NEUTRALITY OF LAW TOWARDS RELIGION

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The Constitutional referendum in Australia at the end of 1988 was not one of the great world events, nor even one of the great Australian events in that Bicentennial year. And yet, not a few sympathetic Australia-watchers were surprised to learn that Australians overwhelmingly rejected, among other things, a proposal to broaden the scope of the provisions for freedom of religion contained in the Constitution to apply everywhere and under all forms of government in Australia, and not only (as is currently the case) under the federal legislative branch. It would require detailed analysis to explain the causes of this, admittedly surprising, result: one would have to investigate to what extent it was based upon a serious consideration of the merits of this particular proposal by the electorate, and to what extent it was based upon some other grounds (for instance, a general distrust of proposed constitutional amendments, or the unwillingness to entrench any constitutional rights, whatever they might be).

Such analysis, important and interesting though it may be, will not be attempted in this article. Rather, I will assume for the purposes of my argument that constitutionally entrenched religious freedom relies for its validity, at least in part, upon the concept of religious freedom *simpliciter*. This concept is not, however, self-explanatory, and it must not be taken for granted that everyone knows, and agrees about, the scope and the reach of principles of religious freedom in a liberal secular society. I will attempt to defend a particular ideal of such a society, and of such principles. A note of caution: I will rely only to a very limited degree upon the argument about what interpretation of religious freedom is constitutional, as distinct from what interpretation is wise. This will be for two reasons. Firstly, even if what is wise is arguably not constitutional, the arguments about wisdom should find their way into the discourse

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about law reform, including constitutional reform, in a society in which the sources of arguments about valid constitutional interpretation refer often (though not always) to the alleged state of mind of a small group of men nearly one hundred years ago. Secondly, it is an illusion (though a widespread one) that in a society such as Australia arguments about constitutionality can be totally divorced from arguments about wisdom. An important function of judicial review is to bring the two closer together, and constantly to re-interpret the constitutional text in terms of reasons which make good moral and political sense in today's society. As a consequence, in the words of a leading contemporary philosopher of law, the "[c]onstitution fuses legal and moral issues, by making the validity of a law depend on an answer to complex moral problems".[1]

This article will attempt to disentangle some of these complexities with regard to the role of law in protecting religious freedom, and it will do so by way of construing this role against a general background of the ideal of state neutrality. The idea of a secular liberal state, i.e. the state which neither gets involved with matters religious, nor inhibits in any way religious expression and activities, has been long understood as best encapsulated by the idea of the state's neutrality toward religion. Propositions such as that "a genuinely democratic state, especially one which contains a plurality of religious faiths, should be neutral in matters of religion, and regard it as essentially a private matter",[2] are neither controversial, nor foreign to judicial reasoning. Indeed, the Supreme Court of the United States has repeatedly declared that the Constitution requires the government to pursue a policy of neutrality regarding religion, and that, in accordance with that constitutional mandate, the Court must "enforce[] a scrupulous neutrality by the State, as among religions, and also between religious and other activities".[3]

"Neutrality is what is required",[4] proclaimed Justice Blackmun. But what is required by neutrality, is by no means clear and unambiguous. It is an illusion that the answer to this question may be found in a semantic dissection of the word "neutrality", or in seeking help from other areas where the concept of "neutrality" has often been applied, notably in international law.[5] It is not the semantic lack of clarity of the word which

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[1] R. Dworkin, *Taking Rights Seriously* (London: Duckworth 1977) 180.

[2] S. Hook, *Religion in a Free Society* (Lincoln: Univ. of Nebraska Press, 1967) 27. See, similarly, M. W. McConnell & R. A. Posner, "An Economic Approach to Issues of Religious Freedom", *Univ. of Chicago L. Rev.* 56 (1989) 1, 5-12, 15-20, 54-59. But see M. Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law* (Harvard University Press, 1988) 269-76 (criticising the liberal tradition's approach to the law of religion).

[3] *Roemer* v. *Board of Public Works*, 426 U.S. 744, 746-7 (1976), footnote omitted. For other examples of judicial appeals to the concept of neutrality, see e.g. *Everson* v. *Board of Educ.*, 330 U.S. 1, 18 (1947); *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952); *Epperson* v. *Arkansas*, 393 U.S. 977, 103 (1968); *Gillette* v. *United States*, 401 U.S. 437, 449 (1971); *Jones* v. *Wolf*, 443 U.S. 595 (1979).

[4] 426 U.S. at 747.

[5] For such analogy, see J. T. Valauri, "The Concept of Neutrality in Establishment Clause Doctrine", *Univ. of Pittsburgh Law Review* 48 (1986) 83, 89-91.

is the source of disagreement; rather, this disagreement hinges upon the controversy about the normative weight of various purposes and ideals contained in a cluster of values captured by the liberal ideal. In other words, it is not that we are uncertain about the true meaning of the word "neutrality", but rather that we often disagree about the reasons for adopting the conception of neutrality in the first place, which calls for an interpretive effort. Hence, in order to clarify the concept of "neutrality", and decide about a preferred interpretation with regard to the law-religion relationship, we must first clarify our vision of the ideals served by the liberal and secular state regarding individual beliefs and organised cults.

This will be the aim of this article. A separationist, as opposed to an accommodationist, interpretation of the ideal of neutrality in this field, will be proposed in the last Part of this article. The separationist view is proposed as the conclusion, rather than as the presupposition, of an interpretation of the secular and liberal ideal. This interpretation will involve a general introduction of the two main regulating principles of the law-religion relationship: the principle of free exercise and the principle of non-establishment (Part I); an attempt to solve selected, typical "hard cases" which implicate a conflict between these two principles (Part II); and a discussion of the High Court's interpretation of the non-establishment principle (Part III). In the concluding remarks (Part IV), the main themes of this article will be brought together in a unifying framework of neutrality of law towards religion.

1. TWO PRINCIPLES

The relationship between the state and religion in modern secular nations is regulated by two principles: the separation of the state and religion, and the freedom of religion. While in general these two principles seem to be coextensive, and the separation of state and religion is often seen as the best guarantee of religious freedom (because it is thought that if the state is disengaged from religious matters, citizens can freely pursue their religious lives according to their own wishes, and obviously a state-established religion tends to interfere with the free exercise of non-established religions), one can also imagine the fulfilment of one of these two principles being accompanied by denial of the other one. One can imagine, for instance, a perfectly secular state in which religion is purged from public life altogether to the detriment of religious freedom (say, the state refuses to grant permission to build new churches, or to provide fire protection to religious buildings), as well as, on the other hand, a state which secures religious freedom while at the same time officially endorsing and encouraging one particular religion (but without coercive prohibitions against the other religions, or against non-religious beliefs), thus satisfying the principle of religious freedom, but not of the separation of state and religion.

As reflected in legal norms, these two principles correspond to two

legal principles: the principle of non-establishment of any religion through law (henceforth referred to as the Non-Establishment Principle or Clause) and the principle of free exercise of any religion (henceforth: the Free Exercise Principle or Clause). These two principles, in this order, have been entrenched both in the Constitution of the United States[6] and in the federal Constitution of Australia.[7] Just as with the political principles of separation of the state from religion and of religious freedom, so in the case of legal principles their coextensiveness is largely illusory. It occurs, no doubt, in easy cases, where both the Non-Establishment and the Free Exercise Principle are threatened; say, in the case of coercive imposition of specific religious observance by the state upon its citizens. But as far as modern liberal societies are concerned (the focus of interest in this paper) these easy cases are highly unlikely to occur and they need not bother us here. With regard to hard cases, the two principles display some tension in their mutual relationship.

At its most general level, this tension is due to the fact that while the Free Exercise Principle calls for some degree of governmental accommodation of religion, the Non-Establishment Principle in contrast calls for suspicion towards any such accommodation, and it detects in them impermissible governmental assistance to religion. This suggests that the conflict between the two principles stems from the fact that the Free Exercise Principle has an expanding dynamic built into it (calling for a positive and active legal attitude towards claims to have one's religious requirements respected through legal accommodation, exemptions and privileges), and this very dynamic threatens to undermine the disengagement of the state from religious matters demanded by the Non-Establishment Principle.

At a more specific level, the tension between the two principles may be illustrated by the current judicial interpretations of both Religion Clauses of the First Amendment in the United States. The valid construction of the Establishment Clause derives from *Everson* v. *Board of Education*[8] of which the practical outcome was, ironically, to validate a specific form of indirect state aid to religious schools, namely the state-financed transportation scheme available to students of both public and non-public schools. The Court, however, announced in *Everson* a set of separationist prohibitions:

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[6] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof", *U.S. Const.* Amend. I.

[7] "The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth", *Const. (Cth)* s. 116. While s. 116 contains four religion-related clauses, the religious-observance clause and the religious-test clauses are clearly derivative from the other two (in particular, from the non-establishment clause) which may be for the purposes of this Article treated as fundamental.

[8] 330 U.S. 1 (1947).

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . No tax in any amount, large or small, can be levied to support any religious activities or instruments, whatever they may be called, or whatever form they may adopt to teach or practice religion.[9]

These famous dicta, which found their way also to a judgment of the High Court of Australia,[10] have an unmistakeably rigorous and absolutist ring to them ("No tax in any amount, large or small . . ."). On this basis, twenty-four years later, the Supreme Court set a general standard of the Establishment Clause, which seems to forbid any governmental assistance to religion whatsoever. In *Lemon* v. *Kurtzman*[11] the Court announced that in order to conform with the Clause, government action must: (1) have a secular purpose, (2) have as its primary effect neither the advancement nor the inhibition of religion, and (3) avoid excessive governmental entanglement with religion.[12] While the third tier of the test clearly admits judgments of degree ("excessiveness" of entanglement), and so arguably does the second tier (what effect of a legislation is "primary"?),[13] the first tier is formulated in categorical, yes-or-no terms.

In contrast, the Supreme Court's interpretation of the Free Exercise Clause involves balancing the state's interest in achieving valid governmental aims and the individuals' interests in exercising their religious objectives without state interference. The modern fountainheads of judicial construction of the Free Exercise Clause are *Sherbert* v. *Verner*,[14] a decision in which the Court found unconstitutional the denial of unemployment benefits to a Seventh-Day Adventist after she had been fired for refusing to work on Saturday, and *Wisconsin* v. *Yoder*[15] where the Court invalidated the imposition of criminal penalties upon Amish parents who refused to send their children to a public high school. In both cases the decision came as the outcome of a weighing and balancing process. To illustrate this *par excellence* balancing nature of the Free Exercise test, one can usefully compare two cases with identical individual-

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[9] 330 U.S. at 15-16. The *Everson* construction of the establishment clause has been confirmed by the Court *inter alia* in *McGowan* v. *Maryland*, 366 U.S. 420, 437-43 (1961); *School Dist.* v. *Schempp*, 374 U.S. 203, 214 (1963); *Committee for Pub. Educ.* v. *Nyquist*, 413 U.S. 756, 770 (1973).

[10] *Attorney-General (Vic.) Ex rel. Black* v. *Commonwealth*, (1981) 55 A.L.J.R. 155 at 166 (Gibbs, J.), at 177 (Murphy, J., dissenting).

[11] 403 U.S. 602 (1971).

[12] Id. at 612-13.

[13] The Supreme Court itself confessed that determining which of a statute's effect is primary belongs to a category of "metaphysical judgments", see *Committee for Pub. Educ.* v. *Nyquist*, 413 U.S. 756, 783 n. 39 (1973).

