

Clear and Emphatic: The Separation of Church and State under the Australian Constitution

LUKE BECK *

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 of public trust under the Commonwealth:
Constitution of the Commonwealth of Australia s 116

Abstract

Section 116 of the Constitution is generally considered a weak guarantee of religious freedom, especially when compared to its United States counterpart. This article demonstrates the potentially broad effect of s 116 of the Constitution by applying its terms to laws relating to important aspects of public affairs in Australia that have generally been considered unproblematic in relation to issues of Church and State interactions: the structures and practices of government, free speech and education. The article takes as examples the practice of reciting prayers at the start of each sitting of the Parliament, the *Royal Style and Titles Act 1973* (Cth), the provision of religious instruction in Territory schools and the law of blasphemy in relation to certain Territories. The article begins by considering the broad definitional issues arising from the terms of the section and then analyses the constitutional validity of the chosen examples as against each relevant clause of the section.

Introduction

Whilst the First Amendment to the United States Constitution guaranteeing religious liberty has been said to erect a 'wall of separation' between Church and State,¹ its cousin, s 116 of the Australian Constitution, has been described as 'seriously limited'² and as creating a

* Luke Beck (B Juris, LLB candidate), Faculty of Law, University of New South Wales.

1 *Everson v Board of Education* 330 US 1 at 16 (1947) citing a letter written by Thomas Jefferson.

2 M Eburn, 'Religion and the Constitution – an illusory freedom' (1995) 8(2) *Australian Religion Studies Review* 77.

'flexible' separation of Church and State.³ While it may be true that s 116 is a weaker provision than the First Amendment, this does not mean that s 116 is capable of having only a very narrow effect. This article demonstrates the potentially broad effect of the section by applying its terms to laws relating to important aspects of public affairs in Australia that have generally been considered unproblematic in relation to issues of Church and State interactions: the structures and practices of government, free speech and education. The article takes as examples the practice of reciting prayers at the start of each sitting of the Parliament, the *Royal Style and Titles Act 1973* (Cth), the provision of religious instruction in Territory schools and the law of blasphemy in relation to certain Territories. The article begins by considering the broad definitional issues arising from the terms of the section and then analyses the constitutional validity of the chosen examples as against each relevant clause of the section.

The extent of the operation of s 116 is not solely a question of legal and constitutional importance. It has important social and political dimensions as well.⁴ Puls observes that:

Whilst there may be a 'wall of separation' between Church and State [in the United States], this wall has only increased the desire of these neighbours to look over the wall into each other's yard, constantly paranoid that the other is silently shifting the wall during the night. In contrast, the less distinct division between Church and State in Australia seems to have facilitated a more peaceful, more reasonable, and ironically, arguably more separate co-habitation.⁵

This article seeks to explore the constitutional parameters of that 'co-habitation'.

Does section 116 embody a broad principle of the separation of Church and State?

The immediate object of inserting s 116 into the Constitution was the desire by certain delegates to the Convention Debates to counter any possible effects that the preamble to the Constitution might have.⁶ The

3 S McLeish, 'Making sense of religion and the constitution: A fresh start for section 116' (1992) *Monash University Law Review* 207 at 221.

4 For an overview of the social and political interactions between Church and State in Australia see T Frame, *Church and State: Australia's Imaginary Wall* (2006), who argues that the absence of an Australian 'wall' demonstrates the 'sophistication of Australia's public life' at 95.

5 J Puls, 'The Wall of Separation: Section 116, The First Amendment and Constitutional Religious Guarantees' (1998) 26 *Federal Law Review* 139 at 163.

6 T Blackshield, 'Religion and Australian constitutional law' in Radan, Meyerson and Croucher (eds), *Law and Religion* (2005), 81-86. Strictly speaking, the preamble is the preamble to the *Commonwealth of Australia Constitution Act 1900* (Imp) and not to the Constitution which is contained in s 9 of the Act.

preamble provides that in forming the Federation, the Australian people were ‘humbly relying on the blessing of Almighty God’. Chief Justice Gleeson has commented on the current appropriateness of the preamble noting that ‘[h]umility and reliance on God are now not generally regarded as virtues. The *Constitution* might be more in keeping with the spirit of our times if it recited that the people of Australia were confidently relying on themselves.’⁷ At the Convention Debates, the two chief reasons offered for the need for a provision like s 116 were that the preamble might result in the Commonwealth having power to interfere with religious freedoms and the pragmatic desire to ensure that those who might have preferred no religious references in the constitutional preamble would still vote in favour of Federation.⁸ The origins of the section might therefore suggest that it embodies no broad principle of the separation of Church and State, regardless of how this concept might be understood.

However, the political debates and compromises resulting in the section’s inclusion in the Constitution do not settle the question of whether it is a repository of broad principle. It is, in fact, its terms and their interpretation by the High Court that do. Most telling against the idea that s 116 embodies a *broad* principle is the fact that it is expressed only to bind the Commonwealth and not the States. Stephen J’s analysis of the question in the *DOGS case* is indicative of the general approach of the High Court:

The very form of s 116, consisting of four distinct and express restrictions upon legislative power, is also significant. It cannot readily be viewed as the repository of some broad statement of principle concerning the separation of Church and State, from which may be distilled the detailed consequences of such separation. On the contrary, by fixing upon four specific restrictions on legislative power, the form of the section gives no encouragement to the undertaking of any such distillation.⁹

Stephen J does not deny that s 116 ‘does indeed provide important safeguards for religious freedom for Australians,’¹⁰ but simply points out that those constitutional safeguards are not part of some *broad* statement of principle that goes beyond the effect of the terms of the provision. Neither is it to deny that the four prohibitions contained in s 116 are derived from the general political and philosophical principle of the separation of Church and State and that it might be entirely accurate to describe s 116 as expressing a limited form of the principle of the separation of Church and State. Nor does the High Court ignore the idea

⁷ M Gleeson, ‘The Relevance of Religion’ (2001) 75 *Australian Law Journal* 93.

⁸ Blackshield, above n 4 at 81.

⁹ *Attorney-General (Vic) (ex rel Black) and Ors v Commonwealth and Ors* (*‘DOGS case’*) (1981) 146 CLR 559 at 609.

¹⁰ *DOGS case* (1981) 146 CLR 559 at 610.

that '[f]reedom of religion, the paradigm freedom of conscience, is of the essence in a free society.'¹¹ Moreover, it might be possible that there exists an implied constitutional separation of Church and State in terms resembling s 116, which extends also to the States,¹² but that possibility is not presently relevant. Whilst commentators such as McLeish are correct to suggest that 'underlying s 116 there exists a general conception of state neutrality towards religion,'¹³ the underlying general conception will be apparent from the effect of the section. According to Wilson J, s 116's ambit of operation 'is clear and emphatic in its command'.¹⁴ Philosophical and political notions of the 'separation of Church and State', of whatever content, are therefore not relevant when discussing the legal effect of s 116. What is relevant, however, are the terms of the section and their proper meaning. In Australia, at the federal level, the constitutional 'separation of Church and State' means only the legal effect of s 116.

Religion

The first question in any analysis of the effect of s 116 is consideration of what exactly the section's four prohibitions are directed at. It is therefore necessary to come to some understanding of what is meant by the word 'religion' and its derivative 'religious'. According to the High Court, this is not a philosophical exercise but primarily a legal one.¹⁵ In *Church of the New Faith*, dealing with the question of whether the Church of Scientology was a religion for the purposes of concessional tax treatment, Mason ACJ and Brennan J noted that:

The chief function in the law of a definition of religion is to mark out an area in which a person subject to the law is free to believe and act in accordance with his [or her] belief without legal constraint. *Such a definition affects the scope and operation of s 116 of the Constitution and identifies the subject-matters which other laws are presumed not to intend to affect.*¹⁶

In articulating appropriate definitions, it is necessary to firstly direct attention to what can constitute 'religion' and secondly, to what can be described as 'religious'. It is doubtful that any definition articulated would be exhaustive.

It is imperative to point out that s 116 is not directed to Churches. Section 116 does not, for example, prohibit laws for establishing a Church as such. The section prohibits laws for establishing any *religion*. The

¹¹ *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* (1983) 154 CLR 120 at 130 (Mason ACJ and Brennan J).

¹² Puls considers the idea but concludes that it is unlikely: above n 5, at 161-2.

¹³ McLeish, above n 3 at 223.

¹⁴ *DOGS case* (1981) 146 CLR 559 at 649.

¹⁵ *Church of the New Faith* (1983) 154 CLR 120 at 133 (Mason ACJ and Brennan J).

¹⁶ (1983) 154 CLR 120 at 130 (emphasis added).

establishment of any Church is prohibited only because in order to establish a Church it would be necessary to establish a religion which the Church then embodies and espouses.¹⁷ ‘Church’ and ‘religion’ can be conceived of as conceptually distinct for legal purposes. ‘Religion’ is the fundamental precondition for ‘Church’. Churches are simply organised religion, in the sense of organised institutions for the practice of a religion. Conceptually, the religion of a particular Church can exist independently of that Church. It is clear then that the definition of ‘religion’ for the purposes of s 116 extends beyond organised religions.

In the *Jehovah’s Witnesses case*, Latham CJ noted that religion is regarded differently by different people:

There are those who regard religion as consisting principally in a system of beliefs or statements of doctrine. So viewed religion may be either true or false. Others are more inclined to regard religion as prescribing a code of conduct. So viewed a religion may be good or bad. There are others who pay greater attention to religion as involving some prescribed form of ritual or religious observance. Many religious conflicts have been concerned with matters of ritual and observance. Section 116 must be regarded as operating in relation to all these aspects of religion...¹⁸

It can hardly be doubted that each of the three forms of religion identified by Latham CJ fall within the definition of religion. It is also beyond doubt that the definition of religion extends beyond the major religions. ‘[T]he search for religious indicia should not be confined to the Judaic group of religions – Judaism, Christianity, Islam – for the tenets of other acknowledged religions, including those which are not monotheistic or even theistic, are elements in the contemporary atmosphere of ideas.’¹⁹ Hinduism is the classic example of a polytheistic religion and Buddhism is the classic example of a non-theistic religion. Any definition must also be broad enough to encompass minority religions.²⁰ Mason ACJ and Brennan J in *Church of the New Faith* also held, consistently with Latham CJ’s broad outline of religion in the *Jehovah’s Witnesses case*, that the test of ‘religion’ is not limited to theistic religions and considered ‘the test of religious belief to be satisfied by belief in supernatural Things or Principles and not to be limited to belief in God or in a supernatural Being otherwise described.’²¹ The limitation to supernatural Things or Principles means that political philosophies, such as communism or liberalism for example, are not religions. ‘Supernatural’ generally means

¹⁷ *DOGS case* (1981) 146 CLR 559 at 580 (Barwick CJ).

