimum content of the High Court’s universal conception of discrimination,¹¹² both of which appear to provide insights for developing a principled means of excluding individuals holding dangerous religious beliefs from the protection of the religious tests clause. The first element is a focus on substance. Simpson writes

104 Ibid 267–73.

105 Ibid 267–8.

106 *Street* (1989) 168 CLR 461, 571.

107 Ibid 574.

108 (1990) 169 CLR 436 (*Castlemaine*).

109 Simpson, ‘The High Court’s Conception of Discrimination’, above n 102, 268.

110 *Castlemaine* (1990) 169 CLR 436, 478.

111 Simpson, ‘The High Court’s Conception of Discrimination’, above n 102, 269.

112 Ibid 277.

It simply involves a refusal to conceptualise discrimination exclusively by reference to considerations of legal form. Where a non-discrimination rule is substance-focused, discrimination may be discerned not just in the language in which an impugned law is expressed but also in the way that the law operates in practice.¹¹³

In other words, as Leslie Zines and Geoffrey Lindell have also pointed out,¹¹⁴ the High Court accepts that discrimination may be direct or indirect. The language of indirect discrimination is also expressly adopted in some of the cases.¹¹⁵

Indeed, the facts of many of the leading cases on constitutional non-discrimination provisions involve claims of indirect discrimination. In the leading case on s 92, *Cole v Whitfield*,¹¹⁶ the Court's unanimous judgment said that '[a] law will discriminate against interstate trade or commerce if the law on its face subjects that trade or commerce to a disability or disadvantage *or if the factual operation of the law produces such a result*'.¹¹⁷ The case involved a Tasmanian prohibition on the possession or sale of crayfish below a minimum size. The defendant was charged with a possession offence in respect of crayfish that had been acquired in South Australia and were above the minimum size prescribed by South Australian law but below the minimum size prescribed by Tasmanian law. Because the crayfish in question were destined for sale on the mainland, the Tasmanian law had the effect of burdening interstate trade. Whilst the Tasmanian law was not discriminatory on its face since it provided a uniform rule (which had been adopted because crayfish found in the colder waters of Tasmania did not grow to the size of crayfish elsewhere),¹¹⁸ it had a discriminatory effect on traders such as the defendant. However, the High Court found there was no discrimination, and thus no breach of s 92, because the requirement causing the discriminatory effect (the lower minimum size) was adopted for a legitimate purpose (to preserve a natural resource) rather than for a forbidden protectionist purpose. Other examples include *Castlemaine*,¹¹⁹ also concerning s 92, and *Street*, concerning s 117.

In *Street*, Mason CJ gave another example of indirect discrimination: 'So to forbid all persons from wearing a turban is on its face a prohibition applicable to all persons without distinction, but in effect is a discrimination based upon religious grounds because its only impact will fall upon adherents of a creed or religion which requires the wearing of turbans.'¹²⁰

113 Ibid.

114 Leslie Zines and Geoffrey Lindell, 'Form and Substance: "Discrimination" in Modern Constitutional Law' (1992) 21 *Federal Law Review* 136, 142–3.

115 See, eg, *Street* (1989) 168 CLR 461, 569 which notes that 'the protection of s. 117 extends to indirect discrimination or different treatment which is revealed by the disparate impact of the matter in the complaint'.

116 (1988) 165 CLR 360.

117 Ibid 399 (emphasis added).

118 It was also impractical for Tasmania to adopt an inspection regime involving a determination of the location of a crayfish catch.

119 (1990) 169 CLR 436.

120 (1989) 168 CLR 461, 488 (citations omitted).