[14] 374 U.S. 398 (1963).

[15] 406 U.S. 205 (1972).

interest sides of the equation but with governmental interests of differing importance, and see how the change of the latter variable results in the change of the outcome. The private interests in *Sherbert* and in *United States* v. *Burry*[16] were identical: the interest of not working on the Sabbath in accordance with one's religious beliefs. And yet in *Burry* no First Amendment right to refuse a military order to cook on the Sabbath was found, while in *Sherbert* a disqualification for unemployment compensation solely because of a refusal to work on the Sabbath was found to be an unconstitutional burden on free exercise of religion. This is, of course, due to the higher urgency of the interests related to national defense over the other interests, including those represented by the state action in *Sherbert*.

In a word, judicial responses to the free exercise claims involve the weighing of the individual's claim to free exercise against the cost to the state of non-compliance with the general governmental regulations. But no such weighing is involved in the anti-establishment standard. In consequence, an exemption upheld in applying the Free Exercise balancing test may, even on the face of it, contravene the Non-Establishment Principle if it lacks a "secular purpose" (for such exemptions are typically aimed at accommodating an individual's religious purposes) or if it has as its primary effect the "advancement of a religion" (for any religiously motivated exemptions create more favourable conditions for this religion than the absence of exemption from general burdens). The conflict between the two principles can be illustrated by the situation in which an implementation of the Free Exercise claim will offend the Non-Establishment Principle (when, for instance, religion-based exemptions may be seen as privileges not available for non-adherents to a particular religion, or for non-believers), and *vice versa*, by the situations in which the Non-Establishment claims may be viewed as denials of the Free Exercise requirements (when, typically, a state refusal to provide aid to religion is seen as inhibiting the exercise of religious freedom).

There are two conceivable strategies for solving the tension between the two principles. One is to postulate the priority of one over the other. Not surprisingly, those who choose to adopt this strategy stipulate the priority of the Free Exercise Principle over the Non-Establishment Principle[17] ("not surprisingly", because on the rhetorical level, the Free

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[16] 36 C.M.R. 829 (C.G.C.M. 1966).

[17] See, e.g., J. Choper, "The Religion Clauses of the First Amendment: Reconciling the Conflict", *University of Pittsburgh Law Review* 47 (1980) 673; W. G. Katz, "Freedom of Religion and State Neutrality", *University of Chicago Law Review* 20 (1953) 426. In Australia, see C. L. Pannam, "Travelling Section 116 With a U.S. Road Map", *Melbourne University Law Review* 4 (1963) 41, 84. See also Gibbs, J., in *Attorney-General (Vic.) Ex rel. Black* v. *Commonwealth*, (1981) 55 A.L.J.R. 155 167: "[T]he establishment clause imposes a fetter on legislative power, and unlike the words which forbid the making of any law prohibiting the free exercise of any religion, does not do so for the purpose of protecting a fundamental human right; indeed, the purpose for which it was inserted in the Constitution remains obscure". Which clause attracts more sympathy of the author of these words?

Exercise Principle sounds like a more fundamental principle describing an important *aim*, while the Non-Establishment Principle has the air of being "merely" an institutional device about the proper *means*). The unsatisfactory nature of this solution is sufficiently indicated by its consequences. If the Free Exercise Principle is to be unconstrained by the Non-Establishment Principle then there is virtually no conceivable limit to official endorsements of religious beliefs and ceremonies. This would create, first of all, an intolerable situation for non-believers. Secondly, this would pose real threats to minoritarian religions and cults. If the Free Exercise claims were to be unconstrained by the Non-Establishment Principle, then the state would have to get embroiled in inquiries into the reasonableness of religious claims for assistance or exemption. Otherwise, any sincere religious claim, however outlandish, would have to be respected and that would quickly lead us to quite absurd consequences which would be unacceptable even to the most ardent proponents of the supremacy of the Free Exercise Principle. Such inquiries into the reasonableness of religious claims would inevitably reflect a majoritarian bias. It is the constraint exerted by the Non-Establishment Principle vis-a-vis the Free Exercise Principle which frees the courts from inquiry into the substantive worth of religious beliefs. The implausibility of the strategy of prioritizing the Free Exercise Principle over the Non-Establishment Principle lies in the fact that such a priority would lead to an undermining of those very values which are to be served by the principle of religious freedom: the values of free choice and pursuit of any religious beliefs (or of rejection of religion) without any governmental inhibition.

A second strategy for reconciling the two principles is by appeal to a higher coordinating value which is supposed to be served by the two principles. By showing that the two principles respond to different types of problems within a unified pattern of values, the second strategy may show that each of these two principles has a proper place in the jurisprudence of religious freedom, and that the conflict may be solved by reflecting upon the best way to promote a more fundamental value. This article will propose an approach to reconciliation of these two principles along the lines of that second strategy. Our appeal here will be to the ideal of legal neutrality towards competing conceptions of the good,[18] and more particularly, towards religious conceptions of the good (which includes also neutrality as between religious and non-religious conceptions).

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[18] On this conception, see R. Dworkin, "Liberalism", in his *A Matter of Principle* (Cambridge: Harvard University Press, 1985); B. Ackerman, *Social Justice in the Liberal State* (New Haven: Yale University Press, 1980); D. A. J. Richards, *Toleration and the Constitution* (New York: Oxford University Press, 1986); J. Rawls, "The Priority of Right and Ideas of the Good", *Philosophy & Public Affairs* 17 (1988): 251-77; W. Sadurski, "The Right, the Good and the Jurisprude", *Law & Philosophy* 7 (1988): 36-66. For a rejection of this conception, in the law/religion context, see M. Tushnet, Book Review, *Colum. L. Rev.* 89 (1989) 1131.

Anticipating possible objections, it is important to observe that it is *not* a restatement of the political principle of separation of state and religion, nor of its legal equivalence, namely the Non-Establishment Principle. After all, there is nothing in the principle of "neutrality" that necessarily commits one to the strategies of no-aid, or disengagement, or non-entanglement (rather than, respectively, to the strategies of equal aid, equal involvement and impartiality). But, while it is not a reformulation, it may well support a no-aid interpretation of the Non-Establishment Principle as the best means to solve the conflict between the Non-Establishment Principle and the Free Exercise Principle in particular cases. So the anticipated objection of an initial bias toward one of the two principles may at this stage be rejected: the principle of neutrality toward moral (and religious) conceptions of the good seems to resonate equally well with the Non-Establishment Principle (because non-establishment or disengagement is presumptively neutral, though the converse is not necessarily true: there may also be other forms of neutrality than non-involvement), and with the Free Exercise Principle (because equal freedom to pursue one's harmless conception of the good underlies the strategy of neutrality).

The general aim of the strategy may be described so as to avoid the situation in which the very characterization of a claim as arising under one or another clause may be decisive as to the legal response about the legitimacy of the claim, so that those same claims made successfully under the Free Exercise Clause will fail under the Non-Establishment Clause.[19] Common sense suggests that the substantive reasons supporting a claim, and not its characterization, should be decisive for the legal outcome.

2. REAL-LIFE CONFLICTS OF FREE EXERCISE AND NON-ESTABLISHMENT

Here is a simple working criterion to distinguish "easy cases" from "hard cases" with respect to the operation of legal principles governing the state/religion relationship. "Easy cases" are those which generate a challenge based upon only one of the two major principles (i.e., the Non-Establishment Principle and Free exercise Principle) *or* (as is more often the case) where both principles point in the same direction. In contrast, "hard cases" imply the conflicting claims triggered by the two principles.

Consider, as contrasting background, some "easy cases" first. In the flagrant examples of religious oppression and denials of religious freedom, such as when people are terrorized against worshipping, when churches and holy scriptures are destroyed by officially sanctioned actions, when people are discriminated against in their access to public offices,

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[19] See Note, "Developments in the Law—Religion and the State", *Harvard Law Review* 100 (1987) 1606, 1631-32.

education etc., because of their religious background,[20] there is no apparent conflict between the Non-Establishment Principle and the Free Exercise Principle because both argue against such practices. Denial of the right to freely exercise one's religious beliefs, and the establishment of the official orthodoxy in matters of faith, are two sides of the same coin. Some of these "easy cases" lend themselves better to the argument based on the Non-Establishment Clause (e.g. the imposition of religious tests in selecting candidates for public appointments, where arguably the freedom of non-favoured religions to profess their faith is not restricted). Other cases generate more obviously the arguments based on the Free Exercise Principle, but the question of characterization is not crucial because no conflicting demands issue from the other principle in these cases.

Not all "easy cases" are equally "easy". I have in mind in particular the problem of those official practices of a more or less symbolic nature[21] which raise the challenge based on the Non-Establishment Clause (but which do not trigger the Free Exercise argument). Consider controversies, in the American legal setting, about whether a government may subsidize a Christian nativity scene in a prominent public place at Christmas,[22] or whether a county seal may depict a cross,[23] or whether a state Department of Transportation may print a "Motorist's Prayer" on a state map,[24] or whether a legislature may begin each session with prayers offered by a priest who was paid out of public funds.[25] Consider also the Australian practice of the reading of a prayer by the presiding officers of the federal House of Parliament at the beginning of the daily sessions.[26] Two usual arguments offered in defense of such symbolic measures are (1) that these symbols and activities have become virtually "secularized" and have lost their original religious meaning,[27] and (2) that they are too trivial for the law to become embroiled in the surrounding controversies (*de minimis non curat lex*).[28]

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[20] For a succinct review of current representative examples of religious discrimination and religious oppression, see M. S. McDougal, H. D. Lasswell, L. Chen, "The Right to Religious Freedom and World Public Order: The Emerging Norm of Nondiscrimination", *Michigan Law Review* 74 (1976) 865 at 866-72.

[21] I am cautiously saying "more or less", because I do not wish to convey the idea of triviality sometimes attributed to "symbolism".

[22] See *Lynch* v. *Donnelly*, 465 U.S. 668 (1984).

[23] See *Friedman* v. *Board of County Comm'rs*, 781 F. 2d 777 (10th Cir. 1985).

[24] See *Hall* v. *Bradshaw*, 630 F. 2d 1018 (4th Cir. 1980).

[25] See *Marsh* v. *Chambers*, 463 U.S. 783 (1983).

[26] See R. D. Lumb & K. W. Ryan, *Constitution of the Commonwealth of Australia Annotated* (Sydney: Butterworths, 1977) 363.

[27] This provided the operative argument in *McGowan* v. *Maryland*, 366 U.S. 420 (1961) (upholding Sunday closing laws) and in *Lynch* v. *Donnelly*, 465 U.S. 668 (1984) (upholding state sponsorship of a Christian nativity scene).

[28] See e.g. Hook, *supra* note 2 at 70-71 (describing "vestigial religious practices of a non-compulsory nature that have been in existence for a century or more" as having become "so much a part of folklore that few if any individuals are upset by their continued existence"). As examples of these practices, Hook mentions references to God in the national anthem, in oaths of any kind, in the uncoerced use of prayer or Bible reading, and the use of the slogan "In God We Trust" on the national currency.