¹⁸ *Adelaide Company of Jehovah’s Witnesses Incorporated v Commonwealth* (‘*Jehovah’s Witnesses case*’) (1943) 67 CLR 116 at 123.

¹⁹ *Church of the New Faith* (1983) 154 CLR 120 at 133 (Mason ACJ and Brennan J).

²⁰ *Jehovah’s Witnesses case* (1943) 67 CLR 116 at 124 (Latham CJ); *Church of the New Faith* (1983) 154 CLR 120 at 131 (Mason ACJ and Brennan J).

²¹ *Church of the New Faith* (1983) 154 CLR 120 at 140.

'belief that reality extends beyond that which is capable of perception by the senses.'²²

On the basis of Latham CJ's first category of religion, a religion need not include any form of a code of conduct.²³ A religion may only include a few specific beliefs with no attached code of conduct or moral precepts. Such a religion is still a religion for the purposes of s 116, though clearly it would be more difficult for the law to interfere with the free exercise of such a religion than it would be for more complex religions. A belief in 'God,' or a supernatural Being otherwise described, need not be accompanied with a personal relationship with that God or supernatural Being in order to be a religion.²⁴ There is no requisite degree of complexity or extent of doctrine for the test of religion to be satisfied. However, in *Church of the New Faith*, Mason ACJ and Brennan J considered that the criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief.²⁵

That definition assumes that the supernatural belief of the first criterion is capable of being given effect to by conduct. This is not necessarily the case and appears to be based on unarticulated assumptions about the nature of religion. Their Honours earlier considered that 'Religion is also concerned, at least to some extent, with a relationship between man and the supernatural order and with supernatural influence upon his life and conduct'.²⁶ This would suggest that the second criterion, if accepted at all, should not be understood as involving conduct giving effect to supernatural belief but rather as requiring some relationship between supernatural belief and human experience. There is no reason in principle why this should not be satisfied by an individual's recognition of his or her place in the supernatural scheme of things. In the same case, Wilson and Deane JJ referred to religion consisting of 'ideas and/or practices',²⁷ indicating that conduct is not a necessary component of religion.

There have been statements in the High Court to the effect that the various Christian denominations are not distinct religions for the purposes of s 116, but are simply part of the one Christian religion.²⁸ Such statements, if correct, would apply also by analogy to the various branches of Islam. In practice, such a definition may not change much, if

²² *Church of the New Faith* (1983) 154 CLR 120 at 174 (Wilson and Deane JJ).

²³ See also *Church of the New Faith* (1983) 154 CLR 120 at 157 (Murphy J).

²⁴ *Church of the New Faith* (1983) 154 CLR 120 at 173 (Wilson and Deane JJ).

²⁵ *Church of the New Faith* (1983) 154 CLR 120 at 136.

²⁶ *Church of the New Faith* (1983) 154 CLR 120 at 135.

²⁷ *Church of the New Faith* (1983) 154 CLR 120 at 173.

²⁸ *DOGS case* (1981) 146 CLR 559 at 579-580 (Barwick CJ).

anything. But, it could hardly be said that Roman Catholicism, as part of the Christian religion, was established in the United Kingdom where history makes it abundantly clear that it is the Protestant Church of England specifically, as against the Catholic Church, which was established.²⁹ Although the Christian denominations share certain beliefs and characteristics such that describing in the plural is not unfair, they are probably best understood as separate religions for the purposes of s 116.

‘The categories of religion are not closed’,³⁰ and it ‘is not for a court, upon some *a priori* basis, to disqualify certain beliefs as incapable of being religious in character’ or as constituting a religion.³¹ Nor, is it ‘an exaggeration to say that each person chooses the content of his [or her] religion.’³² Such statements of principle are in fact consistent with s 116’s use of the terminology ‘*any religion*’.³³

On the basis of the foregoing discussion it is clear that with respect to s 116 of the Constitution, the following list of statements can be said to be justified by authority and/or principle:

- Any of the major religions, including Christianity generally and the various Christian denominations separately, are religions for the purposes of s 116;
- Religion need not be monotheistic or even theistic;
- A system of supernatural belief, however complex or simple or whatever the extent of belief or doctrine, is a religion, and so the mere belief in a supernatural being with no more is a religion;
- A religion need not involve any code of behaviour or moral precepts;
- A religion may consist in ritual and religious observance;
- A religion need not have many followers;
- A religion need not be an organised religion;
- The test of religious belief is satisfied by belief in a supernatural Thing or Principle; and
- New religions may come into existence.

As to the question of what can be described as ‘religious’, it is clear that ‘conduct in which a person engages in giving effect to his [or her] faith in the supernatural is religious’.³⁴ But it is ultimately a question of fact in

²⁹ See, eg, A Lynch, ‘The constitutional significance of the Church of England’ in Radan, Meyerson and Croucher (eds), *Law and Religion* (2005) at 168-196.

³⁰ *Church of the New Faith* (1983) 154 CLR 120 at 151 (Murphy J).

³¹ *Jehovah’s Witnesses case* (1943) 67 CLR 116 at 124 (Latham CJ).

³² *Jehovah’s Witnesses case* (1943) 67 CLR 116 at 124 (Latham CJ).

³³ Emphasis added.

³⁴ *Church of the New Faith* (1983) 154 CLR 120 at 136 (Mason ACJ and Brennan J).

each particular case whether the conduct an individual engages in is done to give effect to a religious belief. ‘Unless there be a real [connection] between a person’s belief in the supernatural and particular conduct in which that person engages, that conduct cannot itself be characterised as religious.’³⁵ What may be religious conduct for one purpose may not be religious conduct for another. And, as was pointed out in *Church of the New Faith*, ‘if a self-proclaimed teacher persuades others to believe in a religion which he propounds, lack of sincerity or integrity on his part is not incompatible with the religious character of the beliefs, practices and observances accepted by his followers.’³⁶

The Commonwealth shall not make any law *for*...

The First Amendment to the United States Constitution provides that ‘Congress shall make no law *respecting* an establishment of religion or prohibiting the free exercise thereof.’³⁷ By contrast, s 116 of the Australian Constitution provides that the ‘Commonwealth shall not make any law *for* establishing any religion, or *for* imposing any religious observance, or *for* prohibiting the free exercise of any religion...’³⁸ It is generally considered that the American use of the word ‘respecting’ is broader than the Australian use of the word ‘for’.³⁹ The Australian expression is generally understood to be purposive.

In the *DOGS case*, Barwick CJ held that ‘in the interpretation and application of s 116, the establishment of religion must be found to be the object of the making of the law. Further, because the whole expression is ‘*for* establishing any religion’, the law to satisfy the description must have that objective as its express objective and, as I think, single purpose.’⁴⁰ On one reading of this passage it could be held that unless an impugned law has as its express and single purpose one of the things prohibited by s 116, that law will not be invalid notwithstanding that that law has the effect of doing one of the things prohibited by s 116. This position is overstated and it is doubtful whether Barwick CJ was himself committed to it.

In that case, Barwick CJ made other statements that do not adopt the incredibly narrow view of purpose evident in the above passage. He also held that it ‘is the making of the law itself which is proscribed. Consequently, the construction of the statute and the determination of its

³⁵ *Church of the New Faith* (1983) 154 CLR 120 at 135 (Mason ACJ and Brennan J).

³⁶ *Church of the New Faith* (1983) 154 CLR 120 at 141 (Mason ACJ and Brennan J).

³⁷ Emphasis added.

³⁸ Emphasis added.

³⁹ Eg *DOGS case* (1981) 146 CLR 559 at 579.

⁴⁰ *DOGS case* (1981) 146 CLR 559 at 579.

operational effect will be the determinant'⁴¹ and that the 'law must be *for* it, that is intended and designed to set up the religion as an institution of the Commonwealth.'⁴² It is clear in these passages that Barwick CJ accepted that the notion of 'purpose' cannot be altogether divorced from the notion of 'effect'. Barwick CJ also accepted that it is possible to work backwards and determine the purpose of a law by considering its effect:

If the administration [of a law] is within the ambit of the authority conferred by the statute, and does amount to the establishment of religion, the statute which supports it will most probably be a statute for establishing a religion and therefore void as offending s 116. That is so, not because of the manner of the administration but because the statute, properly construed, authorises it.⁴³

In *Kruger*, the purposive nature of s 116 was also considered.⁴⁴ In that case, Gaudron J identified two matters that defeat Barwick CJ's incredibly narrow analysis of purpose considered above:

There are two matters, one textual, the other contextual, which in my view, tell against construing s 116 as applying only to laws which, in terms, ban religious practices or otherwise prohibit the free exercise of religion. First, s 116 speaks of the exercise of religion, and it follows, as Latham CJ pointed out in *Adelaide Company of Jehovah's Witnesses Inc*, that "it is intended to protect from the operation of any Commonwealth laws acts which are done in the exercise of religion." The contextual consideration is that... the Commonwealth has no power to legislate with respect to religion, and, thus, a law which, in terms, prohibits religious practice would, ordinarily, not be a law on a subject-matter with respect to which the Commonwealth has any power to legislate. These considerations provide powerful support for the view that s 116 was intended to extend to laws which operate to prevent the free exercise of religion, not merely those which, in terms, ban it.⁴⁵

In *Kruger*, Gummow J held that purpose 'refers not to underlying motive but to the end or object the legislation serves.'⁴⁶ Toohey J held likewise,⁴⁷ adopting Latham CJ's view in the *Jehovah's Witnesses case* that purpose 'refers to an end or object which legislation may serve'.⁴⁸ How a legislative end or object is determined was not articulated.

⁴¹ *DOGS case* (1981) 146 CLR 559 at 581.

⁴² *DOGS case* (1981) 146 CLR 559 at 583.

⁴³ *DOGS case* (1981) 146 CLR 559 at 581.

⁴⁴ Brennan CJ did not define 'purpose' and the question did not arise for Dawson J, with whom McHugh J agreed, because he considered that s 116 had no application to s 122, which on the facts of the case was the trigger for discussion.

⁴⁵ *Kruger v Commonwealth* (1997) 190 CLR 1 at 116.

⁴⁶ *Kruger* (1997) 190 CLR 1 at 153.

⁴⁷ *Kruger* (1997) 190 CLR 1 at 86.

⁴⁸ *Jehovah's Witnesses case* (1943) 67 CLR 116 at 132.