The second element of the minimum content of the High Court's universal conception of discrimination Simpson identifies is related to the first, and was seen in the discussion of *Cole v Whitfield* above. It concerns the methodology for determining the existence of discrimination. Simpson describes the approach as 'holistic' and explains that '[t]he universal conception of discrimination has consistently been expressed in terms that reflect a preference for the holistic approach'.¹²¹ As Simpson summarises it, under the holistic approach 'in essence, the presence of a compelling policy justification for differentiating between legal subjects simply undoes the very allegation of discrimination. Discrimination is conceived of as the vice of differentiating *without* adequate justification'.¹²²

What is involved is a form of internal balancing to determine whether discrimination exists. In other words, indirect discrimination exists where a law that is neutral on its face in respect of the constitutionally protected attribute has a disparate effect and, in the words of Gaudron and McHugh JJ in *Castlemaine* quoted above, 'the different treatment thereby assigned is not appropriate and adapted to the difference or differences which support that distinction'.¹²³

Cole v Whitfield, discussed above, provides a factual example of the application of this definition to find that no discrimination existed. *Castlemaine* provides a factual example of the application of this definition of indirect discrimination to find that discrimination did exist. In *Castlemaine*, the leading judgment of Mason CJ, Brennan, Deane, Dawson and Toohey JJ noted that the s 92 non-discrimination rule would not be infringed by rules that were appropriate and adapted to a proper purpose (in the s 92 context, a non-protectionist purpose) and that burdened interstate trade in a manner that was 'incidental and not disproportionate' to the proper purpose.¹²⁴ On the facts of the case, the court held that the differential treatment experienced by interstate traders was not appropriate and adapted to the legislation's legitimate purposes and therefore amounted to discrimination.

The facts of *Woodward* are amenable to analysis in accordance with the universal conception of discrimination in the same way as those facts are amendable to analysis in accordance with the other bodies of law considered in this article. For the same reasons that conclusion is reached in accordance with the bodies of law considered above, adopting the analytical device of distinguishing between direct and indirect discrimination involved in the 'universal conception' of discrimination in Australian constitutional law allows for the conclusion that the facts of *Woodward* did not involve a religious test at all. No exception and no external balancing contrary to the constitutional text is required to solve the problem.

121 Simpson, 'The High Court's Conception of Discrimination', above n 102, 283.

122 Ibid 282–3 (emphasis in original).

123 (1990) 169 CLR 436, 478.

124 Ibid 473.

IX THE RELIGIOUS TESTS CLAUSE AS AN ANTI-DISCRIMINATION PROVISION

As Evans recognises, the religious tests clause of s 116 of the *Constitution* should be added to Simpson's list of Australian constitutional anti-discrimination provisions.¹²⁵ The functionalist comparative analysis undertaken in this article supports the conclusion that a religious test exists where there is discrimination, either directly or indirectly, on the ground of religion for any office or public trust under the Commonwealth.

Adopting an anti-discrimination framework for analysing problems under the religious tests clause provides a constitutionally satisfactory solution to the problem of excluding individuals holding dangerous religious beliefs from the protection of the religious tests clause. This section of the article first shows that an anti-discrimination framework is consistent with history and then clarifies the test for determining whether an indirect religious test exists.

A *The Anti-Discrimination Framework is Consistent with History*

In *Crittenden v Anderson*, Fullagar J said that the religious tests clause 'was, of course, not enacted by men ignorant or unmindful of history'.¹²⁶ The modern history of religious tests, which can be traced back to at least the 17th century in England,¹²⁷ permits a classification of religious tests as direct or indirect.

The first significant statute concerning religious tests following the restoration of the Stuart monarchy in England was the *Corporation Act 1661*,¹²⁸ and involved what can be understood as an indirect religious test (where the ground of discrimination is Catholicism). The statute applied to all

Maiors Aldermen Recorders Bailiffes Towne-Clerks Common Council men and other persons then bearing any Office or Offices of Magistracy or Places or Trusts or other Employment relating to or concerning the Government of the said respective Cities Corporations and Burroughs ...¹²⁹

Those office holders were required to take 'the Sacrament of the Lords Supper according to the Rites of the Church of England' and to take the oath of supremacy, which recognised that supreme authority in spiritual and ecclesiastical matters

125 See Evans, above n 1, 141.

126 *Crittenden v Anderson* (Unreported, High Court of Australia, Fullagar J, 23 August 1950), extracted in Current Topics, 'An Unpublished Judgment on s. 116 of the *Constitution*' (1977) 51 *Australian Law Journal* 171, 171.