The former argument is largely a matter of empirical fact and cannot therefore be discussed *in abstracto*, though a word of warning is perhaps in order against a too hasty acceptance of the "secularization" point at its face value. If one considers the controversy around the government sponsorship of a nativity scene as part of an annual Christmas display, it is hard to believe that the practice reflects mainly secular values (of the traditional family get-together at Christmas etc.) without conveying any strong message of religious support to Christians and an alienating message to Jews, Muslims, atheists etc. This would be the case if the display in question (and other symbolic measures mentioned above) were intended to be (and in its effects would be) a museum-like illustration *about* an important religious tradition which forms a part of the cultural texture of a given society: the crèche (or the cross, or any other religious motives) could then be treated as an "exhibit" on display for educational or aesthetic reasons. But the point is that, more often than not, in the motivations of their supporters and in the public perceptions these practices form part *of* (rather than being *about*) actual celebration and experience of these religious traditions. Hence, state support and sponsorship implies that the government sends a message of inclusion (to the adherents of a favoured cult) and of exclusion (to the non-adherents). To the members of a religious minority, who cannot identify themselves with a given symbol, the governmentally supported practice signifies the denial of accommodation of their religion. The most invidious effect of such governmental involvement or sponsorship lies therefore not so much in endangering the secular character of the state (no-one would seriously claim that, say, by opening a parliamentary session with a prayer, or by funding a crèche in the public park, the state acquires a religious character) and even less in offending the precept of religious freedom, but in the emphatic favouritism of "mainstream" faiths and in the symbolic disregard for the minoritarian ones.[29]

This has consequences also for the "triviality" argument: triviality is in the eyes of the beholder, and the very fact that a given issue became the object of a legal controversy suggests that there was a person or a group who was offended seriously enough by the state endorsement of religious symbols of one particular religious group (even if a majoritarian one) to bring a suit against the government. What "we" ("we", the members of a religious majority) may see as being merely part of innocuous "folklore",[30] members of minority groups may find deeply offensive: "When the government dons a cloak of religious sanctity . . ., the cloak is least likely visible, much less objectionable, to those who wear the

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[29] "The effect [of including a nativity scene in the city's display] on minority groups, as well as on those who may reject all religion, is to convey the message that their views are not similarly worthy of public recognition nor entitled to public support", *Lynch* v. *Donnelly*, 465 U.S. 668, 701 (1984) (Brennan, J., dissenting). See also K. Karst, "Paths to Belonging: The Constitution and Cultural Identity", *North Carolina Law Review* 64 (1986) 303, 357-61.

[30] Hook *supra* note 2 at 71.

same colors".[31] To dismiss the matter on the basis of the "*De minimis*" maxim, involves therefore the danger of a majoritarian bias against the sensibilities of members of minoritarian belief-systems.[32] The injunction of state neutrality with regard to "symbolic" issues requires abstention from sending any message of endorsement or disapproval by the state of any particular religion, cult, or faith.[33]

Though "symbolic" cases are not "easy" in that there may be genuine disagreement between reasonable persons about whether a given practice conveys a message of endorsement or disapproval, they do not belong to the category of "hard cases" in the meaning stipulated for the purposes of the present article, that is, they do not give rise to conflicting claims based on the two fundamental principles: of free exercise of religion and of non-establishment. Such "hard cases" most typically (though not necessarily) involve a state practice which is demanded on the basis of the Free Exercise Principle (calling for a religious recognition, support, accommodation, or exemption) but which falls foul of the Non-Establishment Clause. The problem to be resolved then is how to reconcile the duties and limitations of the state under the Establishment Clause and the rights of the individuals under the Free Exercise Clause: untrammelled protection of "free exercise" would naturally lead to the "establishment" of religion. Consider some typical examples of practices generating such conflicting responses from the two principles:

(1) Voluntary school prayer in public (State) schools.
(2) State financial assistance to denominational schools.
(3) The content of school curricula, with regard e.g. to teaching "creationism" on an equal basis with the evolution theory.
(4) Military chaplaincy in the army (and state paid priests in the prisons).
(5) Religion-based exemptions from military service, from compulsory schooling, and from other burdens and duties.

Now it need not bother us here that some of these cases have usually been decided, in the American legal setting, on Non-Establishment grounds (items 1, 2 and 3), and others—on Free Exercise grounds (items 4 and

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[31] L. Tribe, "Seven Deadly Sins of Straining the Constitution Through a Pseudo-Scientific Sieve", *Hastings Law Journal* 36 (1984) 157, 162 (criticising *Lynch*); see also L. Tribe, "Constitutional Calculus: Equal Justice or Economic Efficiency?" *Harvard L. Rev.* 98 (1985) 594, 611 (same); W. Van Alstyne, "Trends in the Supreme Court: Mr Jefferson's Crumbling Wall—A Comment on *Lunch* v. *Donnelly*", *Duke L. J.* (1984) 770, 781-87 (same); P. Kurland, "The Religion Clauses and the Burger Court", *Catholic Univ. L. Rev.* 34 (1984) 1, 13 (same).

[32] "A critical function of the Religion Clauses of the First Amendment is to protect the rights of members of minority religions against quiet erosion by majoritarian social institutions that dismiss minority beliefs and practices as unimportant because unfamiliar", *Goldman* v. *Weinberger*, 106 S.Ct. 1310, 1321-22 (1986) (Brennan, J.) (dissenting).

[33] In *Lynch*, O'Connor J. reformulated the *Lemon* test by recasting the "advance or inhibit" test in terms of "endorsement or disapproval" of religion by the government, 465 U.S. at 687-90. Ironically, O'Connor J. concurred in the judgment which upheld the maintenance of state-sponsored nativity scenes as part of a Christmas display. See M. Tushnet, *supra* note 2 at 256 n. 31 (criticising O'Connor's views in *Lynch*).

5). It does not follow, however, that the characterization of a given case (as arising under one or the other clause) is insignificant. For one thing, the characterization is highly relevant from the point of view of litigation strategy, because the threshold questions to be answered under each of the Clauses are different and pose different types of problems to the litigants. Under the Free Exercise Clause, the complaint of the plaintiff is typically that his or her religious activities are being inhibited; what has to be shown, initially (i.e. before the balancing of the free exercise interests against the compelling state interests in a challenged regulation) is the *bona fide* nature of religiousness of the claimant's activities. In contrast, a typical complaint arising under the Non-Establishment Clause is that the government supports someone else's religious activities; hence the threshold question here concerns the nature of activities not of the plaintiff, but of those who receive the government's support. For another thing, the characterization often has to do with the specific type of remedies available under either of the Clauses. For example, in the case of the school curriculum, the remedy for a free exercise breach would consist in the creation of special curriculum exemptions tailored to eliminate the specific encroachments on individual religious rights. In a school setting this would lead to a significant disruption of the instructional process. In turn, a typical remedy under the Non-Establishment Clause is complete prohibition of the offending practice: the Clause prohibits absolutely the state from advancing or promoting a religion. The certainty and simplicity (as well as practicability) of this remedy explains a clear preference of the courts to consider the challenges to school boards under the Establishment Clause.[34]

But obviously both principles seem *prima facie* equally applicable to the issue in question. From our point of view the characterization should be of no relevance since we view the two principles not as grounding two separate and independent injunctions, but rather as being unified within a common scheme of state neutrality towards religion. What we want to avoid is precisely the situation in which "stamping a label on the case before considering the issues as one involving either the free exercise clause or the establishment clause"[35] is determinative of its outcome.

Consider first the question of the voluntary, organized prayer in public schools. This is an issue which provokes widespread emotions in the United States, as is evidenced by a number of states which have enacted laws authorizing voluntary spoken prayer,[36] by the consistent

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[34] See Project, "Education and the Law: State Interests and Individual Rights", *Michigan Law Review* 74 (1976) 1373, 1431-32.

[35] P. B. Kurland, "The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court", *Villanova Law Review* 24 (1978) 3, 15.

[36] Each of these laws have been eventually struck down. See Note, "Daily Moments of Silence in Public Schools: A Constitutional Analysis", *New York University Law Review* 58 (1983) 364, 366-67.

support of the Reagan Administration for school prayer, and by a great number of efforts to restore school prayer by a constitutional amendment.[37] An argument of the proponents of organized school prayer has a deceptive air of neutrality: by stressing the voluntary nature of such a practice, these proponents suggest that it is the only way of protecting the religious child's free exercise rights without at the same time infringing on the rights of non-believers. The only "neutral" course of action, they claim, is neither to prohibit nor to order public prayer, but merely to permit it. As one critic of the current Supreme Court's doctrine says, the only "neutral option" is to "let each student decide whether or not to pray".[38] And if this solution is still unacceptable to the opponents, the partisans of the voluntary school prayers fall back on the idea of a mandatory "moment of silence" which might be used by students, according to their wishes, for reflection or prayer. This practice is presented as not "sponsor[ing] prayer, but merely permitt[ing] it".[39]

The critics usually point out that the voluntary nature of organized prayer in a sensitive school setting is largely illusory; that given children's impressionability and need to conform, the pressure upon the non-religious children would be very strong; that those who would not conform, would stand out from the rest and run a risk of being stigmatized and labelled as outsiders; that, finally, where a teacher leads school prayer, then notwithstanding its formally voluntary character, the practice would be seen by children as a norm, promoted and encouraged by a school, and hence that public schools would get involved in promoting purely devotional activity.[40]

While accepting these arguments as valid and convincing, I would like to raise an issue of neutrality with regard to voluntary school prayer. The argument of the proponents of voluntary school prayer that the prohibition is non-neutral with respect to the religious expression of the believers, must be taken seriously. But to see why this argument has no force in this case, compare voluntary school prayer with another issue from our list of "hard cases": the one of military chaplaincy, funded by the government.[41] The latter seems at first even more problematic, since

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[37] Note, *supra* note 19 at 1661 n. 107.

[38] Valauri, *supra* note 5 at 128; see also *Abington School Dist.* v. *Schempp*, 374 U.S. 203, 309-20 (1963) (Stewart, J., dissenting).

[39] A. H. Loewy, "Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight", *North Carolina Law Review* 64 (1986) 1049, 1066.

[40] For these arguments, see *inter alia Illinois ex rel. McCollum* v. *Board of Educ.*, 333 U.S. 203, 227 (1948) (Frankfurter, J., concurring); Note, "The Unconstitutionality of State Statutes Authorizing Moments of Silence in the Public Schools", *Harvard Law Review* 96 (1983) 1874, 1891-92; Note, *supra* note 19 at 1663-65.

[41] It is worth noting that some judges actually used the chaplaincy example to support prayer in public school, see *Engel* v. *Vitale*, 370 U.S. 421, 449 n. 4 (1962) (Stewart, J., dissenting); *Abington School Dist.* v. *Schempp*, 374 U.S. 203, 309 (1963) (Stewart, J., dissenting); *McCollum* v. *Board of Education*, 333 U.S. 203, 254 (1948) (Reed, J., dissenting).

it requires very substantive funding from the public purse,[42] and a high degree of state involvement (entanglement) with religious bodies and structures, occasioned by governmental monitoring and administration of the military chaplaincy system.[43] And yet the chaplaincy system seems to fare better on a scale of "neutrality" than a cost-free and non-entangling practice of voluntary school prayer.

The reason is this. To describe a practice as neutral, with respect to conflicting moral (and religious) conceptions, we must imagine a baseline of action (or non-action) by a neutral agent (here: the government) which establishes, as it were, a normal situation, by reference to which all departures from the baseline may be judged as non-neutral. Imagine a position of an agent N who wants to be neutral between two warring parties: A and B. Imagine further that before the conflict broke, the agent N was supplying one of the parties, A, with a resource R which may now be helpful in ending the conflict to the benefit of A. Will N behave neutrally by continuing the supply of R, or by withholding it from A at the moment of the beginning of the conflict?