That s 116 is set out in purposive terms is clear. That the test is purposive is also clear and generally accepted in the cases. Despite the lack of clarification as to how that purposive test is to be properly understood and applied, it is clear that the section's 'terms are sufficiently wide to encompass any law which has a proscribed purpose'.⁴⁹ It is also possible 'that a particular law is disclosed as having a purpose prohibited by s 116 only upon consideration of extraneous material indicating a concealed means or a circuitous device to attain that end' and that such a law will be prohibited by s 116.⁵⁰ A law will be for a prohibited end therefore if it has as a purpose, whether express or implicit, the attainment of an end prohibited by s 116. The best view of this test appears to be as Barwick CJ put it: a law's 'operational effect will be the determinant' of whether the law has a prohibited purpose and so violates s 116.

It is clear from the terms of s 116 that the purposive analysis applies only to the first three prohibitions and not to the fourth.

The Commonwealth shall not make *any* law...

In the *DOGS case*, Barwick CJ held that '[s]ection 116 in terms applies to all laws, in my opinion without exception. The Parliament 'shall not make *any* law for ...' I can see no acceptable reason for excluding from this universality an Appropriation Act.'⁵¹ Barwick CJ also held that:

Included in laws the making of which the section proscribes are laws which authorise the making of subsidiary laws in the form of proclamations, statutory rules, or by-laws. The prohibition will include such subsidiary legislation which is within the authority of an Act of the Parliament but which in itself offends the terms of the section.⁵²

Thus, s 116 applies to 'any' law made by the Commonwealth regardless of which power the law is made pursuant to. The principles expounded by Barwick CJ make clear that the prohibitions contained in s 116 apply to laws made pursuant to s 122 (the territories power). There is other significant judicial support for the conclusion that s 116 applies to s 122.⁵³ This conclusion is important in view of certain examples discussed below.

⁴⁹ *Kruger* (1997) 190 CLR 1 at 119 (Gaudron J) (emphasis added).

⁵⁰ *Kruger* (1997) 190 CLR 1 at 154 (Gummow J).

⁵¹ *DOGS case* (1981) 146 CLR 559 at 576 (original emphasis).

⁵² *DOGS case* (1981) 146 CLR 559 at 580.

⁵³ *Kruger* (1997) 190 CLR 1 at 54 (Toohey J) at 105, 116 (Gaudron J) at 155, 160, 161 (Gummow J); *Lamshed v Lake* (1958) 99 CLR 132 at 141 (Dixon CJ) at 154 (Kitto J); *Church of the New Faith* (1983) 154 CLR 120 at 360 (Murphy J) at 383 (Wilson J); *Jehovah's Witnesses case* (1943) 67 CLR 116 at 123 (Latham CJ) at 154 (Starke J) at 156 (McTiernan J); *Teori Tau v Commonwealth* (1969) 119 CLR 564 at 570 (Barwick CJ); *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 288 (Gaudron J).

It is not possible in the context of demonstrating that s 116 is capable of a broader than usually considered effect to discuss the interaction of s 122 with other sections of the Constitution. However, it is possible to present a brief outline, broadly stated, as relevant to the issues at hand. The main argument proffered against the conclusion that s 122 is controlled by s 116 is the view that s 122 is a ‘non-federal power’ and does not relate to subject matters as the powers enumerated in s 51 do. In *Kruger*, Dawson J considered that:

There is no suggestion [in the text of the Constitution or in the Convention Debates] of any desire to extend the restriction upon Commonwealth federal power to the “disparate and non-federal matter” dealt with in s 122. The States are not precluded by s 116 from doing those things which the Commonwealth is prohibited from doing and there is no reason to suppose that the Commonwealth was to be inhibited in a way in which the States are not in its capacity to legislate for the government of any territory.⁵⁴

Dawson J overlooks the very plain reason to suppose that the Commonwealth is so inhibited, being that s 116 provides that ‘the Commonwealth shall not make any law...’ Section 116 does not limit its application to laws relating to certain subject matters, whether ‘federal’ or not, or under particular grants of power. Instead, it applies to *any* law and has a ‘universality’ of operation.⁵⁵ The Constitution must be read as a whole and ‘as one coherent instrument’,⁵⁶ and it would ‘be erroneous to construe s 122 as though it were isolated from other provisions of the Constitution which might qualify its scope.’⁵⁷

Dawson J is correct in stating that s 122 concerns ‘non-federal’ matters but it has that character only in the sense that the total legislative power to make laws to operate in and for a territory is not shared with the States. But this does not mean that the power is not controlled in some way by other parts of the Constitution.⁵⁸ Moreover, the Commonwealth ordinarily has no power to legislate at all with respect to religion. Dawson J’s analysis would give s 116 almost no application. Simply because the States have power to enact a certain sort of law does enable the Commonwealth to do the same with respect to a territory where the Constitution specifically prohibits the Commonwealth from making such a law. Pursuant to s 122, the Commonwealth may make laws with respect

⁵⁴ *Kruger* (1997) 190 CLR 1 at 60 (Dawson J).

⁵⁵ *DOGS case* (1981) 146 CLR 559 at 576 (Barwick CJ).

⁵⁶ *Lamshed v Lake* (1958) 99 CLR 132 at 154 (Kitto J).

⁵⁷ *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 272 (Brennan, Deane and Toohey JJ).

⁵⁸ *Spratt v Hermes* (1965) 114 CLR 226 at 242 (Barwick CJ), cited with approval in *Capital Duplicators Pty Ltd v Australia Capital Territory* (1992) 177 CLR 248 at 272 (Brennan, Deane and Toohey JJ).

to religion which it ordinarily could not, but not if those laws violate s 116.

It is sometimes said that unlike the powers enumerated in s 51, s 122 is not expressed to be 'subject to this Constitution,' therefore, it is uncontrolled by any limitations contained elsewhere in the Constitution.⁵⁹ However, such a proposition is flawed.⁶⁰ Firstly, s 116 expresses itself clearly and emphatically as applying to 'any law'. Secondly, covering clause 5 of the Constitution provides that 'This Act [which includes the Constitution]... shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth.' The only way therefore that s 122 is uncontrolled by s 116 on this argument is if the territories are not 'part of the Commonwealth'.⁶¹ The High Court has recognised that such a conclusion would be absurd; not least because that would mean that the capital and 'political centre' of the Commonwealth is not actually a part of the Commonwealth.⁶² Covering clause 6 speaks of new States either being 'admitted into' or 'established by' the Commonwealth and s 121 of the Constitution likewise speaks of the 'admission' and 'establishment' of new States. The distinction is that a new State will be *admitted into* the Commonwealth where it has never been part of the Commonwealth. Such would be the case if, say, Nauru were to become a State. A new State will be *established by* the Commonwealth where it is already part of the Commonwealth, such as an existing territory. In the latter instance it is not possible to speak of entry *into* the Commonwealth. The wording of covering clause 5 also suggests that the Commonwealth is larger than simply an aggregation of the States. The logical conclusion is that the territories are part of the Commonwealth.⁶³ The result is that s 122 is controlled by s 116.

Very recently in *Wurridjal v Commonwealth*⁶⁴ a majority of the High Court overruled the key decision, *Teori Tau*, which held that s 122 was disjointed from any limitations contained elsewhere in the Constitution.⁶⁵ In *Wurridjal* the court held that s 122 is indeed subject to limitations

⁵⁹ Eg, *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 at 550 (Dawson J).

⁶⁰ *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 at 606 (Gummow J).

⁶¹ A proposition which Menzies J said he was 'unable to grasp' and which 'should be given no further countenance': *Spratt v Hermes* (1965) 114 CLR 226 at 270.

⁶² *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 286 (Gaudron J).

⁶³ *Spratt v Hermes* (1965) 114 CLR 226 at 246-7 (Barwick CJ); *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 276 (Brennan, Deane and Toohey JJ), 285-6 (Gaudron J).

⁶⁴ (2009) 83 ALJR 399; [2009] HCA 2.

⁶⁵ (2009) 83 ALJR 399 at 407, 423 (French CJ), at 399-440 (Gummow and Hayne JJ), at 460 (Kirby J).

contained elsewhere in the Constitution including that it is subject to the requirement in s 51(xxxi) such that the acquisition of property pursuant to laws made under s 122 must be on just terms. There can therefore be little doubt that s 122 is subject to the limitations imposed by s 116.

It is helpful to consider how this controlling interaction between s 116 and s 122 operates. This could arise in two ways. Firstly, the Commonwealth may make a law pursuant to s 122, in which case the above discussion shows that the position is relatively clear in principle. Secondly, the Commonwealth may, pursuant to s 122, grant a territory self-government and the territory legislature may enact laws contrary to s 116. The position is not clear because it has not been considered directly by the High Court. The following discussion sets out what appears to be the best view of the position. A law enacted pursuant to s 122 will be invalid whether the Commonwealth legislation itself directly offends s 116 or the offending provisions are found in the subsidiary legislation enacted by a territory legislature. This is so because the Commonwealth statute granting power to a territory legislature is unable to grant the territory legislature power to enact legislation contravening s 116. This is because, were that power granted, the Commonwealth statute would be a law for one or more prohibited purposes and therefore void.

Any Commonwealth statute granting self-government to a territory includes an implied restriction not to legislate such as to bring about an effect prohibited by s 116. This is due to the fact that the existence of a territory law with a prohibited *effect* will mean that the Commonwealth law authorising that territory law to be made will be a Commonwealth law *for* a prohibited purpose, namely bringing about the impugned territory law. It would therefore be void as contravening s 116. The result would be that there is no valid enabling legislation authorising the territory law to be made at all. For example, a Commonwealth statute may grant a territory legislature power to enact laws for the peace, welfare and good government of that territory. Pursuant to that grant of power the territory legislature may see fit to enact a law imposing a religious observance. Logically, the Commonwealth statute is a statute *for* bringing about the results of territory legislative activity, which in this example would make the Commonwealth statute a law *for*, among other things, imposing a religious observance. The Commonwealth statute is therefore void as offending s 116 and as a consequence, the territory legislature has no power to enact the law imposing a religious observance. A territory legislature can only enact laws to the extent that the Commonwealth has authorised and there are express limitations on what the Commonwealth can authorise. One of the limitations is s 116. Therefore, a Commonwealth statute cannot validly authorise a subsidiary lawmaker, such as a territory legislature, to bring about an effect prohibited by s 116.

As Barwick CJ held in the *DOGS case*:

Included in laws the making of which [s 116] proscribes are laws which authorise the making of subsidiary laws in the form of proclamations, statutory rules, or by-laws. The prohibition will include such subsidiary legislation which is within the authority of an Act of the Parliament but which in itself offends the terms of the section.⁶⁶

The implied restriction on territory legislative competence is therefore a result of the reading down that is necessary to make the Commonwealth legislation granting territory self-government valid. Any territory law which does bring about a prohibited effect is not itself void as contravening s 116 but is void as being ultra vires the Commonwealth enabling legislation. On this basis, an impugned territory law to attract invalidity need not be *for* a prohibited purpose. It is enough if it has a prohibited *effect*.

