

THE CONSTITUTIONAL PROHIBITION ON RELIGIOUS TESTS

LUKE BECK*

[Section 116 of the Australian Constitution sets out four important guarantees of religious freedom. The fourth clause of that section provides that ‘no religious test shall be required as a qualification for any office or public trust under the Commonwealth’. During the Convention Debates, the religious tests clause was described as being the least necessary clause of s 116 on the basis, first, that there were no remaining religious tests in the Australian colonies and, second, that it was outlandish to think that the Commonwealth would ever impose one. This article seeks to explore the meaning of the religious tests clause and refute those two suggestions. It seeks to show that at the time of Federation religious tests remained in the Australian colonies. It also seeks to show that the Commonwealth today, albeit unconstitutionally, requires the satisfaction of religious tests for certain public positions.]

CONTENTS

I	Introduction	323
II	History	324
	A English History	324
	B American History	328
	C Australian History	332
III	What Is a Religious Test?	337
IV	The Nature of the Prohibition	342
V	What Is an Office and What Is a Public Trust?	347
VI	When Is an Office or Public Trust under the Commonwealth?	349
VII	Conclusion	352

I INTRODUCTION

On 2 March 1898, Edmund Barton told delegates to the Constitutional Convention at Melbourne that in the Australian colonies ‘we have wiped out every religious test’¹ and that ‘it is not possible’ that a religious test for a position of public trust would ever be required by the Commonwealth for which the Convention was drafting a constitution.² On both counts, the man who would become Australia’s first Prime Minister and one of the first judges of the High Court of Australia was wrong. Not every religious test had been wiped out and the Commonwealth would in fact go on to require religious tests for public offices and positions of public trust. It still does.

* BJuris, LLB (Hons) (UNSW), LLM (Syd), PhD Candidate and Associate, Constitutional Reform Unit, Sydney Law School, The University of Sydney.

¹ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 2 March 1898, 1771 (Edmund Barton).

² *Ibid* 1772.

Barton made his bold claims in the context of arguing against the need for the provision that became s 116 of the *Constitution*. The final clause of that provision, which may be conveniently called the religious tests clause, provides: 'and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.' The provision echoes a similarly worded clause in the *United States Constitution*³ and was directed at a mischief that had a long and disreputable history.

This article seeks to demonstrate why it is that Barton was wrong and, in the process, explore the meaning of the religious tests clause. It begins by noting the history of religious tests and considers how it is that constitutional prohibitions against them came about in the United States and Australia. It then provides a close analysis of each part of the religious tests clause in the *Australian Constitution* using two contemporary examples: the appointment of military chaplains and the requirement that the Speaker of the House of Representatives and the President of the Senate participate in religious practices. The analysis will show that the constitutional prohibition has been violated.

II HISTORY

In the first judicial consideration of the religious tests clause, Fullagar J said that the provision 'was, of course, not enacted by men ignorant or unmindful of history'.⁴ Understanding that history is essential to understanding the constitutional prohibition. The relevant history spans three continents and many centuries. As Fullagar J noted, that history includes the history of religious tests directed primarily against Catholics in England.⁵ But, it also includes the American history of religious tests and the insertion into that country's *Constitution* of a provision almost identical to the prohibition on religious tests in s 116. There is also an Australian history of religious tests for positions of public trust and that history clearly shows that Barton's claim that all religious tests in Australia had been 'wiped out' by the time of Federation was wrong. What follows is a brief overview of those three histories. The discussion of Australian history focuses on New South Wales for reasons of space.

A English History

The English history of religious test laws stretches back to well before the Restoration of the Stuart monarchy.⁶ The first post-Restoration statute of significance is the *Corporations Act 1661*.⁷ That statute applied to all

³ *United States Constitution* art VI cl 3.

⁴ *Crittenden v Anderson* (Unreported, High Court of Australia, Fullagar J, 23 August 1950), extracted in 'An Unpublished Judgment on s 116 of the *Constitution*' (1977) 51 *Australian Law Journal* 171, 171.

⁵ 'An Unpublished Judgment on s 116 of the *Constitution*', above n 4, 171.

⁶ For an overview of pre-Restoration test oaths, see Enid Campbell, 'Oaths and Affirmations of Public Office under English Law: An Historical Retrospect' (2000) 21(3) *Journal of Legal History* 1. Oaths more generally have been in use for millennia: see Helen Silving, 'The Oath: I' (1959) 68 *Yale Law Journal* 1329.

mayors, aldermen, recorders, bailiffs, town clerks, common council-men, and other persons ... bearing any office or offices of magistracy, or places, or trusts, or other employment relating to or concerning the government of the said respective cities, corporations, and boroughs ...⁸

Those people were required to take ‘the sacrament of the Lord’s Supper, according to the rites of the Church of England’.⁹ If a person defaulted in this obligation their position was automatically vacated.¹⁰ The statute also required the occupants of these positions to take the oath of supremacy,¹¹ which recognised the King’s supreme authority in all spiritual and ecclesiastical matters. Catholics true to their faith could not participate in the rites of the Church of England or take an oath that had the effect of repudiating the Pope’s spiritual authority.

The second important statute was the *Test Act 1672* (*‘First Test Act’*).¹² The long title described the Act as one ‘for preventing dangers which may happen from Popish recusants’ and was comprehensive in its efforts to visit disabilities upon Catholics. The Act’s first provision required

[t]hat all and every person or persons as well peers as commoners that shall bear any office or offices civil or military or shall receive any pay, salary, fee or wages by reason of any patent or grant from his Majesty; or shall have command or place of trust from or under his Majesty ... or from any of his Majesty’s predecessors ... shall personally appear ... in his Majesty’s High Court of Chancery or in his Majesty’s Court of King’s Bench and there in public ... take the several oaths of supremacy and allegiance ... And the said respective officers aforesaid shall also receive the sacrament of the Lord’s Supper according to the usage of the Church of England ... in some parish church upon some ... Sunday immediately after divine service and sermon.¹³

A new additional oath was also required:

I AB do declare that I do believe that there is not any transubstantiation in the sacrament of the Lord’s Supper, or in the elements of bread and wine, at, or after the consecration thereof by any person whatsoever.¹⁴

New appointees to the positions identified in the first provision were subject to the same requirements and those who refused to take the required oaths and sacrament were rendered incapable of holding any of the positions.¹⁵ A person who refused to take the oaths or the sacrament was also thereafter incapable of prosecuting any suit in law or equity, acting as the guardian of a child, or acting as executor or administrator of a deceased estate.¹⁶

⁷ 13 Car 11, c 1.

⁸ *Ibid* s 4.

⁹ *Ibid* s 12.

¹⁰ *Ibid*.

¹¹ *Ibid* s 3.

¹² 25 Car 2, c 2.

¹³ *Ibid* s 1.

¹⁴ *Ibid* s 8.

¹⁵ *Ibid* ss 2–3.

¹⁶ *Ibid* s 4.

The *Test Act 1678* ('*Second Test Act*')¹⁷ went further. The long title stated that it was '[a]n Act for the more effectual preserving [of] the Kings person and government by disabling papists from sitting in either House of Parliament.' The Act's first provision required all persons who were or became 'a peer of this Realm [or] member of the House of Peers' and all persons who were or became members of the House of Commons to take the oaths of allegiance and supremacy, and a rather long additional oath. That additional oath commenced:

I AB doe solemnly and sincerely in the presence of God profess, testify and declare that I do believe that in the sacrament of the Lords Supper there is not any transubstantiation of the elements of bread and wine into the body and blood of Christ at or after the consecration thereof by any person whatsoever; and that the invocation or adoration of the Virgin Mary or any other saint, and the sacrifice of the Mass as they are now used in the Church of Rome are superstitious and idolatrous ...

Those who failed to fulfil these obligations were 'disabled to hold or execute any office or place of profit or trust civil or military' or to sit or vote in either House of Parliament and were subject to the same additional disabilities prescribed in the *First Test Act*.¹⁸ However, unlike the *First Test Act*, the *Second Test Act* did not require participation in any Anglican sacrament.

