

PRINCIPLES, PRAGMATISM AND POWER: ANOTHER LOOK AT THE HISTORICAL CONTEXT OF SECTION 116

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This article examines the historical and theological background to the recognition of God in the Preamble to the Australian Constitution and the insertion of s 116. We challenge the account of that context, and the implications for the understanding of s 116, presented in Luke Beck's recent work Religious Freedom and the Australian Constitution: Origins and Future. We argue that the campaign for constitutional recognition was driven by deep theological convictions about the role of religion in public life, not power. Further, contemporaries did not believe in a separation of religion and state and were not, for the most part, suspicious of the influence of religion. Section 116 therefore cannot be plausibly understood as intended to establish a separation between religion and the state, or as being intended to guard against the influence of religion.

CONTENTS

I	Introduction.....	1034
II	Beck's Safeguard against Intolerance Theory	1037
III	The Theological Context: Mainstream Christian Views on Church, Religion and the State.....	1040
	A Roman Catholic Perspectives	1041
	B Historical Protestant Perspectives.....	1043
	C Modern Protestant Perspectives and Presbyterianism	1050
IV	Principle or Pragmatism? Constitutional Recognition of God and Protestant Political Theology.....	1053
V	Separating Religion and the State	1059

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A	The Seventh Day Adventist Position: Strict Separation.....	1059
B	The Mainstream Christian Response: Institutional Separation, Beneficial Interaction.....	1062
VI	Conclusion	1067

I INTRODUCTION

At face value, the *Australian Constitution* imposes significant limitations on the Commonwealth's power to legislate in relation to religious matters. Section 116 provides:

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.

The High Court has typically adopted a narrow interpretation of s 116, approaching it through the lens of federalism as a limitation on Commonwealth power, rather than as a guarantee of civil liberties.¹ Different approaches have been proposed by commentators. In 1992, Stephen McLeish challenged the High Court's approach, proposing in its place a 'neutrality' theory.² According to McLeish:

[U]nderlying s 116 there exists a general conception of state neutrality toward religion, reflected both in the avoidance of religious preferences and in respect

¹ *A-G (Vic) ex rel Black v Commonwealth* (1981) 146 CLR 559, 605, 609 (Stephen J), 615–16 (Mason J), 652–3 (Wilson J) ('*DOGS Case*'). This narrow approach has been well documented: see, eg, Reid Mortensen, 'The Unfinished Experiment: A Report on Religious Freedom in Australia' (2007) 21(1) *Emory International Law Review* 167, 167–77; Carolyn Evans, 'Religion as Politics Not Law: The Religion Clauses in the Australian Constitution' (2008) 36(3) *Religion, State and Society* 283; Luke Beck, 'The Case against Improper Purpose as the Touchstone for Invalidity under Section 116 of the *Australian Constitution*' (2016) 44(3) *Federal Law Review* 505, 505–14; Alex Deagon, 'Defining the Interface of Freedom and Discrimination: Exercising Religion, Democracy and Same-Sex Marriage' (2017) 20 *International Trade and Business Law Review* 239, 239–51 ('Defining the Interface of Freedom and Discrimination'); Paul Babie, 'National Security and the Free Exercise Guarantee of Section 116: Time for a Judicial Interpretive Update' (2017) 45(3) *Federal Law Review* 351, 351–8, 366–8; Alex Deagon, 'Liberal Assumptions in Section 116 Cases and Implications for Religious Freedom' (2018) 46(1) *Federal Law Review* 113; Carolyn Evans, 'Religion' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 1033.

² Stephen McLeish, 'Making Sense of Religion and the Constitution: A Fresh Start for Section 116' (1992) 18(2) *Monash University Law Review* 207.

for the autonomy of individuals in matters of religion, especially as participants in the wider community.³

Most recently, Luke Beck has proposed a further alternative, which he calls the ‘safeguard against religious intolerance’ theory.⁴ Beck argues that s 116 is best understood as a safeguard against religious intolerance, according to which the four clauses of s 116 exist to prevent the Commonwealth from attempting to legislate in a manner that is religiously intolerant, where religious intolerance is defined as the attempt to change or suppress religious beliefs or practices, or impose penalties for holding or following them.⁵

In articulating this view, Beck has undertaken a detailed consideration of the theological, political and legal factors at play in the Federation Conventions which eventually led to the recognition of God in the Preamble to the *Constitution* and the adoption of s 116 — including the theological and political views held by contemporaries regarding church, religion and state, and the reasons why church groups devoted such energies to agitating for constitutional recognition and s 116.⁶ This article examines the historical and theological background to the recognition of God in the Preamble and the insertion of s 116 into the *Constitution*, and challenges the interpretation of that context, and the implications for s 116, presented by Beck. We express no view in regard to Beck’s claim that the historical context is necessary to understand s 116 properly.⁷ We are not providing a normative argument about the importance of history or claiming that history is determinative for constitutional interpretation. Instead, we critique Beck’s specific claims about the historical context and suggest implications for how convincing his proposed theory is. We argue that Beck has misread crucial aspects of that context, which significantly weakens his proposed safeguard against religious intolerance theory. In particular, Beck’s account rests on a misunderstanding of the principles of Protestant political theology. The portrayal of the recogni-

³ Ibid 223. A subsequent article by Puls largely accepts this account in the context of a discussion about the definition of religion: Joshua Puls, ‘The Wall of Separation: Section 116, the First Amendment and Constitutional Religious Guarantees’ (1998) 26(1) *Federal Law Review* 139, 150–1.

⁴ Luke Beck, *Religious Freedom and the Australian Constitution: Origins and Future* (Routledge, 2018) 118–29 (‘*Religious Freedom and the Australian Constitution*’).

⁵ Ibid 118–19.

⁶ Beck, *Religious Freedom and the Australian Constitution* (n 4). See also Luke Beck, ‘The Theological Underpinnings of Australia’s Constitutional Separation of Church and State Provision’ (2018) 64(1) *Australian Journal of Politics and History* 1 (‘Theological Underpinnings’).

⁷ Beck, *Religious Freedom and the Australian Constitution* (n 4) 126–7.

tion campaign as unprincipled does not do justice to the real motivations of the petitioners. It ignores the principled theological reasons that formed the basis for the argument for recognition, which were consistent with standard Protestant political–theological convictions.

Secondly, broadly following the Seventh Day Adventists, the arguments made by Beck consistently conflate ‘church’ and ‘religion’, which were not, and are not, the same thing. Beck expressly characterises s 116 as a ‘separation of religion and government provision’.⁸ Many aspects of his argument are consistent with this characterisation, such as his argument that the recognition debate was about church leaders seeking political power.⁹ In contrast, while contemporaries consistently argued for an institutional separation of church from the institutions of government, a prevailing view was that religion and the state remained closely intertwined.¹⁰ This is an important feature of the historical context that Beck ignores in his theory of s 116.

We outline Beck’s theory in Part II. Beck’s treatment of the historical context contains a detailed analysis of the views of the Seventh Day Adventists and briefly considers the Council of Churches. One significant omission is his failure to consider mainstream Christian perspectives on constitutional recognition and s 116 in adequate detail. Given that such perspectives are more likely to have accurately reflected broader public opinion at the time of Federation, and consequently have exerted a greater influence on the framers’ thinking than the views of the much smaller Adventists (or any other religions), these perspectives are necessary for an accurate understanding of the context. Accordingly, Part III considers Protestant theological views, and the views of the Council of Churches (the broad coalition of Protestant church groups who campaigned for constitutional recognition) together with two prominent mainstream Christian denominations (Roman Catholics and Presbyterians), regarding the relationship between church, religion and the state. Part IV draws on this analysis to argue that the campaign for constitutional recognition was based on deep principles and convictions stemming from Protestant and Roman Catholic theology, undermining Beck’s contention that recognition was principally about power, politics and expediency.

Part V considers the views of the Seventh Day Adventists and their underlying theological principles. Beck’s work demonstrates that the Adventists had an important influence in lobbying for the protection of religious freedom,

⁸ Ibid 4.

⁹ Ibid 16–17.

¹⁰ Andrew Harper, *Australia without God: An Appeal to the Churches of Australia to Secure an Acknowledgement of God in the Australian Constitution* (ML Hutchinson, 1897) 12–13.

and his argument is clearly sympathetic to their views.¹¹ However, the vast majority of the Australian people at the time of Federation did not accept the principles underlying the Adventist position. Contrary to the Adventist view, and the arguments made by Edmund Barton, the majority accepted the need for an institutional separation of church and state but rejected the idea that this required a total separation of religion and government.¹² Accordingly, although the Adventist proposal for a protection of religious liberty was ultimately adopted into the *Constitution* as a response to the recognition campaign, their views cannot be taken as the only reason for the incorporation of s 116 into the *Constitution*. In Part VI, we conclude that Beck's failure to appreciate that the campaign for constitutional recognition was principled and not pragmatic — and his failure to consider broader aspects of the historical context — significantly weaken his proposed theory of s 116.

II BECK'S SAFEGUARD AGAINST INTOLERANCE THEORY

Beck's proposed account of s 116 is a 'safeguard against religious intolerance theory'.¹³ Beck follows the definition of intolerance set out by Melissa Williams and Jeremy Waldron,¹⁴ arguing that religious intolerance is to be understood as the attempt to change or suppress religious beliefs or practices, or impose penalties for holding or following them.¹⁵ Beck's theory explains the purpose of the four clauses of s 116. In summary, establishing a religion is intolerant 'because it frames those who are not members of the established religion as outsiders'; imposing a religious observance amounts to 'an attempt to change the religious practices of individuals'; prohibiting the free exercise of religion 'is explicitly the suppression of religious practices'; and imposing a religious test for public office 'penalises individuals who do not adhere to favoured religious beliefs ... by denying them access to public office'.¹⁶

Beck's proposed theory is 'a constitutive theory of the origins of s 116 and not a doctrinal interpretation of the constitutional provision's legal operation and effect'.¹⁷ That is, his theory aims to answer the question: what kind of

¹¹ See Beck, 'Theological Underpinnings' (n 6) 3–10.

¹² Cf *ibid* 13–15.

¹³ Beck, *Religious Freedom and the Australian Constitution* (n 4) ch 9.

¹⁴ Jeremy Waldron and Melissa S Williams, 'Introduction' in Melissa S Williams and Jeremy Waldron (eds), *Toleration and Its Limits* (New York University Press, 2008) 1, 4.

¹⁵ Beck, *Religious Freedom and the Australian Constitution* (n 4) 119.

¹⁶ *Ibid*.