Establishment

The first prohibition in s 116 prohibits laws for establishing any religion. In the *DOGS case*, Barwick CJ held:

[E]stablishing a religion involves the entrenchment of a religion as a feature of and identified with the body politic, in this instance, the Commonwealth. It involves the identification of the religion with the civil authority... In other words, establishing a religion involves its adoption as an institution of the Commonwealth, part of the Commonwealth 'establishment'... Thus what s 116 forbids is the passage of a law which will erect a religion into such a relationship to the body politic of the Commonwealth as I have attempted to describe.⁶⁷

In the same case, Wilson J, with whom Mason J separately agreed,⁶⁸ held that establishment requires legal recognition of a religion 'as a national institution' and that the concept involves the 'deliberate selection of one to be preferred from among others'.⁶⁹ Gibbs J also held that a religion will be established when it is put in the position of a state or national religion.⁷⁰ Barwick CJ's analysis is not inconsistent with the analyses of Wilson, Mason and Gibbs JJ, and appears simply to be a fuller and more particular articulation of the same concept. If a religion becomes (or will become) entrenched as a feature of the body politic, it has plainly been

⁶⁶ *DOGS case* (1981) 146 CLR 559 at 580.

⁶⁷ *DOGS case* (1981) 146 CLR 559 at 582. Certain words have been deleted from the original passage on the basis that their inclusion could mean that it would not be possible to say that the Church of England is or was established in the United Kingdom; such a definition of 'establish' would be plainly wrong.

⁶⁸ *DOGS case* (1981) 146 CLR 559 at 612.

⁶⁹ *DOGS case* (1981) 146 CLR 559 at 563.

⁷⁰ *DOGS case* (1981) 146 CLR 559 at 596-597.

recognised as a national institution. It might be that there are other ways in which a religion may become recognised as a national institution. The concept of establishment as articulated by the High Court is thus not limited to situations replicating the position of the Church of England in the United Kingdom, which in any event has varied over time.⁷¹ That the prohibition against establishment contained in s 116 does not mean establishment in the sense of the position of the Church of England in the United Kingdom is supported by the fact that the Church of England is an established *church*, whereas s 116 prohibits establishing any *religion*.

The articulation of establishment in the *DOGS case* creates a demanding test that was not satisfied by government funding of religious schools.⁷² The test is much more demanding than the corresponding test for establishment under the American First Amendment.⁷³ The idea behind such a prohibition was noted by Mason ACJ and Brennan J in *Church of the New Faith*: ‘Under our law, the State has no prophetic role in relation to religious belief; the State can neither declare supernatural truth nor determine the paths through which the human mind must search in a quest for supernatural truth.’⁷⁴

There is debate whether the other three prohibitions narrow the meaning of the establishment prohibition.⁷⁵ Ultimately, the debate has little practical significance because if the meaning of ‘establishment’ is narrowed by the other prohibitions such that there is no overlap between the prohibitions, an impugned law will likely be invalid by virtue of one of the other prohibitions. That said there is no logical reason why an impugned law would not be able to violate more than one prohibition. As the United States Supreme Court has recognised in relation to the clauses of the First Amendment, ‘although the clauses may, in certain circumstances, overlap, they forbid quite different kinds of governmental encroachment upon religious freedom.’⁷⁶

⁷¹ *DOGS case* (1981) 146 CLR 559 at 607 (Stephen J).

⁷² The ‘National Schools Chaplaincy Program’ initiated by Prime Minister Howard, which provides funding to employ ‘chaplains’ in schools, probably does not fall foul of the prohibition but likely comes closer than does merely funding religious schools because by the Program the Commonwealth is directly attending to the supposed spiritual needs of the nation’s young people.

⁷³ See the discussion in Puls, above n 4. Providing government funds directly to sectarian schools was considered unconstitutional by the United States Supreme Court in *Mueller v Allen* 463 US 388 at 399 (1983).

⁷⁴ *Church of the New Faith* (1983) 154 CLR 120 at 134.

⁷⁵ See, eg, *DOGS case* (1981) 146 CLR 559 at 597 (Gibbs J) at 623 (Murphy J).

⁷⁶ *Engel v Vitale* 370 US 421 at 424 (1962) (Black J for the Court).

The Royal Style and Titles Act

On the basis of the exposition by Barwick CJ, Gibbs, Wilson and Mason JJ on what it means to establish a religion outlined above, the command of s 116 needs to be applied. That command is clearly applicable to the *Royal Style and Titles Act 1973* (Cth) as it is to all other Commonwealth legislation and, as will be seen, probably operates to render it invalid.

The *Royal Style and Titles Act* gives the Queen her Royal Style and Title to be used in relation to Australia, namely Elizabeth the Second, by the Grace of God Queen of Australia and Her other Realms and Territories, Head of the Commonwealth.⁷⁷ The words ‘by the Grace of God’ would appear to make the *Royal Style and Titles Act* a law for establishing a religion. Whether or not it is the case that the Act could be said to establish Christianity or any branch thereof, the Act plainly asserts the existence of ‘God’ and thereby creates state sponsorship of monotheism. The Act declares supernatural truth in two ways: first, it asserts that the divine or supernatural exists, and second, it proclaims that there is only one supernatural Being by asserting that a singular ‘God’ exists. The Act is prophetic and declares monotheism to be true. The existence of ‘God’ is the central proposition of many religions and the Act declares that proposition to be true. The Act puts monotheism into a position of state orthodoxy, and thereby establishes a religion in violation of s 116.⁷⁸

By virtue of s 1 of the Constitution, the Queen is a part of Parliament. The Parliament is one of the most important expressions of the Australian body politic and the centre of Commonwealth civil authority. By asserting that the Queen is queen by the grace of ‘God’, that is, a part of Parliament exists by the grace of ‘God’, the Act entrenches monotheism as a feature of and identified with the body politic, thus satisfying Barwick CJ’s conception of establishment. The Act thereby also gives monotheism legal recognition as a national institution, satisfying the analyses of Wilson J, Mason J and Gibbs J.

The reference to ‘God’ is not vague. Whilst it may not be entirely clear which particular god the reference is to, that reference deliberately selects theistic religion over non-theistic religion, monotheism over polytheism, and religion over atheism or absence of religion. This breach of s 116 is not trivial or merely incidental to some other legitimate purpose. Clearly, the chief purpose of the Act is to give the Queen a title for use in Australia that refers to Australia rather than to the United Kingdom, but that purpose could readily be achieved without violating the prohibition against laws establishing any religion. There is no need to assert that the

⁷⁷ Schedule to the *Royal Style and Titles Act 1973* (Cth).

⁷⁸ On the definition of ‘religion’ see above.

Queen is queen by ‘the Grace of God’.⁷⁹ The notion of the divine right of kings was long ago rejected⁸⁰ and that rejection is part of Australia’s constitutional heritage. The phrase ‘by the Grace of God’ is not mere rhetorical flourish, especially given its origins in the notion of the divine right of kings. And, it is never trivial to establish a religion or to declare supernatural truth. Moreover, triviality and incidentality to some other purpose are unlikely to constitute exceptions to the prohibition. Within their ambit of operation the terms of s 116 are, according to Wilson J, ‘clear and emphatic in their command’.⁸¹ The Act in its current form would appear to be void as contravening s 116.

Given the context and history of the Royal Style and Title which previously included in Australia, and continues to include in the United Kingdom, ‘Defender of the Faith’⁸² and which is bestowed on a person who is entitled to the Throne only if they are a Protestant,⁸³ it may also be the case that the *Royal Style and Titles Act* establishes Christianity. The ‘Faith’ is clearly Christianity (or perhaps Protestantism on a narrower interpretation). It could not sensibly be argued that the Royal Style and Title allows an interpretation such that the Queen is queen by the grace of Allah or any other monotheistic god as well as the traditional Christian god. The monotheism analysis above does not make this argument because the precise identity of ‘God’, which as a singular word refers only to one particular god, is irrelevant to the analysis and conclusion. The relationship between Christianity and the body politic of the Commonwealth is the same as outlined above in relation to monotheism: namely, the Act declares that the Christian god exists and that part of Parliament exists by His grace. It thereby entrenches Christianity as a feature of the body politic of the Commonwealth and on the same basis, establishes Christianity as a national institution. As noted above, the fact that this institution is not identical to the position of the Church of England in the United Kingdom is immaterial.⁸⁴ This therefore represents an alternative basis on which the Act in its current form appears to be void as contravening s 116.

⁷⁹ Anne Twomey recounts that during Prime Minister Gough Whitlam’s discussions with the Queen about altering her titles in respect of Australia, ‘Her Majesty reportedly insisted on maintaining “by the Grace of God” in her title as it was “important to her”’: Twomey, *The Chameleon Crown: The Queen and her Australian Governors* (2006) at 108.

⁸⁰ See *Bill of Rights 1688* (Eng) and *Act of Settlement 1701* (Eng). The execution of Charles I in 1649 by Parliament would seem to be ultimate rejection of the divine right of kings in English law.

⁸¹ *DOGS case* (1981) 146 CLR 559 at 649.

⁸² *Royal Titles Act 1953* (UK); *Royal Style and Titles Act 1953* (Cth) (repealed).

⁸³ *Act of Settlement 1701* (Eng).

⁸⁴ *DOGS case* (1981) 146 CLR 559 at 607 (Stephen J).

The foregoing analysis is not necessarily inconsistent with an originalist form of constitutional interpretation.⁸⁵ Goldsworthy argues for a mode of constitutional interpretation which gives primacy to the founders' conception of principles and purposes adopted in the Constitution.⁸⁶ Once the meaning of a constitutional provision has been determined by this method, Goldsworthy argues the application of that meaning to the facts of a case need not involve any further consideration of the founders' intentions.⁸⁷ Goldsworthy is of the view that the High Court's interpretation of s 116 in the *DOGS case* took due account of 'the original, intended meaning' of the words 'for establishing any religion'.⁸⁸ On this basis, the above analysis is simply an application of the original, intended meaning of s 116 to a particular factual circumstance, which was probably not even thought of at the time of Federation.