There were, however, loopholes in the legislation that needed closing. Protestant Dissenters (ie non-Anglican Protestants) would often participate in the Anglican sacrament on one occasion only, in order to satisfy the statutory requirement, and then continue to worship in their own way. The *Occasional Conformity Act 1711* made this practice an offence.¹⁹ Those convicted were to be

disabled ... to hold such office or offices, employment or employments [identified in the *Corporations Act 1661*, *First Test Act* and *Second Test Act*], or to receive any profit or advantage by reason of them ... and shall be adjudged incapable to bear any office or employment whatsoever ...²⁰

During the 18th and 19th centuries, several statutes were enacted weakening to varying degrees the operation of various religious disabilities imposed on non-Anglicans.²¹ The most significant reform was the *Roman Catholic Relief Act 1829*.²² This statute repealed the existing statutes requiring a declaration against transubstantiation and related oaths (except those relating to the succession to the Crown), thus enabling Catholics to be members of Parliament. Catholic parliamentarians were required to swear a new oath pledging allegiance to the King, abjuring the doctrine that princes excommunicated by the Pope might be

¹⁷ 30 Car 2, c 1.

¹⁸ *Ibid* s 3.

¹⁹ 10 Anne, c 6, s 1.

²⁰ *Ibid* s 2.

²¹ Campbell, 'Oaths and Affirmations of Public Office under English Law', above n 6, 13.

²² 10 Geo 4, c 7. For a discussion of political history leading up to this Act, see, eg, R W Davis, 'The Strategy of "Dissent" in the Repeal Campaign, 1820–1828' (1966) 38 *Journal of Modern History* 374; G I T Machin, 'Resistance to Repeal of the *Test* and *Corporation* Acts, 1828' (1979) 22 *Historical Journal* 115; Richard W Davis, 'The House of Lords, the Whigs and Catholic Emancipation 1806–1829' (1999) 18 *Parliamentary History* 23.

overthrown by their subjects and repudiating the Pope's authority in temporal affairs.²³ The Act also gave Catholics the right to vote in parliamentary elections,²⁴ and to 'hold, exercise and enjoy all civil and military offices and places of trust or profit'.²⁵ The Act, however, specifically prohibited Catholic priests from being Members of Parliament.²⁶

The disqualification of Catholic priests was consistent with the disqualification in the *House of Commons (Clergy Disqualification) Act 1801* of any 'person having been ordained to the office of priest or deacon, or being a minister of the Church of Scotland' from being elected to serve as a Member of the House of Commons.²⁷ In *Re MacManaway*, the Privy Council interpreted the Act as disabling from sitting as a Member of the House of Commons any person who had been ordained to the office of priest or deacon by any form of episcopal ordination (ie ordination by a bishop).²⁸

It is an understatement to say that reform of clergy disqualification was very slow in coming. The *Clerical Disabilities Act 1870*²⁹ provided a mechanism for priests and deacons in the Church of England, but not other Churches, to relinquish their clerical positions and thereby become eligible for election. Aside from this one statute, reform of clergy disqualification did not come until the *House of Commons (Removal of Clergy Disqualification) Act 2001* (UK) c 13. That Act removed all clergy disqualification from the House of Commons,³⁰ except for providing that the Lords Spiritual (ie Anglican bishops who sit in the House of Lords) remained disqualified from membership of the House of Commons.³¹

Whilst the reforms noted above went a long way towards removing discriminatory religious tests from public life in England, another issue had to be confronted: that of who may take an oath. Oaths were required for most public offices and positions of trust.³² And, of course, oaths were required for various participants in court proceedings.

It had long been assumed that only a Christian could take an oath in England.³³ This assumption was rejected when the question of who may take an oath was

²³ 10 Geo 4, c 7, ss 2, 4.

²⁴ *Ibid* s 5.

²⁵ *Ibid* s 10. Section 12, however, excepted

the office of Lord High Chancellor, Lord Keeper or Lord Commissioner of the Great Seal of Great Britain or Ireland; or the office of Lord Lieutenant, or Lord Deputy, or other Chief Governor or Governors of Ireland; or His Majesty's High Commissioner to the General Assembly of the Church of Scotland.

²⁶ *Ibid* s 9.

²⁷ 41 Geo 3, c 63, s 2.

²⁸ [1951] AC 161.

²⁹ 33 & 34 Vict, c 91.

³⁰ *Ibid* s 1(1).

³¹ *Ibid* s 1(2).

³² The report of a Royal Commission in 1867 included a table of 300 pages listing the various oaths required by law or practice for a variety of public positions: Campbell, 'Oaths and Affirmations of Public Office under English Law', above n 6, 22–3.

³³ Thomas Raeburn White, 'Oaths in Judicial Proceedings and Their Effect upon the Competency of Witnesses' (1903) 51 *American Law Register* 373, 387–90.

considered in 1744 by the Court of Chancery in *Omichund v Barker*.³⁴ The Court held that an oath was a religious, but not exclusively Christian, institution and that any person professing religious beliefs may take an oath in a form that was binding on the person's conscience.³⁵ However, there was a condition: the Court held that a person must 'think [their god or gods] will either award or punish them in this world or in the next ... for this plain reason, because [otherwise] an oath cannot possibly be any tie or obligation upon them.'³⁶ It followed that atheists could not take an oath,³⁷ and taking an oath was a condition precedent to assuming many offices and to participation in other aspects of public life such as court proceedings. Indeed, evidence of atheism was admissible to prove that a witness was not competent to testify.³⁸

After piecemeal reform allowing the making of an affirmation or declaration for particular purposes³⁹ or by particular classes of person,⁴⁰ eventually the *Oaths Act 1888* provided simply that

[e]very person upon objecting to being sworn, and stating, as the ground of such objection, either that he has no religious belief, or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation instead of taking an oath in all places and for all purposes where an oath is or shall be required by law, which affirmation shall be of the same force and effect as if he had taken the oath ...⁴¹

This was the general state of the English law of religious tests when the *Australian Constitution* came into effect on 1 January 1901.

B American History

The American history of religious tests is not dissimilar to the English. Despite this, there are statements in the United States Supreme Court that religious tests are 'abhorrent' to American tradition.⁴² In fact, religious tests are very much a part of American tradition. There is an accurate judicial summary of the early American history of religious tests:

³⁴ (1744) 1 Wille 538; 125 ER 1310 ('*Omichund*'). For a discussion of this case, see *ibid* 389–91; Silving, above n 6, 1371–2.

³⁵ This requirement led the English, and American, courts to invent some strange ceremonies for swearing oaths including smashing a saucer, decapitating a chicken and wrapping oneself in rope: White, above n 33, 442; *R v Winneke*; *Ex parte Gallagher* (1982) 152 CLR 211, 227 (Murphy J).

³⁶ *Omichund* (1744) 1 Wille 538; 549; 125 ER 1310, 1315 (Wille CJ).

³⁷ See *A-G v Bradlaugh* (1885) 14 QBD 667.

³⁸ *Omichund* (1744) 1 Wille 538, 550; 125 ER 1310, 1316 (Wille CJ). See White, above n 33, 410–12.

³⁹ See, eg, *Evidence Further Amendment Act 1869*, 32 & 33 Vict, c 68, s 4, which allowed affirmations by witnesses where an oath would not be binding on their conscience.

⁴⁰ See, eg, *Act of Toleration 1688*, 1 Wm & M, c 18, which allowed Quakers to make affirmations.

⁴¹ 51 & 52 Vict, c 46, s 1. The current legislation removes the requirement that the person state the ground of objection: *Oaths Act 1978* (UK) c 19, s 5.

⁴² *Girouard v United States*, 328 US 61, 69 (Douglas J for Black, Douglas, Murphy, Rutledge and Burton JJ) (1946).

Indeed, it was largely to escape religious test oaths and declarations that a great many of the early colonists left Europe and came here hoping to worship in their own way. It soon developed, however, that many of those who had fled to escape religious test oaths turned out to be perfectly willing, when they had the power to do so, to force dissenters from their faith to take test oaths in conformity with that faith.⁴³

In the period prior to the American Revolution almost all of the state constitutions contained religious tests.⁴⁴ These tests often coexisted with constitutional statements of religious freedom.⁴⁵ Many of the states provided religious tests for members of the legislature, for holders of positions of public trust and for voters. A number of the state constitutions allowed office holders to affirm rather than swear; others made no provision in this respect or limited affirmations to Quakers who had religious objections to swearing oaths. Many also excluded members of the clergy from the legislature. The tests took various forms. For example, the *New Jersey Constitution* of 1776 set a direct condition. That Constitution provided that ‘all persons, professing a belief in the faith of any Protestant sect ... shall be capable of being elected into any office of profit or trust, or being a member of either branch of the Legislature’.⁴⁶ Differently, the *Pennsylvania Constitution* of 1776 provided for a test oath. Members of the legislature were required to take a Christian oath:

I do believe in one God, the creator and governor of the universe, the rewarder of the good and the punisher of the wicked. And I do acknowledge the scriptures of the Old and New Testament to be given by Divine inspiration.