¹⁷ *Ibid*.

provision is s 116? It explains the purpose or foundation of the provision, and does not explain how courts ought to interpret s 116. The theory is proposed in contrast to the neutrality theory proposed by Stephen McLeish in 1992.¹⁸ McLeish's neutrality theory is intended to construe s 116 as 'a guarantee of civil liberty' with an individual rights focus, assessing the impact of a law on individuals rather than as a limitation on federal power.¹⁹

Beck gives detailed reasons why the neutrality theory is wrong,²⁰ but devotes much less space to explaining why the safeguard against religious intolerance theory is correct.²¹ Beck argues that a 'constitutive theory of the foundations of s 116 needs to have a negative direction and be conceptually modest in terms of its substantive content.'²² Beck points out a number of similarities or characteristics that his theory shares in common with certain features of Australian constitutionalism or the drafting history of s 116. The first is that the theory does not give conceptual primacy to rights.²³ Secondly, the principal objective of the 1897–98 Federal Convention, according to Beck, was to deny power to the Commonwealth to legislate on the subject of religion; thus, the framers intended to prevent a vice, not imbue with a virtue.²⁴ As a result, any constitutive theory of s 116 must have a 'negative direction'.²⁵ Concern that any exercise of Commonwealth legislative power might lead to religious intolerance is consistent with this focus on preventing a vice.²⁶ Thirdly, the theory sits comfortably with the 'non-theorised nature of Australian constitutionalism and its lack of concern with philosophical questions about the nature of the state'.²⁷ A final reason for adopting the safeguard against religious intolerance theory is the theme of pragmatism which runs through the origins of s 116.²⁸ This pragmatism lay behind the Seventh Day Adventist campaign for s 116 and was characteristic of the Convention's approach.

¹⁸ McLeish (n 2).

¹⁹ Ibid 210.

²⁰ Beck, *Religious Freedom and the Australian Constitution* (n 4) 123–8.

²¹ Ibid 128–9. See also at 123–4, 127.

²² Ibid 128.

²³ Ibid 125.

²⁴ Ibid 122–3.

²⁵ Ibid 123–4.

²⁶ Ibid 128. Beck does not state whose concern is relevant.

²⁷ Ibid.

²⁸ Ibid 128–9.

Accordingly, Beck's reading of the history plays a crucial role in the articulation and defence of his proposed safeguard against religious intolerance theory. Almost every reason articulated by Beck has reference in some way to the historical context of s 116. Beck critiques the neutrality theory for failing to take adequate account of 'the broader aims of the recognition movement' and for not explaining that 'the campaign for recognition of God in the *Constitution* was part of a broader and longstanding movement by colonial church leaders for public recognition of God and religion more generally'.²⁹ According to Beck, the historical context requires that any convincing account of s 116 have two key features, namely 'a substantively minimalist' content, and a negative rather than positive direction.³⁰

Beck therefore has undertaken a detailed consideration of the historical context to the inclusion of s 116 in the *Constitution*, including relevant aspects of the theological, political and legal factors. Prior to Beck, the major work to have examined the historical context to s 116 was that of Richard Ely.³¹ While Beck challenges Ely's earlier work in some respects, his account of the historical and theological context shares many similarities. Both scholars consider that the recognition of God in the Preamble to the *Constitution* was inserted at the 1897 Federal Convention largely as a result of a flood of petitions from churches and religious groups,³² and that this campaign was inconsistent with the 'fundamental doctrine' of Protestantism, namely the 'individualistic character of relations of each human soul to its creator'.³³ Having denied any possible principled basis for the campaign to recognise God in the Preamble, Beck argues that the campaign was largely political and pragmatic, originating from a desire to maintain public status and recognition.³⁴ This campaign was ultimately successful, and became the catalyst for the insertion of s 116 into the *Constitution*. The Seventh Day Adventists — a minority religious group consisting of fewer than 2,000 adherents in 1897³⁵ — were concerned that recognition could potentially lead to the

²⁹ Ibid 127.

³⁰ Ibid 123–4.

³¹ Richard Ely, *Unto God and Caesar: Religious Issues in the Emerging Commonwealth, 1891–1906* (Melbourne University Press, 1976) ('*Unto God and Caesar*').

³² See generally Beck, *Religious Freedom and the Australian Constitution* (n 4) ch 2; *ibid* ch 1.

³³ Beck, *Religious Freedom and the Australian Constitution* (n 4) 15, citing Richard Ely, 'Andrew Inglis Clark on the Preamble of the Australian Constitution' (2001) 75(1) *Australian Law Journal* 36.

³⁴ Beck, *Religious Freedom and the Australian Constitution* (n 4) 17.

³⁵ Beck, 'Theological Underpinnings' (n 6) 3.

imposition of religious observances such as mandatory Sunday closing laws.³⁶ Accordingly, they agitated for protection of religious liberty in the *Constitution* through preventing the Commonwealth from imposing religious laws.³⁷ Championing the Adventist viewpoint, at the 1898 Federal Convention Henry Higgins moved the insertion of what became s 116 into the *Constitution* in order to deny the Commonwealth power to legislate on the subject of religion.³⁸ Beck challenges the ‘standard account’ of Higgins’ motives, namely that s 116 was intended to prevent any potential for the *Constitution* to be interpreted so as to confer power on the Commonwealth to legislate with respect to religion, given the acknowledgment of God in the Preamble. Instead, Beck argues, Higgins was concerned to prevent the express heads of legislative power from being interpreted so as to inferentially confer such power on the Commonwealth.³⁹

Beck employs this interpretation of the historical record, together with a number of other factors, to ground his reading of the foundations of s 116.⁴⁰ Is Beck’s reading of the history correct? In the following parts we suggest that there are serious deficiencies in his account.

III THE THEOLOGICAL CONTEXT: MAINSTREAM CHRISTIAN VIEWS ON CHURCH, RELIGION AND THE STATE

Beck’s work proceeds from the assumption that the historical context is necessary to understand s 116. However, his work gives prominence to the views of the Seventh Day Adventists, who were a tiny minority in the 1890s,⁴¹ and gives limited attention to more mainstream views.⁴² We argue that it is also necessary to understand the views of more mainstream Christian traditions. The population in the 1890s was overwhelmingly Christian, and

³⁶ Ely, *Unto God and Caesar* (n 31) 27. See ‘Petitions! Petitions! Petitions!’ (1897) 12(13) *Bible Echo* 104.

³⁷ Beck, *Religious Freedom and the Australian Constitution* (n 4) 20–31; Beck, ‘Theological Underpinnings’ (n 6).

³⁸ Beck, *Religious Freedom and the Australian Constitution* (n 4) 78, 88–97.

³⁹ *Ibid* ch 6.

⁴⁰ *Ibid* 128–9. Beck critiques the neutrality theory at 123–7.

⁴¹ By 1897, the Seventh Day Adventists had fewer than 2,000 adherents out of a total population of about 3.6 million: *ibid* 20, citing Australian Bureau of Statistics, *Australian Historical Population Statistics 2014* (Catalogue No 3105.0.65.001, 18 September 2014).

⁴² See Beck, ‘Theological Underpinnings’ (n 6); Beck, *Religious Freedom and the Australian Constitution* (n 4) chs 2–3.

‘increasingly Protestant in religious affiliation’;⁴³ indeed, the Federation period represented the peak of Protestant influence in Australia.⁴⁴ Roman Catholics were also a sizeable minority.⁴⁵ The views of these groups were therefore more likely to have accurately reflected public opinion at the time and have exerted an influence on the views of the framers. This part explores the principles of Protestant political theology and the views of the Council of Churches, the Roman Catholics and the Presbyterians. The Council of Churches consisted of representatives from the largest Protestant denominations and therefore represented a broad spectrum of religious views in the late 19th century. The Presbyterians have been chosen because they were the influential mainstream denomination that initiated the Council of Churches,⁴⁶ furnished the largest number of signatures in the recognition campaign,⁴⁷ and their proposed wording for the constitutional recognition of God was almost identical to that ultimately adopted in the Preamble.⁴⁸ The Roman Catholic Church had an important impact on the success of Federation through the influence of Cardinal Patrick Moran, the Archbishop of Sydney and most prominent Roman Catholic leader of the 1890s,⁴⁹ who is credited with having proposed the idea for constitutional recognition.⁵⁰

A Roman Catholic Perspectives

The 1880s and ’90s are often considered to mark the commencement of the modern Catholic tradition of social teaching, with the publication of important encyclicals by Pope Leo XIII that outlined the relationship between church, religion and the state.⁵¹ Cardinal Moran was a faithful disciple of Pope

⁴³ JD Bollen, *Protestantism and Social Reform in New South Wales 1890–1910* (Melbourne University Press, 1972) 4; Beck, ‘Theological Underpinnings’ (n 6) 3.

⁴⁴ Stuart Piggin, *Spirit of a Nation: The Story of Australia’s Christian Heritage* (Strand Publishing, 2004) 49.

⁴⁵ Bollen (n 43) 183; Beck, ‘Theological Underpinnings’ (n 6) 4.

⁴⁶ Beck, *Religious Freedom and the Australian Constitution* (n 4) 12.

⁴⁷ AE Cahill, ‘Catholics and Australian Federation’ (2001) 22 *Journal of the Australian Catholic Historical Society* 9, 17.

⁴⁸ Beck, *Religious Freedom and the Australian Constitution* (n 4) 36.

⁴⁹ See generally AE Cahill, ‘Cardinal Moran and Australian Federation’ (2001) 78(1) *Australasian Catholic Record* 3.

⁵⁰ Patrick Francis Moran, ‘The Cardinal and Federation: Address to the Electors’, *The Freeman’s Journal* (Sydney, 20 February 1897) 17.

⁵¹ See, eg, Pope Leo XIII, ‘Immortale Dei: Encyclical of Pope Leo XIII on the Christian Constitution of States’ in Claudia Carlen Ihm, *The Papal Encyclicals: 1878–1903* (Pierian

Leo XIII: these encyclicals were known to Moran and shaped his views.⁵² A number of elements of Roman Catholic social teaching are relevant to the issues discussed in relation to Australian Federation. Roman Catholics recognised no separation between ‘sacred’ and ‘secular’; rather, religion was (or ought to be) woven throughout the fabric of society, constituting the bond that united communities, renewing and energising social institutions.⁵³ According to Pope Leo XIII, true authority proceeded from God, who alone could ‘commit power to a man over his fellow men’;⁵⁴ further, civil laws must be consistent with the natural law.⁵⁵ A government that sought only ‘external advantages’ such as peace and economic prosperity neglects its true office; a community that ignores God is only ‘the deceitful imitation or appearance of a society’.⁵⁶ The secularists’ aim of banishing religion from the family, schools and legislation was fundamentally inconsistent with man’s religious nature.⁵⁷ Catholic teaching saw the Church playing a key role in remedying important social questions; for instance, the respective rights and duties of labour and capital, a critical question during the 1890s, were considered legitimate targets for instruction by the Church.⁵⁸ Indeed, they believed that such issues could not be resolved without the mediating influence of religion.

Although Roman Catholics believed that religion should be present through society as a whole, there was a distinction between ecclesiastical and civil powers.⁵⁹ The Church’s role was to aim at ‘the eternal end of man, his

Press, 1990) 107 (‘Immortale Dei’); Pope Leo XIII, ‘Sapientiae Christianae: Encyclical of Pope Leo XIII on Christians as Citizens’ in Claudia Carlen Ihm, *The Papal Encyclicals: 1878–1903* (Pierian Press, 1990) 211 (‘Sapientiae Christianae’).

