Parliamentary Prayers and Section 116 of the Australian Constitution

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Introduction

Late last year, the Speaker of the House of Representatives, Mr Harry Jenkins MP, called for debate on the continuation of parliamentary prayers as the practice questions freedom of religion in Australia.[1] Indeed, standing orders require the Speaker of the House of Representatives and the President of the Senate to read a prayer for the parliament and the Lord's Prayer at the beginning of each sitting of the Parliament of the Commonwealth of Australia:

> 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 Kingdome 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.[2]

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1 See M. Metherell, 'Lord, No: Leaders United Against Removal of Prayer', *Sydney Morning Herald*, 27 October 2008 http://www.smh.com.au/news/national/lord-no-leaders-united-against-removal-of prayer/ 2008/10/26/ 1224955854983.html; ABC Radio National, 'To The Advancement of Thy Glory', *Perspective*, 18 November 2008 http://www.abc.net.au/rn/perspective/stories/2008/2422035.htm; M. Cooper, 'New Calls to Ditch Parliamentary Prayer', *The Age* (Melbourne), 21 November 2008 http://www.theage.com.au/action/ printArticle?id=295195; S. Tudor and G. Villalta Puig, 'Why Prayers in Parliament Should Stop', La Trobe Opinions, 2008, http://www.latrobe.edu.au/news/ articles/2008/opinion/to-the-advancement-of-thy-glory-why-parliamentary-prayers-should-be-replaced. Note that, in the United Kingdom, the National Secular Society recently called on the House of Lords to scrap its equivalent prayers: http://www.secularism.org.uk/callfromnsstoscraphouseoflordspr.html.

2 House of Representatives Standing Order 38. The current version of the House of Representatives standing orders are available online at

However, under s 116 of the *Constitution*, the Commonwealth shall not make any law 'for imposing any religious observance'. This article examines the constitutionality of parliamentary prayers.

Section 116 and the express right to freedom of religion

Michael Hogan writes:

> The constitutional standing of the relationship between church and state in Australia is a unique mixture of elements derived from a British Constitution and tradition of law, from a superimposed American principle of separation, and from the evolving pattern of Australian federalism and judicial interpretation.[3]

Text of Section 116

The text of the preamble to and s 116 of the *Constitution* combine the unique mixture of elements that Hogan refers to. The preamble to the *Constitution* reads like a 'constitutional obeisance to God'.[4] It states:

> WHEREAS the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, *humbly relying on the blessing of Almighty God*, have agreed to unite in one indissoluble Federal Commonwealth.[5]

Yet, s 116 of the *Constitution* is akin to a constitutional guarantee of freedom of religion. It states:

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

Thus, s 116 of the *Constitution* comprises four clauses. First, '[t]he Commonwealth shall not make any law for establishing any religion'. Secondly,

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http://www.aph.gov.au/house/pubs/standos/index.htm. In the Senate, the first prayer is in different and longer terms: 'Almighty God, we humbly beseech Thee to vouchsafe Thy special blessing upon this Parliament, and that Thou wouldst be pleased to direct and prosper the work of Thy servants to the advancement of Thy glory, and to the true welfare of the people of Australia.' See Senate Standing Order 50. The current version of the Senate standing orders are available online at http://www.aph.gov.au/Senate/pubs/standing_orders/index.htm.

3 M. Hogan, 'Separation of Church and State: Section 116 of the Australian Constitution', *Australian Quarterly*, vol. 53, no. 2, 1981, p. 214.

4 T. Blackshield, 'Religion and Australian Constitutional Law' in P. Radan, D. Meyerson and R.F. Croucher (eds), *Law and Religion: God, the State and the Common Law*. London, Routledge, 2005, p. 82.

5 Emphasis added.

the Commonwealth shall not make any law 'for imposing any religious observance'. Thirdly, the Commonwealth shall not make any law 'for prohibiting the free exercise of any religion'. Fourthly, 'no religious test shall be required as a qualification for any office or public trust under the Commonwealth.'