And no further or other religious test shall ever hereafter be required of any civil officer or magistrate in this State.⁴⁷

As with the English test statutes, loopholes could be found in the American test requirements. The *North Carolina Constitution* of 1776 provided that

no person, who shall deny the being of God or the truth of the Protestant religion, or the divine authority either of the Old or New Testaments ... shall be capable of holding any office or place of trust or profit in the civil department within this State.⁴⁸

⁴³ *Torcaso v Watkins*, 367 US 488, 490 (Black J for Warren CJ, Black, Douglas, Clark, Brennan, Whittaker and Stewart JJ) (1961).

⁴⁴ John K Wilson, ‘Religion under the State Constitutions, 1776–1800’ (1990) 32 *Journal of Church and State* 753, 768–73 provides a number of tables setting out the various provisions concerning religion, including religious tests, in the state constitutions prior to 1800. The texts of the state constitutions of this era are available online: Lillian Goldman Law Library, *The Avalon Project: Documents in Law, History and Diplomacy* (2008) <<http://avalon.law.yale.edu>>. See also Winston E Calvert, ‘Judicial Selection and the Religious Test Clause’ (2004) 82 *Washington University Law Quarterly* 1129, 1146 n 75.

⁴⁵ Daniel L Dreisbach, ‘The Constitution’s Forgotten Religion Clause: Reflections on the Article VI Religious Test Ban’ (1996) 38 *Journal of Church and State* 261, 294. See also the discussion in Michael W McConnell, ‘Establishment and Disestablishment at the Founding, Part I: Establishment of Religion’ (2003) 44 *William and Mary Law Review* 2105.

⁴⁶ *New Jersey Constitution* § 19.

⁴⁷ *Pennsylvania Constitution* § 10.

⁴⁸ *North Carolina Constitution* § 32.

This did not prevent a Catholic from becoming Governor since whilst he did not affirm the truth of the Protestant religion he was clever enough not to publicly deny it.⁴⁹

Perhaps surprisingly, the current constitutions of Arkansas,⁵⁰ Maryland,⁵¹ Massachusetts,⁵² North Carolina,⁵³ Pennsylvania,⁵⁴ South Carolina,⁵⁵ Tennessee⁵⁶ and Texas⁵⁷ all contain religious tests. However, the result of a Supreme Court decision in 1961 means that those tests are unconstitutional as they violate the First and Fourteenth Amendments of the *United States Constitution*.⁵⁸

⁴⁹ Gerard V Bradley, 'The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself' (1987) 37 *Case Western Reserve Law Review* 674, 682.

⁵⁰ Atheists are disqualified from holding office or testifying as witnesses: *Arkansas Constitution* art 19 § 1. Cf art 2 § 26, which prohibits religious tests to vote, hold office and testify in court.

⁵¹ Witnesses and jurors are not to be deemed incompetent on account of their religious beliefs provided they believe in the existence of God: *Maryland Constitution Declaration of Rights* art 36. Further, art 37 declares '[t]hat no religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God'.

⁵² Oaths are to be taken for positions in public office except by Quakers, who must make only an affirmation: *Massachusetts Constitution* pt 2 ch VI art 1.

⁵³ The oath and affirmation of office conclude with the words 'so help me God': *North Carolina Constitution* art VI § 7. Further, those who deny the existence of God are to be disqualified from office: at art VI § 8. This is despite a provision that states that 'no human authority shall, in any case whatever, control or interfere with the rights of conscience': at art 1 § 13.

⁵⁴ 'No person who acknowledges the being of a God and a future state of rewards and punishments shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this Commonwealth': *Pennsylvania Constitution* art 1 § 4. But like in the *North Carolina Constitution*, 'no human authority can, in any case whatever, control or interfere with the rights of conscience': at art 1 § 3.

⁵⁵ 'No person who denies the existence of the Supreme Being shall hold any office under this Constitution': *South Carolina Constitution* art VI § 2, art § 4. The oath and affirmation of office conclude with the words '[s]o help me God': at art VI § 5. But note that the *South Carolina Constitution* adopts the First Amendment of the *United States Constitution*, including the religion clauses: at art I § 2.

⁵⁶ '[N]o minister of the Gospel, or priest of any denomination whatever, shall be eligible to a seat in either House of the Legislature': *Tennessee Constitution* art IX § 1. The *Constitution* further provides that '[n]o person who denies the being of God, or a future state of rewards and punishments, shall hold any office in the civil department of this state': at art IX § 2. But again, 'no human authority can, in any case whatever, control or interfere with the rights of conscience': at art 1 § 3; and 'no political or religious test, other than an oath to support the *Constitution* of the United States and of this state, shall ever be required as a qualification to any office or public trust under this state': at art I § 4.

⁵⁷ 'No religious test shall ever be required as a qualification to any office, or public trust, in this State; nor shall any one be excluded from holding office on account of his religious sentiments, provided he acknowledge the existence of a Supreme Being': *Texas Constitution* art 1 § 4. But '[n]o human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion': at art 1 § 6.

⁵⁸ *Torcaso v Watkins*, 367 US 488 (1961). In *Torcaso*, a Maryland constitutional provision prohibiting religious tests other than declaration of belief in God was held invalid. See also *Cummings v Missouri*, 71 US 277 (1866) (political test oath held to be ex post facto law); *Ex parte Garland*, 71 US 333 (1866) (political test oath held to operate as bill of attainder); *Wieman v Updegraff*, 344 US 183 (1952) (political test oath held to violate due process clause); *Speiser v Randall*, 357 US 513 (1958) (political test oath held to violate due process clause); *Nicholson v Alabama Bar Association*, 338 F Supp 48 (MD Ala, 1972) (religious oath requirement for admission to Bar violates free exercise clause); *Kirkley v Maryland*, 381 F Supp 327 (D Md, 1974) (clergy disqualification provision violates free exercise clause); *Voswinkel v City of Charlotte*, 495 F Supp 588 (WD NC, 1980) (requirement that a police chaplain be a minister of religion involves a religious test and violates the First Amendment); *Silverman v Campbell*,

The command of the *United States Constitution* that ‘no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States’⁵⁹ has been described as a ‘decisive break’ with the prevailing constitutional practice at the time it was drafted.⁶⁰ Unfortunately, the records of the Philadelphia Convention that drafted the *United States Constitution* provide little assistance in understanding the provision.⁶¹

Governor Pinckney of South Carolina, a Convention delegate, is reported to have told the Convention on 28 May 1787 that ‘the prevention of religious tests, as qualifications to offices of trust or emolument ... [is] a provision the world will expect from you, in the establishment of a system founded on republican principles, and in an age so liberal and enlightened as the present.’⁶² On 20 August 1787, Pinckney submitted a number of propositions to the Convention including: ‘No religious test or qualification shall ever be annexed to any oath of office under the authority of the United States.’⁶³ Without debate or consideration of Pinckney’s various propositions, they were all referred to a committee from where nothing more came of them.

On 30 August 1787, the Convention debated the requirement for an oath of office. Two amendments were moved to the draft provision before the delegates. The first was an amendment to allow an oath ‘or affirmation’ to be taken. Pinckney moved a second amendment to ban religious tests: ‘but no religious test shall ever be required as a qualification to any office or public trust under the authority of the [United] States’.⁶⁴ The records of the Convention Debates note only that one delegate ‘thought it unnecessary, the prevailing liberality being a sufficient security [against] such tests’⁶⁵ and that two others spoke in favour of Pinckney’s amendment.⁶⁶ Their speeches are not recorded. Pinckney’s amendment is reported to have been agreed to without objection and the ‘whole article’ was approved almost unanimously.⁶⁷ The approved article was then sent to the Committee on Style, which produced the final version:

486 SE 2d 1 (D SC, 1997) (South Carolina constitutional provision prohibiting public office to those who deny existence of ‘Supreme Being’ violates the First Amendment and the religious tests clause of the *United States Constitution*); *Oxford v Beaumont Independent School District*, 224 F Supp 2d 1099 (ED Tex, 2002) (school program whereby clergy volunteers discuss welfare issues with students violates First Amendment because of clergy only recruitment policy).