The answer, I submit, depends on our views about the "normalcy" of the N supplying A with R in a pre-conflict situation. If A, B and N are three neighbouring states, and R is wheat (and it happens, for the sake of argument, that A cannot easily find another supplier), then by terminating its export to B, N weakens A economically, threatens it with starvation of the population and the loss of efficiency of its army. Hence withholding of R would be non-neutral: it would be a departure from the baseline set by our views about "normalcy" in international relations. But if, by contrast, R is an enriched uranium with which A can complete building its own nuclear bomb, then to continue to supply R with it puts the country N in the position of taking sides, while withholding its export would be a more neutral course of action. The reason for this is that we do not consider the export of commodities which are so threatening to international peace and security as something "normal" but rather as something very problematic, calling for some special justification, and operating only between allies, with respect to whom the question of "neutrality" does not arise at all. That is why a possible complaint by A that, by terminating the export of uranium N behaves non-neutrally (because this export began before the conflict with B and therefore A expected that it would go ahead and planned its relations with B accordingly) cannot have any force because the export was tainted with non-neutrality from the very beginning. It couldn't have estabished a baseline of normalcy but rather constituted a departure from it.

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[42] The annual cost of the military chaplaincy program in the United States is about five million dollars, see *Katcoff* v. *Marsh*, 755 F.2d 223, 229 (2d Cir. 1985).

[43] See J. B. Kaplan, "Military Mirrors on the Wall: Nonestablishment and the Military Chaplaincy", *Yale Law Journal* 95 (1986) 1210, 1227-9.

Now back to voluntary school prayer and military chaplaincy. The baseline in the latter example is established by the usual religious needs of individuals which include, quite typically, attendance at masses in the church, access from time to time to a minister (e.g., for confessional purposes, for advice in personal crisis situations, etc). By removing a person from his or her normal environment, and by putting them in a (more or less) closed institution, the government deprives a person of what are his or her usual religious needs.[44] The consideration of "neutrality" is established by a baseline of normalcy, the departure from which calls for a redressing action by that very government which caused the disturbance in the first place. (Note, incidentally, that the argument in its "pure" version works well with respect to compulsory institutionalization, hence with respect to prison chaplains or military chaplains in a system of compulsory draft. With respect to voluntary military service, the chaplaincy must be defended by a derivative argument, with the extra support of the incentive considerations: the absence of military chaplains in a relatively closed (though voluntary) institution, would be a powerful counter-incentive against joining the army, and thus would work against the nation's needs.)

But an analogous argument cannot be made with respect to state schools: while compulsory schooling disturbs the daily routine of a pre-school period of a child, it would be impossible to argue that there is a baseline of "normal" religious needs which is so disturbed by a schooling duty that a prayer has to be introduced in the school as a redressing measure. School prayer is seen by its proponents not as a substitute for another collective prayer which would occur were it not for the compulsory presence of a child in a public school; it is rather seen as an additional religious activity in a public forum, added to those already existing in private. The forum of a school establishes the value of a collective prayer, in the eyes of the proponents of school prayer. Such prayer would, therefore, be non-neutral between religious and non-religious students, because it would be a move in the direction of religious beliefs and practices, as compared to a baseline of a "normalcy" of religious needs outside the school forum. Incidentally, it would be also non-neutral between those religions (in particular Christian) which include among their devotional activities a relatively short prayer[45] and those where the prayer is of a different form (from the point of view of its length, frequency, vocalization or gesticulation) and therefore which cannot be easily managed within a "moment of prayer" or a "moment of silence".[46]

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[44] For the argument that government provisions for military chaplaincy are justifiable because military service deprives people of the opportunity for free exercise of religion, see *Abington*, 374 U.S. at 296-98 (Brennan, J., concurring).

[45] The Alabama statute challenged in *Jaffree* required public schools to observe "a period of silence not to exceed one minute in duration . . . for meditation or voluntary prayer . . .", see *Wallace* v. *Jaffree*, 472 U.S. 38, 40 n. 2 (1985).

[46] See Note, *supra* note 19 at 1663 n. 121.

This type of reasoning helps also to explain why the neutrality of a "moment of silence" (as opposed to a moment of prayer) in a public school is illusory. It has been argued that such a moment of silence would allow both the non-religious persons to meditate or reflect and the religious ones to pray, and that it merely "provide[s] the opportunity for those inclined to pray to do so" without the school's endorsement of prayer as a favoured practice.[47] Indeed, one might perhaps argue that there is no possibility of creating any feeling of opprobrium on the part of the non-religious, because one could not distinguish between those who pray and those who merely meditate. But, again, this measure does not meet the condition of neutrality as indicated by a baseline of normalcy disturbed (in this case) by compulsory schooling. It is not a normal, usual practice for non-religious people to "meditate" collectively and regularly in public fora, except under most extraordinary circumstances (e.g., when mourning the death of a friend, or of some great public figure). The school "moment of silence" does not therefore restore any initial practice, hindered by school. In contrast, collective and regular praying (in silence or otherwise) is a religious practice. The moment of silence does not resemble to non-religious students any usual ritual of their own life, but it does appear as something very familiar to religious students, evoking an unmistakable analogy with their church services. The moment of silence is, therefore, non-neutral; it is simply an attempt to smuggle in prayer to public schools under a more palatable guise.

Another issue which generates a great deal of controversy is state aid to religiously affiliated schools. The question of whether it is a forbidden "establishment of religion" for the government to provide some assistance to religious schools has been given different answers in Australia and in the United States. In Australia, the High Court announced (by a 6:1 majority) that federal financial assistance to denominational schools did not constitute the "establishment of a religion", and did not contravene section 116 of the Constitution.[48] In the United States, the argument has been set within a complex scheme of the Establishment Clause analysis established in *Lemon* v. *Kurtzman*,[49] a decision which invalidated state statutes paying the salaries of teachers in non-public schools or reimbursing such schools for teachers' salaries, textbooks and other instructional materials. Under this scheme, the scrutiny of state aid focuses on three issues: whether it has "a secular legislative purpose", whether its "principal or primary effect" is one that "neither advances nor inhibits religion", and whether it does not foster "an excessive government entanglement

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[47] Loewy, *supra* note 39 at 1068.

[48] *Attorney-General (Vic.) Ex rel Black* v. *Commonwealth* (1981) 55 A.L.J.R. 155. More precisely, the Court upheld the validity of Commonwealth legislation for financial assistance to States and Territories for sums to be applied in payment for capital projects and recurrent expenses of non-government (mainly Roman Catholic) schools.

[49] 403 U.S. 602 (1971).

with religion".[50] If a statute violates any of these three prongs: of purpose, of effect, or of entanglement, it must be held violative of the Non-Establishment Clause. Thus, even if a statute has a strong secular purpose (such as, e.g., to promote a high quality education, or to make general state services available to religious schools students) and a non-entangling nature, it cannot be upheld if it has the primary effect of advancing or promoting religion. Indeed, more often than not the Court found most aid to religious schools failing under the effect criterion.

At the same time, all three prongs of the establishment clause test are formulated in an absolute way, i.e. they do not allow the balancing against conflicting social values: even a significant gain in terms of such other values cannot redeem a state action if it advances a religion even to a small degree. It would take no special effort to show that any state aid to religious schools advances the given religion with which they are affilitated (e.g. because "in aiding a religious institution to perform a secular task, the State frees the institution's resources to be put to sectarian ends"),[51] but the Court relaxed the categorical nature of its test by permitting those benefits to religious institutions which are "indirect", "remote", or "incidental".[52] In effect, the application of the test resulted in a set of decisions in which it is sometimes difficult to draw a clear line between permissible and impermissible governmental aid.[53] Nevertheless, it has the merit of establishing a conceptual scheme closely related to the goal of strictly separating the state and religion in a system where, as the *Lemon* Court noted, "government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government".[54]

Consider the injunction of neutrality in the context of state aid to religious schools. The proponents of aid argue that a denial of such aid is non-neutral because it disfavours those parents who send their children to private schools pursuant to their religious duties, as compared to other believing and non-believing parents.[55] The former have to carry a double burden: as taxpayers who contribute to the support of the public school system, and then as parents who pay tuition for their children. For the government to assist them (by tax subsidies directly to them, or by various

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[50] 403 U.S. at 612-13.

[51] *Roemer* v. *Board of Public Works*, 426 U.S. 736, 745 (1976) (footnote omitted).

[52] See *e.g., Committee for Public Ed.* v. *Nyquist*, 413 U.S. 756, 772 (1973); *Walz* v. *Tax Comm's*, 397 U.S. 664, 671-72, 674-75 (1970).

[53] For example, *compare Everson* v. *Board of Education*, 330 U.S. 1 (1947) (the state may reimburse parents for the costs of a public bus service to take students to private schools) *with Wolman* v. *Walter*, 433 U.S. 229, 252-255 (1977) (the state may not pay for buses to take students on field trips); *Board of Educ.* v. *Allen*, 392 U.S. 236 (1968) (the state may furnish textbooks to religious school students) *with Meek* v. *Pittinger*, 421 U.S. 349 (1975) (the state may not provide educational materials and equipment such as maps and films). For other examples of apparent inconsistencies, see Kurland, *supra* note 35 at 18-19.

[54] 403 U.S. at 625.

[55] See Valauri, *supra* note 5 at 128; McConnell & Posner, *supra* note 2 at 18.

forms of funding religious schools which would result in a reduction of tuition costs) would simply relieve them of this extra burden, not incurred by those whose religious beliefs do not require sending their children to religiously affiliated schools. State aid to religious schools may therefore be seen as an equalizing measure assisting those parents who are "compelled to support public school services unused by them and to pay for their own children's education",[56] and recognizing in practice that these parents "are rendering the State a service by decreasing the cost of public education and by physically relieving an already overburdened public school system".[57] In the context of the state-parent relationship, state aid may be therefore seen as effectuating a compensation for this "service", or for the costs incurred; in the context of the state-school relationship, state aid amounts to the payment for services provided by a private school, which the state would have to provide anyway.[58]

Does this argument pass the muster of the neutrality test? Consider the following reply by a parent (let us call her "Parent A") who does not send her children to a religious school. "As a tax-payer, I support the funding by the government of a certain number of essential services which are available to all the citizens on a free or on a subsidized basis. Typically, those services are free when they are made compulsory and there is no possibility for the beneficiaries to opt out (e.g., primary education), and those services are subsidized when they are addressed to such important needs of individuals that it would be unfair to supply them at the market price (public transport).[59] These state-funded (or state-subsidized) services provide a basic level of satisfaction of the needs in a given field, according to collective, politically formed judgments in our community about what constitutes such a minimum. Everyone is free to purchase extra services at the market price, but one has no claim for a state subsidy (even in an indirect way, say through tax deductions) because it would amount to taxpayers' supporting extra tastes or unusual requirements of some of the citizens. It would be a non-neutral policy because it would give extra support to some substantive preferences, over and above what others receive.

"Imagine (our hypothetical Parent A could continue) a claim by a private car owner for a special subsidy. Paraphrasing Justice Rehnquist's dissent,[60] he might well say: 'I am not using public transport services, I am helping to reduce the costs of public transport and I am physically

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[56] *Committee for Public Ed.* v. *Nyquist*, 413 U.S. 756, 813 (1973) (Rehnquist, J., dissenting).