Formation of Section 116

The unique mixture of elements that the preamble and s 116 combine was the subject of debate over the course of the final session of the National Australasian Convention held at Melbourne in March 1898.[6] Patrick Glynn of South Australia moved to insert the words 'humbly relying on the blessing of Almighty God' in the preamble as it 'would recommend the *Constitution* to thousands to whom the rest of its provisions may for ever be a sealed book'.[7]

Henry Higgins of Victoria opposed the motion.[8] He thought that the reference to 'Almighty God' in the preamble could imply a power in the Commonwealth Parliament to make laws with respect to religion.[9] Thus, he moved to insert the four separate guarantees in s 116 as 'proper safeguards'.[10] The first three guarantees were a derivation of the First Amendment to, and Art VI, cl 3 of, the United States *Constitution*.[11] The fourth guarantee was an original formulation.[12]

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6 Blackshield, 2005, op. cit., p. 81. See also R.G. Ely, *Unto God and Caesar: Religious Issues in the Emerging Commonwealth 1891–1906*. Clayton, Vic., Melbourne University Press, 1976, esp Ch 11; C.L. Pannam, 'Travelling Section 116 With a US Road Map' (1963) 4 MULR 41 at 51–56; S. McLeish, 'Making Sense of Religion and the Constitution: A Fresh Start for Section 116' (1992) 18 Mon LR 207 at 217–221; J. Puls, 'The Wall of Separation: Section 116, The First Amendment and Constitutional Religious Guarantees' (1998) 26 Fed LR 139 at 140–141. See generally F.D. Cumbrae-Stewart, 'Section 116 of the Constitution' (1946) 20 ALJ 207.

7 *Official Record of the Debates of the Australasian Federal Convention*, Third Session, Melbourne, 20 January to 17 March 1898, vol. v, p. 1732 (The Debates of the Federal Conventions are available online at http://www.aph.gov.au/senate/pubs/records.htm.); see also McLeish, op. cit., p. 220.

8 Blackshield, 2005, op. cit., pp. 81–2.

9 Ibid, pp. 82–4. See also Puls, 2005, op. cit., p. 140; McLeish, 2005, op. cit., at 220; Pannam, 2005, op. cit., at 53–5.

10 Ely, 2005, op. cit., pp. 58–9. See also McLeish, 2005, at 219–20.

11 See generally Pannam, 2005, op. cit., at 41; J.T. Richardson, 'Minority Religions ("Cults") and the Law: Comparisons of the United States, Europe and Australia' (1995) 18 UQLJ 183; Puls, op. cit., p. 139. In the United States of America the decision in *Marsh v Chambers* 463 US 783 (1983) upheld the constitutionality of (non-sectarian) legislative prayer. See also *Hinrichs v Bosma* 440 F 3d 393 (7th Cir, 2006). For some recent commentary see: R.J. Delahunty, ' "Varied Carols": Legislative Prayer in a Pluralist Polity' (2007) 40 Cre LR 517; R. Luther III, and D.B. Caddell, 'Breaking Away from the "Prayer Police": Why the First Amendment Permits Sectarian Legislative Prayer and Demands a "Practice Focused" Analysis' (2008) 48 Santa Clara L Rev 569; A. Abrell, 'Just a Little Talk with Jesus: Reaching the Limits of the Legislative Prayer Exception' (2007) 42 Val UL Rev 145. While consideration of the US case law is beyond the scope of this article, the fact is that the application in Australia of the relevant US constitutional principles is limited. The religion clauses in the US *Constitution*'s First Amendment are, at once, both textually narrower than s 116 (there is no prohibition on 'imposing any religious observance') and jurisprudentially broader than s 116, since they have given rise to a distinct and much more rigorous separation of state and religion than is true in Australia.

12 Blackshield, 2005, op. cit., p. 85.

Interpretation of Section 116

The High Court has interpreted only two of the four guarantees in s 116, namely, the 'free exercise' clause and the 'establishment' clause.

The High Court has interpreted the 'free exercise' clause narrowly.[13] Therefore, the High Court seeks to assess whether the Commonwealth law under challenge unduly infringes the right to the free exercise of religion. As part of that assessment, the High Court may take the general interest into account. In that regard, the High Court considers that a Commonwealth law of general application cannot infringe the right to the free exercise of religion.[14] The rationale is that a law requiring an act or omission that has nothing at all to do with religion is not tantamount to a law prohibiting the free exercise of religion. Correspondingly, the High Court considers that the right to the free exercise of religion is not absolute because religion is so broad a political and ethical concept that it is liable to be misinterpreted to include objectionable, if not otherwise illegal, rituals and practices.