Alternatively, a stricter originalist interpretation might draw attention to the fact that the Monarch has traditionally been associated with 'God', at least to the extent of titles, and the Monarch's position as Head of the Church of England as a basis for arguing that s 116 was never intended⁸⁹ to operate as suggested by the above analysis. Such an argument might point to covering clause 2 of the Constitution, which extends references to the Queen in the Constitution to her heirs and successors in the sovereignty of the United Kingdom. Such an argument might also assert that the Constitution imports the religious incidents of British Monarchy into the Australian Constitution. On this basis, the Act is simply acknowledging what already exists. Such an argument is unlikely to find favour in modern constitutional interpretation, not least because it is rather speculative.

Whatever religious roles the Queen has in her personal or professional capacity as Queen of the United Kingdom are not relevant to the Queen's separate and distinct capacity as Queen of Australia⁹⁰ or, more relevantly, to the Queen's role as a constituent element of the Australian Parliament.

⁸⁵ For an overview of some of the American writing on constitutional originalism and a rejection of Justice Kirby's 'radical non-originalism', see J Goldsworthy, 'Interpreting the Constitution in its Second Century' (2000) *Melbourne University Law Review* 677.

⁸⁶ J Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 *Federal Law Review* 1.

⁸⁷ J Goldsworthy, 'Originalism in Constitutional Interpretation', above n 86, at 30.

⁸⁸ J Goldsworthy, 'Interpreting the Constitution in its Second Century', above n 85, at 687. Indeed, in the *DOGS case* (1981) 146 CLR 559 at 614-15 Mason J considered that 'a constitutional prohibition must be applied in accordance with the meaning which it had in 1900.'

⁸⁹ In the sense that that would not have been the intention had the founders' minds turned to consider the issue and that this point should be borne in mind when interpreting the Constitution.

⁹⁰ Twomey identifies Elizabeth II's 'separate capacities' as Queen of Australia, Queen of the United Kingdom etc, above n 79, at 264.

Arguably, the Queen's religious roles are not part of her capacity as Monarch but are in addition to that capacity. The disestablishment of the Church of England would not affect the monarch's position as monarch and nor would it affect the assertion that that position is bestowed by the grace of God. The divine right of kings pre-dates the establishment of the Church of England. The Queen is sovereign (in the sense of being Head of State) in independent members of the Commonwealth of Nations 'by virtue of the law, not of the United Kingdom but of that other member'. The law of independent members simply adopts the person entitled to the throne in the United Kingdom.⁹¹ This is what covering clause 2 is directed at. In this respect, there are 'as many Crowns as there are independent realms.'⁹² Therefore, the position is that whatever the incidents, religious or otherwise, of the Crown in right of the United Kingdom, they do not necessarily affect the legal position of the Queen of Australia. That is, the Queen's role, personal or institutional, in religious matters in the United Kingdom is irrelevant to the present argument. Therefore, that the Crown in right of the United Kingdom has some religious incidents is not at all relevant in considering the position of the Queen of Australia as a constituent element of Parliament under the Australian Constitution. It is therefore unlikely that any originalist objections would operate to defeat the above analysis of the constitutionality of the *Royal Style and Titles Act*.

Parliamentary prayers

Another instance of laws which may amount to establishing a religion relates even more directly to the Parliament. Pursuant to s 50 of the Constitution 'Each House of the Parliament may make rules and orders with respect to: ... (ii) The order and conduct of its business and proceedings either separately or jointly with the other House.' It is pursuant to this power that the Standing Orders of each House of the Parliament are made. The High Court's broad interpretation of the phrase 'any law', discussed above, likely applies such that standing orders are laws thus engaging s 116. Order 50 of the Senate Standing Orders provides:

The President, on taking the chair each day, shall read the following prayer:

Almighty God, we humbly beseech Thee to vouchsafe Thy special blessing upon this Parliament, and that Thou wouldst be pleased to direct and

⁹¹ *Halsbury's Laws of England*, Commonwealth, '3 The Crown in the Commonwealth' at [716].

⁹² *Halsbury's Laws of England*, Commonwealth, '3 The Crown in the Commonwealth' at [716]. Boyce notes the 'establishment of a distinct Australian Crown', *The Queen's Other Realms: The Crown and its legacy in Australia, Canada and New Zealand* (2008) at 117; Twomey also notes the 'existence of a separate Crown', above n 79, at 264.

prosper the work of Thy servants to the advancement of Thy glory, and to the true welfare of the people of Australia.

Our Father, which art in Heaven, Hallowed be Thy name. Thy kingdom come. Thy will be done in earth, as it is in Heaven. Give us this day our daily bread. And forgive us our trespasses, as we forgive them that trespass against us. And lead us not into temptation; but deliver us from evil: For thine is the kingdom, and the power, and the glory, for ever and ever. Amen.

Order 38 of the House of Representatives Standing Orders⁹³ provides:

On taking the Chair at the beginning of each sitting, the Speaker shall read the following prayers:

Almighty God, we humbly beseech Thee to vouchsafe Thy blessing upon this Parliament. Direct and prosper our deliberations to the advancement of Thy glory, and the true welfare of the people of Australia.

Our Father, which art in Heaven: Hallowed be Thy Name. Thy Kingdom come. Thy will be done in earth, as it is in Heaven. Give us this day our daily bread. And forgive us our trespasses, as we forgive them that trespass against us. And lead us not into temptation; but deliver us from evil: For Thine is the kingdom, and the power, and the glory, for ever and ever. Amen.

Both Standing Orders would be invalid on the same basis that the *Royal Style and Titles Act* would appear to be invalid, namely as being a law for declaring the truth of monotheism by declaring that ‘God’ exists and thereby establishing a religion contrary to s 116. Even if the prayers did not expressly refer to ‘God’ and ‘Our Father’, the fact that they are prayers necessarily asserts that some divine Being exists and can hear them. The analysis, therefore, would only be slightly different. The fact that the prayers include a reference to ‘Our Father’ and are in part the ‘Lord’s Prayer’ found in the Christian Bible may make it possible to argue that the Standing Orders establish Christianity. The basis for such an argument is that the prayers can plainly be said to be directed at the Christian god. Indeed, in 1972 the House of Representatives Standing Orders Committee rejected a suggestion to alter the prayer to make it ‘more universally acceptable and relevant’. The suggestion had been prompted by a recognition that not all Members were Christian.⁹⁴ The express implication was that the Committee was content to have a Christian observance. The work of the Parliament, as the central embodiment of the body politic of the Commonwealth and centre of

⁹³ Inserted into the Standing Orders in 1901 on the recommendation of the House of Representatives Standing Orders Committee: see that Committee’s *Report* (1901). See further *House of Representatives Practice*, 4th ed, at 247.

⁹⁴ House of Representatives Standing Orders Committee, *Report* (1972), Parliamentary Paper 20.

Commonwealth civil authority, is preceded by the people's representatives seeking, as directed by law, divine intervention from the Christian god to 'Direct and prosper our deliberations to the advancement of Thy glory'. Christianity is thereby put into a special position in relation to the Parliament. The Christian god is acknowledged as real and as actually guiding the work of the Parliament not only to the advancement of 'the true welfare of the people of Australia' but also to 'the advancement of [God's] glory'. The Standing Orders therefore assert that the work of the Parliament is to be directed, in part, to the glory of the Christian god. Christianity is thus made a feature of and identified with the body politic of the Commonwealth and also put into the position of a national institution, thereby establishing a religion contrary to s 116. Both standing orders are therefore probably invalid.

The general principle that the internal proceedings of Parliament are not justiciable is unlikely to have any application here. The claim is that a law made pursuant to s 50(ii) of the Constitution violates a constitutional prohibition on its creation. That section is a grant of power in the Constitution and must be read subject to limitations on power such as s 116. The question of the validity of the Standing Orders is not like the situation considered in *Osborne*⁹⁵ which related to the *procedures* to be followed in enacting certain sorts of laws. That case considered that s 53 of the Constitution was not justiciable because it relates to '*proposed laws*' rather than *actual laws*. In *Cormack v Cope*, Menzies J considered that 'The validity of the law that follows from what Parliament has done is one thing. The proceedings of Parliament ... are another.'⁹⁶ The fundamental and decisive distinction is between *actual laws*,⁹⁷ the validity of which presents a justiciable question, and *parliamentary practices and processes*, which are generally not justiciable. The validity of the Standing Orders is a question as to the validity of actual laws and not parliamentary processes or procedures. It was on this basis that the Privy Council in *Hartnett v Crick* considered the validity under the *Constitution Act 1902* (NSW) of certain standing orders of the New South Wales Parliament.⁹⁸ In *R v Richards; Ex parte Fitzpatrick and Browne*, the High Court considered that questions as to the existence of a power, privilege or immunity of a House of Parliament are justiciable, but that questions as to the proper application of an existing power, privilege or immunity are not.⁹⁹ This was approved in *Egan v Willis*.¹⁰⁰

⁹⁵ *Osborne v Commonwealth* (1911) 12 CLR 321.

⁹⁶ *Cormack v Cope* (1974) 131 CLR 432 at 464.

⁹⁷ More accurately, *purported* actual laws. If a purported law is invalid then it is not really a law.

⁹⁸ (1908) AC 470 at 473-6.

⁹⁹ (1955) 92 CLR 157 at 162 (Dixon CJ).

¹⁰⁰ (1998) 195 CLR 224 at 438-9, 446 (Gaudron, Gummow and Hayne JJ), at 493 (Kirby J), at 509 (Callinan J).

On this basis, a mere parliamentary practice of reciting prayers would not ordinarily be justiciable, whilst actual laws which impose such a practice present a justiciable question as to their validity. As *Harnett v Crick* shows, Standing Orders are actual laws. This is consistent with s 116's use of the terminology 'any law'. Moreover, the United States Supreme Court has had no difficulty in considering the validity of standing orders as against the First Amendment proscription against laws respecting the establishment of religion.¹⁰¹ To suggest that rules and orders made pursuant to s 50 are not 'laws' is artificial and overlooks the fact that, unlike the British Parliament, the Australian Parliament is not completely sovereign and is subordinated to the Constitution which expressly restricts its competence.¹⁰²

The above analyses are not arguments about the relatively trivial matters of royal titles or the habitual recitations of parliamentarians, but rather are about the nature of the Commonwealth Parliament and therefore arguments about the nature of the Australian polity. The *Royal Style and Titles Act* proclaims that a constituent element of Parliament – the most important institution of the Australian polity – exists by divine will. Rather than Parliament existing by the consent of the people, the Act declares that Parliament, or at least one part of it, is divinely ordained. Rather than the Australian state being secular with secular institutions of government, the Act and Standing Orders would have it that Parliament is, at least in part, divinely ordained to govern and actively seeking to govern for the glory of God and therefore that the Australian state and its institutions are not as secular as commonly believed. This has implications well beyond the narrow legal issue of constitutionally validity.