[57] Id.

[58] See J. Choper, "The Establishment Clause and Aid to Parochial Schools", *California Law Review* 56 (1968) 260.

[59] Of course, there may be many other justifications for public expenditure, such as the collective nature of benefits and the avoidance of the free-riders phenomena, but these are not relevant to our argument.

[60] 413 U.S. at 813.

relieving an already overburdened public transport: why should I support public transport unused by me *and* pay fully for my own car, fuel etc.? Financial aid granted to me would merely equalize the cost of transport borne by those who travel by private cars.' Obviously, (Parent A would conclude) these claims have no weight because it would be unfair to burden a tax-payer with the cost of subsidizing extra or special tastes. Likewise, it is unfair to make me pay for the special preferences of some parents for the private, religious upbringing of their children".

Now superficially there is a defect in Parent A's reply: the analogy between a private-car owner and the religious parent is not proper because religious beliefs are not like "tastes": they constitute a much more important part of one's spiritual identity, and therefore for the community to attach costs to exercising them is not like attaching costs to private-car use. A private-car user can still (when hard pressed) travel by public bus without any special detriment to his personal integrity, while a parent unable (for financial reasons) to send a child to a religious school is deprived of a very important part of his spiritual identity.

But is this reply really satisfactory? For one thing, remember that we are dealing not so much with the claims of absolute deprivation (that is with a situation where, in the absence of state aid, a parent will not be able to send her children to a religious school at all—let us assume, *arguendo*, that a system of private scholarships will handle such situations) but rather with a claim of fairness, that is when a parent who can afford to send her child to a private school anyway complains about the "non-neutrality" of what she sees as double payment: once as a tax-payer, and second as a parent. The issue of the loss to personal integrity is therefore, in these cases, largely absent.

More importantly, however, one surely cannot accept a general rule that a community has a duty to subsidize "extra" requirements (i.e. above the minimum already provided in a given field) when they are moulded by the consideration of religion. Would an Orthodox Jew have the right to claim a tax subsidy for his regular travel to another city where the nearest kosher butcher is located? Would a Muslim be able to claim for aid towards the costs of flying to Mecca? If not, then it is hard to see any principled basis for a Catholic's claim for the state support of her children's religious schooling, even if these needs are sincerely felt as essential to her religious duties.

Incidentally, one could also question the premise of an argument just considered, namely that religious beliefs and tastes (such as for private transport) are non-analogous. Indeed, why non-analogous? If it is because of the importance of the former as opposed to the relative triviality of the latter, then this judgment in itself is based on the non-neutral assessment of the moral worth of non-harmful preferences: the sort of assessment that a liberal state is prohibited from enforcing. If it is, in turn, on the basis that religious beliefs are much less controllable by a person than consumption tastes, in the sense that one more or less "chooses" one's

consumption tastes but not one's religious beliefs, then we face a dual dilemma. For one thing, it is often untrue: there may well be consumption tastes largely independent of one's volition (resulting, say, from socialization process in which a particular lifestyle is considered natural and essential, or from addiction) and, on the other hand, a religious affiliation can be freely chosen by a person (a convert from another cult, or a former non-believer). For another thing, if indeed "immutability" (in the sense of a characteristic being beyond one's conscious control) is what distinguishes religion from consumption tastes, then religious requirements become analogous to an affliction or a handicap. The community's duty to help meet one's religious needs acquires then a status similar to the community's duty to satisfy a handicapped person's special needs. Quite apart from the anticipated protest by religious people against such an analogy, the problem with it is that in the case of special needs there are always at least two morally justified courses of action: to satisfy them or (even better) to eliminate their source. But surely it would be non-neutral for the state to try to eliminate those religious beliefs which give rise to special schooling needs.

The analogy between religious parents and the private-car owners is therefore vindicated. As long as there is a minimum service provided by the state, those who wish to acquire something extra cannot complain about the unfairness of the system in which they have to contribute to the support of the basic level. In a landmark case about state funding of school transportation (which would benefit the religious schools' children), Justice Rutledge in his dissent made this reply to a charge that "failure to provide . . . [bus transportation] would make the state unneutral in religious matters, discriminating against or hampering such children [ie., parochial school children] concerning public benefits all others receive":[61] "Of course discrimination in the legal sense does not exist. The children attending the religious school has the same right as any other to attend the public school".[62] The neutrality of the state in matters of religion (just as in matters of special consumption tastes) requires abstention from the recognition of special preferences and requirements which admit claims to subsidies at the taxpayer's expense, as long as a minimum level of satisfaction of given needs is met.

But is it really met in our examples? Consider the claim of a religious parent that her choice between the public (secular) and a private, religiously-affiliated school for her children is not a matter of choosing between a school providing an educational minimum and, on the other hand, a school which provides that minimum plus something extra (namely, a religious content) but rather it is a choice between a totally inappropriate inculcation of secularity (which she rejects, for religious reasons) and

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[61] *Everson* v. *Board of Education*, 330 U.S. 1, 56 (1947).

[62] Id. at 58.

an environment inculcating in her children proper religious and moral beliefs. In this case, a public school is not a proper baseline of comparison (by relation to which we may decide about what tastes and preferences are "extra") but rather it is one of two conflicting substantive moral options between which the state must be neutral.[63]

In replying to this argument, Parent A must appeal to a factual demonstration that public schools do not inculcate anti-religious beliefs but are neutral on the questions of faith. If such an argument cannot be made, then religious parents have a point. But if it has a firm empirical basis, and the state in question does not promote atheism through its public schools, then these public schools are religion-neutral. In this situation, the policy of neutrality itself cannot be neutral between a neutral and a non-neutral option: public schools and private religious schools are not two options to be compared for the purpose of the neutrality analysis, but rather the former constitute a baseline, the departure from which is non-neutral and therefore should not be subsidized by the state.

The question is, of course, whether it is at all conceivable that non-religious schools can be neutral on matters of faith, even if they do not actively propagate atheism. Can one be religiously neutral when one, for instance, teaches evolutionism and ignores, or dismisses, creationism? This leads us to our next area of "hard cases". The question of the content of the curriculum, in particular as far as the scientific explanation of the origin of the human race is concerned, has been in a number of countries, including the United States and Australia, an object of political controversy raised mainly by those fundamentalist Christian groups which are offended by the perceived growing secularization of public education. Having, in the past, lost battles to relegate Darwinism from public schools,[64] or to explicitly favour the creationist view of evolution,[65] the current line of the attack is to say that secular education is non-neutral because it promotes anti-religious views of evolution and does not accord proper attention to alternative hypotheses.[66] The consequent demand is either to expurgate public teaching of all these themes which contradict particular religious teachings, or to introduce religious precepts and interpretations (in particular, so-called "creation science") into the curriculum along with Darwinian evolutionism.

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[63] See P. E. Johnson, "Concepts and Compromise in First Amendment Religious Doctrine", *California Law Review* 72 (1984) 817, 823-24.

[64] See *Spperson* v. *Arkansas*, 393 U.S. 97 (1968) (invalidating a ban on the teaching of evolution in public schools as a violation of the Establishment Clause).

[65] See *Daniel* v. *Waters*, 515 F.2d 485 (6th Cir. 1975) (invalidating a state statute that explicitly favoured creationism); *Moore* v. *Gaston County Bd. of Ed.*, 357 F.Supp. 1037 (W.D.N.C. 1973) (granting relief to the teacher discharged for challenging the literal interpretation of the Bible and for approving the Darwinian theory).

[66] For a good survey of these attacks on "secular humanism" in public schools, see Note *supra* note 19 at 1665-74.

While the former option is clearly impracticable (to eliminate all these themes which are not in line with any particular faith's precept would leave virtually nothing left to teach, considering the variety of religious creeds and beliefs),[67] the latter solution has some initial air of "neutrality". Indeed, some writers (not necessarily the fundamentalists themselves) criticise the current doctrine of the Supreme Court (which rejects the constitutionality of the "balanced treatment" or "equal time" statutes)[68] from the standpoint of neutrality.[69]

To see why legislative attempts to limit the exclusive teaching of evolution as the explanation of human origins, and to require that equal time be devoted to creation-based accounts, are non-neutral, it is important to understand the nature of the fundamentalist challenge. The mystification involved in this challenge is to present those values, norms and interpretations which are at variance with certain religious precepts as "anti-religious". There is a double confusion here: first, the teachings which are inconsistent with the precepts of *some* religions may be acceptable to the adherents of other faiths (hence any accommodation of teaching in public schools to the sensitivities of adherents to one religion would favour this particular religion over the others); second, not everything that is non-religious is *eo ipso* anti-religious. Interpretations of human origins which fall foul of some religious precepts do not themselves express hostility toward religion, nor do they necessarily advocate atheism, though they may form a basis upon which a student might wish to reconsider her or his religious commitments and choices. But these reconsiderations need not lead to a rejection of one's religious affiliation (for one may wish to draw a line between matters of faith and matters of knowledge); much less to a rejection of religion as such.

In a recent article, critical of the liberal neutrality approach to school curricula, S. L. Carter asks: "[W]hy is it that contemporary liberalism, which proclaims the freedom of individual conscience, values conscience less when an individual chooses to discover the world through faith rather than through reason? What is it about religious belief that liberalism so fears?"[70] The answer is, I suppose, that liberalism cannot, without running into hopeless contradiction, allow itself to be neutral between neutral accounts (motivated by non-religious considerations, even if in conflict with *some* precepts of *some* religions) and those articles of faith which themselves implicate a rejection of neutrality as the main part

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[67] "If we are to eliminate everything that is objectionable to any of [the religious bodies that exist in the United States] . . . or inconsistent with any of their doctrines, we will leave public education in shreds", *Illinois ex rel. McCollum* v. *Board of Educ.*, 333 U.S. 203, 235 (1948) (Jackson, J., concurring).

[68] See recently *Edwards* v. *Aguillard*, 107 S.Ct. 2573 (1987) (invalidating a state law which forbids the teaching of evolution without the accompanying instruction in creation science).

[69] Valauri, *supra* note 5 at 127.

[70] S. L. Carter, "Evolutionism, Creationism, and Treating Religion as a Hobby", *Duke Law Journal* (1987) 977, 985-86.

of a liberal vision of political values. The fundamentalist challenge to secular education is grounded in a cluster of values which reject respect for value pluralism, toleration for diverse moral views, an open attitude to the potentialities of human reason, and the equal moral agency of all individuals, regardless of their substantive moral conceptions. These values underlie the constitutional order of a liberal state; their rejection cannot be mandated by liberal neutrality. It does not follow that "religious faith" as such is dangerous for a liberal order, but rather that it can coexist with a liberal order when kept in a private dimension of social interaction. If given political support through state and law, it threatens those very values upon which liberal neutrality (including the toleration for diverse religious beliefs themselves) is erected.