The High Court has developed this line of argument over the four cases that, to date, it has decided on the 'free exercise' clause. In *Krygger v Williams* (1912) 15 CLR 366 at 369, Griffith CJ held:

> Sec 116 of the *Constitution* provides that 'the Commonwealth shall not make any law for … prohibiting the free exercise of any religion'—that is, prohibiting the practice of religion—the doing of acts which are done in the practise of religion. 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. It may be that a law requiring a man to do an act which his religion forbids would be objectionable on moral grounds, but it does not come within the prohibition of sec 116.[15]

Since its decision in *Krygger v Williams*, the High Court has continued to interpret the 'free exercise' clause narrowly. In *Adelaide Co of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116 at 132 (*Jehovah's Witnesses Case*), Latham CJ held that it is 'possible to reconcile religious freedom with ordered government':

> Can any person, by describing (and honestly describing) his beliefs and practices as religious exempt himself from obedience to the law?

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13 T. Blackshield and G. Williams, *Australian Constitutional Law and Theory: Commentary and Materials*. 4th ed., Annandale, NSW, Federation Press, 2006, p. 1207.

14 See generally R. Mortensen, 'Blasphemy in a Secular State: A Pardonable Sin?' (1994) 17 UNSWLJ 409 at 422.

15 Curiously, in *Judd v McKeon* (1926) 38 CLR 380, Higgins J questioned the rationale in *Krygger v Williams* (1912) 15 CLR 366. In the decision, which concerned compulsory voting, his Honour suggested that a religious duty not to vote would be 'a valid and sufficient reason' for refusal to do so under s 116. See Blackshield, 2005, op. cit., p. 87.

> Does s 116 protect any religious belief or any religious practice, irrespective of the political or social effect of that belief or practice?
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> It has already been shown that beliefs entertained by a religious body as religious beliefs may be inconsistent with the maintenance of civil government. The complete protection of all religious beliefs might result in the disappearance of organized society, because some religious beliefs, as already indicated, regard the existence of organized society as essentially evil …
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> The word 'free' is used in many senses, and the meaning of the word varies almost indefinitely with the context. A man is said to be free when he is not a slave, but he is also said to be free when he is not imprisoned, and is not subject to any other form of physical restraint. In another sense a man is only truly free when he has freedom of thought and expression, as well as of physical movement. But in all these cases an obligation to obey the laws which apply generally to the community is not regarded as inconsistent with freedom …
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> [I]n 1900 it had been thoroughly established in the United States that the provision preventing the making of any law prohibiting the free exercise of religion was not understood to mean that the criminal law dealing with the conduct of citizens generally was to be subject to exceptions in favour of persons who believed and practised a religion which was inconsistent with the provisions of the law. The result of this approach to the problem has been the development of the principle which has been applied in the later cases … according to which it is left to the court to determine whether the freedom of religion has been *unduly* infringed by some particular legislative provision. This view makes it possible to accord a real measure of practical protection to religion without involving the community in anarchy.
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> There is, therefore, full legal justification for adopting in Australia an interpretation of s 116 which had, before the enactment of the Commonwealth *Constitution*, already been given to similar words in the United States. This interpretation leaves it to the court to determine whether a particular law is an undue infringement of religious freedom.[16]

The case of *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* (1983) 154 CLR 120 (*Scientology Case*) did not concern s 116 but, nonetheless, the judgment by Mason ACJ and Brennan J is relevant to the interpretation of the section. Their Honours held:

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16 *Adelaide Co of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116 at 126–127, 130–131 (*Jehovah's Witnesses Case*).

> the area of legal immunity marked out by the concept of religion cannot extend to all conduct in which a person may engage in giving effect to his faith in the supernatural. The freedom to act in accordance with one's religious beliefs is not as inviolate as the freedom to believe, for general laws to preserve and protect society are not defeated by a plea of religious obligation to breach them … Religious conviction is not a solvent of legal obligation …
>
> Conduct in which a person engages in giving effect to his faith in the supernatural is religious, but it is excluded from the area of legal immunity marked out by the concept of religion if it offends against the ordinary laws, ie if it offends against laws which do not discriminate against religion generally or against particular religions or against conduct of a kind which is characteristic only of a religion.[17]

More recently, in *Kruger v Commonwealth* (1997) 190 CLR 1 at 40 (*Stolen Generations Case*), Brennan CJ held that '[t]o attract invalidity under s 116, a law must have the purpose of achieving an object which s 116 forbids'.[18] Gaudron J added:

> a law will not be a law for 'prohibiting the free exercise of any religion', notwithstanding that, in terms, it does just that or that it operates directly with that consequence, if it is necessary to attain some overriding public purpose or to satisfy some pressing social need. Nor will it have that purpose if it is a law for some specific purpose unconnected with the free exercise of religion and only incidentally affects that freedom.[19]

The High Court has interpreted the 'establishment' clause narrowly too. Thus, to the High Court, s 116 only prohibits the Commonwealth from making laws that set up any religion as the official religion of the State.[20] However, Commonwealth laws may still favour one religion over another.