Observance

The second prohibition in s 116 prohibits laws imposing any religious observance. This prohibition has received scant attention by the High Court. Murphy J has considered that an oath is a religious observance,¹⁰³ but other than that there is little that suggests a definition. That said a prayer is plainly a religious observance. The parliamentary prayers extracted above are imposed on Members and Senators and appear therefore to violate the prohibition. On this basis, the Standing Orders in question are invalid.

¹⁰¹ *Marsh v Chambers* 463 US 783 (1983). The standing orders in that case are called the 'Rules of the Nebraska Unicameral' rather than 'standing orders' but are equivalent.

¹⁰² *Egan v Willis* (1998) 195 CLR 224 at 493 (Kirby J).

¹⁰³ *R v Winneke; ex parte Gallagher* (1982) 152 CLR 211 at 227-229.

Order 38 of the House of Representatives Standing Orders provides that ‘On taking the Chair at the beginning of each sitting, the Speaker shall read the following prayers...’ Order 50 of the Senate Standing Orders provides that ‘The President, on taking the chair each day, shall read the following prayer...’ Both Orders provide that the presiding officer ‘*shall*’ read the prayer. The language is language of compulsion and therefore the prayer is imposed. It is irrelevant that Members or Senators might be free to be absent in the chamber during the recital of the prayer; a religious observance is still imposed by the Orders on all present in the chamber. The motivation behind the imposition is entirely irrelevant: the Constitution forbids laws for imposing *any* religious observance. This language is ‘clear and emphatic in its command’¹⁰⁴ and does not invite an investigation of underlying motivations. Nor would a lack of objection on the part of Members or Senators affect the position; it is still the imposition of a religious observance even if the imposition is not objected to or even encouraged. Imposition does not require unwillingness. Moreover, any possible option to leave the chamber clearly does not apply to the Speaker or the President who are commanded to recite the prayers. The United States Supreme Court in holding unconstitutional the imposition of a prayer on public school students said:

The respondents’ argument to the contrary, which is based upon the contention that the ... prayer is ‘nondenominational’ and the fact that the program [of prayer in schools] ...does not require all pupils to recite the prayer, but permits those who wish to do so to remain silent or be excused from the room, ignores the essential nature of the program’s constitutional defects. Neither the fact that the prayers may be denominationally neutral nor the fact that its observance on the part of students is voluntary can serve to free it from the limitations of the [Constitution].¹⁰⁵

There is no apparent reason why this reasoning would not be equally applicable to the Australian provision. Moreover, the fact that the parliamentary prayers are non-denominational, in the sense of not discriminating between the various Christian denominations, only adds further support to the fact that they are a Christian religious observance.

The Constitution does not allow the Commonwealth to make any law for imposing any religious observances on religious individuals whether or not those individuals object to that imposition or for imposing religious observances on non-religious individuals. The clear and emphatic command of s 116 makes this plain. Nor is it possible for such an imposition to be valid merely because those who suffer the imposition are free to leave. The terms of s 116 in prohibiting the imposition of any religious observance are unlikely to admit any exceptions.

¹⁰⁴ *DOGS case* (1981) 146 CLR 559 at 649.

¹⁰⁵ *Engel v Vitale* 370 US 421 at 430 (1962) (Black J for the Court).

In *Marsh v Chambers*¹⁰⁶ a majority of the United States Supreme Court upheld the practice of opening sessions of the Nebraska Legislature with prayers. The Court's reasoning relied almost entirely on the fact that the practice had begun 200 years earlier and had continued ever since. This case does not affect the analysis of the constitutionality of the Standing Orders imposing the parliamentary prayers above. In the first place, *Marsh v Chambers* was a case decided by considering the American establishment clause. Section 116 of the Australian Constitution includes an express prohibition on the imposition of religious observances which is absent in the United States Constitution. Secondly, it is contrary to logic and the law to ignore the express terms of the Constitution simply on the basis that a practice has occurred for a long period of time and is found, on later inspection, to be in violation of the Constitution.

Free exercise

The third prohibition contained in s 116 prohibits laws preventing the free exercise of any religion. This prohibition has received some consideration by the High Court. It is well settled that this prohibition not only protects the free exercise of religion but also the freedom not to exercise a religion.¹⁰⁷ But the freedom thus protected is, like all other freedoms, not absolute as 'general laws to preserve and protect society are not defeated by a plea of religious obligation to breach them.'¹⁰⁸ In the *Jehovah's Witnesses case* Latham CJ summarised the principle:

I think it must be conceded that the protection of any form of liberty as a social right within a society necessarily involves the continued existence of that society as a society. Otherwise the protection of liberty would be meaningless and ineffective. It is consistent with the maintenance of religious liberty for the State to restrain actions and courses of conduct which are inconsistent with the maintenance of civil government or prejudicial to the continued existence of the community. The Constitution protects religion within a community organised under a Constitution, so that the continuance of such protection necessarily assumes the continuance of the community so organised.¹⁰⁹

Admittedly, this passage does not necessarily provide the basis for putting forward a settled test for determining invalidity under the free exercise limb, and other cases do not consider the issue in any more depth. Despite the paucity of case law, it would appear that where an impugned law, though actually operating to restrict the free exercise of religion, is reasonably capable of being considered appropriate and

¹⁰⁶ 463 US 783 (1983).

¹⁰⁷ *Jehovah's Witnesses case* (1943) 67 CLR 116 at 123 (Latham CJ).

¹⁰⁸ *Church of the New Faith* (1983) 154 CLR 120 at 136 (Mason ACJ and Brennan J).

¹⁰⁹ *Jehovah's Witnesses case* (1943) 67 CLR 116 at 131-2.

adapted to achieving some legitimate overriding public purpose, that law will be valid.¹¹⁰ The form and structure of this test is consonant with the form and structure of the test for invalidity of the other constitutional freedom, the implied freedom of political communication.¹¹¹ It is far from settled. It is however settled that 'To require a man to do a thing which has nothing at all to do with religion is not prohibiting him from a free exercise of religion.'¹¹² This, of course, raises the factual question of what things have something to do with religion.

The free exercise clause of s 116 has a wide scope for operation in the territories and, as will be seen in relation to the law of blasphemy in Norfolk Island and religious instruction in schools in the Northern Territory, is capable of operating in quite unexpected ways.

The law of blasphemy in Norfolk Island

In the external territory¹¹³ of Norfolk Island¹¹⁴ the common law offence of blasphemy operates by virtue of statute. Section 3 of the *Criminal Law Act 1960* (NI) provides that the provisions of the *Crimes Act 1900* (NSW) as amended before 16 December 1936 apply by force of the *Criminal Law Act 1960* as a law of Norfolk Island. Section 574 of the *Crimes Act 1900* provides:

No person shall be liable to prosecution in respect of any publication by him orally, or otherwise, of words or matter charged as blasphemous, where the same is by way of argument, or statement, and not for the purpose of scoffing or reviling, nor of violating public decency, nor in any manner tending to a breach of the peace.

That section does not replace the common law because it does not define 'blasphemous' but merely limits the availability of prosecutions for blasphemy. If blasphemy operates to prohibit the free exercise of any religion, a challenge to the *Criminal Law Act 1960* (NI) would likely result in reading down the Act such that it does not import the New South

¹¹⁰ See *Kruger* (1997) 190 CLR 1 at 83, 119 (Gaudron J).

¹¹¹ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Coleman v Power* (2004) 220 CLR 1.

¹¹² *Kryger v Williams* (1912) 15 CLR 366 at 369 (Griffith CJ).

¹¹³ The term 'external territory' is not a legal expression and simply means that the territory is external to mainland Australia, not that it is external to the Commonwealth of Australia. In the same way Tasmania could be described as an external State. The external territories are, like the internal territories, territories of the Commonwealth of Australia. The Constitution itself does not distinguish between 'internal' and 'external' territories and in *Attorney-General (NSW); Ex rel McKellar v Commonwealth* (1977) 139 CLR 527 at 533 Barwick CJ was 'unable to find any relevant distinction between the so-called internal Territories and the external Territories.'

¹¹⁴ As to the constitutional arrangements for self-government on Norfolk Island see the *Norfolk Island Act 1979* (Cth).

Wales blasphemy provision into Norfolk Island law. Of course, this argument is of little practical effect if the offence of blasphemy operates at common law independently of the statute.¹¹⁵

There are no reported cases of blasphemy prosecutions in Norfolk Island. This does not however mean that an occasion might not arise when the prosecuting authorities decide to institute a prosecution under this law. Nor does it serve to negative the central argument being put that s 116 of the Constitution has a wider operation than usually considered.

It is necessary to show how the common law offence of blasphemy prohibits the free exercise of religion. McNamara summarises the potentially uncertain actus reus of blasphemy at common law as involving:

... a communication, either oral (blasphemy) or written (blasphemous libel), the language must be contemptuous, reviling or scurrilous rather than argumentative in a decent and sober tone, the matter must relate to Christianity.¹¹⁶

The New South Wales Law Reform Commission considers, reading s 574 together with the common law, that to prove blasphemy it must be shown that:

... the accused has published any words or matter, which refer to the basic tenets of the Christian religion, not by way of argument or statement but in a manner which is scoffing, reviling or violating public decency, or in any manner tending to a breach of the peace, with the intention of causing offence or outrage.¹¹⁷

The mens rea of the common law offence of blasphemy was held by the House of Lords to be merely the intention to make the offending communication.¹¹⁸ The New South Wales Law Reform Commission however believes that the mens rea in Australia involves an intention to cause offence or outrage.¹¹⁹ Resolution of this question is not presently relevant.

¹¹⁵ Whether this is the case depends upon whether blasphemy was received in New South Wales on its settlement, Norfolk Island originally being part of that colony, and whether the offence survived Norfolk Island's separation from New South Wales: see New South Wales Law Reform Commission, *Blasphemy*, Discussion Paper 24, (1992) at [2.24]-[2.42]; *Australian Courts Act 1828* (9 Geo IV c 83) (Imp) s 24; *Norfolk Island Act 1843* (6 & 7 Vic c 35) (Imp) s 2; *Norfolk Island Act 1913* (Cth); *Norfolk Island Act 1957* (Cth) s 12; *Norfolk Island Act 1979* (Cth) ss 16 and 17.

¹¹⁶ McNamara, L 'Blasphemy' in Radan, Meyerson and Croucher (eds), *Law and Religion* (2005), at 198.

¹¹⁷ NSWLRC, above n 84 at [2.56].

¹¹⁸ *R v Lemon* [1979] AC 617 at 646.

¹¹⁹ NSWLRC, above n 84 at [2.56], [2.77]-[2.107].