⁵² Cardinal Archbishop of Sydney, *Lecture on the Rights and Duties of Labour* (Finn Brothers & Co, 1891) 3–4; Cardinal Moran, *The Catholic Church in the Nineteenth Century: Inaugural Discourse* (F Cunninghame & Co, 1900) 7–9.

⁵³ See Pope Leo XIII, ‘Immortale Dei’ (n 51) 108 [3].

⁵⁴ Pope Leo XIII, ‘Sapientiae Christianae’ (n 51) 213 [8].

⁵⁵ *Ibid* 213 [10].

⁵⁶ *Ibid* 211 [2].

⁵⁷ Cardinal Archbishop of Sydney, *The Reunion of Christendom* (F Cunninghame & Co, 1895) 10.

⁵⁸ Pope Leo XIII, ‘*Rerum Novarum*: Encyclical of Pope Leo XIII on Capital and Labor’ in Jordan J Ballor (ed), *Makers of Modern Christian Social Thought: Leo XIII and Abraham Kuyper on the Social Question* (Acton Institute, 2016) 3; Cardinal Archbishop of Sydney, *Lecture on the Rights and Duties of Labour* (n 52).

⁵⁹ This reflects the ‘two swords’ doctrine famously laid out by Pope Gelasius I in AD 494: ‘Two there are, august Emperor, by which this world is ruled: the consecrated authority of priests and the royal power’: Pope Gelasius I, ‘Letter to Emperor Anastasius’ in Oliver O’Donovan and Joan Lockwood O’Donovan (eds), *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought, 100–1625* (William B Eerdmans Publishing, 1999) 179, 179.

salvation, and likewise the function of the state was the ‘temporal end of man, his common good, his political, economic, and cultural welfare.’⁶⁰ Both powers had a legitimate function and were supreme within that sphere.⁶¹ While the Roman Catholic view distinguished between the roles of church and state, it did not recognise a separation between sacred and secular.⁶² However, the Roman Catholic view was generally not favourable to freedom of religion and speech. The ruler had a duty to favour and protect religion — being, of course, the ‘true faith’ (that is, the Roman Catholic faith) — and so should not permit citizens to publish false doctrines or follow their own personal views about religion and worship.⁶³ Indeed, true freedom did not consist ‘in every man doing what he pleases’, for this would lead to anarchy, but rather the conformity of the civil law with the prescriptions of natural law.⁶⁴ It is in this theological context that Cardinal Moran wished the Preamble to the *Constitution* to state that ‘[r]eligion is the basis of our Commonwealth and of its laws’, while including statements affirming a ‘genuine liberty of conscience’ and the ‘free exercise of Divine worship ... consistent with public order and public morality.’⁶⁵

B Historical Protestant Perspectives

As Beck outlines, the (New South Wales) Council of Churches was originally formed to campaign for the maintenance and imposition of Sunday observance laws.⁶⁶ It was an initiative of the Presbyterian General Assembly and represented the main Protestant denominations in the colony, including the Presbyterian, Anglican, Wesleyan, Primitive Methodist, Congregationalist and Baptist denominations.⁶⁷ Similar councils were subsequently established in

⁶⁰ Thomas T Love, ‘The Two Principles of Roman Catholic Church–State Relations’ (1965) 76(1) *Ethics* 57, 57.

⁶¹ Pope Leo XIII, ‘Immortale Dei’ (n 51) 110 [13]; Pope Leo XIII, ‘Sapientiae Christianae’ (n 51) 218 [30].

⁶² See, eg, Pope Leo XIII, ‘Sapientiae Christianae’ (n 51) 218 [30].

⁶³ Pope Leo XIII, ‘Immortale Dei’ (n 51) 108–9 [6], 114 [34]; Pope Leo XIII, ‘Libertas: Encyclical of Pope Leo XIII on the Nature of Human Liberty’ in Claudia Carlen Ihm, *The Papal Encyclicals: 1878–1903* (Pierian Press, 1990) 169, 180 [42] (‘Libertas’).

⁶⁴ Pope Leo XIII, ‘Libertas’ (n 63) 172 [10]. For a critique of this encyclical, see Frederick E Ellis, ‘The Concept of Liberty in the Papal Encyclical: *Libertas Praestantissimum*’ (1952) 2(4) *Educational Theory* 247, 251–5.

⁶⁵ Moran (n 50) 17.

⁶⁶ Beck, *Religious Freedom and the Australian Constitution* (n 4) 12.

⁶⁷ *Ibid.*

the other colonies.⁶⁸ As Federation materialised, the Council of Churches focused its efforts on arguing for a recognition of God in the Preamble to the *Constitution* of the Commonwealth of Australia, which was being framed at the time.⁶⁹ Adopting a proposal which appears to have originated from Cardinal Moran,⁷⁰ they resolved that it was of 'utmost importance' that 'there should be a recognition of God as the Supreme Ruler', and they resolved to organise petitions to be sent to the Federal Convention to this effect.⁷¹ These were enthusiastically supported by the Councils in other colonies.⁷²

As will also be discussed in Part IV, Beck relies on the writings of Andrew Inglis Clark, Tasmanian delegate to the 1891 Federal Convention, to argue that the campaign for constitutional recognition by the Protestant churches was inconsistent with the true principles of Protestantism and therefore devoid of principle.⁷³ Given that Clark was not an orthodox Protestant,⁷⁴ it is unclear why Beck relies on his views as accurately expressing the principles of Protestantism. Clark considered that the 'fundamental doctrine of Protestantism is the essentially and absolutely individualistic character of relations of each human soul to its creator' (reflecting the Protestant emphasis on the importance of individual conscience); accordingly, no human institution had power to impose any religious doctrine or belief on a portion of the community.⁷⁵ Clark argued that, in contrast to Roman Catholicism,

Protestantism does not recognize any corporate righteousness whereby any man shall be accepted by God in consequence of inclusion in any church or other community or organization of men, and it therefore does not recognize any power or authority in any majority of men to impose any confession or declaration of religious doctrine or belief upon a minority of the same nation or community.⁷⁶

According to this perspective, a constitutional recognition of God involves a corporate confession of faith, which imposes a particular version of faith on

⁶⁸ Ibid.

⁶⁹ Beck, 'Theological Underpinnings' (n 6) 1.

⁷⁰ Beck, *Religious Freedom and the Australian Constitution* (n 4) 14–15.

⁷¹ Beck, 'Theological Underpinnings' (n 6) 5, quoting Ely, *Unto God and Caesar* (n 31) 22.

⁷² Beck, *Religious Freedom and the Australian Constitution* (n 4) 13.

⁷³ See *ibid* 15–17.

⁷⁴ Ely, 'Andrew Inglis Clark on the Preamble of the Australian Constitution' (n 33) 40–1.

⁷⁵ *Ibid* 38. Clark's original essay, titled 'The Preamble to the Constitution of the Commonwealth of Australia', is unpublished.

⁷⁶ *Ibid*.

the rest of the population and is therefore a denial of the core principle of Protestantism.⁷⁷

This argument significantly misrepresents and misunderstands accepted Protestant principles. Contrary to Clark's view, the Protestant tradition has consistently held that a corporate confession of religion is necessary and desirable. Virtually every significant Protestant theologian from the Reformation and post-Reformation period affirmed a role for the 'civil magistrate' — the civil ruler — which went well beyond the corporate confession of religion; most believed that the civil ruler had a duty to defend true religion, punish heretics, maintain pure worship and promote the kingdom of God, and that this was not inconsistent with the principle of conscience. Leading Protestant theologians from the Reformation period who contributed to the formulation and systematisation of Protestant theology and who held to such a view include Martin Luther,⁷⁸ Philip Melancthon,⁷⁹ Ulrich Zwingli,⁸⁰ Heinrich Bullinger,⁸¹ John Calvin,⁸² Peter Martyr Vermigli,⁸³ Wolfgang Musculus,⁸⁴ Theodore Beza,⁸⁵ Martin Bucer,⁸⁶ Richard Hooker⁸⁷

⁷⁷ Beck, *Religious Freedom and the Australian Constitution* (n 4) 29.

⁷⁸ WDJ Cargill Thompson, *The Political Thought of Martin Luther*, ed Philip Broadhead (Harvester Press, 1984) 107–8, 150–4; David M Whitford, 'Cura Religionis or Two Kingdoms: The Late Luther on Religion and the State in the Lectures on Genesis' (2004) 73(1) *Church History* 41.

⁷⁹ John Witte Jr, *Law and Protestantism: The Legal Teachings of the Lutheran Reformation* (Cambridge University Press, 2002) 129–32.

⁸⁰ J Wayne Baker, 'Church, State, and Dissent: The Crisis of the Swiss Reformation, 1531–1536' (1988) 57(2) *Church History* 135, 135–6.

⁸¹ Thomas Harding (ed), *The Decades of Henry Bullinger, Minister of the Church of Zurich*, tr HI (Cambridge University Press, 1849) 323–44. See also Torrance Kirby, 'The Civil Magistrate and the "Cura Religionis": Heinrich Bullinger's Prophetic Office and the English Reformation' (2004) 9 *Animus* 25.

⁸² John Calvin, *Institutes of the Christian Religion*, ed John T McNeill, tr Ford Lewis Battles (SCM Press, 1960) vol 2, 1495–7.

⁸³ Torrance Kirby, '"The Charge of Religion Belongeth unto Princes": Peter Martyr Vermigli on the Unity of Civil and Ecclesiastical Jurisdiction' (2003) 94 *Archiv für Reformationsgeschichte* 161.

⁸⁴ Jordan J Ballor, *Covenant, Causality, and Law: A Study in the Theology of Wolfgang Musculus* (Vandenhoeck & Ruprecht, 2012) 183–94, 228–9.

⁸⁵ Theodore Beza, *De Haereticis a Civili Magistratu Puniendis Libellus, adversus Martini Bellii Farraginem, et Novorum Academicorum Sectam* (Oliva Roberti Stephani, 1554); Tadataka Maruyama, *The Ecclesiology of Theodore Beza: The Reform of the True Church* (Librairie Droz, 1978) 240.

⁸⁶ Martin Bucer, 'De Regno Christi' in Wilhelm Pauck (ed), *Melancthon and Bucer* (SCM Press, 1969) 155, 266–7.

and Francis Turretin.⁸⁸ Such powers were also explicitly affirmed in the major Protestant confessional statements from the Reformation and post-Reformation period, including the *Belgic Confession*,⁸⁹ *Scots Confession*,⁹⁰ *Second Helvetic Confession*,⁹¹ *Thirty-Nine Articles*⁹² and the *Westminster Confession of Faith* ('*Westminster Confession*').⁹³ This principle can also be seen in operation in Protestant states throughout history. In 1555, 'the Peace of Augsburg legally ratified the confessional divisions of the empire' by establishing the principle that the religion of a particular state was to be determined by the religion of the ruler of that state.⁹⁴ Roman Catholic, Lutheran and Calvinist territories all gave effect to this principle.⁹⁵

Later Protestant thinkers have typically affirmed a less extensive role for the civil magistrate in relation to religion.⁹⁶ Nevertheless, many continued to believe that religion ought to play an important public role in society and the state, and that the institutions of government should explicitly acknowledge the lordship of Christ and enforce a mandatory Christian sabbath, all the while recognising a distinction between church and state. Such theologians

⁸⁷ Daniel Eppley, 'Royal Supremacy' in Torrance Kirby (ed), *A Companion to Richard Hooker* (Brill, 2008) 503; WDJ Cargill Thompson, *Studies in the Reformation: Luther to Hooker*, ed CW Dugmore (Athlone Press, 1980) 189.