In *Attorney-General (Vic); Ex rel Black v Commonwealth* (1981) 146 CLR 559 (*DOGS Case*), the only significant High Court decision to interpret the 'establishment' clause, Barwick CJ held that:

> establishing a religion involves the entrenchment of a religion as a feature of and identified with the body politic … It involves the identification of the religion with the civil authority so as to involve the citizen in a duty to maintain it and the obligation of …

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17 *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* (1983) 154 CLR 120 at 135–136 (Mason ACJ and Brennan J) (*Scientology Case*).

18 See generally N. Watson, 'A Denial of Religious Freedoms: Section 190C(3) of the Native Title Act' (2001) 5(7) ILB 4.

19 *Kruger v Commonwealth* (1997) 190 CLR 1 at 133–134 (Gaudron J) (*Stolen Generations Case*).

20 See generally Mortensen, op. cit., p. 421.

> the Commonwealth to patronize, protect and promote the established religion. In other words, establishing a religion involves its adoption as an institution of the Commonwealth, part of the Commonwealth 'establishment'.[21]

In similarly narrow terms, Mason J added:

> the first clause in the section forbids the establishment or recognition of a religion (and by this term I would include a branch of a religion or church) as a national institution … [T]o constitute 'establishment' of a 'religion' the concession to one church of favours, titles and advantages must be of so special a kind that it enables us to say that by virtue of the concession the religion has become established as a national institution, as, for example, by becoming the official religion of the State.[22]

Much of the jurisprudence on s 116 relates to the 'free exercise' and 'establishment' clauses and so there is little, if any, judicial commentary on the other two clauses of the section.[23] The High Court has not interpreted the 'religious test' clause except to reject, in an unreported decision, a challenge under s 44(i) to the election of a Roman Catholic to the House of Representatives in 1949 on the grounds that he was under acknowledgment 'of allegiance, obedience, or adherence to a foreign power', presumably, the Holy See. In *Crittenden v Anderson* (1950) 51 ALJ 171,[24] Fullagar J held that the challenge was tantamount to the requirement of a religious test as a qualification for public office and, therefore, contrary to s 116. To date, the High Court has not authoritatively interpreted the 'religious observance' clause.

In summary, the High Court has interpreted s 116 narrowly because it has read it as a regulator of Commonwealth legislative power rather than as a guarantee of an individual civil right.[25] The High Court has found further justification for its

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21 *Attorney-General (Vic); Ex rel Black v Commonwealth* (1981) 146 CLR 559 at 582 (Barwick CJ) (*DOGS Case*).

22 *Attorney-General (Vic); Ex rel Black v Commonwealth* (1981) 146 CLR 559 at 612 (Mason J) (*DOGS Case*).

23 Hogan, op. cit., p. 219. Murphy J, in sole dissent, briefly discussed the application of s 116 to oath-taking requirements in *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211 at 229ff. His Honour held that the *Royal Commissions Act 1902* (Cth) infringed s 116 insofar as it required that a witness before a Royal Commission take an oath or, if he or she conscientiously objected, make an affirmation. He observed (at 229) that '[t]he mandate against laws imposing any religious observance protects believers as well as non-believers; it may be a more serious interference with the freedom of religion to impose a religious observance on believers than on non-believers.' The other judges did not address this issue.

24 See generally G. Carney, 'Foreign Allegiance: A Vexed Ground of Parliamentary Disqualification' (1999) 11 Bond LR 245.

25 In the *DOGS Case* (1981) 146 CLR 559 at 614–615, Mason J stated: 'Although in some circumstances it is permissible to construe a grant of legislative power so as to apply it to things and events coming into existence and unforeseen at the time of the making of the *Constitution*, so that the operation of the relevant grant of power in the *Constitution* enlarges or expands, a constitutional prohibition must be applied in accordance with the meaning which it had in 1900. As a prohibition is a restriction on the exercise of power there is no

narrow approach in the limited jurisdiction of s 116, which does not apply to the States even though it is in Ch V (The States) of the *Constitution*,[26] and in the text of the section, which by the preposition 'for' directs the High Court to assess the purpose as opposed to the effect of the law under challenge.