127 Luke Beck, 'The Constitutional Prohibition on Religious Tests' (2011) 35 *Melbourne University Law Review* 323, 324–8.

128 *Corporation Act 1661*, 13 Car 2 stat 2, c 1 ('*Corporation Act*').

129 *Ibid* s 3.

vested in the King.¹³⁰ Office holders who failed to comply automatically vacated their offices.¹³¹

The purpose of those requirements was to disqualify Catholics (and Protestant dissenters) from public office. The *Corporation Act* did not set a direct religious test on the ground of Catholicism for this purpose, such as the requirement in the *Act of Settlement 1701* that the monarch must not ‘hold Communion with the See or Church of Rome or ... profess the Popish Religion’.¹³² Rather than directly prohibit Catholics from holding office, the *Corporation Act* set an indirect religious test for achieving that purpose.¹³³ The legislation set a condition for holding office that Catholics could not satisfy without acting contrary to their religious beliefs. Catholics could not participate in an Anglican sacrament or repudiate the Pope’s spiritual authority. This is similar to modern indirect discrimination cases involving Sikh men who are dismissed from service as police officers for failing to comply with dress code regulations to wear a police hat.¹³⁴ The dress code does not involve direct discrimination on the ground of religion but does involve indirect discrimination because Sikh men are unable to comply with the dress code regulations regarding hats due to their religious obligation to wear a turban.

Just as general history supports recognising a distinction between direct and indirect religious tests, so too does the drafting history of s 116. The debate on s 116 at the Australasian Federal Convention of 1897–8 focussed principally on whether it was necessary to deny the Commonwealth power to legislate in respect of religion.¹³⁵ In a discussion concerning the religious observances clause of the provision, Henry Bournes Higgins, who moved the introduction of the provision and led the argument in favour of it, referred directly to American equal protection clause jurisprudence. He said

A number of laws have been held to be unconstitutional in America because of their reasons and because of their motives. There was a funny case in San Francisco, where a law was passed by the state that every prisoner, within one hour of his coming into the prison, was to have his hair cut within one inch of his head. That looked very harmless, but a Chinaman brought an action to have it declared unconstitutional, and it turned out that the law was actually passed by the Legislature for the express purpose of persecuting Chinamen.¹³⁶

Whilst these comments were not directed specifically at the religious tests clause, they reveal that the framers of the religious tests clause were cognisant and accepting of the distinction between direct and indirect classifications in American equal protection jurisprudence. Significantly, the ‘funny case’ Higgins

130 Ibid s 9.

131 Ibid.

132 *Act of Settlement 1701*, 12 & 13 Wm 3 c 2, s 2.

133 ‘However, the same set of facts can be used to plead a claim both in direct and indirect discrimination’: Ronalds and Raper, above n 96, 32.

134 *Mandla v Dowell Lee* [1983] 2 AC 548.

135 See Luke Beck, ‘Higgins’ Argument for Section 116 of the *Constitution*’ (2013) 41 *Federal Law Review* 393.

136 *Official Report of the Debates of the Australasian Federal Convention*, Melbourne, 8 February 1898, 664 (Henry Higgins).

referred to had pointed out that historically many religious tests were indirect in form.