It is not difficult to imagine a situation in which, for example, a non-Christian preacher gives a sermon which scoffs at certain tenets of Christianity with the intention of causing offence or outrage. The criminalisation of this conduct means that the offence of blasphemy operates to prohibit the free exercise of the preacher's religion.¹²⁰ However, the legislation noted above will escape constitutional invalidity if the offence of blasphemy is reasonably capable of being considered appropriate and adapted to achieving some legitimate overriding public purpose. The European Commission on Human Rights has held on an appeal from a blasphemy prosecution in the United Kingdom, in which the plaintiff was the Government of the United Kingdom, that blasphemy at common law 'has the main purpose to protect the rights of citizens not to be offended in their religious feelings by publications.'¹²¹ It is doubtful that, in a modern, multicultural and secular state, the purpose suggested by the Commission amounts to an overriding legitimate public purpose. It is perfectly permissible to be contemptuous, reviling and scurrilous or to cause offence or outrage in debating politics for instance. It is equally permissible for Christians to be contemptuous, reviling, scurrilous, offensive or outrageous in their communications about other religions. Nor is offensiveness or outrageousness otherwise prohibited by law. There is a clear historical rationale behind the offence of blasphemy, but that rationale whilst maybe once relevant in England cannot reasonably be considered relevant in modern Australia.

The common law offence of blasphemy operates to restrict the free exercise of non-Christian religions where the exercise of such religions may amount to common law blasphemy and there is no discernible legitimate overriding public purpose to which the offence is reasonably capable of being considered appropriate and adapted to achieving. The offence of blasphemy operates solely to protect Christianity from ridicule and offence. Indeed, Mortensen points out that the elements of the offence imply that blasphemy is 'defined by reference to the susceptibilities of the practising Christian community.'¹²² The offence is not at all akin to a law of general application prohibiting vilification on the basis of religion which may be considered reasonably appropriate and adapted to achieving a legitimate overriding public purpose, namely the protection of individuals from vilification. Blasphemy is therefore an

¹²⁰ Assuming, of course, that scoffing is actually a part of the preacher's religion and not merely incidental to it. As noted above, unless there is 'a real [connection] between a person's belief in the supernatural and particular conduct in which that person engages, that conduct cannot itself be characterised as religious': *Church of the New Faith* (1983) 154 CLR 120 at 135 (Mason ACJ and Brennan J). Scoffing at other religions may meet this criterion.

¹²¹ *Gay News Ltd & Lemon v United Kingdom* (1982) 5 EHRR 123 at 130.

¹²² Mortensen, R 'Blasphemy in a Secular State: A Pardonable Sin?' (1994) 17(2) *University of New South Wales Law Journal* 409 at 416.

offence operating to impermissibly restrict the free exercise of non-Christian religions. As such, for the reasons discussed above, the *Criminal Law Act 1960* (NI) would appear to violate s 116 of the Constitution. It might also be the case that by giving a specific religion protection from public attack, the blasphemy law makes it a feature of the body politic and hence establishes a religion.¹²³

Religious instruction

American cases on the free exercise of religion often relate to public schools. The free exercise clause of s 116 can also be applied to laws relating to schools. One example is the doubtful validity of section 73 of the *Education Act* (NT). That section provides:

- 1) Subject to this section, the Secretary may make regular provision for religious instruction to be given to the children in attendance at a Government school under such conditions and at such times during which the school is open for instruction as he thinks fit.
- 2) Upon the request, in writing, of the parents of a child or children in attendance at a Government school, the Secretary shall, where he considers it practicable, permit a person who is a minister of religion and is nominated by those parents or a person authorized by such a minister of religion, during school hours, to give to the children in attendance at that Government school whose parents wish them to receive religious instruction from that minister of religion or a person authorized by that minister of religion, religious instruction during not less than half an hour in every week when instruction is provided at the school for children, on such days and at such times as the Secretary determines.

Whether the Secretary has in fact made such provision or given the relevant authorisation is irrelevant to the question of whether that section is constitutionally valid.¹²⁴ Rather, the question is whether what that section permits to be done is constitutionally permissible. Under sub-s (1) the Secretary may make regular provision for religious instruction to be given to students and under sub-s (2) must allow, where practicable, a parent-nominated minister of religion to provide religious instruction to those parents' children. Even if no parents make a request under sub-s (2), the Secretary is still empowered to make regular provision for public school students to receive religious instruction under sub-s (1). There are thus two distinct ways in which the Secretary can require students to

¹²³ It might be that the law makes the protected religion a feature of and identified with the body politic of Norfolk Island rather than the Commonwealth. But because the Norfolk Island statute importing the blasphemy law is itself supported by a Commonwealth statute there may be the necessary connection with the Commonwealth.

¹²⁴ The Northern Territory *Schools Policy Handbook*, CS-01.3.1, provides that 'Religious instruction is NOT included in the curriculum... It is left to the discretion of the Principal as to the time(s) to be made available and how the religious instruction will fit in with the rest of the school program.'

receive religious instruction. It will become apparent that this law contravenes s 116 of the Constitution.

Pursuant to sub-s (1) it is open to the Secretary to provide that all public school students receive religious instruction under such conditions as he thinks fit. For example, the sub-section allows the Secretary to provide that all students, without exception, receive religious instruction in Catholicism. The Secretary is therefore empowered to compel non-Catholic students to submit to Catholic religious instruction. This plainly violates such non-Catholic students' free exercise of religion. The free exercise of an individual's religion includes the freedom not to be compelled to receive religious instruction in another religion. Indeed, even Catholic students are prohibited in the *free* exercise of their religion by such an order because the exercise of religion provided for by the Secretary's order is not in reality free. Students have no choice in the matter; it is not open for them to decline. It is irrelevant that they might not object to religious instruction being provided. Section 73 therefore empowers the Secretary to *require* students to exercise their religion. The presence of any element of compulsion will necessarily mean that the exercise of religion is not free.

The Ontario Court of Appeal has considered the constitutional validity of similar laws requiring religious instruction to be given to pupils in Ontario schools as against the right to freedom of religion contained in the Canadian *Charter of Rights and Freedoms*.¹²⁵ In *Canadian Civil Liberties Association v Ontario (Minister for Education)*¹²⁶ the court distinguished between religious instruction and instruction about religion. The distinction is that instruction about religion, such as a course in comparative religion, is descriptive, such as 'Buddhists believe ...', whereas religious instruction is normative and requires pupils to 'participate in manifestations of faith, not critical or objective study.'¹²⁷ The court concluded that such religious instruction 'in this sense [normative instruction] ... can be said to have been aimed at indoctrination'.¹²⁸ The court held that such laws violate the right to freedom of religion.

The Ontario definitional analysis is directly applicable to the Northern Territory provision under consideration. Religious instruction is normative and s 73 of the *Education Act* authorises the Secretary to

¹²⁵ *Canadian Charter of Rights and Freedoms* s 2(a).

¹²⁶ *Canadian Civil Liberties Association v Ontario (Minister for Education)* (1990) 65 DLR (4th) 1.

¹²⁷ *Canadian Civil Liberties Association v Ontario (Minister for Education)* (1990) 65 DLR (4th) 1 at 20.

¹²⁸ *Canadian Civil Liberties Association v Ontario (Minister for Education)* (1990) 65 DLR (4th) 1 at 20.

impose such instruction on students. To impose compulsory normative religious instruction on a person necessarily infringes upon the free exercise of that person's religion or absence of religion. There is plainly no overriding legitimate public purpose to which compulsory normative religious instruction can be reasonably considered to be appropriate and adapted to achieving. Even if such religious instruction is motivated by a desire to teach students about morality, teaching about morality can be achieved without normative religious instruction,¹²⁹ such as through a comparative religion course. Morality does not necessarily require religion. Moreover, if the compulsory religious instruction provided under s 73 included the recitation of prayers, the section might also amount to the imposition of religious observances contrary to s 116 of the Constitution.¹³⁰

It is now helpful to consider what the position would be if the section, while still authorising the Secretary to provide that religious instruction be provided to students, also provided an exemption clause for students who may object.¹³¹ Would such an exemption overcome the constitutional flaws in the real section? The laws under consideration by the Ontario Court of Appeal in *Zylberberg v Sudbury Board of Education*¹³² contained such an exemption clause, but that did not cure the constitutional defect. The court considered that 'the requirement that pupils attend religious exercises, unless exempt, compels students and parents to make a religious statement.'¹³³ Any compulsion by law to make a religious statement necessarily infringes the prohibition against laws prohibiting the free exercise of religion, which necessarily includes the freedom not to exercise a religion, in s 116 of the Constitution. The free exercise of a person's religion includes the right not to announce that that person has a religion or lacks a religion. In *Abington School District v Schempp*, Brennan J of the United States Supreme Court said in obiter:

The more difficult question, however, is whether the availability of excusal for the dissenting child serves to refute challenges to these practices under the Free Exercise Clause... The answer is that the excusal procedure itself necessarily operates in such a way as to infringe the rights of free exercise of those children who wish to be excused... [T]he State could not constitutionally require a student to profess publicly his disbelief as the prerequisite to the exercise of his constitutional right of abstention.¹³⁴

¹²⁹ *Canadian Civil Liberties Association v Ontario (Minister for Education)* (1990) 65 DLR (4th) 1 at 20.

¹³⁰ See *Zylberberg v Sudbury Board of Education* (1988) 52 DLR (4th) 577 at 590.

¹³¹ Section 23 of the *Education Act* (NT) provides that *parents* may withdraw their children from religious instruction. There is no provision allowing a student to object.

¹³² (1988) 52 DLR (4th) 577.

¹³³ *Zylberberg v Sudbury Board of Education* (1988) 52 DLR (4th) 577 at 591.

¹³⁴ 347 US 203 at 288 (1963).

Even if the excusal procedure did not require any reasons to be given, the requirement to seek excusal would still involve an infringement of the dissenting child's religious freedom. This is because the law would be requiring the child to make a statement, even one without reasons, from which implications about his or her religious beliefs could be drawn as a pre-requisite to avoiding compulsory normative religious instruction. In effect, there would be only a slightly less definitive announcement of religious views.

Whilst Canadian and United States decisions are not determinative of questions arising under the Australian Constitution, there is no discernable reason why the decisions referred to above are not applicable to the issues under consideration. Nor is there a discernable reason why the High Court would not reach the same, or substantially similar, results. There does not appear to be any difference in constitutional structures making these foreign decisions unpersuasive. It is always necessary to read Canadian decisions with care, taking into consideration that the Canadian *Charter of Rights and Freedoms* under consideration bestows rights which is not the case with s 116. Instead, s 116 simply limits Commonwealth legislative competence. The Canadian decisions discussed above consider the meaning of the free exercise of religion, which is, analytically, the definitional prerequisite to determining the extent of rights bestowed by the Canadian *Charter* and the extent that Commonwealth legislative competence is limited by s 116. That the Canadian *Charter* involves rights does not therefore serve to make the Canadian cases considered above inapplicable to the present analysis.