⁵⁹ *United States Constitution* art VI cl 3.

⁶⁰ Bradley, above n 49, 679. Indeed, many of those who voted in favour of the provision had earlier personal involvement in drafting state religious tests: Dreisbach, ‘The *Constitution’s* Forgotten Religion Clause’, above n 45, 294.

⁶¹ See Gaillard Hunt and James Brown Scott (eds), *The Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States of America* (Oxford University Press, 1999).

⁶² Max Farrand (ed), *The Records of the Federal Convention of 1787* (Yale University Press, 1911) vol 3, 122, quoted in Dreisbach, ‘The *Constitution’s* Forgotten Religion Clause’, above n 45, 270.

⁶³ Hunt and Scott, above n 61, 428; Farrand, above 62, vol 2, 342, quoted in Dreisbach, ‘The *Constitution’s* Forgotten Religion Clause’, above n 45, 270.

⁶⁴ Hunt and Scott, above n 61, 495 (quoting General Pinckney).

⁶⁵ *Ibid* (quoting Mr Sherman).

⁶⁶ *Ibid*.

⁶⁷ *Ibid*; Dreisbach, ‘The *Constitution’s* Forgotten Religion Clause’, above n 45, 271.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.⁶⁸

C Australian History

Whilst religious tests in America may have been introduced some time after European settlement, religious tests in Australia have existed since the arrival of the First Fleet in 1788. The first Governor of New South Wales, Captain Arthur Phillip, came within the provisions of the *First Test Act* and other statutes. On 13 February 1788 at Sydney Cove, Phillip took oaths of abjuration and assurance in which he recognised the lawful reign of the King and abjured the title of any pretenders to the throne.⁶⁹ On the same day he made the required declaration against transubstantiation.⁷⁰ On 6 October 1788, Phillip took an oath of office as Captain-General and an oath of office as Governor in a Plantation.⁷¹ Each oath taken by Phillip concluded with the words: ‘So help me God’.⁷² And, as they were oaths, it was law that only people holding religious beliefs could take them.⁷³ Subsequent Governors were subject to similar requirements.⁷⁴

The commission of Governor Darling in 1825 required him to take various oaths and make the declaration against transubstantiation.⁷⁵ That commission also established an Executive Council to advise the Governor. Members were required to take the same oaths and make declarations against transubstantiation, as well as take ‘the usual oath for the due execution of their place and trust respectively’.⁷⁶ The *New South Wales Act 1823*,⁷⁷ among other things, established an appointed Legislative Council for New South Wales. Members were required to take an oath of office concluding with the words ‘[s]o help me God’

⁶⁸ *United States Constitution* art VI cl 3.

⁶⁹ ‘Oaths Taken by Captain Phillip as Governor’ in Library Committee of the Commonwealth Parliament, *Historical Records of Australia: Series IV — Legal Papers* (1922) vol 1, 19, 19–20. The *Historical Records of Australia* are available online at <<http://publications.nsw.gov.au>>.

⁷⁰ *Ibid* 21.

⁷¹ *Ibid* 19–21, cited in Enid Campbell, ‘Oaths and Affirmations of Public Office’ (1999) 25 *Monash University Law Review* 132, 140 n 18. It appears that this second oath was unnecessary: see Frederick Watson, ‘Introduction’ in Library Committee of the Commonwealth Parliament, *Historical Records of Australia: Series IV — Legal Papers* (1922) vol 1, viii, ix.

⁷² ‘Oaths Taken by Captain Phillip as Governor’ in Library Committee of the Commonwealth Parliament, *Historical Records of Australia: Series IV — Legal Papers* (1922) vol 1, 19, 19–21.

⁷³ See above n 35 and accompanying text.

⁷⁴ Campbell, ‘Oaths and Affirmations of Public Office’, above n 71, 140.

⁷⁵ ‘Governor Darling’s Commission’ in Library Committee of the Commonwealth Parliament, *Historical Records of Australia: Series I — Governors’ Despatches to and from England* (1922) vol 12, 99, 99–107, cited in *ibid* 140 n 19. Governor Darling’s Commission is also available online at <<http://www.foundingdocs.gov.au/item.asp?sdID=74>>.

⁷⁶ ‘Governor Darling’s Commission’ in Library Committee of the Commonwealth Parliament, *Historical Records of Australia: Series I — Governors’ Despatches to and from England* (1922) vol 12, 99, 101.

⁷⁷ 4 Geo 4, c 96, s 24.

before they ‘enter upon and discharge the duties of such their office’.⁷⁸ The *New South Wales Constitution Act 1842*⁷⁹ reconstituted the New South Wales Legislative Council, increasing the number of its Members and providing that two-thirds of them should be elected. Section 25 required an oath of allegiance to be taken by Members before sitting and voting concluding with the words ‘[s]o help me God’. Section 26 allowed ‘every person authorised by law to make an affirmation instead of taking an oath’ to affirm their allegiance.⁸⁰

The *New South Wales Constitution Act 1855*⁸¹ conferred a constitution on New South Wales.⁸² Section 20 of that *Constitution* disqualified from the Legislative Assembly every person who was ‘a minister of the Church of England, or a minister, priest, or ecclesiastic, either according to the rites of the Church of Rome, or under any other form or profession of religious faith or worship.’ Section 33 required an oath of allegiance concluding with the words ‘[s]o help me GOD’ from all Members of Parliament before sitting or voting, and s 34 allowed those persons ‘authorized by law to make an affirmation instead of taking an oath’ to make an affirmation of allegiance instead.

The New South Wales clergy disqualification provision was not removed until the enactment of the *Constitution Act 1902* (NSW) shortly after Federation. New South Wales was not alone in disqualifying clergy from the legislature. At the time of Federation, the constitutions of all the other states except Queensland contained clergy disqualification provisions.⁸³ The removal of these religious tests did not occur for several decades.⁸⁴

As originally enacted just after Federation, the *Constitution Act 1902* (NSW) provided that no Member of the Legislative Council or Legislative Assembly

shall be permitted to sit or vote therein until he has taken and subscribed ... the oath of allegiance in the form prescribed by the *Oaths Act 1900* ... [p]rovided that every person authorised by law to make an affirmation instead of taking an oath may make such affirmation in every case in which an oath is hereinbefore required to be taken.⁸⁵

An important question then is: who was authorised by law to make an affirmation in lieu of an oath? The *Imperial Acts Adoption Act 1837* (NSW) adopted as the law of New South Wales the British statute titled ‘An Act to allow Quakers

⁷⁸ Ibid s 32.

⁷⁹ 5 & 6 Vict, c 76.

⁸⁰ The *Government Oaths Abolition Act 1845* (NSW) s 1 substituted declarations for all oaths and affirmations of office, except where an oath or affirmation of allegiance was required by law.

⁸¹ 18 & 19 Vict, c 54.

⁸² The *Constitution* is contained in sch 1 to the Act and is an amended version of legislation passed by the New South Wales Parliament in 1853: *New Constitution Act 1853* (NSW).

⁸³ *Constitution Act 1856* (SA) s 36; *Constitution Act 1855* (Tas) s 15; *Victoria Constitution Act 1855* (Vic) ss 4, 11; *Constitution Acts Amendment Act 1899* (WA) s 31(4).

⁸⁴ Before the enactment of the following statutes, the *Constitution Acts* in force in those states all contained religious tests: *Constitution Act 1934* (SA); *Constitution Act 1934* (Tas); *Constitution Act 1975* (Vic); *Constitution Acts Amendment (No 3) Act 1975* (WA).