It is therefore unnecessary, for this debate, to enter into a controversy about whether "creationism" is as "scientific" as Darwinism, or whether it is scientific at all.[71] The critics of the present position of the Supreme Court have a point when they argue that the Court has no constitutional mandate to protect "science" against "non-scientific" approaches.[72] The strategy of the Court, in invalidating the "equal time" and "balanced treatment" laws under the "purpose" prong of the Establishment Clause test (by arguing that such laws have a "primary religious purpose")[73] may be unfortunate (by running into the routine problems of legislative mind reading) and less effective than an argument under the "effects" prong,[74] but the result is correct from the point of view of neutrality. The effect of bringing creationism into the classroom (and I have in mind here "teaching creationism", rather than "teaching *about* creationism") would be to introduce an account based ultimately on an article of faith, forming an integral part of a sectarian cluster of values, exclusionary of other beliefs (both religious and non-religious) and contrary to the very values which are served by liberal neutrality.[75]

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[71] Most critics of "creationism" argue, of course, that it is not a "science" at all but a sectarian religious dogma, see Richards, *supra* note 18 at 153-55.

[72] Carter, *supra* note 70 at 984.

[73] See *Edwards* v. *Aguillard*, 107 S.Ct. 2573 (1987).

[74] This is the argument of the Note, *Edwards* v. *Aguillard*, "Leading Cases", *Harvard Law Review* 101 (1987) 189, 198.

[75] To see that it is not an exaggerated claim, consider some of the examples of the effects of the "anti-secularist" challenge upon the values of tolerance, freedom of expression and equality. Judge Hand, in *Jaffree* v. *James*, 544 F.Supp. 727, 732 (S.D. Ala. 1982), has cited as an instance of impermissible promotion of secular humanism, and as blasphemy to Christianity, the appearance in a school reading textbook of the word "Goddamn". The same federal district judge banned the use in Alabama schools of forty-four textbooks judged to be biased against theistic religion and promoting secular humanism, *Smith* v. *Board of School Comm'rs* (reported in Note, *supra* note 19 at 1667 n. 135). Among other things, Judge Hand deemed "antireligious" the view that "we can direct our own lives", because it implies a denial that salvation is only through God. *Id.* at 1669, n. 152. In *Mozert* v. *Hawkins County Public Schools*, 647 F.2d 1194 (E.D. Tenn. 1986) the court ordered exemption from classes for children whose parents' religious beliefs were offended by instruction from certain state-selected textbooks. The "offensive" passages included the ones which depicted boys cooking and girls reading; the plaintiffs argued that such passages promoted secular humanism by suggesting that there are no God-given roles for the different sexes. See Note, *supra* note 19 at 1669 n. 152.

The problem of religion-based exemptions from various duties and burdens raises a different set of *legal* problems, as the exemptions are always claimed under the Free Exercise Clause, and therefore raise the difficult question of comparing the importance of the objector's dilemma with the importance of state regulation, as applied uniformly to all. The comparison, according to the current American doctrine, should be measured on the scale of strict scrutiny, which calls for showing that the state interest is "compelling"[76] and that the regulation uses the least restrictive means available[77]—hence a scrutiny which immediately puts a claimant in a privileged position. In contrast to the Non-Establishment Clause analysis, the test under which the Free Exercise claims are measured is therefore rather unfavourable to the injunction of neutrality.

But, this legal technicality notwithstanding, the question of neutrality arises very clearly with respect to religion-based exemptions, as is evidenced by various judicial pronouncements in conscientious-objection cases.[78] It should be perhaps noted, at the outset, that different types and areas of exemptions raise different issues: one should not lump together exemptions from military service[79] with exemptions from compulsory school attendance,[80] from monogamy laws,[81] from Sunday closing laws,[82] from the Flag Salute duty,[83] from narcotics prohibitions,[84] and from taxes,[85] to mention a few. But, all the peculiarities aside, they all highlight the same fundamental problem: that they constitute privileges based on religious beliefs, which are not available to other religions (those which do not object to a particular duty or burden) or to non-religious people. As Philip Kurland put it, "to afford a privilege of freedom claimed for adherents to one religion necessarily results in aiding the religion over others or over the nonreligious".[86] For this reason, those judges who took seriously the principle of neutrality, felt uneasy about supporting religion-based conscientious objections; Justice Douglas said, criticising the law

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[76] See e.g. *Wisconsin* v. *Yoder*, 406 U.S. 205, 215 (1972).

[77] See e.g. *Sherbert* v. *Verner*, 374 U.S. 398, 407 (1963).

[78] See e.g. *Gillette* v. *U.S.*, 401 U.S. 437, 451, 453-55 (1971) (Marshall, J., for the Court); *id.* at 469 (Douglas, J., dissenting).

[79] See e.g. *Welsh* v. *United States*, 398 U.S. 333 (1970) (upholding exemptions from combat for some conscientious objectors); *United States* v. *Seeger*, 380 U.S. 163 (1965) (same).

[80] See *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972) (upholding the right of the Amish parents to withdraw children from school after eighty grade).

[81] See *Reynolds* v. *United States*, 98 U.S. 145 (1978) (affirming the conviction of a Mormon for bigamy).

[82] See *McGowan* v. *Maryland*, 366 U.S. 420 (1961) (upholding Sunday closing laws).

[83] See *Minersville School Dist.* v. *Gobitis*, 310 U.S. 586 (1940) (refusing religiously motivated exemptions from compulsory flag salutes in public schools); *Board of Educ.* v. *Barnette*, 319 U.S. 624 (1943) (overruling *Gobitis*).

[84] See *People* v. *Woody*, 61 Cal. 2d 716, 720, 394 P.2d 813, 816, 40 Cal. Rptr. 69, 72 (1964) (upholding a Free Exercise right to use peyote in a religious ceremony of a particular tribe).

[85] See *Follett* v. *Town of McCormick*, 321 U.S. 573 (1944) (exempting certain religious activities from taxation).

[86] Kurland, *supra* note 35 at 15.

which exempted religious objectors from military service, "The law as written is a species of those which show an invidious discrimination in favor of religious persons and against others with like scruples".[87]

There are, in the ascending order of generality, three neutrality-related problems, raised by the religious based exemptions. First, can the Court grant exemptions to some religions but not to others, even if these other religions also could sincerely claim an exemption? In *Gillette* the Court upheld a provision which exempted from military service persons conscientiously opposed to all war, but not those who were opposed to a particular war, deemed by them "unjust". The distinction between a general and a selective opposition to war was drawn by the Court on the basis that to allow opposition to a particular war to count would produce too much uncertainty in assessing the sincerity of an objection and a risk that exemptions will be granted on political and non-conscientious grounds.[88] To be sure, these are real dangers, but they do not detract from the fact that the distinction is discriminatory against those religions which prohibit participation in unjust wars only. Second, the exemptions discriminate against people who object to certain duties on profoundly moral, but secular grounds. Third, they may discriminate against those who object on non-moral grounds, which under the circumstances might be of high importance to them (e.g. those merchants who do not benefit from the religious exemptions from the Sunday Closing laws may justifiably fear economic losses).

Neutrality of the state between religious and non-religious beliefs seems to be the main casualty of religious exemptions. There is no basis, in an ideology of a liberal and secular state, to draw the line between the religiously motivated and other deep moral beliefs, with respect to bearing common burdens and fulfilling societal duties. "If the state is truly neutral, then no privilege can be extended to any religious group which is not open to any nonreligious group".[89] It does not follow that conscientious objection must necessarily be disallowed, but rather that it should be measured by the sincerity and intensity of moral reluctance to engage in a certain activity, and not by whether this reluctance has religious rather than secular grounds.[90] The fact that an objector derives his or her moral complaint from participation in an organized and recognized religion may be one of the indicia of judging the sincerity of the claim, but it must not be conclusive evidence nor a prerequisite for recognizing it as valid.

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[87] *Gillette* v. *U.S.*, 401 U.S. 437, 469 (1971).

[88] Id. at 455-57.

[89] Hook, *supra* note 2 at 45.

[90] For a similar argument, see J. Weiss, "Privilege, Posture and Protection: 'Religion' in the Law", *Yale Law Journal* 73 (1964) 593, 621-23; P. B. Kurland, "Of Church and State and the Supreme Court", *Univ. of Chicago Law Review* 29 (1961) 1, 22-52.

Very significantly, this consequence has been achieved, *sans le dire*, by the United States Supreme Court with respect to military service. This result (on which religious and secular objections have been virtually put on a par) has been reached by a broadening of the definition of "religion". In *United States* v. *Seeger* a *religious* conscientious objection (restricted by the law to those conscientiously opposed to participation in war "by reason of religious training and belief")[91] has been recognized in a person who admitted that he did not believe in God but whose sincere and meaningful beliefs, according to the Court, "occupie[d] a place . . . parallel to that filled by the God of those admittedly qualifying for the exemption . . .".[92] Subsequently, in *Welsh* v. *United States* the exemption has been expanded upon all "deeply held moral, ethical, *or* religious beliefs",[93] as opposed to consideration of mere "policy, pragmatism, or expediency".[94] Thus, for all practical purposes, the religious/secular distinction ceased to be operative.

This extension of the coverage provided by religious exemptions to non-religious military objectors is very significant from the point of view of the problem of religious exemptions in general. It suggests how anachronistic the distinction remains in a secular society where the state wants to be neutral between religion and non-religion. The Court, while feeling bound to pay lip service to the constitutional mandate (which, after all, puts "religion" in a preferred position vis-a-vis other forms of conscience), at the same time avoids discrimination against non-religious moralities by extending the concept of "religion".

Interestingly, it does not always happen this way. In another case of conscientious objection, decided shortly after *Seeger* and *Welsh*, the Supreme Court quite explicitly confined the Free Exercise protection to religious beliefs, as distinct from other, secular, beliefs. In *Wisconsin* v. *Yoder*[95] the Court went to some length to stress that exemption from compulsory school attendance would not be accorded to anyone for "purely secular considerations".[96] In what seems like a stark departure from the expansive, functional concept of religion under *Seeger* and *Welsh*, the Court said:

> [T]o have the protection of the Religion Clauses, the claims must be rooted in religious belief. . . . Thus, if the Amish asserted their claims [for exemptions] because of their subjective evaluation and

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[91] Section 6(j) of the Universal Military Training and Service Act of 1948, 50 U.S.C. app. para. 456(j) (1964).

[92] 380 U.S. 163, 176 (1965).

[93] 398 U.S. 333, 334 (1970) (emphasis added).

[94] 398 U.S. at 343.

[95] 406 U.S. 205 (1972) (upholding the right of the Amish to withdraw their children from school after eighth grade).

[96] Id. at 215.

> rejection of contemporary secular values accepted by the majority, . . . their claims would not rest on a religious basis. . . . [S]uch belief [which is based on "philosophical and personal rather than religious" choice] does not rise to the demands of the Religion Clauses.[97]

How can this strange inconsistency between *Seeger* and *Welsh* on the one hand and *Yoder* on the other be explained? The only explanation which seems plausible is that the nature of moral duties, from which the Court grants exemptions to objectors in these cases, is so different that it justifies application of different standards of judicial scrutiny. In *Seeger* and *Welsh* the subject matter is military service: a duty which imposes a very significant burden on the moral objector's conscience, whatever its nature (religious or otherwise) might be. This is amplified by the fact that the war in question was largely unpopular in the United States, and that it was not a defensive war fought on the territory of one's own country. Due to the problematic character of this political and moral duty, the Court applied a very relaxed scrutiny of the objector's claims, resulting in an expanded category of "religious" objection. But in *Yoder* the situation was different for a number of reasons. First, the duty in question (i.e., the duty to send one's children to school until a certain age) is largely non-problematic, or in any event, it is not as dramatic as the duty of military service. Compulsory schooling is widely seen not as a burden and a restriction of one's liberty, but rather as an essential prerequisite of one's conscious citizenship.[98] Second, the Amish protested not on their own behalf but on behalf of their children. It is always much more suspect when one wants to avoid public benefits (and elementary schooling, while a duty, is also a benefit) on conscientious grounds for someone else. There must be some limits to the parental values-imposition upon their children, and the court should be concerned about the danger of parental oppression, or of parental bigotry, producing disadvantageous results to the children, and masquerading under the guise of parental rights.[99] While the *Yoder* Court upheld parents' rights to mould their children's religious beliefs and to control their education,[100] we may speculate that by virtue of the reasons just given, the Court's scrutiny

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[97] Id. at 215-16.