⁸⁸ Francis Turretin, *Institutes of Elenctic Theology*, ed James T Dennison Jr, tr George Musgrave Giger (P&R Publishing, 1997) vol 3, 316–36.

⁸⁹ 'The Belgic Confession of Faith, 1561' in Arthur C Cochrane (ed), *Reformed Confessions of the Sixteenth Century* (Westminster John Knox Press, 2003) 185, 217 art XXXVI: the civil magistrate's office is 'not only to have regard unto and watch for the welfare of the civil state, but also that they protect the sacred ministry, and thus may remove and prevent all idolatry and false worship'.

⁹⁰ 'The Scottish Confession of Faith, 1560' in Arthur C Cochrane (ed), *Reformed Confessions of the Sixteenth Century* (Westminster John Knox Press, 2003) 159, 183 ch XXIV: '[W]e state that the preservation and purification of religion is particularly the duty of kings, princes, rulers, and magistrates. They are not only appointed for civil government but also to maintain true religion and to suppress all idolatry and superstition.'

⁹¹ 'The Second Helvetic Confession, 1566' in Arthur C Cochrane (ed), *Reformed Confessions of the Sixteenth Century* (Westminster John Knox Press, 2003) 220, 299–300 ch XXX: 'We certainly teach that the care of religion belongs especially to the holy magistrate.'

⁹² *The Thirty-Nine Articles: The Articles of Religion Agreed upon by the Archbishops, Bishops, and the Whole Clergy of the Provinces of Canterbury and York, London, 1562*, art XXXVII ('*Thirty-Nine Articles*'): 'godly Princes' are given the prerogative to 'rule all estates and degrees committed to their charge by God, whether they be Ecclesiastical or Temporal'.

⁹³ *The Confession of Faith of the Assembly of Divines at Westminster*, ed SW Carruthers (Presbyterian Church of England, 1946) ch XXIII [3] ('*Westminster Confession*').

⁹⁴ Carter Lindberg, *The European Reformations* (Blackwell, 1996) 197.

⁹⁵ *Ibid* 169–97.

⁹⁶ See, eg, AA Hodge, *The Confession of Faith* (Banner of Truth Trust, 1958) 297–9.

include Abraham Kuyper,⁹⁷ Charles Hodge,⁹⁸ AA Hodge,⁹⁹ Robert Dabney,¹⁰⁰ James Henly Thornwell¹⁰¹ and Charles H Spurgeon.¹⁰² The fact that leading Protestant theologians from the Reformation period as well as those writing in later centuries held to such a position significantly weakens Clark's argument that a corporate confession of religion is inconsistent with the principles of Protestantism.

Underlying Clark's view is a failure to appreciate the 'two kingdoms' principle, and a failure to understand the nature of the power that Protestant theologians have ascribed to the civil magistrate. The two kingdoms doctrine was famously outlined by Martin Luther and has had a profound impact on Protestant political theology.¹⁰³ In his tract *The Freedom of a Christian*, Luther wrote these profound and paradoxical words:

⁹⁷ Abraham Kuyper, *Lectures on Calvinism* (Wm B Eerdmans Publishing, 1999) ch 3.

⁹⁸ Charles Hodge, *Systematic Theology* (Scribner, Armstrong, and Co, 1874) vol 3, 340–8.

⁹⁹ AA Hodge, *Evangelical Theology: A Course of Popular Lectures* (Banner of Truth Trust, 1976) 283 ('*Evangelical Theology*')

Since the kingdom of God on earth is not confined to the mere ecclesiastical sphere, but aims at absolute universality, and extends its supreme reign over every department of human life, it follows that it is the duty of every loyal subject to endeavour to bring all human society, social and political, as well as ecclesiastical, into obedience to its law of righteousness.

¹⁰⁰ Robert L Dabney, 'The Christian Sabbath: Its Nature, Design and Proper Observance' in CR Vaughan (ed), *Discussions by Robert L Dabney* (Presbyterian Committee of Publication, 1890) vol 1, 496, 544–50. See especially at 545: 'The increasing disregard of the Lord's day in the United States demands a renewed application of the authority of the civil law to support right customs.' See also Robert L Dabney, *Discussions: Evangelical and Theological* (Banner of Truth Trust, 1982) vol 2, 594–617.

¹⁰¹ James Henley Thornwell, 'Relation of the State to Christ' in John B Adger and John L Girardeau (eds), *The Collected Writings of James Henley Thornwell* (Presbyterian Committee of Publication, 1889) vol 4, 549. See especially at 551: 'If, then, the State is an ordinance of God, it should acknowledge the fact.'

¹⁰² CH Spurgeon, *The Treasury of David* (Passmore and Alabaster, 1871) vol 3, 318: 'A righteous king is the patron and producer of righteous subjects.'

¹⁰³ See, eg, David VanDrunen, *Natural Law and the Two Kingdoms: A Study in the Development of Reformed Social Thought* (William B Eerdmans Publishing, 2010); WJ Torrance Kirby, *Richard Hooker's Doctrine of the Royal Supremacy* (EJ Brill, 1990) 41–51; Matthew J Tuininga, *Calvin's Political Theology and the Public Engagement of the Church: Christ's Two Kingdoms* (Cambridge University Press, 2017).

A Christian is a perfectly free lord of all, subject to none.

A Christian is a perfectly dutiful servant of all, subject to all.¹⁰⁴

The first of these statements expresses the truth that salvation is only possible by faith alone, which comes through the Word of God, unmediated by any human authority or institution. By faith, the Christian is completely free, and has confidence of acceptance with God. As such, ‘no external thing has any influence in producing Christian righteousness or freedom.’¹⁰⁵ Having experienced this freedom, Christians willingly subject themselves, serving their neighbours and acting for the common good rather than in their own interests.¹⁰⁶ They become ‘dutiful servant[s] of all’. Luther’s two statements correspond to the twofold nature of man and the twofold government instituted to rule those natures.¹⁰⁷ For Luther, the spiritual realm pertains to the inner person — the conscience — which is ruled exclusively by the Holy Spirit, without law.¹⁰⁸ This spiritual government is a voluntary rule which cannot be imposed by force.¹⁰⁹ By contrast, the ‘outer realm’ pertains to temporal matters, which for Luther had a broad compass, referring to everything outside of a Christian’s relationship with God. In contrast to the government of the word, the temporal government of the sword is a coercive power that exists to maintain order and peace.¹¹⁰

The two kingdoms principle explains why Protestant theologians did not consider that the powers ascribed to the civil magistrate in relation to religion violated the principle of conscience. Luther’s emphasis on the inner realm freed the individual conscience from the intermediation of the Church, thereby implying ‘the dispensability of the Church considered only as a visible and hierarchical structure.’¹¹¹ But a less often understood implication of Luther’s doctrine is that it leads to a surprisingly robust acceptance of ‘intru-

¹⁰⁴ Martin Luther, ‘The Freedom of a Christian, 1520’, tr WA Lambert in Theodore G Tappert (ed), *Selected Writings of Martin Luther: 1520–1523* (Fortress Press, 2007) vol 2, 3, 20.

¹⁰⁵ *Ibid* 20–1.

¹⁰⁶ *Ibid* 42–3, 47.

¹⁰⁷ William J Wright, *Martin Luther’s Understanding of God’s Two Kingdoms: A Response to the Challenge of Skepticism* (Baker Academic, 2010) 118, 121.

¹⁰⁸ Martin Luther, ‘Temporal Authority: To What Extent It Should Be Obeyed, 1523’, tr JJ Schindel in Theodore G Tappert (ed), *Selected Writings of Martin Luther: 1520–1523* (Fortress Press, 2007) vol 2, 265, 283 (‘Temporal Authority’).

¹⁰⁹ *Ibid* 297–8.

¹¹⁰ Thompson, *The Political Thought of Martin Luther* (n 78) 46–8.

¹¹¹ Paul DL Avis, *The Church in the Theology of the Reformers* (John Knox Press, 1981) 4.

sions' in the external realm. The two kingdoms principle radically relativises all attachments and loyalties given that no Christian ought to invest any earthly authority — whether church or state — with ultimate significance.¹¹² If no external thing can have any influence in producing righteousness, it is equally true that no external thing can hinder such righteousness. Reflecting the distinction between the inner realm and the outer realm, the magistrate's powers could only ever remain 'outward, coercive, and temporal', and could not 'enter into the conscience'.¹¹³ Any compulsion levelled at 'religious minorities' — such as blasphemers or heretics — was directed 'purely at the body physical and did not infringe upon their "freedom of conscience"', because external compulsion could not interfere with the freedom that a Christian possesses.¹¹⁴ Accordingly, many in the Protestant tradition have considered that merely being required by law to do something did not amount to an infringement of conscience. As John Calvin put it, 'outward subjection does not prevent us from having within us a conscience free in the sight of God'.¹¹⁵

Clark also conflates the distinction between membership in the state and membership in the kingdom of God. As already noted, Clark considered that imposing a confession of religious belief on a religious minority was tantamount to recognising a 'corporate righteousness whereby any man shall be accepted by God in consequence of inclusion in any church or other community or organization of men'.¹¹⁶ Protestants certainly held that the attainment of salvation was only possible by faith, and that true faith is not susceptible of being coerced.¹¹⁷ And yet many Protestant states throughout history have made national confessions of faith, in the desire to establish the fundamental character of the state along Christian lines.¹¹⁸ Rather than these being

¹¹² W Bradford Littlejohn, *The Peril and Promise of Christian Liberty: Richard Hooker, the Puritans, and Protestant Political Theology* (William B Eerdmans Publishing, 2017) 261, 263.

¹¹³ Tuininga (n 103) 286, 288.

¹¹⁴ Robert von Friedeburg and Michael J Seidler, 'The Holy Roman Empire of the German Nation' in Howell A Lloyd, Glenn Burgess and Simon Hodson (eds), *European Political Thought, 1450–1700: Religion, Law and Philosophy* (Yale University Press, 2007) 102, 132–3.

¹¹⁵ John Calvin, *Commentary on a Harmony of the Evangelists: Matthew, Mark, and Luke*, tr William Pringle (Wm B Eerdmans Publishing, 1949) vol 3, 44 ('*Commentary on a Harmony of the Evangelists*'), discussing *Gospel of St Matthew* 22:21.

¹¹⁶ Ely, 'Andrew Inglis Clark on the Preamble of the Australian Constitution' (n 33) 38.

¹¹⁷ Luther, 'Temporal Authority' (n 108) 297, 304; Tuininga (n 103) 288–9, 312.