⁸⁵ *Constitution Act 1902* (NSW) s 12. The section was most recently amended by the *Constitution Amendment (Pledge of Loyalty) Act 2006* (NSW) to require a pledge of loyalty to be taken which can include the words ‘[u]nder God’ if a Member so chooses.

and Moravians to make Affirmation in all cases where an Oath is or shall be required',⁸⁶ which did as its title suggested. Before that adoption, no-one in New South Wales could lawfully make an affirmation and, in any event, no statute contemplated the making of affirmations.⁸⁷ The *Evidence Further Amendment Act 1876* (NSW) allowed witnesses in court proceedings to make a declaration if they objected to taking an oath or were not competent to take an oath.⁸⁸ To similar effect, in the months before Federation the *Oaths Act 1900* (NSW) was enacted, which allowed witnesses and jurors to make an affirmation instead of taking an oath if they objected to being sworn.⁸⁹ Section 12 of that Act also provided a new form of affirmation of allegiance but limited its availability to those 'by law entitled to make a solemn affirmation or declaration'.⁹⁰ Section 12 of the *Oaths Act 1900* (NSW) was not amended until the *Evidence and Oaths (Amendment) Act 1973* (NSW) amended it to provide that 'any person who objects to take an oath may instead of taking such oath make a solemn affirmation'.⁹¹

Section 116 of the *Commonwealth Constitution* does not provide Australia's first prohibition on the imposition of religious tests. For example, the *University of Sydney Act 1850* (NSW) provided a qualified prohibition:

no religious test shall be administered to any person in order to entitle him to be admitted as a student of the said University or to hold any office therein or to partake of any advantage or privilege thereof. Provided always that this enactment shall not be deemed to prevent the making of regulations for securing the due attendance of the students for divine worship at such church or chapel as shall be approved by their parents or guardians respectively.⁹²

The insertion into the *Commonwealth Constitution* of a prohibition on the use of religious tests was largely a reaction to the inclusion of the words 'humbly relying on the blessing of Almighty God' in the preamble of the *Constitution*. Henry Bournes Higgins, a Victorian delegate who would later become Attorney-General and a justice of the High Court, thought that recognition of religion in the preamble might enable 'a number of corollaries [to] be deduced' thereby

⁸⁶ *Quakers and Moravians Act 1833*, 3 & 4 Wm 4, c 49. The imperial statute was appended to the New South Wales statute.

⁸⁷ The *Oaths of Office Simplifying Act 1857* (NSW) rewrote the required oath and affirmation of office but did not expand the classes of person entitled to affirm rather than swear.

⁸⁸ *Evidence Further Amendment Act 1876* (NSW) s 3.

⁸⁹ *Oaths Act 1900* (NSW) ss 13–14. These sections have since been amended.

⁹⁰ English cases had decided that under the relevant British statutes a right to affirm in court proceedings did not mean that a person was entitled to make an affirmation of office: see, eg, *Clarke v Bradlaugh* (1881) 7 QBD 38.

⁹¹ *Evidence and Oaths (Amendment) Act 1973* (NSW) s 3(c). It is open to doubt that *Oaths Act 1900* (NSW) s 12 was actually strictly applied for most of the 20th century. For an overview of the other states, see Campbell, 'Oaths and Affirmations of Public Office', above n 71.

⁹² *University of Sydney Act 1850* (NSW) s 20. The preamble to the Act commenced:

Whereas it is deemed expedient for the better advancement of religion and morality and the promotion of useful knowledge to hold forth to all classes and denominations of Her Majesty's subjects resident in the Colony of New South Wales without any distinction whatsoever an encouragement for pursuing a regular and liberal course of education ...

allowing the Commonwealth to interfere with the free exercise of religion.⁹³ He also thought that this was the precise motive of those advocating for the recognition of ‘Almighty God’ in the preamble.⁹⁴ Higgins was adamant that a provision preventing that possibility was needed. He considered that recognition might be necessary to ensure maximum political support for the *Constitution* from voters but that equally ‘without a safeguard in the *Constitution* itself, we shall be very likely to alienate a large force against us’.⁹⁵

An early draft of the *Constitution* contained a clause — cl 109 — preventing the states from interfering with the free exercise of religion: ‘A state shall not make any law prohibiting the free exercise of any religion.’⁹⁶ On 7 February 1898, Higgins moved to amend that clause so it would read: ‘A state shall not, nor shall the Commonwealth, make any law prohibiting the free exercise of any religion, or imposing any religious test or observance.’⁹⁷ In speaking to that amendment, Higgins came to recognise that it might ‘void our imposing of the ordinary oaths in the courts and elsewhere.’⁹⁸ The following day, Higgins informed the Convention of his intention to move a motion so that cl 109 would read: ‘A state shall not, nor shall the Commonwealth, make any law prohibiting the free exercise of any religion, or for the establishment of any religion, or imposing any religious observance.’⁹⁹ The prohibition on religious tests had been removed.

During debate that morning, Josiah Henry Symon, a South Australian delegate who would also later become Attorney-General, suggested that it might be sufficient for ensuring freedom of religion, whilst also permitting action against obnoxious religious practices, if the clause merely limited the prohibition to ‘the imposition of any religious test’.¹⁰⁰ Symon had in mind: ‘No religious test shall be imposed as a qualification for any public office or trust in the Commonwealth or in a state.’¹⁰¹

Picking up on his concerns expressed the previous day, Higgins responded that banning the imposition of religious observances might be preferable since “[t]est” might include oaths administered in our courts and elsewhere.¹⁰² Symon did not agree. He replied:

⁹³ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 7 February 1898, 656 (Henry Bournes Higgins).

⁹⁴ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 2 March 1898, 1735 (Henry Bournes Higgins).

⁹⁵ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 7 February 1898, 656 (Henry Bournes Higgins).

⁹⁶ *Ibid* 654.

⁹⁷ *Ibid* 656–7.

⁹⁸ *Ibid*. Cf *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211, 229–30, where Murphy J considered that the prohibition on imposing religious observances prevents the imposition of oaths for judicial and similar proceedings.

⁹⁹ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 8 February 1898, 658 (Henry Bournes Higgins).

¹⁰⁰ *Ibid* 660 (Josiah Henry Symon).

¹⁰¹ *Ibid* 662.

¹⁰² *Ibid* 660 (Henry Bournes Higgins).

I think that the object we have in view will be sufficiently met if we prohibit the imposition of any religious test as a qualification for any public office of trust. That is as it existed in the original *Constitution* of the United States. If we do that, I think we are giving a sufficient assertion in this *Constitution* to the principle that religion or no religion is not to be a bar in any way to the full rights of citizenship, and that everybody is to be free to profess and hold any faith he likes but the Commonwealth must be the judges of when it is proper to interfere with its open exercise.¹⁰³

At the end of the debate, both Higgins' amendment and cl 109 in its entirety were negatived.¹⁰⁴

On 2 March 1898, Higgins moved to insert a provision to replace cl 109. He told the Convention:

My idea is to make it clear beyond doubt that the powers which the states individually have of making such laws as they like with regard to religion shall remain undisturbed and unbroken, and to make it clear that in framing this *Constitution* there is no intention whatever to give to the Federal Parliament the power to interfere in these matters.¹⁰⁵

Higgins proposed a clause that would read:

The Commonwealth shall not make any law prohibiting the free exercise of any religion, or for the establishment of any religion, or imposing any religious observance, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.¹⁰⁶

Edmund Barton, who was the Leader of the Convention, was unconvinced about the need for such a provision. He told delegates:

I think that because we are a Christian community we ought to have advanced so much since the days of state aid and the days of making a law for the establishment of a religion, since the days for imposing religious observances or exacting a religious test as a qualification for any office of the State, as to render any such dangers practically impossible, and we will be going a little too far if we attempt to load this *Constitution* with a provision for dangers which are practically nonexistent.¹⁰⁷

More specifically, Barton told delegates that in the Australian colonies 'we have wiped out every religious test'.¹⁰⁸ He continued his speech adding:

The only part of the matter upon which I have had the least doubt (having become more confirmed in my opinion since I have considered the matter further) is the latter part of the proposal, which is that no religious test shall be required for any place of public trust in the Commonwealth. I do not think that any such

¹⁰³ Ibid 660.

¹⁰⁴ Ibid 664.

¹⁰⁵ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 2 March 1898, 1769 (Henry Bournes Higgins).

¹⁰⁶ Ibid.

¹⁰⁷ Ibid 1771 (Edmund Barton).