The Constitutionality of Parliamentary Prayers under Section 116

Indeed, the text of s 116 in conjunction with its narrow interpretation by the High Court would make a hypothetical claim of unconstitutionality against parliamentary prayers untenable, for four reasons.

First, s 116 is directed to the 'Commonwealth'. The High Court could interpret the word 'Commonwealth' in s 116 as a reference to any institution of the Commonwealth and, therefore, include not only the legislature but also the Executive and the judiciary. On that interpretation, the High Court could hold that the Commonwealth, under s 116, includes either House of Parliament, namely, the Senate and the House of Representatives.

However, the High Court would be unlikely to adopt such a wide interpretation of the word 'Commonwealth'. The academic consensus is that s 116 does not apply to either the Executive or the judiciary. In relation to the Executive, Hogan writes:

> executive acts of the Commonwealth government are not restricted by this section. It is quite easy to imagine … a determined government avoiding the restraints of s 116 by its powers of appointment and by ministerial advice to government agencies.[27]

In relation to the judiciary, James Richardson writes:

> In one clear demonstration of the weakness of s 116, apparently the provisions were not even thought of as binding on judicial orders. In 1982 a case involving a custody dispute resulted in a High Court statement that s 116 did not bind the Court.[28]

Given the exclusion of the Executive and judicial arms of government from the jurisdiction of s 116, it would be unlikely that the High Court would extend the operation of the section to the department of any individual House of Parliament even if, collectively, the two Houses articulate the legislative arm of the

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reason for enlarging its scope of operation beyond the mischief to which it was directed ascertained in accordance with the meaning of the prohibition at the time when the *Constitution* was enacted.' See also McLeish, 1972, op. cit., pp. 208, 211; S. McLeish, 'Church and State' in T. Blackshield, M. Coper and G. Williams (eds), *The Oxford Companion to the High Court of Australia.* South Melbourne, Vic., Oxford University Press, 2001, pp. 93, 95.

26 There is uncertainty as to whether s 116 applies to the Territories: *Stolen Generations Case* (1997) 190 CLR 1. See generally H.T. Gibbs, 'Section 116 of the Constitution and the Territories of the Commonwealth' (1947) 20 ALJ 375; C.L. Pannam, 'Section 116 and the Federal Territories' (1961) 35 ALJ 209.

27 Hogan, op. cit., p. 222.

28 Richardson, op. cit., p. 198.

Commonwealth Government. It seems then that the High Court would not read the word 'Commonwealth' in s 116 as a reference to the Houses of Parliament in any capacity other than as makers of law.

Secondly and correspondingly, given that s 116 is directed to 'law', it follows that the High Court would be unlikely to accept that the word includes standing orders made under s 50 such as those that require the reading of parliamentary prayers. On a narrow interpretation, the likelihood would be even lower than stated as the High Court would hold that the word can only ever refer to statutes made by Parliament to the exclusion of any other instrument of law such as standing orders.

On a wide interpretation, the principle of administrative law that delegated legislation is valid only to the extent to which it is authorised by the empowering law[29] could be influential enough for the High Court to hold that the powers under s 50 are powers that the *Constitution* itself delegates to the Houses of Parliament. On that interpretation, the High Court could confer on standing orders a status higher than that of delegated legislation perhaps even equivalent to that of legislation under s 51. However, notwithstanding any theoretical merit of that interpretation, in practice, the High Court could never reconcile the word 'laws' in s 116 with what are, ultimately, rules and orders with respect to the order and conduct of parliamentary business and proceedings subject only to parliamentary privilege.[30]

Thirdly, even if the import of the words 'Commonwealth' and 'laws' in the text of s 116 were not an obstacle, only two of the four clauses of s 116 could potentially ground a hypothetical claim of unconstitutionality against parliamentary prayers. The 'establishment' clause is only concerned with Commonwealth laws that set up any religion as the official religion of the State. Standing Orders 38 and 50 do not do so. They do prescribe Christian prayers but even that favouritism would be constitutional.[31] The 'religious test' clause is simply not relevant: parliamentary prayers are not intended as religious tests.

The two other clauses of s 116 could, with some difficulty, ground a hypothetical claim of unconstitutionality against parliamentary prayers. The 'free exercise' clause relates to Commonwealth laws that unduly infringe the right to the free exercise of religion. Arguably, the prescription of Christian prayers could have an effect tantamount to an insult to members of Parliament who follow other

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29 *Minister for Primary Industries and Energy v Austral Fisheries Pty Ltd* (1993) 40 FCR 381 at 381 (Lockhart J). See generally R. Douglas and M. Jones, *Douglas and Jones' Administrative Law*. 5th ed, Annandale, NSW, Federation Press, 2006.