¹¹⁸ See Ian Hazlett, 'Church and Church/State Relations in the Post-Reformation Reformed Tradition' in Ulrich L Lehner, Richard A Muller and AG Roeber (eds), *The Oxford Handbook of Early Modern Theology, 1600–1800* (Oxford University Press, 2016) 242, 249–53.

inconsistent, Protestants recognised that the national enforcement of a confession of religious belief is not the same thing as being ‘accepted by God’. Such confessions reflected a particular view of the nature of civil society, presupposing a unified Christian society corporately confessing the same faith.¹¹⁹ ‘Spiritual crimes’ such as blasphemy and heresy should be punished because they constituted an attack both on the Church and the foundation of the state.¹²⁰

Accordingly, Clark wrongly characterises a national confession of faith as being inconsistent with the principles of Protestantism. Historically, many Protestants have held that such a confession is consistent with Protestant political principles.¹²¹ Clark erred by failing to appreciate the distinction between the two kingdoms that was so central to Protestant thought, and by conflating ‘acceptance with God’ with ‘membership in the civil realm.’

C *Modern Protestant Perspectives and Presbyterianism*

In Australia in the 19th century, it was widely believed that Christian teachings ought to permeate society and be recognised in public life; indeed, Christianity was considered to furnish the foundations of civilisation and morality.¹²² Notwithstanding the cessation of state aid to the churches, Australia was widely considered to be a Christian nation: the ‘idea of a “Christian Commonwealth” as both ideal and possibility runs through Australia’s religious history.’¹²³ Protestants were ‘committed to nation-building on Christian foundations’, understood in terms of common cultural ties as well as guarding and preserving moral order.¹²⁴ At the Convention Debates, Sir John Downer asserted that ‘the Commonwealth will be from its first stage a Christian Commonwealth.’¹²⁵ The debates over abolition of the *Church Acts*¹²⁶ and the

¹¹⁹ Tuininga (n 103) 313–14.

¹²⁰ RH Murray, *The Political Consequences of the Reformation: Studies in Sixteenth-Century Thought* (Ernest Benn, 1926) 183–4.

¹²¹ See above nn 78–102 and accompanying text.

¹²² Stephen A Chavura, John Gascoigne and Ian Tregenza, *Reason, Religion and the Australian Polity: A Secular State?* (Routledge, 2019) 131.

¹²³ Bruce Mansfield, ‘Thinking about Australian Religious History’ (1989) 15(3) *Journal of Religious History* 330, 343.

¹²⁴ Stuart Piggan and Robert D Linder, *The Fountain of Public Prosperity: Evangelical Christians in Australian History, 1740–1914* (Monash University Publishing, 2018) 480.

¹²⁵ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 2 March 1898, 1741 (Sir John Downer).

¹²⁶ See Chavura, Gascoigne and Tregenza (n 122) 90–1.

role of religion in the education system forged a distinctive Australian view of religion and the state by the Federation period, which was non-establishment but also non-secular, namely ‘that the state should not be godless, and yet that it should not privilege one Christian church over others.’¹²⁷ Indeed, Sunday trading laws were premised on Australia being a Christian country: the view that the ‘right observance of the Christian Sabbath is the bulwark of religion in the land.’¹²⁸

In some churches towards the end of the 19th century, there was a decline in belief in traditional doctrine, but there was at the same time an increased emphasis on the moral outworking of Christianity.¹²⁹ Many began to reinterpret Christianity in moral and social terms, shifting away from its supernatural elements,¹³⁰ and giving greater emphasis to ‘active concern for the common good’ and transformed engagement throughout society.¹³¹ As such, the Australian churches began to assume ‘a more vivid sense of their responsibility’ for dealing with the evils around them and ameliorating human suffering.¹³² In 1895, the Reverend WJL Closs exhorted the Congregational Union of New South Wales to ‘[c]arry our Christianity into the State’ and ‘insist upon the controlling power of God being recognised.’¹³³ Noteworthy manifestations of this desire included the formation of many benevolent institutions, involvement in social reform, the desire for social improvement, and the removal of ‘public maladies’ such as drunkenness.¹³⁴ Indeed, the list of religiously inspired campaigns for moral and social reform is a long one. In New South Wales, an early view that the churches should avoid ‘strictly political questions’ was relaxed in favour of a broader conception of Christian social duty, which saw the state as an agent in social amelioration.¹³⁵ Accord-

¹²⁷ Ibid 126.

¹²⁸ Mansfield (n 123) 339–40, quoting Walter Philips, *Defending ‘A Christian Country’: Churchmen and Society in New South Wales in the 1880s and After* (University of Queensland Press, 1981) 188.

¹²⁹ Mansfield (n 123) 341. Melleuish argues that religion in Australia has evinced a general tendency to focus on moral rather than doctrinal questions: Gregory Melleuish, ‘A Secular Australia? Ideas, Politics and the Search for Moral Order in Nineteenth and Early Twentieth Century Australia’ (2014) 38(3) *Journal of Religious History* 398, 401.

¹³⁰ See generally Piggin and Linder (n 124) ch 16.

¹³¹ Meredith Lake, *The Bible in Australia: A Cultural History* (NewSouth, 2018) 140.

¹³² John Clifford, *God’s Greater Britain* (James Clarke & Co, 1899) 165.

¹³³ ‘Congregational Union of New South Wales: Annual Session,’ *The Sydney Morning Herald* (Sydney, 23 October 1895) 8.

¹³⁴ Bollen (n 43) 49, 53–4.

¹³⁵ Ibid 69, 103.

ing to the Protestant view, the ‘root of good government’ was ‘righteousness’.¹³⁶

Christian influence on social and political questions was welcomed by many contemporaries. In 1890, *The Sydney Morning Herald* exhorted the churches to exercise ‘a vital influence’ on the pressing social questions of the day and to have ‘a practical and direct relation to contemporary conditions’.¹³⁷ One politician, James Blanksby MLC, argued that ‘[i]t was the work of the Church to say what reforms are necessary, and the business of the legislator to carry them out’.¹³⁸ Contemporaries thus saw the Church and state working in partnership to improve society. Of course, this was not universal. Edmund Barton, for instance, considered:

The whole mode of government, the whole province of the State, is secular. The whole business that is transacted by any community — however deeply Christian, unless it has an established church, unless religion is interwoven expressly and professedly with all its actions — is secular business as distinguished from religious business.¹³⁹

Statements such as these were, however, the exception rather than the norm, given that many in the late nineteenth century did believe that ‘religion is interwoven expressly and professedly’ throughout society.

The Presbyterian tradition exemplifies the broader Protestant tradition of political theology, but with some distinctive views. Presbyterians emphasise the independent spiritual jurisdiction of the Church, distinct from the power of the ‘civil magistrate’ (that is, the secular ruler).¹⁴⁰ The *Westminster Confession*, the doctrinal standard of the Presbyterian Church, provides that ‘[t]he Lord Jesus, as King and Head of His Church, hath therein appointed a government, in the hand of Church officers, distinct from the civil magistrate’.¹⁴¹ This, however, did not prevent the civil magistrate from performing important roles in relation to religion. Indeed, the *Westminster Confession*, while denying to the civil magistrate ‘the administration of the Word and

¹³⁶ Ibid 69.

¹³⁷ Editorial, *The Sydney Morning Herald* (Sydney, 6 March 1890) 6.

¹³⁸ Bollen (n 43) 92.

¹³⁹ *Official Report of the National Australasian Convention Debates*, Adelaide, 22 April 1897, 1187 (Edmund Barton) (*Convention Debates (Adelaide)*).

¹⁴⁰ *Westminster Confession* (n 93) ch XXIII [3].

¹⁴¹ Ibid ch XXX [1].

sacraments,¹⁴² and ‘the power of the keys of the kingdom of heaven,’¹⁴³ namely discipline and excommunication, provides that the magistrate

hath authority, and it is his duty, to take order that unity and peace be preserved in the Church, that the truth of God be kept pure and entire, that all blasphemies and heresies be suppressed, all corruptions and abuses in worship and discipline prevented or reformed, and all the ordinances of God duly settled, administered, and observed.¹⁴⁴

While in later centuries Presbyterians accepted a more limited role for the civil government,¹⁴⁵ they continued to believe that religion should play an important role throughout public life and society more generally.¹⁴⁶

Accordingly, mainstream Christian denominations in the Federation era strongly affirmed the important role of religion in politics for the good and blessing of the nation, while at the same time maintaining a structural distinction between the institutions of the Church and the state in the spirit of the two kingdoms doctrine. Importantly for present purposes, these views had a basis in theological principle rather than mere pragmatism, and they were consistent with mainstream Protestant views about the proper relationship between religion and the state. These considerations are relevant in challenging Beck’s characterisation of the recognition campaign.¹⁴⁷

IV PRINCIPLE OR PRAGMATISM? CONSTITUTIONAL RECOGNITION OF GOD AND PROTESTANT POLITICAL THEOLOGY

The Council of Churches agitated for the new *Constitution* to contain ‘a formal and public recognition by the state of the authority of God.’¹⁴⁸ Beck, drawing on the earlier work of Richard Ely, presents the campaign for

¹⁴² Ibid ch XXIII [3].

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Cf AA Hodge, *Evangelical Theology* (n 99) 283–4. The Australian Presbyterian Churches in 1900 adopted a ‘declaratory statement’, titled ‘Basis of Union’, which provided that ‘liberty of opinion is allowed on matters in the subordinate standard not essential to the doctrine therein taught’, including the role of civil government, while retaining the *Westminster Confession* as the Churches’ doctrinal standard: *Presbyterian Church of Australia Act 1900* (Vic) sch cl II.

¹⁴⁶ See above nn 89–93.

¹⁴⁷ See Beck, *Religious Freedom and the Australian Constitution* (n 4) 127.

¹⁴⁸ Ibid 13.

recognition as principally about power, politics and expediency.¹⁴⁹ Some contemporaries made similar claims. The Adventists asserted that the Council of Churches had adopted a Roman Catholic approach to the question of constitutional recognition. The Roman Catholics signed the same petitions as the Council of Churches and agreed on the wording of the 'religious clause'.¹⁵⁰ Hence, according to the Adventists, the Council had 'yielded the very principles which gave rise to Protestantism. They have abandoned Protestantism, and taken their stand on papal ground'.¹⁵¹ Part III also considered Andrew Inglis Clark's view that the desire for constitutional recognition was inconsistent with the true principles of Protestantism.

Beck considers that the campaign for constitutional recognition was a form of 'civic Protestantism', defined somewhat imprecisely as the idea that 'the marriage of law and morality was made in heaven', and which found expression in seeking the outworking of Christian principles throughout society and public life.¹⁵² As an example of 'civic Protestantism', Beck argues that the campaign for recognition was inconsistent with the true principles of Protestantism, based on Clark's characterisation of Protestantism and the recognition campaign.¹⁵³ He cynically concludes: 'What Clark's analysis confirms is that the constitutional recognition of God campaign was not the result of any deep theological convictions or deep intellectual thought. The campaign was about politics, status and power'.¹⁵⁴

¹⁴⁹ Ibid ch 2.

¹⁵⁰ 'Protestants and Papists Uniting' (1897) 12(16) *Bible Echo* 122.

¹⁵¹ Ibid.