¹⁰⁸ Ibid.

test would be required, and the only question is whether it is possible. I have come to the conclusion that it is not possible.¹⁰⁹

Symon, again adopting the views he expressed earlier, moved to amend the proposed clause to read simply: ‘Nothing in this *Constitution* shall be held to empower the Commonwealth to require any religious test as a qualification for any office of public trust under the Commonwealth.’¹¹⁰

Richard Edward O’Connor from New South Wales, who would become one of the first judges of the High Court, spoke in favour of Symon’s proposed amendment:

With regard to the subject of the amendment of the honourable and learned member (Mr Symon), there is no doubt that the Commonwealth might have the right to impose any form of oath which it thought fit as a qualification of office. I am quite willing however, that some such provision as the honourable and learned member has suggested should be inserted in the *Constitution*, so that it would not be possible for the Commonwealth to require a religious test.¹¹¹

Symon’s amendment failed with 19 delegates in favour and 22 against. Higgins’ clause was approved with 25 delegates in favour and 16 against.¹¹² On 16 March 1898, the provision which had been crafted into its final form by the Drafting Committee, without any changes to the phrasing of the religious tests clause, was agreed to by the Convention:

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.¹¹³

III WHAT IS A RELIGIOUS TEST?

To understand the religious tests clause it is first necessary to consider what exactly a religious test is. The question of religious tests has come before the High Court on two very brief occasions. In *Crittenden v Anderson*,¹¹⁴ the applicant sought to challenge the respondent’s election to the House of Representatives on the ground that the respondent had acknowledged allegiance to a

¹⁰⁹ Ibid 1772. Sir John Quick and Sir Robert Garran, who were both delegates to the Convention, took a different view to Barton in their commentaries on the *Constitution*. They dismissed the first three clauses as ‘superfluous’ on the basis that it was unnecessary to expressly deny a power that was not expressly granted but considered the religious tests clause ‘a provision of practical use and value’. The clause was necessary, they said, ‘because otherwise there would have been nothing to prevent the Federal legislature, in defining the qualifications for federal office, to impose such tests’: John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Melville & Mullen, 1901) 952.

¹¹⁰ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 2 March 1898, 1775–6 (Josiah Henry Symon).

¹¹¹ Ibid 1779 (Richard Edward O’Connor).

¹¹² Ibid.

¹¹³ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 16 March 1898, 2463. This became s 116 of the *Commonwealth Constitution*.

¹¹⁴ (Unreported, High Court of Australia, Fullagar J, 23 August 1950), extracted in ‘An Unpublished Judgment on s 116 of the *Constitution*’, above n 4, 171.

foreign power contrary to s 44(i) of the *Constitution*. The respondent was a Catholic and the foreign power in question was what Fullagar J called the ‘Papal State’. The argument was that the mere fact of the respondent’s Catholicism created the allegiance. Fullagar J, sitting alone, rejected the argument, holding:

it is, in my opinion, s 116, and not s 44(i) of our *Constitution* which is relevant when the right of a member of any religious body ... is challenged on the ground of his religion. Effect could not be given to the petitioner’s contention without the imposition of a ‘religious test’.¹¹⁵

The second occasion was *Church of Scientology Inc v Woodward*.¹¹⁶ The plaintiff argued, among other things, that the defendant, who was Director-General of the Australian Security Intelligence Organisation (‘ASIO’), caused or permitted ASIO to communicate security assessments to Commonwealth Ministers about certain current and potential Commonwealth employees. These assessments claimed that those persons were ‘security risks’ by reason of their membership of the Church of Scientology. The plaintiff further alleged that this meant that ASIO had required a religious test as a qualification for a Commonwealth office. On a strike-out application, Aickin J sitting alone struck out the plaintiff’s argument, holding that ‘[t]he provision of information to a prospective employer cannot be regarded as the imposition of a religious test by the provider of the information.’¹¹⁷ Aickin J noted that the substance of the allegation ‘seems really to be that the Commonwealth itself required a religious test’ and added ‘but that does not particularise the allegation [as spelt out in the statement of claim].’¹¹⁸ Better pleadings may well have got the plaintiffs further.

Thus, there is authority that preventing a person sitting as a Member of Parliament on the ground of religion involves a religious test and that the provision of information about a person’s religion to another person does not amount to a religious test. Neither proposition takes the analysis very far.

The United States Supreme Court has not had to directly decide any case on the basis of the American religious tests clause.¹¹⁹ There has, however, been academic suggestion in the United States that that country’s religious tests clause is directed only at tests ‘forcing individuals seeking certain positions ... to bind themselves through an oath or affirmation to a particular religious belief or sacrament in order to be qualified to hold office’¹²⁰ and is not directed at ‘status-based religious qualifications’.¹²¹ This suggestion is based on the ‘placement of the clause in Article VI [of the *United States Constitution*], immediately after the

¹¹⁵ *Crittenden v Anderson* (Unreported, High Court of Australia, Fullagar J, 23 August 1950), extracted in ‘An Unpublished Judgment on s 116 of the *Constitution*’, above n 4, 171.

¹¹⁶ (1979) 154 CLR 79. The case was decided on 9 November 1979 and was reported as an appendix to the later case *Church of Scientology Inc v Woodward* (1982) 154 CLR 25.

¹¹⁷ *Church of Scientology Inc v Woodward* (1979) 154 CLR 79, 83.

¹¹⁸ *Ibid.*

¹¹⁹ But see above n 58, citing cases which invalidate religious tests on other grounds.

¹²⁰ Note, ‘An Originalist Analysis of the No Religious Test Clause’ (2007) 120 *Harvard Law Review* 1649, 1660.

¹²¹ *Ibid.* 1659. Counsel argued for a similar conclusion in *Ex parte Garland*, 71 US 333, 355 (Mr Speed) (during argument) (1866). The case was decided on other grounds.

Oath Clause¹²² and ‘the fact that the two clauses are joined by the conjunction “but”’.¹²³ It is far from clear that this suggestion accurately reflects the American position. In *McDaniel v Paty*,¹²⁴ the United States Supreme Court considered the question whether the exclusion of clergy from holding elected office violated the First Amendment. In the course of holding that the exclusion violated the free exercise clause, Brennan and Marshall JJ considered that ‘[a] law which limits political participation to those who eschew prayer, public worship, or the ministry as much establishes a religious test as one which disqualifies Catholics, or Jews, or Protestants.’¹²⁵

In any event, even if the suggestion accurately reflects the American position, it does not reflect the Australian position. First, the Australian religious tests clause is not contained in the same sentence as an obligation to take an oath or affirmation; rather it is in a sentence containing three other religious freedom guarantees and is connected to them by the conjunction ‘and’. Secondly, *Critenden v Anderson* involved a status-based religious qualification, namely the fact of the candidate’s Catholicism. Thirdly, the suggestion is historically unsound.¹²⁶ The discussion of English, American and Australian history above shows that religious tests come in many forms. These include a requirement to participate in particular religious practices, a requirement to disclaim belief in a particular religious doctrine, a requirement to take a religious oath of office such that a person must hold some religious belief, a requirement to be or not to be of a particular religious status, as well as a requirement to swear or affirm to particular religious beliefs.

Unfortunately, these forms of religious test are still evident in Australian law and practice today. In 1946, Cumbrae-Stewart suggested that the religious tests clause ‘may at some time embarrass the Commonwealth in appointing chaplains, for they cannot be required to show an adherence to any religion before appointment.’¹²⁷ Whilst Cumbrae-Stewart is correct that chaplains cannot constitutionally be required to show religious adherence, the current practice is that they are indeed required to do so. Under the *Defence (Personnel) Regulations 2002* (Cth) a person cannot be appointed as a chaplain in the Australian Defence Force unless ‘the person is a member of a church or faith group approved by the

¹²² Note, above n 120, 1660.

¹²³ *Ibid* 1659. In full, art VI cl 3 of the *United States Constitution* reads:

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

¹²⁴ 435 US 618 (1978).

¹²⁵ *Ibid* 632.

¹²⁶ Indeed, the United States Supreme Court has said of the English history of religious tests that such an ‘experience is written into our *Constitution*’ by the religious tests clause: *American Communications Association CIO v Douds*, 339 US 382, 414 (Vinson CJ for Vinson CJ, Reed and Burton JJ) (1950).

¹²⁷ F D Cumbrae-Stewart, ‘Section 116 of the *Constitution*’ (1946) 20 *Australian Law Journal* 207, 211.