The ‘funny case’ concerned a San Francisco ordinance popularly known as the ‘Pigtail Ordinance’ or the ‘Queue Ordinance’ (queue being another word for pigtail), since it was targeted at Chinese residents of San Francisco who commonly wore that hairstyle. Ho Ah Kow, a Chinese resident of San Francisco, was imprisoned for failing to pay a fine and had his pigtail forcibly removed by prison authorities. Kow sued in tort and the prison authorities pleaded the ordinance as a justification.¹³⁷ In *Ho Ah Kow v Nunan*,¹³⁸ the Circuit Court of the United States, comprising a judge of the United States Supreme Court and a circuit judge, invalidated the ordinance on the independent grounds that it imposed a cruel and unusual punishment contrary to the Eighth Amendment of the *United States Constitution*,¹³⁹ and denied Chinese people the equal protection of the laws contrary to the Fourteenth Amendment.¹⁴⁰ In its reasoning on the equal protection clause ground, the Court explained the idea of indirect classifications. The Court said

The second objection to the ordinance in question is equally conclusive. It is special legislation on the part of the supervisors against a class of persons who, under the constitution and laws of the United States, are entitled to the equal protection of the laws. The ordinance was intended only for the Chinese in San Francisco. This was avowed by the supervisors on its passage, and was so understood by every one. The ordinance is known in the community as the “Queue Ordinance,” being so designated from its purpose to reach the queues of the Chinese, and it is not enforced against any other persons. The reason advanced for its adoption, and now urged for its continuance, is, that only the dread of the loss of his queue will induce a Chinaman to pay his fine...

The class character of this legislation is none the less manifest because of the general terms in which it is expressed ... The complaint in this case shows that the ordinance acts with special severity upon Chinese prisoners, inflicting upon them suffering altogether disproportionate to what would be endured by other prisoners if enforced against them.¹⁴¹

The Court continued its reasoning by referring to the English history of religious tests directed at Catholics, which the Court recognised were often indirect in form. The Court commented

During various periods of English history, legislation, general in its character, has often been enacted with the avowed purpose of imposing special burdens and

137 For some background to this case see, eg, Charles J McClain, *In Search of Equality: The Chinese Struggle Against Discrimination in Nineteenth-Century America* (University of California Press, 1994) 73–6.

138 12 Fed Cas 252 (D Cal, 1879).

139 *United States Constitution* amend VIII provides: ‘Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.’ Amend XIV § 1 provides: ‘nor shall any State ... deny to any person within its jurisdiction the equal protection of the laws’.

140 *Ibid* amend XIV § 1: ‘nor shall any State ... deny to any person within its jurisdiction the equal protection of the laws’.

141 *Ho Ah Kow v Nunan*, 12 Fed Cas 252, 255 (D Cal, 1879).

restrictions upon Catholics; but that legislation has since been regarded as not less odious and obnoxious to animadversion than if the persons at whom it was aimed had been particularly designated.

But in our country hostile and discriminating legislation by a state against persons of any class, sect, creed or nation, in whatever form it may be expressed, is forbidden by the fourteenth amendment of the constitution.¹⁴²

It follows that both the general history of religious tests and the drafting history of s 116 support adopting an anti-discrimination framework for understanding the religious tests clause that recognises that a religious test exists where there is discrimination, either directly or indirectly, on the ground of religion.

B Determining whether an Indirect Religious Test Exists

It remains to articulate the test for determining the existence of an indirect religious test. This requires analysis of two potential options since the precise tests for determining the existence of indirect discrimination (or classification) vary slightly between the various bodies of law considered above.

The first element of the test for the existence of an indirect religious test is obvious enough. The impugned requirement said to be a religious test must be neutral on its face in respect of religion. Otherwise, the allegation would be one of a direct religious test.