30 Contra *Jehovah's Witnesses Case* (1943) 67 CLR 116 at 123 (Latham CJ) but see below. This particular line of argument was briefly but directly addressed in the Senate debate of 14 June 1901 on the motion to adopt the standing order containing the prayer. As Ely recounts the debate (Ely, op. cit., pp. 123–4), Senator Gregor McGregor (Labor Senate leader) argued that s 116 would preclude parliamentary prayers. 'What did the framers of the *Constitution* mean?' he asked. 'Did they mean that Parliament was not to impose religious observances anywhere else but here?' In reply, Senator Sir Frederick Sargood stated that '[a] standing order is not a law', so s 116 did not apply.

31 Section 116 does not prohibit the Commonwealth from favouring one religion over another through, eg school funding: *DOGS Case* (1981) 146 CLR 559.

religious traditions or who are agnostic or otherwise atheist. However, the High Court has interpreted the clause so narrowly that the lack of a purpose on the face of Standing Orders 38 and 50 with the express intent to infringe the right to the free exercise of religion would prompt the High Court to dismiss a claim of unconstitutionality. The High Court would not consider their effect.[32]

The 'religious observance' clause would be the most appropriate basis for a hypothetical claim of unconstitutionality against parliamentary prayers. The difficulty is that the High Court has never interpreted the clause. Accordingly, the High Court would tend to follow the narrow approach that it has taken to the interpretation of the three other clauses of s 116. In the absence of any precedent, the extent of judicial narrowness is uncertain. In one extreme, the High Court could refer to the Convention Debates and, in deference to the intention of the framers, hold that the clause only forbids the Commonwealth from making Sunday observance laws. In another extreme, the High Court could hold that the prescription of Christian prayers goes against the contemporary and socially acceptable sense of the clause and that, therefore, Standing Orders 38 and 50 are unconstitutional. However narrow an approach it takes, the High Court would still dismiss the claim if, as is likely, it does not accept standing orders as 'laws' and either individual House of Parliament as 'Commonwealth' for the purposes of s 116.

Fourthly and finally, irrespective of the text of s 116 and its narrow interpretation by the High Court, the convention is that, under s 49, the Commonwealth Parliament orders and conducts its business and proceedings in accordance with Westminster practice and is very much left to administer and manage itself subject only to parliamentary privilege and s 50. Accordingly, the High Court has refused to limit the unlimited discretion of either House of Parliament to order and conduct its business and proceedings under ss 49 and 50 of the *Constitution*. This was the sentiment of the Privy Council in *Harnett v Crick* [1908] AC 470 when his Majesty in Council resolved that '*no Court of law can question the validity of a standing order* duly passed and approved, which, in the opinion of the House, was required by the exigency of the occasion'.[33] Three years later,

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32 See generally *DOGS Case* (1981) 146 CLR 559; *Stolen Generations Case* (1997) 190 CLR 1. In the *Stolen Generations Case*, Gaudron J stated (at 132): 'The use of the word "for" indicates that purpose is the criterion and the sole criterion selected by s 116 for invalidity.' See also Blackshield, 2005, op. cit., p. 85. Compare this interpretation to the situation in Canada, with its *Canadian Charter of Rights and Freedoms*. There the test for constitutionality (under *R v Big M Drug Mart Ltd* [1985] 1 SCR 295) requires the court first to consider the purpose of the legislation in question and then, if the purpose appears to be constitutional, to consider its effect. The Court of Appeal for Ontario applied this test in *Freitag v Penetanguishene Town* (1999) 179 DLR (4th) 150; 47 OR (3d) 301. Mr Freitag, a non-Christian, regularly attended his local town council meetings but objected to the practice of commencing the meetings with the Lord's Prayer. The Court of Appeal applied the *Big M Drug Mart* test to the town council meeting procedure (as 'governmental conduct' within the scope of the *Canadian Charter of Rights and Freedoms*), and found that, in both its purpose and effect, the practice of the prayer did infringe Mr Freitag's right to freedom of religion under the *Canadian Charter of Rights and Freedoms*. Such a result would not be possible in Australia under current s 116 jurisprudence, even if s 116 applied to town council meeting procedure.

33 *Harnett v Crick* [1908] AC 470 at 476 (emphasis added).