Under s 73(2) of the Northern Territory *Education Act*, the Secretary is required to have religious instruction provided to students whose parents so request. Superficially, it may appear that sub-s (2) does not suffer from the same constitutional defects as sub-s (1), primarily because under sub-s (2) the religious instruction is provided at the request of a student's parents. However, this sub-section suffers from the same constitutional defects as sub-s (1). It still compels students to submit to normative religious instruction. As noted above, the exercise of religion in such a case is not free because there is compulsion. No person can be compelled to exercise a religion which is not their own, nor can any person be compelled to exercise their own religion. Such an exercise of religion is not free.

More interesting issues concerning the free exercise of religion arise when the central assumption underlying s 73 is articulated. The Northern Territory Legislature assumes in sub-s (2) that a child takes on the religion of their parents. However, it is not beyond comprehension to imagine that a child does not share the religious beliefs of his or her

parents. Such a child cannot be subjected to compulsory normative religious instruction in the religion of his or her parents by force of the Secretary's order made under the Northern Territory legislation. Whatever be the source of a parent's ability to 'bring up' their children in the parent's religion, no *law* can assist them in doing so if such a law violates s 116 of the Constitution. This is so even if the free exercise of a person's religion includes the ability to 'bring up' their children in that religion. The Supreme Court of Canada has held that the only limitation upon an individual's freedom of conscience or religion is that its manifestation must not injure others or interfere with their right to manifest their own beliefs and opinions.¹³⁵ The basis for this conclusion is simply that to hold otherwise would be to unevenly weaken the freedom bestowed. Therefore, the constitutionally protected free exercise of A's religion does not, and cannot, extend to infringing the constitutionally protected free exercise of B's religion or C's constitutionally protected freedom not to exercise a religion. That is so even if B or C is the child of A.

Within their field of operation, the terms of s 116 are 'clear and emphatic in their command'¹³⁶ and apply equally to children as they do to adults. This is not an issue of the rights of parents versus the rights of children. Section 116 speaks only to legislative competence. The terms of s 116 do not create any personal right to a free exercise of religion¹³⁷ such that a child could enforce against his or her parents and s 116 does not therefore prevent parents bringing up their children in a religion of the parents' choice. The point is that a law compelling a child to submit to religious instruction, even with the consent of the child's parents, is a law prohibiting the *free* exercise of religion and therefore void as offending s 116.

Religious tests

The final clause of s 116 of the Constitution provides that no religious test shall be required as a qualification for any office of public trust under the Commonwealth. The first thing which is apparent when compared with the first three clauses of s 116 is that it does not in terms prohibit *laws* for doing a thing. In the *DOGS case*, Stephen J held that this clause 'prohibits the imposition, whether by law or otherwise, of religious tests for the holding of Commonwealth office.'¹³⁸ This suggests that this clause is likely to have a broader operation than would be the case if the prohibition was against only laws imposing religious tests.

¹³⁵ *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 231 at 361; see also *Zylberberg v Sudbury Board of Education* (1988) 52 DLR (4th) 577 at 589.

¹³⁶ *DOGS case* (1981) 146 CLR 559 at 649.

¹³⁷ *Kruger* (1997) 190 CLR 1 at 124-5 (Gaudron J).

¹³⁸ *DOGS case* (1981) 146 CLR 559 at 605.

In *Crittenden v Anderson*¹³⁹ a challenge to the validity of the election of a Catholic to the House of Representatives was challenged on the ground that the candidate had acknowledged allegiance to a foreign power contrary to s 44(i) of the Constitution. The foreign power was the State of the Vatican City. Fullagar J held that effect could not be given to the challenge without imposing a religious test as a qualification contrary to s 116. There are no other cases dealing with this clause of s 116.

The *Test Act 1673* (Eng) obliged all persons filling any office, whether civil or military, inter alia to subscribe to a declaration against transubstantiation. Without expounding its content, transubstantiation is a central tenet of Catholic belief. Thus, to declare against it would be to forsake the Catholic religion. The test was designed to prevent Catholics from holding various offices as Catholicism holds the denial of transubstantiation to be a sin. The test was repealed by the *Roman Catholic Relief Act 1829* (Eng). The fourth clause of s 116 plainly protects against such tests and would render the *Test Act* invalid were it to be enacted by the Commonwealth Parliament. But there is no reason to believe that a test needs to be in the form of a test or of a kind such as provided in the *Test Act*. The better view may be that a religious test need not be in the form of a test. Rather the test, whether by law or otherwise including by practice, must have the *effect* of imposing a religious test. Form does not prevail over substance.

Whilst the parliamentary prayer imposed on Members and Senators under the Standing Orders extracted above would be more directly impugned by the observance clause, they may also create a religious test as a qualification for office. Suppose, for example, that a successful candidate elected to the Commonwealth Parliament is an atheist. Suppose further that that successful candidate conscientiously believes that it is repugnant to him to have to participate in prayers and refuses to do so. Does the fact that all Members and Senators who wish to be present in the chamber at the start of a parliamentary sitting are subjected to prayers amount to a religious test as a qualification on membership of the Commonwealth Parliament? The basis of the test being that those who conscientiously object to prayers and refuse to take part in them must choose to subject themselves to the parliamentary prayers or limit their attendance in the chamber.

That is, it could be said that the existence of the parliamentary prayers requires that those who wish to become members of Parliament must accept that they will be subjected to those prayers on their attendance in

¹³⁹ (Unreported, High Court of Australia sitting as the Court of Disputed Returns, Fullagar J, 23 August 1950) noted in (1977) 51 *Australian Law Journal* 171.

the chamber at the start of each sitting. Membership may thus be conditional upon either being subjected to the prayers or limiting attendance in the chamber because of the prayers. This condition to holding office amounts to a test and it is plainly a religious one. This is in fact rather similar in form to the test imposed under the *Test Act*. That Act did not explicitly prohibit Catholics from holding public office but set a requirement for holding public office that Catholics could not meet without denying their religious beliefs. Holding public office under the *Test Act* was conditional upon subjecting oneself to a practice that amounted to a denial of religious freedom. In the same way, being subjected to religious prayers on attendance in the chamber as a practical condition on membership of the Commonwealth Parliament amounts to a denial of religious freedom for an atheist. A similar analysis would apply to persons of non-Christian religions who may object to the Christian overtones of the parliamentary prayers.

Arguably, the Constitution anticipates this sort of freedom of and from religion in Parliament by providing in the Schedule both an Oath and an Affirmation as alternatives. The anticipation arises from the constitutional structuring of Parliament such that a Member of Parliament can take his or her seat without being subjected to religious practices.¹⁴⁰

Even if the parliamentary prayers do not amount to imposing a religious test on membership of the Commonwealth Parliament, they plainly impose such a test as a qualification for the offices of Speaker of the House of Representatives and President of the Senate. The Standing Orders make it a function of those offices to actually recite the prayers. The act of praying asserts that the individual praying believes that a divine Being exists which can hear the prayers. Holding the office of Speaker or President requires the office-holder to engage in a practice potentially repugnant to their conscientious religious beliefs as did the *Test Act*. The Standing Orders require the Speaker and the President to profess that they believe in a divine Being, whether they subjectively believe that or not. Given that profession of belief in a divine Being is a requirement of the offices, willingness to profess such a belief is a test for qualification for those offices. Necessarily, it is a religious test. This may also amount to a violation of the free exercise clause.

Clause 3 of the Sixth Amendment to the United States Constitution provides that ‘... no religious Test shall ever be required as a

¹⁴⁰ This was not always the case in the United Kingdom Parliament. In the 1880s Charles Bradlaugh, an atheist elected to the House of Commons, was repeatedly prevented from taking his seat, at times ejected from the House for refusing to take the Oath and fined for attempting to vote without subscribing to the Oath: see *Clarke v Bradlaugh* (1881) 7 QBD 38, *Bradlaugh v Gossett* (1884) 12 QBD 271, *Attorney-General v Bradlaugh* (1885) 14 QBD 667.

Qualification to any Office or public Trust under the United States.' It is almost identical in terms and plainly identical in meaning to the fourth clause of s 116 of the Australian Constitution. The United States Supreme Court has held that that clause makes it impossible to limit 'public offices to persons who have, or perhaps more properly, profess to have, a belief in some particular kind of religious concept.'¹⁴¹ Hence, a requirement to utter words that profess religious belief cannot be considered analogous to an actor reciting lines as if the words are without meaning. That analysis is directly in point in considering the effect of the parliamentary prayers. The parliamentary prayers limit the Speakership and Presidency, and perhaps also membership of the Parliament generally, to those who are willing to profess, whether honestly or falsely, belief in a divine Being. That amounts to a religious test as a qualification for public office under the Commonwealth. The Standing Orders in question are therefore probably invalid as contravening the fourth clause of s 116 of the Constitution.

Conclusion

This article has considered the constitutional validity of a number of laws relating to matters of public affairs in Australia as against s 116 of the Constitution effecting a form of 'separation of Church and State' in Australia.

The constitutional invalidity of the *Royal Style and Titles Act* is not a mere triviality relating only to the unimportant matter of royal pomp and circumstance but puts focus on the fact that at present, the law of Australia asserts the divine providence of both the Australian Head of State and a constituent element of Parliament. Moreover, contemporary parliamentary practice is permeated on a daily basis with invocations of 'God' and prayers that the Parliament should direct its work to the glory of that god. This contradicts the received wisdom that Australia's system of government is secular and religiously neutral.

It would no doubt come as a surprise to many Australians to learn that the law could compel a child to submit to religious indoctrination and criminalise conduct that scoffs at the tenets of a single protected religion. The fact that these issues as they relate to s 116 extend only to the territories and not the states, and have not been given their fullest possible effect by the relevant authorities, does not minimise their significance. They raise important questions as to the proper place of religion in the law, politics and public affairs of Australia, as does discussion of s 116 generally, and so are of much greater consequence than narrow legal analysis of statutory provisions.

¹⁴¹ *Torcaso v Watkins* 367 US 488 at 494 (1961).

This article has shown that s 116 of the Constitution is capable of having a broader effect than usually considered, despite the fact that it is considered weak in comparison to its American counterpart. The interpretation given to s 116 by the High Court does not limit the section to only a narrow range of operation. The analyses presented in this article have shown that the constitutional 'separation of Church and State' in Australia, which means only the legal effect of s 116, is far more complex and extensive than is usually perceived to be the case.