Religious Advisory Committee to the Services'.¹²⁸ This is precisely the sort of status-based religious test considered in *Crittenden v Anderson*.¹²⁹

Another form of religious test currently in use in Australia is the requirement to participate in a particular religious practice. This occurs in the case of the offices of Speaker of the House of Representatives and President of the Senate, a requirement of both offices being to recite prayers. 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 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 Orders similarly provides:

On taking the Chair at the beginning of each sitting, the Speaker shall [after reading an Acknowledgement of Country] read the following prayers:

¹²⁸ *Defence (Personnel) Regulations 2002* (Cth) reg 110(2)(a).

¹²⁹ There is no American case challenging United States military chaplains under the religious test clause even though there is a similar eligibility requirement. An attempt to challenge the congressional chaplaincy under the religious tests clause failed for lack of standing: *Newdow v Eagen*, 309 F Supp 2d 29 (D DC, 2004). There have been a few, unsuccessful, direct challenges to military chaplains under the First Amendment: *Katcoff v Marsh*, 755 F 2d 223 (2nd Cir, 1985); *Larsen v United States Navy*, 486 F Supp 2d 11 (D DC, 2007). There is also dicta in the Supreme Court indicating that because the First Amendment was approved by Congress in the same week it enacted legislation for congressional chaplains, that office does not violate the First Amendment: *Lynch v Donnelly*, 465 US 668, 674 (Burger CJ for Burger CJ, White, Powell and Rehnquist JJ) (1984). There is also dicta that a failure to provide military chaplains would infringe the free exercise clause: *Abington School District v Schempp*, 374 US 203, 308–9 (Stewart J, dissenting) (1963). Such an argument could not readily be made relying on the Australian free exercise clause, which is seen only as a limit on the power of the Commonwealth to enact laws with the purpose of prohibiting the free exercise of religion and not as involving notions of 'rights' as in the United States. There is also a body of literature considering military chaplains and the First Amendment: see, eg, Ira C Lupu and Robert W Tuttle, 'Instruments of Accommodation: The Military Chaplaincy and the Constitution' (2007) 110 *West Virginia Law Review* 89; William A Wildhack, 'Navy Chaplains at the Crossroads: Navigating the Intersection of Free Speech, Free Exercise, Establishment, and Equal Protection' (2005) 51 *Naval Law Review* 217; Paul J Weber, 'The First Amendment and the Military Chaplaincy: The Process of Reform' (1980) 22 *Journal of Church and State* 459; Richard D Rosen, 'Katcoff v Marsh at Twenty-Two: The Military Chaplaincy and the Separation of Church and State' (2007) 38 *University of Toledo Law Review* 1137; Julie B Kaplan, 'Military Mirrors on the Wall: Nonestablishment and the Military Chaplaincy' (1986) 95 *Yale Law Journal* 1210; Steven K Green, 'Reconciling the Irreconcilable: Military Chaplains and the First Amendment' (2007) 110 *West Virginia Law Review* 167; William T Cavanaugh, 'The United States Military Chaplaincy Program: Another Seam in the Fabric of Our Society?' (1983) 59 *Notre Dame Law Review* 181; Emilie Kraft Bindon, 'Entangled Choices: Selecting Chaplains for the United States Armed Forces' (2004) 56 *Alabama Law Review* 247.

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.

As Villalta Puig and Tudor explain, praying is an inherently religious practice and these prayers are plainly Christian.¹³⁰ They conclude with ‘Amen’ and include the Lord’s Prayer. The final line of the Lord’s Prayer — ‘For thine is the kingdom, and the power and the glory, for ever and ever’ — appears only in the authorised version of the Bible used by Protestants and this fact has led one Catholic Archbishop to complain that the prayers are ‘distinctly Protestant’.¹³¹ Moreover, the prayers adopt with a slight modification the line ‘direct and prosper all their consultations to the advancement of thy glory’ from ‘A Prayer for the High Court of Parliament’ in the Church of England’s *Book of Common Prayer*.¹³²

So, just as the *First Test Act* required participation in an inherently religious practice (taking the sacrament of the Lord’s Supper according to Anglican rites), the parliamentary standing orders require participation in an inherently religious practice that is plainly Christian, if not specifically Protestant, in character.¹³³ It is not to the point that a particular Speaker or President might consider his or her role in reciting prayers to be analogous to an actor reciting lines as if the act and words are without meaning — he or she is still participating in an inherently religious practice, albeit insincerely.¹³⁴ As noted above, before the *Occasional Conformity Act 1711* outlawed the practice,¹³⁵ Protestant Dissenters in England would participate as actors in the required Anglican sacrament in which they did not believe and then carry on. A religious test therefore appears to exist in the requirement to recite the prayers.

¹³⁰ Gonzalo Villalta Puig and Steven Tudor, ‘To the Advancement of Thy Glory?: A Constitutional and Policy Critique of Parliamentary Prayers’ (2009) 20 *Public Law Review* 56, 58–9.

¹³¹ *Ibid* 59 n 16.

¹³² *Ibid* 58–9.

¹³³ Cf *ibid* 65, where Villalta Puig and Tudor state in passing that the religious tests clause ‘is simply not relevant’ to the question whether or not the parliamentary prayers are constitutionally valid.

¹³⁴ An *inherently* religious practice, one that always has a religious character of some sort to it, might be distinguished from a practice that is religious in character only in certain contexts. For example, wearing a beard is, in certain contexts, a religious practice. However, in other contexts wearing a beard has nothing whatsoever to do with religion. On this basis, that practice might be considered as not inherently religious. On the other hand, praying always has a religious character of some sort and can thus be described as inherently religious in character. Indeed, praying retains its inherently religious character even when done by an actor as part of a performance; in such a case a religious practice is being portrayed and it cannot be said that the act has nothing whatsoever to do with religion.

¹³⁵ See above nn 19–20 and accompanying text.

IV THE NATURE OF THE PROHIBITION

Consideration of the nature of religious tests is not sufficient for a proper understanding of the religious tests clause and whether it has been violated. The nature of the prohibition it creates is also significant. On this issue, three important things are apparent when the religious tests clause is compared with the other three clauses of s 116. Those clauses all commence with the command '[t]he Commonwealth shall not make any law for', whereas the religious tests clause does not: it is disconnected from that command altogether. The first important thing that is apparent on comparison is that the religious tests clause does not in terms prohibit the making of laws of a particular description. The second important thing is that notions of purpose that arise from 'for'¹³⁶ are not relevant to this clause.¹³⁷ Thus, in *Attorney-General (Vic) ex rel Black v Commonwealth* (commonly known as the 'DOGS Case'), Stephen J commented that the religious tests clause 'prohibits the imposition, whether by law or otherwise, of religious tests for the holding of Commonwealth office.'¹³⁸ This suggests that the religious tests clause is likely to have a broader operation than would be the case if the prohibition was limited to making laws for imposing religious tests.¹³⁹ The third important thing is that it is not in terms directed only at the Commonwealth; it simply prohibits religious tests for offices and public trusts under the Commonwealth. As one judge of the United States Supreme Court said of the American religious tests clause, 'the plain language of the Clause [shows] that it bars the States as well as the Federal Government from imposing religious disqualifications on federal offices.'¹⁴⁰

During the debate in the Senate on 14 June 1901 as to whether the standing order requiring the President to recite prayers should be agreed to, Senator Gregor McGregor thought that the standing order would amount to imposing a religious observance contrary to s 116.¹⁴¹ Senator McGregor asked: 'Did [the framers of the *Constitution*] mean that Parliament was not to impose religious observances anywhere else but here?'¹⁴² A response came from Senator Frederick Sargood who asserted that s 116 could not apply because 'a standing order is not a law, and therefore I think his argument falls to the ground.'¹⁴³ However, as Stephen J pointed out, the question of identifying a law is quite irrelevant to consideration of whether the religious tests clause has been violated. Whereas the operative words of the first three clauses of s 116 are '[t]he Commonwealth shall not make any law for', the operative words of the religious

¹³⁶ For a discussion, see Luke Beck, 'Clear and Emphatic: The Separation of Church and State under the Australian *Constitution*' (2008) 27 *University of Tasmania Law Review* 161, 168–74.