Griffith CJ in *Osborne v Commonwealth* (1911) 12 CLR 321 agreed. Writing about the Houses of Parliament, his Honour stated that the 'conduct of their internal affairs is not subject to review by a court of law'.[34] In that same case, O'Connor J said '[t]his Court … can … in [no] way interfere in questions of parliamentary procedure.'[35] Standing Orders 38 and 50 would be no exception.

Section 116 and the implied right to freedom of thought and conscience

Parliamentary prayers may well be constitutional but they should not be. In fact, the Commonwealth, as a democratic polity, should not sponsor any religion. Any such sponsorship offends against the accustomed community rights of a majority of Australians who believe that the *Constitution* protects the right to freedom of thought and conscience just like it protects other civil and political freedoms.[36] It is not a mistaken belief. As Tony Blackshield and George Williams note:

> the *Constitution* contains, by implication, a commitment to certain fundamental freedoms or democratic values operating as judicially enforceable limits on the legislative powers of the Commonwealth, and perhaps on those of the States as well.[37]

It is then up to the High Court to give judicial expression to that belief and imply a right to freedom of thought and conscience in s 116.[38] Thus, the High Court should no longer interpret s 116 as a regulator of Commonwealth legislative power but as a guarantee of an individual civil right.[39] The rationale is fourfold.

First, the implication of a constitutional right would not be without precedent. The High Court has, in recent times, moved towards a rights-based interpretation of the *Constitution*.[40] The freedom of political communication in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 (*Free Speech Case*) is but only one example.[41] There are others. Joshua Puls reports that '[b]etween 1990 and 1993 the High Court handed down twelve decisions all of which had some form of rights considerations'.[42]

Secondly, there is already enough High Court commentary on s 116 to ground an implied right to freedom of thought and conscience. As early as 1943, Latham CJ in the *Jehovah's Witnesses Case* stated:

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34 *Osborne v Commonwealth* (1911) 12 CLR 321 at 336 (Griffith CJ). See generally G. Carney, 'Intervention in Parliamentary Process' in Blackshield et al, 2001, op. cit., pp. 523–5.

35 *Osborne v Commonwealth* (1911) 12 CLR 321 at 355 (O'Connor J).

36 Hogan, op. cit., p. 227.

37 Blackshield and Williams, 2006, op. cit., p. 1291.

38 Puls, op. cit., p. 162.

39 McLeish, op. cit., p. 210.

40 Puls, op. cit., p. 161.

41 See also *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (*Political Advertising Case*).

42 Puls, op. cit., p. 161.

> The prohibition in s 116 operates not only to protect the freedom of religion, but also to protect the right of a man to have no religion … Section 116 proclaims not only the principle of toleration of all religions, but also the principle of toleration of absence of religion.[43]

More recently, in the *Scientology Case*, Mason ACJ and Brennan J asserted, '[f]reedom of religion, the paradigm freedom of conscience, is of the essence of a free society'.[44] The case considered exemptions from pay-roll tax and, therefore, was not on s 116. Nonetheless, the assertion by their Honours is relevant to the argument for an implied right to freedom of thought and conscience.

Interestingly, there is also judicial commentary to the effect that s 116 is an overriding provision applicable to all instruments of law. In the *Jehovah's Witnesses Case*, Latham CJ declared:

> *Section 116 is a general prohibition applying to all laws, under whatever power those laws may be made.* It is an overriding provision. It does not compete with other provisions of the *Constitution* so that the Court should seek to reconcile it with other provisions. It prevails over and limits all provisions which give power to make laws. Accordingly no law can escape the application of s 116 simply because it is a law which can be justified under ss 51 or 52, or under some other legislative power. All the legislative powers of the Commonwealth are subject to the condition which s 116 imposes.[45]

Such a statement may suffice to persuade the High Court to extend a possible implied right to freedom of thought and conscience to all Commonwealth instrumentalities, including standing orders.

Thirdly, the Convention Debates reveal that State neutrality towards religion (which involves, arguably, the 'establishment' rather than the 'free exercise' clause) was the intention. Before *Cole v Whitfield* (1988) 165 CLR 360, the High Court had seldom sponsored the use of primary sources, like the Convention Debates, as an interpretative aid. Since that decision, the High Court can refer to the Convention Debates in an attempt to discover the ambitions that the founders of the Commonwealth had for the *Constitution*:

> Reference to the history of [the section] may be made, not for the purpose of substituting for the meaning of the words used the scope and effect–if such could be established–which the founding fathers subjectively intended the section to

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

44 *Scientology Case* (1983) 154 CLR 120 at 130 (Mason ACJ and Brennan J).