¹⁵² The term 'civic Protestantism' was coined by Richard Ely, 'Protestantism in Australian History: An Interpretative Sketch' (1989) 5 *Lucas* 11 ('Protestantism in Australian History'), cited in Beck, *Religious Freedom and the Australian Constitution* (n 4) 16.

¹⁵³ Beck, *Religious Freedom and the Australian Constitution* (n 4) 29–31.

¹⁵⁴ Ibid 17. See also Beck, 'Theological Underpinnings' (n 6) 15. In her recent work, Barker agrees that recognition of God in the Preamble and s 116 were included for largely political reasons, arguing that '[t]hey are a tangible reminders of the compromises needed to make Federation possible ... the churches were adamant that they would not support Federation if God was not recognised in the nation's founding document': Renae Barker, *State and Religion: The Australian Story* (Routledge, 2019) 68. Similarly, there were many petitions seeking to exclude God from the *Constitution*. 'The solution was to both include God in the preamble and then exclude the Commonwealth from effectively doing anything about it' through the insertion of what eventually became s 116: at 69. However, Barker's conclusion focuses on the pragmatics of including the provisions, rather than the reasons why the churches advocated for the recognition of God in the first place. It is in the context of this latter issue where we wish to challenge Beck's account. We do not deny that there were significant political reasons for why recognition was eventually accepted.

This argument is deeply flawed. Even if Clark was correct that the campaigners' views were inconsistent with the principles of Protestantism, this in and of itself is not sufficient to demonstrate that they were unprincipled: it demonstrates only that those principles were theologically inconsistent. In addition, if churchmen were primarily concerned about public status, merely inserting the words 'humbly relying on the blessing of Almighty God'¹⁵⁵ would seem a remarkably ineffective method of achieving that status. Beck himself demonstrates that the Preamble had no legal consequence.¹⁵⁶

Perhaps more fundamentally, the examination in Part III demonstrates that many Protestant political theologians have advocated for a positive relationship between religion and state throughout history. Clark and Beck make no reference to these historic Protestant theological principles. While Protestantism certainly emphasised the importance of conscience, its approach to matters of church and state was much more nuanced than Clark's and Beck's arguments suggest.¹⁵⁷ A more accurate understanding of the political and theological views held by mainstream Christian traditions at the time of Federation illuminates the reasons why such leaders sought recognition of God in the *Constitution*. Leaders sought constitutional recognition not primarily for political reasons or in order to seek greater prominence for themselves, but as a result of deeply held principles regarding the connection between God and nation. Whether or not 'civic Protestantism' is an apt label for the constitutional recognition campaign,¹⁵⁸ there is no theological inconsistency in that campaign. In light of the analysis in Part III, Protestant arguments for recognition are a straightforward application of Protestant theological principles. Mainstream Christian views of the 1890s considered

¹⁵⁵ *Constitution Preamble*.

¹⁵⁶ Beck, *Religious Freedom and the Australian Constitution* (n 4) 24–8. Beck makes reference to a belief 'that a religious preamble would have actual legal effect' and 'that constitutional recognition of God would authorise legislation concerning religion', but the sources cited in support of this suggest the existence of a hope that constitutional recognition would exert moral force in preventing the secularisation of Australian laws, and do not appear to advocate the hope or belief that constitutional recognition would have substantive *legal* consequence: at 18–19. See also Luke Beck, 'The Constitutional Prohibition on Imposing Religious Observances' (2017) 41(2) *Melbourne University Law Review* 493, 499, where Beck claims that '[s]ome proponents of constitutional recognition of God believed that a religious Preamble would have actual legal effect and authorise laws concerning religion', but only cites Richard Ely and does not refer to any specific proponents of that view.

¹⁵⁷ See, eg, Constance Youngwon Lee, 'Calvinist Natural Law and Constitutionalism' (2014) 39 *Australian Journal of Legal Philosophy* 1.

¹⁵⁸ Beck, *Religious Freedom and the Australian Constitution* (n 4) 16, quoting Ely, 'Protestantism in Australian History' (n 152) 15.

that religion underlay all institutions, and indeed society as a whole — the separation of church and state did not mean a removal of religion from public life. This desire can also be seen within the context of the link between religion and nationalism that characterised the Federation movement, whereby Federation was understood as ‘a sacred cause’, as John Hirst has ably documented.¹⁵⁹ Part of the driving force for Federation was a spirit of nationalism ubiquitous throughout Europe in the 19th century, and this nationalism was often deeply religious.¹⁶⁰

Prominent Protestants of the Federation era viewed constitutional recognition as an acknowledgement of God and religious tradition to receive his blessing on the federating nation.¹⁶¹ One Anglican church leader in Sydney, Archdeacon Langley, argued that the foundation and prosperity of the nation was dependent on, or at least related to, ‘the recognition of God and true religion.’¹⁶² Many religious persons believed that the acknowledgement of God would result in blessing.¹⁶³ In 1897, Andrew Harper, Professor of Hebrew and Old Testament at the Presbyterian Theological Hall, Ormond College, gave an address exhorting the churches to lobby for an acknowledgement of God in the *Constitution*.¹⁶⁴ Although more a call to arms than a detailed articulation of the rationale underlying constitutional recognition, the address included some important statements of principle. Harper argued that constitutional recognition would be to give due acknowledgment to God as the ‘supernatural supreme factor in human affairs’, which was true in any case, regardless of whether any declaration was made or not.¹⁶⁵ Recognition would be to establish the new Australian nation upon a proper basis, and would constitute an important declaration of the intended character of the nation.¹⁶⁶ Indeed, there could be no ‘neutrality’: the only alternative would be to found the *Constitution* upon the negation of God, which would inevitably lead to Australia’s progressive degeneration.¹⁶⁷ Harper contended that the ‘Gospel of

¹⁵⁹ John Hirst, *The Sentimental Nation: The Making of the Australian Commonwealth* (Oxford University Press, 2000) 15. See generally at ch 1.

¹⁶⁰ *Ibid* ch 1.

¹⁶¹ Beck, *Religious Freedom and the Australian Constitution* (n 4) 17.

¹⁶² *Ibid*.

¹⁶³ *Ibid* 17–18. See also Alan Atkinson, *The Europeans in Australia* (UNSW Press, 2014) vol 3, ch 9 for a detailed discussion.

¹⁶⁴ Harper (n 10).

¹⁶⁵ *Ibid* 8, 10.

¹⁶⁶ *Ibid* 6–7.

¹⁶⁷ *Ibid* 6–7, 15–18; ‘The Federal Convention’ (1897) 12(5) *Presbyterian Monthly* 153.

Christ necessarily has large social and political implications, leading to the transformation of society and social change; to deny the existence of God would therefore be to remove an important spur to social and moral transformation.¹⁶⁸ Congregationalist James Jefferis believed that Christians should take ‘the deepest interest in the work of government’¹⁶⁹ and considered Federation to be ‘a step towards the creation of the Kingdom of God on earth, to a new heaven and a new earth, to a life of Christian humanity’.¹⁷⁰ Henry Montgomery, Bishop of Tasmania, saw Federation as a profoundly religious matter, expressing the brotherhood of man and the unity of the Anglo-Saxon race.¹⁷¹

Leaders such as these had strong convictions on the need for recognition to acknowledge God’s sovereignty and obtain his blessing, and the Council of Churches in general had deeply entrenched convictions about the importance of the nation’s Christian nature and the need for days of national worship, prayer and fasting, and for maintaining Sunday observance.¹⁷² Indeed, the history of Australian society in the late 19th century offers many examples of how religious ideals, and particularly cultural Protestantism, influenced public culture, social policy and civic rituals. The nation itself took on sacred forms, and the link between religion and public and private morality was part of the common cultural sense of a time when it was almost universally accepted that Australia was a Christian nation.¹⁷³ Therefore if, as conceded by Beck, arguments *against* recognition (in particular, those made by the Adventists) could be based on firm theological convictions,¹⁷⁴ then arguments *for* recognition could equally have resulted from theological principle.

Furthermore, it is problematic to draw a sharp distinction between political motivations and theological convictions. The churches had deep theological convictions that they should be involved with and influence the *Constitution* and the nation’s policy directions in accordance with Protestant views; this necessarily committed them to the political engagement required to

¹⁶⁸ Harper (n 10) 20.

¹⁶⁹ Piggin and Linder (n 124) 483, quoting Walter Phillips, *James Jefferis: Prophet of Federation* (Australian Scholarly Publishing, 1993) 238.

¹⁷⁰ Piggin and Linder (n 124) 481. See also Atkinson (n 163) 275–6.

¹⁷¹ Robert Withycombe, *Montgomery of Tasmania: Henry and Maud Montgomery in Australasia* (Acorn Press, 2009) 124–7.

¹⁷² Beck, *Religious Freedom and the Australian Constitution* (n 4) 13, 17–18.

¹⁷³ Chavura, Gascoigne and Tregenza (n 122) 207. See also at 90, 104–5, 126, 183.

¹⁷⁴ Beck, *Religious Freedom and the Australian Constitution* (n 4) 31.

achieve those ends.¹⁷⁵ The Adventists were deeply committed to precisely the opposite theological conviction, namely that the Church should have no involvement with the state — which, ironically, secured their intense political engagement with the Federation process.¹⁷⁶ In their recent extensive historical study, Chavura, Gascoigne and Tregenza warn that

it is probably wise to be wary of any analysis that reads the federal movement in strictly utilitarian terms, seeing it as merely a series of practical problems to be solved. This might have some appeal for later, more overtly ‘secular’ times such as our own, but it all too conveniently ignores the deep and widely held nineteenth-century conviction that the creation of the nation was nothing short of a work of providence. The churches and religious communities might have played an important role in the federal movement, but it was the nation itself that was increasingly assuming sacred qualities.¹⁷⁷

Beck considers that the campaign for recognition of God in the *Constitution* is an important feature of the historical context to Federation for which any adequate theory of the foundation of s 116 must account.¹⁷⁸ However, Beck’s characterisation of the recognition campaign as principally political and expedient, rather than as the result of theological conviction, is reductionist, and fails to understand the theological principles held by those arguing for recognition. It is misguided to dismiss the possibility that theological convictions were a major contributing factor in the constitutional recognition campaign, and to do so does not appreciate the sacral–secular nature of thought about the nation that prevailed throughout the 19th century. A more likely explanation is that there were a variety of perspectives undergirding both sides of the recognition campaign, and many advocates for recognition believed deeply in the sacred quality of the nation and the need for acknowledgement of God in its supreme legal text.

¹⁷⁵ An example is the Public Questions Committee, a committee of the Presbyterian Church of Victoria established to report on, and be involved in, public questions. To claim otherwise is a Rawlsian retrojection — namely, that religious doctrines should not influence public policy. Cf John Rawls, *Political Liberalism: Expanded Edition* (Columbia University Press, 2005) 458–60.

¹⁷⁶ The details of this theological conviction are explained in Part V below.

¹⁷⁷ Chavura, Gascoigne and Tregenza (n 122) 138 (citations omitted).

¹⁷⁸ Beck, *Religious Freedom and the Australian Constitution* (n 4) 127.