[98] For example, see recently, in Canada, *Jones* v. *The Queen* (1986), 28 C.C.C. (3d) 513, 31 D.L.R. (4th) 569 (the law which requires every child of a certain age to attend public school unless excused for certain reasons, does not offend the freedom of religion guaranteed by the Charter of Rights and Freedoms, and it sets suitable standards of education for the welfare of children); *Regina* v. *Powell et al.* (1985), 39 Alta. L.R. (2d) (Prov. Ct.) (same).

[99] Justice Douglas argued in dissent: "It is the future of the student, not the future of the parents, that is imperiled by today's decision. If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today", 406 U.S. at 246 (Douglas, J., dissenting). See also Richards, *supra* note 18 at 157; R. C. Post, "Cultural Heterogeneity and Law: Pornography, Blasphemy and the First Amendment", *California Law Review* 76 (1988) 297, 303-5.

[100] 406 U.S. at 233; for an earlier announcement of this right, see *Meyer* v. *Nebraska*, 262 U.S. 390 (1923).

was much more stringent, resulting in a narrow definition of "religion" for the purposes of Free Exercise claims. And while one may disagree with the substantive result, one can see that what really distinguished *Yoder* from *Welsh* was not the different nature of "religiousness" in both cases but the different weight of the moral claim for exemption. But if this is the case, then it confirms our general suggestion that the Free Exercise exemptions should be considered on general moral grounds (irrespective of their religious or secular character) and that it is only the stringency of the moral weight of objections which should solely determine the level of judicial scrutiny of an exemption.

There is yet another important lesson to be learnt from *Yoder*, as confronted with military duty objections. If we agree that the objectors' case in *Yoder* is relatively weak (for reasons given above), then the Court's surprising (because inconsistent with *Seeger* and *Welsh*) insistence on the duty to show a *par excellence* religious character of an objection may be explained by an attempt to limit the reach of the exemption about which the Court feels uneasy. At the same time, this confinement of the exemption to religious objections does very little damage here, in terms of possible discrimination against other beliefs, because it is based on very idiosyncratic beliefs of a minoritarian, fringe group. There is a very low likelihood that a number of members of other groups (religious or otherwise) will attempt to release their children from compulsory school attendance. While it is reasonable to expect that mainstream religious groups will be protected, in their Free Exercise rights, through ordinary legislation, groups such as the Amish may fear that their beliefs will be disregarded due to the legislators' prejudice, hostility or ignorance. In conclusion, the indicium of "religion" should still remain operative in the interpretation of the Free Exercise of Religion principle,[101] but only when it is justified by the need to assure (through a judicial process) that the members of small, idiosyncratic minorities will be treated equally with those adherents to mainstream religions who can rely on the political process.[102] Beyond this rationale, however, a differential protection of "religious" and "secular" beliefs is non-neutral, and disadvantageous to the latter.

3. HIGH COURT'S INTERPRETATION OF NON-ESTABLISHMENT

It has been long established in American judicial doctrine that a

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[101] This provides a response to the objections that the neutrality strategy runs counter to the plain demands of the First Amendment which singles out religion for special treatment. For this objection, see Note, *supra* note 19 at 1637; see also, similarly, J. H. Mansfield, "The Religion Clauses of the First Amendment and the Philosophy of the Constitution", *California Law Review* 72 (1984) 847, 851; M. W. McConnell, "Neutrality Under the Religion Clauses", *Northwestern University Law Review* 81 (1986) 146, 151-53; S. Ingber, "Religion or Ideology: A Needed Clarification of the Religion Clauses", *Stanford Law Review* 41 (1989) 233, 246.

[102] For a similar argument, see M. Galanter, "Religious Freedoms in the United States: A Turning Point?", *Wisconsin Law Review* (1966) 217, 291; D. Laycock, "A Survey of Religious Liberty in the United States", *Ohio State Law Journal* 47 (1986) 409, 432-33.

prohibited establishment of religion need not consist in setting up a "state religion" by the government, but that this constitutional prohibition of "establishment" applies to all action which advances, or benefits, religion[103] (except when this effect of advancement is only an indirect effect of a permissible, secular action).[104] It has also been established that non-preferential aid to all religions, which benefits all religions alike, is prohibited under the Establishment Clause.[105]

None of these propositions has been accepted by the Australian High Court; indeed, both have been explicitly rejected.[106] A currently binding construction of the Non-Establishment Clause of s. 116 of the Constitution is that "law for establishing any religion" must be understood in a very narrow way, as the law which confers upon a particular religion a status of the official or national religion, and furthermore that it must be the express and direct purpose of such a law in order to place it within the meaning of s. 116. The sorts of law which would be invalidated under s. 116 are described as those which "involve[] the entrenchment of a religion as a feature of and identified with the body politic"[107] or as those which "constitute a particular religion or religious body as a State religion or State church",[108] or those which require "statutory recognition of a religion as a national institution".[109] Any other laws, including those which give aid to religion, and in particular provide financial assistance to religious bodies, pass the muster of the Non-Establishment Clause. Specifically, the majority judges said that they would give constitutional approval to the laws "which may assist the practice of a religion and, in particular, of the Christian religion";[110] to "[t]he mere provision of financial aid to churches generally, more particularly when that aid is genuinely linked to expenditure on education"[111] and to laws which do no more than "accord[] material recognition and status to a set of beliefs, a system of moral philosophy or particular doctrines of faith".[112]

As can be seen, there is a dramatic difference between the United States Supreme Court's separationist interpretation of the Non-Establishment Clause[113] and the doctrine of the High Court of Australia.

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[103] *Lemon* v. *Kurtzman*, 403 U.S. 602, 612 (1971).

[104] See e.g. *Walz* v. *Tax Comm'n*, 397 U.S. 664, 671-72 (1970).

[105] See e.g. *Everson* v. *Board of Educ.*, 330 U.S. 1, 15 (1947).

[106] See *Attorney-General (Vic.) Ex rel. Black* v. *Commonwealth* (1981) 55 A.L.J.R. 155, 159-60.

[107] Id. at 159 (Barwick, C.J.).

[108] Id. at 165 (Gibbs, J.).

[109] Id. at 187-88 (Wilson, J.).

[110] Id. at 160 (Barwick, C.J.).

[111] Id. at 172 (Mason, J.).

[112] Id. at 168 (Stephen, J.).

[113] "[I]t is now firmly established that a law may be one 'respecting an establishment of religion' even though its consequence is not to promote a 'state religion' . . . and even though it does not aid one religion more than another but merely benefits all religions alike.", *Committee for Public Ed.* v. *Nyquist*, 413 U.S. 756, 772 (1973).

The arguments the High Court used to defend its deferential approach towards the state's aid to religion are historical, textual and purposeful. As historical arguments it is maintained that the meaning that "a law for establishing any religion" had in 1900 involved the entrenchment of religion as a national religion or national church, and nothing else. The majority judges found it important "to ensure that the then current meaning is adopted".[114] This I will leave without comment: how important it is for judicial review to discover the historical meaning in enforcing constitutional rights in a changed society is a matter for debate which cannot be pursued here. But, one must concede, that if one sincerely believes that the views of a group of draftsmen in 1900 should be determinative about interpreting the rights of Australians in the 1980's, the majority judges have a point.

Second, there are textual arguments about the proper and natural meaning of the "law for establishing any religion". The majority judges contrasted this phrase with the American description of any law "respecting an establishment of religion" claiming that what is embraced by the latter, is left unaffected by the former. Special weight is attached to the use of the word "for" in the Australian constitutional text as opposed to "respecting" in the American Constitution, because (as we are told) the Australian words "look to the purpose of the law rather than to its relationship with a particular subject-matter".[115] This is a case of hair splitting. For one thing, one can make an argument that one of the acceptable dictionary meanings of "for" is precisely "with respect to", or "concerning", or "as regards".[116] For another thing, one could say that the American text actually gives the United States Court *a weaker* rather than a stronger mandate to scrutinize governmental involvement with religion than the Australian words. Literally speaking, the American Establishment Clause may be read as prohibiting the Congress from interference with any state's religious establishment laws. The Clause's words ("Congress shall make no law respecting an establishment of religion . . ."), if read pedantically, mean only the denial of power in Congress to invalidate the establishment of churches by the states or to institute its own established churches.[117] But such a reading would be clearly absurd because it would suggest that the Congress has to respect (and, consequently, so has the Court) whatever establishment of state religion is entrenched by a state constitution: a result clearly contrary to the idea of religious freedom. The High Court judges also argue, in

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[114] (1981) 55 A.L.J.R. 155, 159 (Barwick, CJ.). See also id. at 169 (Stephen, J.) (describing the meaning of "establishment" in 1901); at 172 (Mason, J.) (stating that "a constitutional prohibition must be applied in accordance with the meaning which it had in 1900); at 188 (Wilson, J.) (inferring "a legislative intent" to adopt a narrow notion of "establishment").

[115] Id. at 165 (Gibbs, J.).

[116] Id. at 174 (Murphy, J.).

[117] See W. W. Van Alstyne, "What Is 'An Establishment of Religion'?", *North Carolina Law Review* 65 (1987) 909, 910-11; M. E. Smith, Book Review, *California Law Review* 72 (1984) 908, 912.

a similar vein, that "establishing *any* religion" is different from the American "establishment of religion" in that the former suggests that "it is the establishment of one particular religion rather than of religion generally" that is proscribed in s. 116.[118] But then, if the use of the indefinite article in the Australian constitutional text suggests that the clause prohibits only the establishment of *one* particular religion, then an odd consequence follows in which an indiscriminate establishment of all religions (but falling short of imposing compulsory religious observance, proscribed in the second clause of s. 116), would be permissible under s. 116.[119]

Finally, there is an appeal to the purpose of the Clause. To be sure, some High Court judges are uncertain about the purpose of the Clause: one Judge frankly admits that its purpose remains to him "obscure",[120] and some consider it even "self-evident" that the non-establishment clause does *not* amount to a "constitutional guarantee of the rights of individuals".[121] However, one of the majority judges defined the purposes of s. 116 as "the preservation of religious equality, freedom of religion and . . . 'the right of a man to have no religion' ".[122] It is a significant list. One telling omission from this catalogue is the preservation of equality between religious and non-religious beliefs, activities and bodies. While freedom, in Mason J's catalogue, works both ways (i.e. both for the religious and non-religious persons), equality is one-dimensional: it is only between religions. One might perhaps say that it is consistent with the method of a literal reading of the Constitutional text: there is no express mention of the equality of religion and non-religion. True, but then there is no mention of "religious equality" either. The non-establishment of any religion, in the narrow sense adopted by the Court, falls short of the general injunction of non-preferential treatment of all religions, for the Commonwealth may well favour some religions quite significantly without establishing them as national religions. One cannot therefore have it both ways: interpret "establishing" as allowing financial aid to religions and at the same time read in section 116 a principle of "religious equality", which is not there once we adopt the narrow sense of "establishing". If, however, as seems to be obviously correct in a pluralistic and liberal society, and is in any case accepted by the judiciary and the commentators,[123] s. 116 is indeed directed to the preservation of religious equality as such, then it is hard to see on what basis we can deny the constitutional mandate to preserve equality

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[118] (1981) 55 A.L.J.R. 155, 165 (Gibbs, J.).