The second element of the test calls for the making of a choice in terminology but not of principle. The impugned requirement alleged to be a religious test must have a ‘discriminatory’, ‘disparate’ or ‘disproportionate’ impact or effect on a group of individuals identified by reference to religion. For example, a rule that persons under the age of 21 years will not be employed in the Australian Public Service does not have a discriminatory impact on any group of individuals identified by reference to religion. However, to take the example given by Mason CJ in *Street*, a rule that employees of the Australian Public Service must not wear headwear in the workplace has a discriminatory or disparate or disproportionate impact on members of the Sikh religion since it is a practice of that faith that men wear a turban. In the context of Australian constitutional law, the word ‘disproportionate’ seems most appropriate since it is more familiar. Indeed, the joint judgment of Mason CJ, Brennan, Deane, Dawson and Toohey JJ in *Castlemaine* adopted the language of proportionality in saying there would be no discrimination where the effect of a law on interstate trade was merely ‘incidental and not disproportionate to’ a proper purpose.¹⁴³ Whilst whether the impact of a requirement is disproportionate is one of fact and degree, the test of disproportionate impact is familiar to Australian constitutional law.

It is the third element of the test for the existence of an indirect religious test that calls for making a doctrinal choice. The test for indirect classifications

¹⁴² Ibid 255–6.

¹⁴³ (1990) 169 CLR 436, 473.

in American equal protection clause jurisprudence requires the existence of a discriminatory purpose.¹⁴⁴ That purpose need not be the sole or dominant purpose, but unintentionally causing a disparate impact on a group identified by reference to a protected attribute does not enliven equal protection clause scrutiny.¹⁴⁵ In contrast, the test for indirect discrimination under art 26 of the *ICCPR*, Australian statutory anti-discrimination law, and what Simpson calls the ‘universal conception’ of discrimination in Australian constitutional law, does not require a discriminatory purpose.¹⁴⁶ Rather, although the precise formulation of the test varies, those bodies of law all require a lack of justification for the impugned requirement. In those bodies of law, unintentionally causing a disproportionate effect on a group identified by reference to a protected attribute can give rise to a breach of the anti-discrimination norm. As the Human Rights Committee explained in *Althammer v Austria*, a discriminatory effect may occur ‘without intent to discriminate’ and will amount to prohibited discrimination.¹⁴⁷ It follows that a doctrinal choice is required.

One argument in favour of requiring the existence of a discriminatory purpose is historical. Historical instances of indirect religious tests, such as that imposed by the *Corporation Act 1661*, often had discriminatory purposes. Indeed, the preamble to the *Test Act 1672*,¹⁴⁸ which expanded the scope of the religious tests imposed by the *Corporation Act*, was explicit in stating its discriminatory purpose. The statute commenced by stating its purpose: ‘For preventing dangers which may happen from Popish Recusants and quieting the minds of his Majestyes good Subjects Bee it enacted ...’¹⁴⁹

There may also be some support in the drafting history of s 116 in favour of a requirement of discriminatory purpose. Higgins’ explanation of *Ho Ah Kow v Nunan* at the Australasian Federal Convention ended with him telling delegates: ‘I am trying to point out that laws would be valid if they had one motive, while they would be invalid if they had another motive. All I want is, that there should be no imposition of any observance because of its being religious.’¹⁵⁰

144 *Washington v Davis*, 426 US 229, 242 (1976): ‘a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another’; *Village of Arlington Heights v Metropolitan Housing Development Corporation*, 429 US 252, 265 (1977) states that ‘[p]roof of ... discriminatory intent or purpose is required to show a violation of the Equal Protection Clause’. For an analysis of discriminatory intent in equal protection jurisprudence see, eg, Julia Kobick, ‘Discriminatory Intent Reconsidered: Folk Concepts of Intentionality and Equal Protection Jurisprudence’ (2010) 45 *Harvard Civil Rights — Civil Liberties Law Review* 517; Gayle Binion, ‘“Intent” and Equal Protection: A Reconsideration’ [1983] *Supreme Court Review* 397; Ian Haney-Lopez, ‘Intentional Blindness’ (2012) 87 *New York University Law Review* 1779.

145 *Village of Arlington Heights v Metropolitan Housing Development Corporation*, 429 US 252, 265–6 (1977).

146 Simpson, ‘The High Court’s Conception of Discrimination’, above n 102, 264.

147 *Althammer v Austria*, UN Doc CCPR/C/78/D/998/2001, [10.2].