V SEPARATING RELIGION AND THE STATE

This part discusses conceptions of the separation of religion and state and its implications for the position of religion under the *Constitution*. Parts III and IV considered the principles that animated the campaign for constitutional recognition by mainstream Christian groups. This campaign was strongly opposed by the Seventh Day Adventists, who argued that recognition would lead to the denial of religious liberty by conferring power on the Commonwealth to mandate religious observances such as compulsory Sunday closing laws.¹⁷⁹ The Adventists strongly believed that religion and the state should be firmly separated.¹⁸⁰ In this part, we explore the reasoning underlying the Seventh Day Adventist position and argue that their views cannot be taken as accurately stating the proper relationship between religion and the *Constitution*. While contemporaries considered that an institutional separation of *church* and state was desirable, the vast majority did not hold that there should be a removal of *religion* from the state. In the 1890s, religion was considered to be the essential foundation for morality, and people were comfortable with religion influencing many aspects of public life and politics.¹⁸¹ Thus, it is unlikely that s 116 can be understood as requiring the separation of religion and the state, or the removal of religion from public life, as the Seventh Day Adventists intended it to.

A *The Seventh Day Adventist Position: Strict Separation*

The Adventists claimed that the Council of Churches was using recognition of God in the Preamble as a vehicle for uniting church and state to enforce Sunday observance laws.¹⁸² The Adventists were of the view that nominal recognition of God in the Preamble would enable the passing of religious laws on the basis that Australia was a 'Christian nation'.¹⁸³ A concise explanation of their argument is as follows:

¹⁷⁹ See generally Beck, 'Theological Underpinnings' (n 6); *ibid* ch 3.

¹⁸⁰ 'The "Council of Churches" Petition: Should It Be Granted?' (1897) 12(13) *Bible Echo* 99 ('The "Council of Churches" Petition').

¹⁸¹ See, eg, Piggin and Linder (n 124) ch 16. Although it was not unusual for people to argue that religion and state should be separate, by this they meant that the state should not be sectarian rather than that the state should be completely 'secular': see, eg, Chavura, Gascoigne and Tregenza (n 122) chs 2–3.

¹⁸² See 'The "Council of Churches" Petition' (n 180) 99; 'Petitions! Petitions! Petitions!' (n 36) 104. See also 'Aims of the Council of Churches' (1897) 12(28) *Bible Echo* 224.

¹⁸³ 'What Will Follow' (1897) 12(28) *Bible Echo* 217.

To incorporate in the *Constitution* of a civil government a recognition of God, or a declaration of faith, is to insert a religious clause.

To insert a religious clause in the *Constitution* is to give the government a religious basis.

A religious basis confers power for religious legislation.

Power to legislate on matters of religion implies power to execute religious laws.

Power to execute religious laws means compulsion in matters of religion.¹⁸⁴

It is evident that their concern was with the enforcement of religious laws by the government,¹⁸⁵ especially the enforcement of Sunday observance.¹⁸⁶ The Adventists also pointed to Council petitions that argued for constitutional recognition that made provision ‘for such acts of common worship as should be deemed suitable for a legislative body’ and ‘[t]hat the Governor-General be empowered to appoint days of national thanksgiving and humiliation’.¹⁸⁷

Underlying these arguments was a distinctive conception of the relationship between church, religion and state. It is important to unpack the elements of this theological and political framework. The general principle was that the state is responsible for temporal matters and the Church for spiritual matters: ‘they are ordained for entirely separate lines of work; that each has its particular sphere; and that the realm of one is in no sense the realm of the other’.¹⁸⁸ In the *Gospel of St Matthew 22:21*, Christ famously said: ‘Render therefore unto Caesar the things which are Caesar’s; and unto God the things that are God’s.’ The Adventists claimed that, by these words, ‘Christ forever

¹⁸⁴ ‘Governmental Recognition of God: What Does It Mean?’ (1897) 12(28) *Bible Echo* 220 (‘Governmental Recognition of God’).

¹⁸⁵ ‘The “Council of Churches” Petition’ (n 180) 99:

This effort on the part of the churches to introduce religion into the *Constitution* is but the first of a series of steps. If they succeed in getting a religious clause in the *Constitution*, then they will demand religious laws. And having secured the religious clause in the *Constitution*, they will plead the *Constitution* as the basis for the laws demanded. Such laws will then be ‘constitutional’.

And if it is right for the government to make religious laws, it will be right for it to enforce them, and this means religious persecution to everyone who cannot subscribe to the religion required by the laws.

Such is the inevitable logic of the petition which the Council of Churches has sent to the Federal Convention.

¹⁸⁶ Beck, ‘Theological Underpinnings’ (n 6) 7.

¹⁸⁷ *Ibid* 5, citing Ely, *Unto God and Caesar* (n 31) 21–2.

¹⁸⁸ AG Daniells, ‘The Sentinel’ (1894) 1(1) *Australian Sentinel and Herald of Liberty* 1.

separated religion from the things of Caesar, or civil government. They are not to be confounded nor united.¹⁸⁹ They said:

It is therefore evident that religion and civil government occupy two separate and distinct realms; that civil government exists and is necessary because of sin; that in proportion as men are genuinely converted, civil governments have less to do; and that finally, in the redeemed state, there will be no civil governments at all.¹⁹⁰

It follows from this that the Church is a completely separate sphere from politics, as consisting of people that are literally ‘called out’ from the world. The role of the Church is to preach the gospel and attend to spiritual matters. Its methods are faith and persuasion, not the sword of the state or the ballot box. True religion must be voluntary rather than compelled.¹⁹¹ A healthy citizenry will result from the preaching of the gospel and inward heart change rather than ‘through the mediumship of politics.’¹⁹²

Therefore, according to the Seventh Day Adventists, society will benefit the most if the Church keeps to its divine calling, which is to influence the heart of man from within, and avoid entanglement with civil government, which regulates the behaviour of man from without.¹⁹³ People may vote in accordance with their convictions, but the Church should not enter the field of politics as that is not its arena.¹⁹⁴ The Church is not a political organisation, and if the Church enters politics, it must by necessity either attach itself to a political party or become a new political party.¹⁹⁵ It will then demand the enforcement of its religious beliefs and practices through human law, and this means ‘trouble and persecution.’¹⁹⁶ This strict separation of religion and politics extended to clergy holding political office. The Seventh Day Adventists expressed reservations about the potential election of Cardinal Moran due to the ‘suspicion [that] religion and religious controversy would ... be introduced into politics,’ rather than his efforts being confined to ‘civil matters.’¹⁹⁷

¹⁸⁹ ‘Separation of Church and State’ (1897) 12(21) *Bible Echo* 162.

¹⁹⁰ ‘Religion and the State’ (1897) 12(21) *Bible Echo* 162.

¹⁹¹ Beck, ‘Theological Underpinnings’ (n 6) 16.

¹⁹² ‘The “Christian Citizenship” Movement’ (1897) 12(23) *Bible Echo* 177.

¹⁹³ ‘Religion and the State’ (n 190) 162.

¹⁹⁴ ‘The “Christian Citizenship” Movement’ (n 192) 177.

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*

¹⁹⁷ ‘Cardinal Moran’s Proposed Preamble’ (1897) 12(7) *Bible Echo* 51.

Constitutional recognition was a denial of the true nature of religion: ‘true recognition of God’ is ‘personal faith in Him and obedience to His just requirements’, and ‘to recognise the sacred rights ... conferred upon men’, particularly in relation to freedom of religion and conscience and freedom from religion imposed by the state.¹⁹⁸ The Adventists were concerned that the Council of Churches were ‘turn[ing] the churches into political machines’;¹⁹⁹ the Council were acting like they believed that the ‘eternal salvation’ of people was dependent on recognition, and the purpose of the state was to ‘declare a faith, and convert men to it.’²⁰⁰ Fundamentally, the Adventist objection to constitutional recognition was because of their belief that any legal connection between religion and the state is contrary to Scripture and injurious to both religion and state.²⁰¹ In particular:

A national constitution is the basis of national laws. Laws are made in pursuance of constitutions. The subjects treated of in a constitution, if proper there, are proper subjects for subsequent legislation. If, therefore, the framers of the Federal *Constitution* have a right to make a declaration of religious faith in that, then the Federal legislators will have a right to make laws defining, supporting, and enforcing this faith.²⁰²

B *The Mainstream Christian Response: Institutional Separation, Beneficial Interaction*

The Seventh Day Adventist arguments are certainly not without resonances in more modern mainstream Christian views. Rendering ‘unto Caesar [what is] Caesar’s, and unto God [what is] God’s’²⁰³ has been recognised to establish ‘a clear distinction between spiritual and civil government,’²⁰⁴ thereby requiring some degree of separation between church and state, religion and government.²⁰⁵ Christ’s kingdom is ‘not of this world’ and is not instituted through

¹⁹⁸ ‘Governmental Recognition of God’ (n 184) 220. See also ‘Our Petition’ (1897) 12(16) *Bible Echo* 128.

¹⁹⁹ ‘A Movement on the Parliaments’ (1897) 12(21) *Bible Echo* 161.

²⁰⁰ ‘A Mistaken Zeal’ (1897) 12(21) *Bible Echo* 161.

²⁰¹ ‘Separation of Church and State’ (1897) 12(21) *Bible Echo* 162.

²⁰² ‘Our Position’ (1897) 12(21) *Bible Echo* 168.

²⁰³ *Gospel of St Matthew* (Oxford University Press, Authorized King James Version, 1997 ed) 22:21.

²⁰⁴ Calvin, *Commentary on a Harmony of the Evangelists* (n 115) 44.

²⁰⁵ There is considerable literature on this point: see, eg, Steven G Calabresi, ‘Render unto Caesar That Which Is Caesar’s, and unto God That Which Is God’s’ (2008) 31(2) *Harvard Journal of*

arms or political power.²⁰⁶ Genuine religion must be voluntary rather than imposed through legal violence,²⁰⁷ and so the Adventists were correct to say that religion should not be enforced by law.²⁰⁸ However, most contemporaries did not share the Adventist perspective on separation. This is apparent from the theological views of mainstream Christian denominations discussed in Part III. Those traditions considered that religion should be woven throughout society, and these views informed their campaign for constitutional recognition of God. An example is the motion submitted by Alexander Gosman, the Victorian Congregationalist leader, to the Bathurst's People Convention in November 1896, which he argued should be incorporated as part of the Convention's opening formalities.²⁰⁹ This motion acknowledged the supreme rule and authority of God and sought his blessing.²¹⁰ Gosman justified this by distinguishing between an established church on one hand, and atheistic secular separationism on the other. He argued that the state should interact with religion in a mutually beneficial way, and that the churches should be involved in politics.²¹¹ Thus, Gosman, while acknowledging that there should not be an established church in the sense of no separation between church and state, also contended that this did not mean there must be a separation between religion and the state. A state that is non-religious is actually an irreligious or atheistic state.²¹²

A commitment to the separation of church and state did not entail a complete separation between religion and the government. 'Church' and 'religion' are not synonyms, and politics is broader than the 'state'. It is entirely possible

Law and Public Policy 495; Scot McKnight and Joseph B Modica (eds), *Jesus Is Lord, Caesar Is Not: Evaluating Empire in New Testament Studies* (IVP Academic, 2013); Christopher Bryan, *Render to Caesar: Jesus, the Early Church, and the Roman Superpower* (Oxford University Press, 2005).