45 *Jehovah's Witnesses Case* (1943) 67 CLR 116 at 123 (Latham CJ) (emphasis added). See also Puls, op. cit., p. 142.

> have, but for the purpose of identifying the contemporary meaning of language used, the subject to which the language was directed and the nature and objectives of the movement towards federation from which the compact of the *Constitution* finally emerged.[46]

The Convention Debates reveal that the delegates inserted s 116 'to restore the equilibrium upset' by the reference to Almighty God in the preamble. Stephen McLeish agrees that 'the delegates were seeking a balance in matters of religion across the community, in keeping with the historical desire to avoid sectarian disputes in public life.' He concludes:

> underlying s 116 there exists a general conception of state neutrality toward religion, reflected both in the avoidance of religious preferences and in respect for the autonomy of individuals in matters of religion, especially as participants in the wider community.[47]

Fourthly, the Convention Debates also reveal that the use of the preposition 'for' in the text of s 116, which has been the justification of the High Court for its narrow interpretation of the section, 'was done only for the sake of clear grammatical structure'. The original formulation that Higgins had proposed only relied on the preposition once and only with respect to the 'establishment' clause. However, the drafting committee repeated the preposition in the three other clauses.[48]

As a result, it is the practice of the High Court to assess the purpose rather than the effect of a law in apparent contravention of s 116.[49] The equivalent if not identical provision in the United States *Constitution* has a wider scope than s 116 only because the wording of it uses no such preposition.[50]

The High Court should, therefore, correct the editorial mistake that the drafting committee introduced into the text of s 116, and it should correct it through an implied right to freedom of thought and conscience concerned not so much with the purpose but with the effect of the law under challenge. That is, in any event, the approach that the High Court follows in its rights-based jurisprudence such as in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (*Political Advertising Case*). That approach is one 'which sees the application of constitutional rights as more a matter of weighing or balancing of competing

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46 *Cole v Whitfield* (1988) 165 CLR 360 at 385. See, generally, G. Villalta Puig, *The High Court of Australia and Section 92 of the Australian Constitution.* Sydney, Lawbook Co, 2008.

47 McLeish, op. cit., p. 223.

48 Blackshield, 2005, op. cit., p. 85.

49 See generally *DOGS Case* (1981) 146 CLR 559; *Stolen Generations Case* (1997) 190 CLR 1.

50 Blackshield, 2005, op. cit., p. 85; Puls, op. cit., p. 143; McLeish, op. cit., p. 93. In *DOGS Case* (1981) 146 CLR 559 at 579, Barwick CJ remarked: 'The divergence in language to which I have earlier referred is apparent from the use of the word "respecting" in the American text and the word "for" in s 116. What the former may fairly embrace, quite clearly the latter cannot: and that is so, in my opinion, even without placing critical significance on the purposive nature of the Australian expression and the lack of such an element in the American text.'

interests and less a process of finding the 'true nature' of the law under challenge'.[51] Section 116 might allow parliamentary prayers but an implied right to freedom of thought and conscience (perhaps) would not.[52]

Conclusion

In conclusion, the right to freedom of religion under s 116 does not apply to the standing orders that require the Speaker and President to read prayers on taking the chair. Parliamentary prayers may well be constitutional but they should not be. The Commonwealth, as a democratic polity, should not sponsor any religion. Any such sponsorship offends against the accustomed community rights of a majority of Australians who believe that the *Constitution* protects the right to freedom of thought and conscience just like it protects other civil and political freedoms.

This article, therefore, calls on the High Court to give judicial expression to that belief and imply a right to freedom of thought and conscience in s 116. The High Court should no longer interpret s 116 as a regulator of Commonwealth legislative power but as a guarantee of an individual civil right concerned not so much with the purpose but with the effect of the law under challenge.

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51 A. Glass, 'Freedom of Speech and the Constitution: Australian Capital Television and the Application of Constitutional Rights' (1995) 17 Syd LR 29 at 32. See also Puls, op. cit., p. 162.

52 Note that an action under s 116 would only proceed if the plaintiff could establish his or her standing and the justiciability of the action. First, standing in this kind of actions may be difficult to establish for two reasons. One, the defendant may argue that the standing orders do not affect the plaintiff's rights and do not alter his or her ability to do anything. Two, only a member of Parliament or a senator would have standing to sue. Secondly, the court may decide that the question of parliamentary prayers is not justiciable on grounds of judicial deference to parliamentary practice irrespective of the standing of the plaintiff.