[119] See, similarly, Murphy, J. id. at 175.

[120] Id. at 167 (Gibbs, J.).

[121] Id. at 168 (Stephen, J.); see also id. at 167 (Gibbs, J.).

[122] Id. at 172 (Mason, J., quoting Latham, C.J., in *Adelaide Company of Jehovah's Witnesses* v. *The Commonwealth* (1943) 67 C.L.R. 116, 123).

[123] See e.g. id. at 170 (Stephen, J.); Pannam, *supra* note 17 at 84-85; Lumb & Ryan, *supra* note 26 at 362; D. Cumbrae-Stewart, "Section 116 of the Constitution", *Australian Law Journal* 20 (1946) 207, 208.

between religious and non-religious people, bodies and activities. This is all the more unclear since s. 116, in contrast to the American First Amendment, explicitly prohibits law "imposing any religious observance", hence expressing concern with the rights of the non-religious. Why this concern must fall short of granting them full equality, remains to be explained by the Court.

4. CONCLUSIONS: THE IMPORTANCE OF NEUTRALITY

While the policy of neutrality between different religions is probably compatible with the strategy of accommodating religious beliefs in the law, through the policy of non-preferential aid (though there is a latent danger of bias in favour of mainstream, orthodox religions), it is impossible to preserve neutrality between religious and non-religious beliefs while accommodating religions' claims for special protection and recognition. Our survey in Part 2 of this article has suggested that only strict separation of law and religion, and non-recognition of religious classifications as relevant to legally imposed burdens and benefits, may guarantee neutrality between religious and non-religious beliefs, and between religions themselves. It is inherently non-neutral to provide a higher level of protection to religious beliefs than to deeply held and ethically argued secular moral views, in granting exemptions from shared burdens and duties in a society. It is also non-neutral to fund, subsidize and otherwise support religious bodies, including religiously affiliated schools, thus advancing the position of a particular religious denomination. It is only in those unusual circumstances when the state itself deprives a person of the normal, free exercise of her religion (as is the case of such closed institutions as the army or prisons), that the state has a duty to provide her with the opportunities and resources necessary to restore a situation which would have existed without the deprivation. Another context in which a claim of a religious group for a privilege or exemption from otherwise shared burdens produces a relatively low degree of risk of discrimination against other groups (or against the non-religious) is when small, unorthodox, fringe religious minorities claim special exemptions from common duties in order to accommodate their beliefs: special consideration of their claim may be a remedy against the systemic under-estimation of the minoritarian interests in a majoritarian political process. To be sure, it is not so much a *religious* but a *minoritarian* status of a group which should warrant special consideration of their claim. But since "religion" is given a special constitutional position anyway, such a rationale of strict judicial scrutiny of religion-based claims may help preserve the validity of textual reading of constitutional language in a secular society, in which special privileges of religion as compared to non-religious beliefs are no longer acceptable.

The strategy of strict separation is, of course, easier to argue for under the Non-Establishment Clause than under the Free Exercise Clause. But if one rejects a principle of separation, then one runs into the problems

of inevitable discrimination and favouritism in awarding privileges granted under the Free Exercise Clause. The way out of this riddle: interpreting even "Secular Humanism" as a religion and then treating it on a par with other religions[124] may be the most palatable solution under a constitutional regime which reserves a special place for the free exercise of *religion*, and yet it indicates the inherent dangers of the rejection of strict separationism. The unattractive dilemma: either favour religions to the detriment of non-religious beliefs, or interpret genuinely secular beliefs as "religious", can be avoided by adopting the policy of strict neutrality: no aid and no disadvantage is to be triggered by a description of a certain belief or activity as "religious".

A usual reaction of the critics of "strict separation" is that it leads to "hostility to religion".[125] This is a sweeping charge. By refusing to recognize religious claims to special treatment, the law is no more "hostile" to religions than it is to anti-religious "atheism" when it refuses to endorse officially atheistic positions. The policy of secularism is critical of allowing a favoured role for religion in the public forum which may be used by religion to impose sectarian religious views upon other cults, or upon the non-religious people. But secularism is not hostile to religious beliefs and observances as the *private* matters of individuals; indeed, it is motivated by a liberal desire to leave the private lives of individuals beyond the scope of governmental regulation.

Contrary to the claims of critics, such a confinement of religion to the private sphere does not inhibit religious exercise. They point out, for instance, that absolute neutrality is impossible, and that often neutrality must be, to use an ironic formula, against or in favour of religion.[126] Discussing the controversy around the "release time" for religious teaching in public schools,[127] one writer claims that any solution would inevitably be non-neutral: to dismiss some students (the religious ones) earlier would be for the school to encourage religious instruction, but, on the other hand, "religious instruction will be discouraged by government to the extent that religious students must wait until after regular school hours to attend religious instruction".[128] It is hard to see why the latter option

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[124] See *Torcaso* v. *Watkins*, 367 U.S. 488, 495 n. 11 (1961). See also *United States* v. *Seeger*, 380 U.S. 163, 176 (1965) (any sincere belief which occupies in a person's life a place parallel to that filled by the God is considered "religious" for the purposes of the Free Exercise interpretation); *Welsh* v. *United States*, 398 U.S. 333 (1970) (a belief which plays the role of religion in a person's life is considered "religious" for the purposes of the Free Exercise interpretation).

[125] See, e.g., W. G. Katz, "Freedom of Religion and State Neutrality", *Univ. of Chicago Law Review* 20 (1953) 426.

[126] Valauri, *supra* note 5 at 120.

[127] Compare *McCollum* v. *Board of Education*, 333 U.S. 203 (1948) (invalidating a plan to offer released time religious education on public school premises); with *Zorach* v. *Clauson*, 343 U.S. 306 (1952) (upholding release time for religious instruction away from the site of the public school). See also R. T. Miller & R. B. Flowers, *Toward Benevolent Neutrality: Church, State, and the Supreme Court* (Markham Press, 1982, rev'd ed.) 305-307.

[128] Valauri, *supra* note 5 at 120. See also, similarly, M. Tushnet, "The Emerging Principle of Accommodation of Religion (Dubitante)", *Georgetown Law Journal* 76 (1988) 1691, 1712.

is seen as "non-neutral", and as hostile to religious instruction. The fact that students who want to attend out-of-school foreign language classes are not released earlier but have to wait until after regular school hours is not a discouragement of language courses—as long as there is reasonable time left after the classes. That such a nonpreferential school policy triggers the accusations of hostility, suggests that the critics of neutrality see "hostility" as departures from the baseline of traditional practices, in which religion had a favoured place in public life, rather than from the baseline of a neutral attitude.

It has sometimes been argued that "neutrality" in general (i.e. not specifically with respect to state-religion relations) may be understood in at least two ways: as requiring non-intervention (or non-involvement) or impartiality (or equal promotion of conflicting interests).[129] In other words, the party who wants to be neutral between two competing parties must either disengage itself from the conflict altogether, or try to affect the interests of the parties to an equal degree.[130] In abstract terms, both conceptions can be supported by *prima facie* convincing arguments, though initially the former seems to be theoretically more attractive. Consider Leszek Kolakowski's argument against the "equal promotion"-type definition of neutrality by Alan Montefiore. Montefiore defines neutrality as "do[ing] one's best to help or hinder the various parties concerned in an equal degree".[131] Kolakowski responds that this produces the bizarre consequence of describing as "neutral" a certain state which sells arms to both of two states at war with each other, for example because it is interested in the prolongation of the war and in weakening both parties. For himself, Kolakowski suggests that neutrality in a particular situation of conflict means a purposeful behaviour in such a way as not to influence its outcome.[132] Nevertheless, there seems to be a good linguistic case for understanding impartiality (including impartial promotion of two competing interests) as *a* possible interpretation of neutrality, especially when we do our best to promote all the conflicting parties equally, and try not to influence the conflict between them, but merely elevate the conflict, so to say, to a higher level. However, when we move to a more specific area of the state-religion relationship, and translate the two interpretations of neutrality into the "no aid" versus "equal aid" controversy, the plausibility of the latter conception of neutrality disappears. One *can* apply the equal-promotion theory of neutrality to the impartiality of the state between different religions (trying to

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[129] See E. Mack, "Liberalism, Neutralism, and Rights", in J. R. Pennock, J. W. Chapman, eds., *Religion, Morality, and the Law: Nomos XXX* (New York: New York University Press, 1988) 46-70; Valauri, *supra* note 5 at 89-91.

[130] As applied to the state-religion relationship, these two conceptions yield the strategies of strict separation and of equal accommodation, respectively.

[131] A. Montefiore, *Neutrality and Impartiality* (Cambridge: Cambridge University Press, 1975) p. 5, footnote omitted.

[132] L. Kolakowski, "Neutrality and Academic Values", in Montefiore, *supra* note 131 at 72-73.

accommodate their demands to an equal degree), but it is not possible for the state to equally promote religious and non-religious interests.

In the area of free exercise interpretation, to equally protect religious and non-religious conscientious objections to military service, for example, would in practice mean that the religiousness of the claim has to be ignored—otherwise the impartiality between religion and non-religion is lost. In the area of non-establishment interpretation, to equally promote religious and non-religious interests would mean that whenever a non-religious benefit is conferred, a similar religion-based benefit must be granted. But what is a comparable non-religious unit which may be analogized, say, with religiously affiliated schools? If we answer that it is the secular schooling, then we end up with a claim that whenever a secular benefit is given, an analogous religious benefit must be conferred. This is incoherent, for there is an infinite number of legitimate state actions and services which are secular but not anti-religious: protection of health, protection of environment, public transport etc. A proper unit with which to compare religious beliefs and interests, for the purposes of the Non-Establishment Principle, is not "non-religion" but anti-religion. The state has to be neutral between religion and atheism: it must not establish either as an officially endorsed ideology, nor support either ideology with public means. But it would be absurd to claim that "non-religion" (i.e. activities and beliefs irrelevant from the point of view of religious beliefs, and from the point of view of the religion-agnosticism-atheism disputes) must be treated the same as religion. To see the absurdity of this proposition consider a practical implication: under this ideal, when the government supports the opera (an arguably non-religious cultural effort) it would have immediately to support, say, a church as well, in order to give to religion what it has already given to "non-religion". But the comparison is mistaken: you cannot, without running into absurdity, be neutral between x and everything that is non-x, including those things which are totally irrelevant from the point of view of x. In practical terms, it means that the "equal aid" for religion and non-religion is not a viable interpretation of the ideal of neutrality. So the only plausible interpretation of neutrality is along the non-interventionist lines: the state has to remain aloof from religious activities (just as it should not get involved in *anti*-religious, as contrasted to non-religious, activities and beliefs). Only by fully "disentangling" itself from all religion-related functions, can the law maintain its position of complete neutrality.