148 25 Car 2, c 2.

149 *Ibid* s 1.

150 *Official Report of the Debates of the Australasian Federal Convention*, Melbourne, 8 February 1898, 664.

These particular comments were directed at the religious observances clause of s 116 rather than the religious tests clause. Higgins' specific point was that a law providing for Sunday closing would be a law for imposing a *religious* observance if it was enacted for a religious purpose, but would not be a law for imposing a *religious* observance if it was enacted for some other purpose.¹⁵¹ Higgins was pointing out that underlying purpose was, in his mind, a determinant of whether an observance was a *religious* observance. This, plainly enough, is weak evidence for a purposive requirement for the religious tests clause.

These historical considerations do not compel the adoption of a requirement for a discriminatory purpose. Although, of course, the existence of a religious purpose will compel concluding that the impugned requirement is an indirect religious test. More significantly, these considerations do not require a departure from the standard form of analysis under the 'universal conception' of discrimination in Australian constitutional law.

That 'universal conception' of discrimination, translated to the specific context of the religious tests clause, requires that the impugned requirement is not reasonably capable of being seen as appropriate and adapted to achieving a non-religious purpose, any such person being legitimate in the context of the religious tests clause. The reasonably capable of being seen as appropriate and adapted test turns on more than simply the bare effects of the impugned requirement. It requires internal balancing in the form of a proportionality analysis.¹⁵² It follows that the third element of the test for the existence of a religious test is that the impugned requirement is not reasonably capable of being seen as appropriate and adapted to achieving a non-religious purpose.

These three general elements may be understood more fully through a series of questions. In order to determine the existence or otherwise of a religious test it is necessary to ask:

1. Is the impugned requirement alleged to be a religious test neutral on its face in respect of religion?
2. If the answer to 1 is no, the requirement is a direct religious test and therefore invalid.
3. If the answer to 1 is yes, does the requirement have a disproportionate effect or impact on a group of individuals identified by reference to religion?
4. If the answer to 3 is no, the requirement is not a religious test.
5. If the answer to 3 is yes, does the requirement have a religious purpose or motivation?

151 A fear of the Commonwealth being able to impose religious observances was a key feature of the argument leading to the adoption of s 116 by the Constitutional Convention, see Beck, 'Higgins' Argument for Section 116 of the *Constitution*', above n 135; Richard Ely, *Unto God and Caesar: Religious Issues in the Emerging Commonwealth 1891–1906* (Melbourne University Press, 1976).

152 *Tajjour v New South Wales* (2014) 254 CLR 508, 549 [35] (French CJ): 'That criterion, that the law be "reasonably appropriate and adapted, or proportionate" to serve the legitimate end, is a species of the genus of proportionality tests.'

6. If the answer to 5 is yes, the requirement is an indirect religious test and therefore invalid.
7. If the answer to 5 is no, is the impugned requirement reasonably capable of being seen as appropriate and adapted to its non-religious purpose?
8. If the answer to 7 is yes, the requirement is not a religious test.
9. If the answer to 7 is no, the requirement is an indirect religious test and therefore invalid.

It is true that the anti-discrimination approach and the exception approach have similarities. Principal among these is that they are both seeking to provide a solution to the same problem. There is no reason to suppose that the internal balancing of the anti-discrimination approach and the external balancing of the exception approach would necessarily reach opposite conclusions as to constitutional validity in any particular case. Because both approaches involve balancing, both approaches involve the concept of justification. The role of justification in the anti-discrimination approach arises at the appropriate and adapted test required by question 7. Following the implied freedom of political communication decision in *McCloy v New South Wales*, that test has three stages:

suitable — as having a rational connection to the purpose of the provision;

necessary — in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on [a group of individuals identified by reference to religion];

adequate in its balance — ... describing the balance between the importance of the purpose served by the [impugned requirement] and the extent of the restriction it imposes on [a group of individuals identified by reference to religion].¹⁵³