²⁰⁶ See *Gospel of St John* (Oxford University Press, Authorized King James Version, 1997 ed) 18:36.

²⁰⁷ See Luther, 'Temporal Authority' (n 108) 283, 297–8.

²⁰⁸ See Beck, 'Theological Underpinnings' (n 6) 16. See generally Alex Deagon, *From Violence to Peace: Theology, Law and Community* (Hart Publishing, 2017) ('*From Violence to Peace*').

²⁰⁹ *Proceedings of the People's Federal Convention*, Bathurst, 16 November 1896, 20–1 (Alexander Gosman).

²¹⁰ Beck, *Religious Freedom and the Australian Constitution* (n 4) 9–10.

²¹¹ Alexander Gosman, 'Imperial Federation and Congregationalism' in *Jubilee of Congregationalism in South Australia: Report of Intercolonial Conference Held in Adelaide, September, 1887* (WK Thomas & Co, 1887) 82, 82–5.

²¹² *Ibid*; Beck, *Religious Freedom and the Australian Constitution* (n 4) 10. Cf Alex Deagon, 'Secularism as a Religion: Questioning the Future of the "Secular" State' (2017) 8 *Western Australian Jurist* 31.

to have a relationship between religion and government without conflating church and state.²¹³ There is no principled reason why religion cannot contribute to politics as part of the normal democratic participatory process.²¹⁴ Indeed, there is no truly 'secular' or 'liberal' state that enshrines a complete separation between religion and politics.²¹⁵ Religious people and groups form part of the democratic state and therefore it is incongruent that religion should be separate from politics in any strict sense. It is consistent with at least some strands of Protestant theology and political theory that a liberal, democratic state can countenance religious contributions to public policy and religious arguments for political views.²¹⁶

This has important implications for s 116. First, s 116 cannot be seen as a provision establishing a secular separation of religion and state, or separation of religion and government. Secondly, s 116 cannot plausibly be understood as having originated from the perspective of hostility to religion, with an intention to guard against its influence. Both of these mistaken views are evident to a greater or lesser extent in Beck's narrative.

First, Beck seems to consider that s 116 establishes a separation of religion and government. He approvingly references La Nauze's blunt claim that, in the campaign for recognition, 'the Convention was being blackmailed into making a gesture that was none of its proper business'.²¹⁷ He observes that

[i]t was the New South Wales Council of Churches that was ultimately responsible for the successful campaign to have God recognised in the *Constitution* and which in turn prompted the successful campaign for a provision separating religion and government.²¹⁸

²¹³ See Deagon, *From Violence to Peace* (n 208); Alex Deagon, 'Liberal Secularism and Religious Freedom in the Public Space: Reforming Political Discourse' (2018) 41(3) *Harvard Journal of Law and Public Policy* 901 ('Liberal Secularism').

²¹⁴ See, eg, John Milbank, *Beyond Secular Order: The Representation of Being and the Representation of the People* (Wiley Blackwell, 2013); John Milbank and Adrian Pabst, *The Politics of Virtue: Post-Liberalism and the Human Future* (Rowman & Littlefield, 2016).

²¹⁵ Stanley Fish, 'Liberalism Doesn't Exist' [1987] (6) *Duke Law Journal* 997, 1000; Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press, 2nd ed, 2013) 17–18, 65.

²¹⁶ Deagon, 'Liberal Secularism' (n 213). See above Part IV.

²¹⁷ JA La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 225, cited in Beck, *Religious Freedom and the Australian Constitution* (n 4) 44.

²¹⁸ Beck, *Religious Freedom and the Australian Constitution* (n 4) 12. Beck refers to this as 'putting religion in the *Constitution*': at 13.

He also describes s 116 as ‘the separation of religion and government provision of the *Australian Constitution*’²¹⁹ and considers that s 116 ‘appears to be a secular separation of religion and state constitutional provision.’²²⁰ This is a questionable characterisation of s 116. Section 116 does not separate religion and government in any absolute, direct sense — and does not separate religion and government at the state level in any way. As Beck himself acknowledges, s 116 is ‘rather more limited and focused in its terms than a simple denial of power in respect of religion,’²²¹ preventing the Commonwealth (and not the states) from passing laws that establish a religion, impose religious observance, prohibit the free exercise of religion, or make a religious test a qualification for public office. Section 116 does not, for example, prevent religion contributing to politics and public policy, or prevent the election of religious ministers as politicians, and it does not contain an absolute prohibition on the Commonwealth passing laws that relate to religion.²²² The argument that constitutional recognition of God was not the proper business of the Convention is only plausible on the basis of anachronistic assumptions about the respective roles of religion and the state, assumptions which, as we have suggested above, most people in the 1890s did not share. At Federation, there was no widely held view that religion and the state should be hermetically separate spheres.²²³

Secondly, Beck’s narrative is suspicious of religion and deeply cynical of the motives of religious leaders. As noted, Beck considers that the religious leaders who argued for constitutional recognition were devoid of principle, acting inconsistently with the tenets of their religion and purely for pragmatic political reasons.²²⁴ Beck expresses concern that the Council of Churches was craving the ‘formal and public recognition ... of God’ and seeking public status and power.²²⁵ This, in Beck’s view, stemmed from a concern about the Council of Churches’ declining influence over public morality and a ‘widening gap between a secular society and socially conservative religious establish-

²¹⁹ Ibid 4.

²²⁰ Beck, ‘Theological Underpinnings’ (n 6) 16.

²²¹ Beck, *Religious Freedom and the Australian Constitution* (n 4) 77.

²²² See, eg, *ibid* 119.

²²³ Chavura, Gascoigne and Tregenza (n 122) 126; Barker (n 154) 96–9.

²²⁴ Beck, *Religious Freedom and the Australian Constitution* (n 4) 15–19; Beck, ‘Theological Underpinnings’ (n 6) 15.

²²⁵ Beck, *Religious Freedom and the Australian Constitution* (n 4) 13. See generally at 12–19.

ments.²²⁶ Above, we challenged the claim that the Council of Churches pursued constitutional recognition purely for political reasons.²²⁷ Further, Beck's suspicion of religion and religious leaders was not a suspicion shared by many contemporaries, who, by and large, believed that religion should exercise a benevolent influence throughout society.²²⁸

Chavura, Gascoigne and Tregenza note that arguments for (and against) the recognition of God 'came about *through* religious engagement with the federation movement' and were infused with various theological frameworks.²²⁹ The popular sentiment that undergirded the campaign for constitutional recognition belies Beck's characterisation of the motives of religious leaders. Chavura, Gascoigne and Tregenza explain that the push for recognition of God was 'largely grassroots' on the part of the churches, but it was 'taken seriously by most delegates as a sincere national expression of religiosity'.²³⁰ As Glynn argued during the Convention Debates:

[W]e cannot ignore the evidence afforded by the petitions of a widespread desire that the spirit of the [recognition] proposal should be accepted; we cannot pass over in silence the almost unanimous request of the members of so many creeds, of one aim and hope, that the supremacy of God should be recognised, and His blessing invoked, in the opening lines of our *Constitution*.²³¹

Hence, there was a 'strong popular sentiment' in favour of the recognition of God, and as a result it was supported by a large number of the Convention delegates.²³² Zimmermann observes that the insertion of an acknowledgement of God occurred in response to overwhelming public support, and it actually received 'the strongest popular support of *any* part of the nation's foundational document'.²³³ Therefore, the Preamble 'exemplifies the nation's religious, and

²²⁶ Ibid 12, quoting Michael Hogan, *The Sectarian Strand: Religion in Australian History* (Penguin Books, 1987) 97.

²²⁷ See above Part IV.

²²⁸ As we indicate in Part III(C) above. See Deagon, 'Defining the Interface of Freedom and Discrimination' (n 1) 256–8. This claim is also supported by Puls (n 3) 140, citing McLeish (n 2) 217.

²²⁹ Chavura, Gascoigne and Tregenza (n 122) 137 (emphasis in original).

²³⁰ Ibid 126.

²³¹ *Convention Debates (Adelaide)* (n 139) 1184 (Patrick Glynn).

²³² Chavura, Gascoigne and Tregenza (n 122) 137. See also Hirst (n 159) ch 1; Atkinson (n 163) ch 9.

²³³ Augusto Zimmermann, *Christian Foundations of the Common Law* (Connor Court Publishing, 2018) vol 3, 52 (emphasis in original). Chavura, Gascoigne and Tregenza (n 122)

specifically Christian, heritage,²³⁴ and the Judeo-Christian values strongly embedded in the community.²³⁴ This is an important feature of the historical context for which Beck does not adequately account.²³⁵

Given the history of the *Constitution*, particularly the prevailing views regarding religion and the state when it was drafted, we conclude that s 116 cannot be plausibly understood as intended to establish a separation between religion and government, and did not arise from suspicion of religion or religious leaders.

VI CONCLUSION

This article has challenged Luke Beck's account of the theological and historical context relating to the recognition of God in the Preamble of the *Constitution* and the subsequent inclusion of s 116. Beck relies on a narrow range of sources, failing to analyse the views of mainstream Christian traditions on their own terms, and omitting to consult the leading works of history that have analysed religion and religious views in Australia in the late 19th century. As a result, he misunderstands mainstream Protestant views as well as widely held views in society regarding religion and the state. We have shown that the campaign for constitutional recognition was driven by deep theological convictions about the role of religion in public life, reflecting a sincere expression of national religious sentiment, and was not primarily pragmatic and driven by considerations of power. Contemporaries did not believe in a separation of religion and government and were not, for the most part, suspicious of the influence of religion.

This presents a significant challenge to Beck's proposed 'safeguard against religious intolerance' theory. As noted earlier, Beck presents two principal reasons for accepting this theory, namely that any theory of s 116 must have a negative direction and must be conceptually modest. These features, according to Beck, are demanded by the history leading to the incorporation of s 116 in the *Constitution*, including the pragmatic and unprincipled nature of the campaign for recognition of God in the *Constitution*, and the pragmatic way the Federal Convention went about the task of drafting s 116. That is, Beck's reading of the history undergirds his articulation and defence of his theory.

agree that recognition was in no insignificant part due to popular support among delegates and the community generally: at 126–7, 137.

²³⁴ Zimmermann (n 233) 135.

²³⁵ See Beck, *Religious Freedom and the Australian Constitution* (n 4) 12–15, 32–7.

Given that there are significant weaknesses in Beck's account of the history, the main support for that theory is correspondingly weakened.

Section 116 cannot be plausibly understood as intended to establish a strict separation between religion and the state, or as being intended to guard against the influence of religion. Recognising this opens the possibility for further exploration regarding the purpose, design and proper interpretation of s 116, which can occupy future research in the area. If history is relied on to ground a particular reading of s 116, that reading should be accompanied by a more nuanced and careful explanation of the historical context.