There is an important difference in the role of justification between the two approaches. The exception approach concedes the existence of a religious test and then reaches a finding of validity based on justification. It involves external balancing. The conclusion is necessarily that a religious test exists, albeit that the existence of that religious test is justified. The anti-discrimination approach uses justification as a tool for internal balancing to reach a finding that no religious test exists at all. This does not involve contradicting the constitutional text as the exception approach does. Unlike the exception approach, the anti-discrimination approach does not permit any 'exception to the usual protections of the test clause'.¹⁵⁴ This is important. The constitutional text is binding.

Asking the above questions of the facts of *Woodward* leads to the conclusion that *Woodward* did not involve a religious test at all. The requirement not to pose a threat to national security is neutral on its face with respect to religion. It may be

153 *McCloy v New South Wales* (2015) 257 CLR 178, 195 [2] (emphasis in original) (citations omitted). The methodology also applies to the reasonably appropriate and adapted test in non-political communication contexts, see Anne Twomey, 'McCloy v New South Wales: Out with US Corruption and in with German Proportionality' on *Australian Public Law* (15 October 2015) <<https://auspublaw.org/2015/10/mccloy-v-new-south-wales/>>; *Alqudsi v Commonwealth of Australia* (2015) 91 NSWLR 92, 117 [121].

154 Mortensen, above n 16, 288.

accepted for the sake of argument that this requirement has a disproportionate effect on Scientologists. Presumably, the purpose of the requirement is simply the preservation of national security. A requirement not to be assessed as a threat to national security by ASIO is reasonably capable of being seen as appropriate and adapted to the purpose of preserving national security. It follows that *Woodward* did not involve a religious test.

It is important to note that analysis of constitutional validity under the religious tests clause involves other considerations, such as the form and nature of the requirement alleged to be a religious test,¹⁵⁵ and determining that the impugned religious test attaches to ‘an office or public trust under the Commonwealth’,¹⁵⁶ that are beyond the scope of this article.

X CONCLUSION

This article has pursued the implications for s 116 doctrine of recognising that the religious tests clause is an anti-discrimination provision. It has employed a functionalist comparative law analysis to argue that the concept of a ‘religious test’ in s 116 of the *Constitution* should be understood as discrimination on the ground of religion and that religious tests may be direct or indirect in character. This anti-discrimination framework of analysis provides a principled and constitutionally satisfactory way of permitting individuals holding dangerous religious beliefs to be excluded from holding offices and public trusts under the Commonwealth.

The article has demonstrated that the idea that the religious tests clause should be read as subject to an exception excluding individuals holding dangerous religious beliefs from its scope is constitutionally unsatisfactory. The exception approach has no persuasive rationale and the external balancing required by the approach involves contradicting the text of the *Constitution*. By contrast, the anti-discrimination approach advanced by this article involves a form of internal balancing to reach the conclusion that a religious test does not exist, rather than a form of external balancing to justify the existence of a religious test.

The anti-discrimination approach to the religious tests clause with the distinction between direct and indirect religious tests is consistent with other bodies of law including American equal protection jurisprudence, international human rights law, Australian statutory anti-discrimination law and other parts of Australian constitutional law involving a prohibition on discrimination. The analytical device of distinguishing between direct and indirect discrimination was also shown to be consistent with the general history of religious tests and with the drafting history of s 116.

155 For example, the requirement might operate as a condition precedent or condition subsequent to holding office, or the requirement might also be structured as a function or duty of the office, see Beck, ‘The Constitutional Prohibition on Religious Tests’, above n 127, 345, 346 n 163; Ronalds and Raper, above n 96, 46–7.

156 See *Williams v Commonwealth* (2012) 248 CLR 156 (‘*School Chaplains Case*’) where this requirement proved fatal to the plaintiff’s religious tests clause claim because the High Court found that the positions of school chaplains were not ‘under the Commonwealth’.