¹³⁷ Cf Villalta Puig and Tudor, above n 130, 65, where it is suggested, without any supporting analysis, that intention is relevant to the religious tests clause.

¹³⁸ (1981) 146 CLR 559, 605.

¹³⁹ See also Beck, above n 136, 192.

¹⁴⁰ *US Term Limits Inc v Thornton*, 514 US 779, 903 (Thomas J for Rehnquist CJ, Thomas, O'Connor and Scalia JJ) (1995).

¹⁴¹ For an argument to this effect, see Beck, above n 136, 182–4.

¹⁴² Commonwealth, *Parliamentary Debates*, Senate, 14 June 1901, 1139 (Gregor McGregor).

¹⁴³ *Ibid* 1139 (Frederick Thomas Sargood).

tests clause are ‘no religious test *shall be required as a qualification*’.¹⁴⁴ Thus, it must be determined in any case relying upon the religious tests clause that a religious test has been required as a qualification.

Before turning to consider that issue, it is appropriate to address the more practical matter of whether the claim that a religious test is involved in the standing orders presents a justiciable question. In *Egan v Willis*,¹⁴⁵ the High Court was required to decide whether the validity of resolutions of the Legislative Council of New South Wales requiring the Usher of the Black Rod to remove a Member from the chamber and parliamentary precincts, and the standing orders pursuant to which they were made, presented a justiciable issue. The question arose since the Member who was removed sued for trespass and the defendant sought to plead the resolutions as justification. Gaudron, Gummow and Hayne JJ held that a justiciable question presented itself but did not need to decide the extent to which a court might rule upon the lawfulness of conduct in a Parliament. Kirby J found it useful to consider that question and, citing a number of cases, stated:

Courts in this country, at least in the scrutiny of the requirements of the *Australian Constitution*, have generally rejected the notion that they are forbidden by considerations of parliamentary privilege, or of the ancient common law of Parliament, from adjudging the validity of parliamentary conduct where this must be measured against the requirements of the *Constitution*.¹⁴⁶

This statement is directly in point since the claim that a religious test is involved in the standing orders is a measurement of parliamentary conduct against the requirements of the *Constitution*.

The reasons McHugh J in dissent gave for holding that ‘[w]hat is said or done within the walls of a parliamentary chamber cannot be examined in a court of law’¹⁴⁷ are of particular interest when it comes to issues of parliamentary religious tests. McHugh J cited the English case of *Bradlaugh v Gossett* and quoted this passage from the judgment of Lord Coleridge CJ: ‘What is said or done within the walls of Parliament cannot be inquired into in a court of law. ... The jurisdiction of the Houses over their own members, their right to impose discipline within their walls, is absolute and exclusive.’¹⁴⁸

In the first place, English decisions on the justiciability of parliamentary conduct can readily be distinguished since the Australian Parliament is created by

¹⁴⁴ *Commonwealth Constitution* s 116 (emphasis added). In the *DOGS Case* (1981) 146 CLR 559, 580, a case about the establishment clause, Barwick CJ appears to have overlooked the religious tests clause when he said: ‘The operative words of s 116 are addressed to the Commonwealth and inhibit the making of laws by the Commonwealth.’

¹⁴⁵ (1998) 195 CLR 424.

¹⁴⁶ *Ibid* 492, citing *Osborne v Commonwealth* (1911) 12 CLR 321, 336 (Griffith CJ); *South Australia v Victoria* (1911) 12 CLR 667, 674–5 (Griffith CJ); *Hughes and Vale Pty Ltd v Gair* (1954) 90 CLR 203, 204–5 (Dixon CJ); *Clayton v Heffron* (1960) 105 CLR 214, 234–5 (Dixon CJ, McTiernan, Taylor and Windeyer JJ); *Cormack v Cope* (1974) 131 CLR 432, 451–4 (Barwick CJ), 464–6 (Menzies J), 467 (Gibbs J), 472 (Stephen J); *Eastgate v Rozzoli* (1990) 20 NSWLR 188, 193–8 (Kirby P).

¹⁴⁷ *Egan v Willis* (1998) 195 CLR 424, 461.

¹⁴⁸ *Ibid*, citing *Bradlaugh v Gossett* (1884) 12 QBD 271, 275.

and subordinated to a written constitution, which is not the case in the United Kingdom. Furthermore, the facts of *Bradlaugh v Gossett* appear sufficient to demonstrate why that decision cannot represent the law in Australia, at least in respect of s 116. Charles Bradlaugh was an outspoken atheist who was elected to the House of Commons. Legislation required certain oaths to be taken before a person could sit and vote in Parliament. As noted above, the common law held that only individuals professing religious beliefs were entitled to take an oath and the legislation allowing affirmations did not apply to atheists. Other cases involving Bradlaugh had confirmed that atheists had no right to make an affirmation in lieu of the parliamentary oath¹⁴⁹ and that atheists could not lawfully take the parliamentary oath.¹⁵⁰ This plainly effected a religious test for membership of Parliament and Bradlaugh could not satisfy it. The Speaker refused to allow Bradlaugh to take the oath, although Bradlaugh was willing to do so, and the House resolved to exclude him. In *Bradlaugh v Gossett*, Bradlaugh sought a declaration that the resolution to exclude him from the House was invalid and an order restraining the Serjeant-at-Arms from preventing him entering the House and taking the oath.¹⁵¹ The Court refused for the reasons identified by McHugh J.

It would be perverse and ahistorical if a constitutional provision prohibiting religious tests, of which parliamentary religious tests are a paradigmatic example, could be rendered impotent due to notions of non-justiciability. It would also sit uneasily with Fullagar J's observation in *Crittenden v Anderson* that s 116 'was, of course, not enacted by men ignorant or unmindful of history.'¹⁵² That observation was made in a sentence immediately following a reference to an English parliamentary religious test. Moreover, the United States Supreme Court has experienced no difficulty in deciding the validity of practices occurring in legislatures under the religion clauses of the First Amendment.¹⁵³

The issue is whether a religious test is required. Thinking about the connection between the American oath of office clause and religious tests clause, Madison asked, in a letter dated 28 October 1787, '[i]s not a religious test as far as it is necessary, or would operate, involved in the oath itself?'¹⁵⁴ The answer, as

¹⁴⁹ *Clarke v Bradlaugh* (1881) 7 QBD 38.

¹⁵⁰ *A-G v Bradlaugh* (1885) 14 QBD 667.

¹⁵¹ During the course of his career, Bradlaugh had been excluded from Parliament on a number of occasions only to be re-elected at the resulting by-elections. Eventually, the Speaker allowed Bradlaugh to swear the oath, although this was contrary to law, and he was instrumental in reforms allowing a general right to affirm instead of swear. Three days before Bradlaugh's death, the House of Commons resolved to expunge from the parliamentary record all previous resolutions for his expulsion: Campbell, 'Oaths and Affirmations of Public Office under English Law', above n 6, 25–6.

¹⁵² (Unreported, High Court of Australia, Fullagar J, 23 August 1950), extracted in 'An Unpublished Judgment on s 116 of the *Constitution*', above n 4, 171.

¹⁵³ See *Marsh v Chambers*, 463 US 783 (1983), where the Court considered whether the practice of commencing legislative proceedings with prayers read by a chaplain violated the First Amendment.

¹⁵⁴ Robert A Rutland et al (eds), *The Papers of James Madison* (University of Chicago Press, 1977) vol 10, 223, quoted in Daniel L Dreisbach, 'In Search of a Christian Commonwealth: An Examination of Selected Nineteenth-Century Commentaries on References to God and the Christian Religion in the *United States Constitution*' (1996) 48 *Baylor Law Review* 927, 984.

history clearly demonstrates, is that a religious test is involved in an oath of allegiance or office. However, the American oath of office clause does not *require* an oath and therefore a religious test; it requires either an oath or an affirmation.¹⁵⁵ Likewise, the *Australian Constitution* requires parliamentarians to take ‘an oath *or* affirmation of allegiance’.¹⁵⁶ In the example of military chaplains, the religious test is a requirement. The *Defence (Personnel) Regulations 2002* (Cth) provide that ‘the Governor-General must not appoint the person unless’ the religious test is satisfied.¹⁵⁷ The parliamentary standing orders extracted above require a religious test. Both orders employ mandatory language and provide that the presiding officer ‘shall’ participate in an inherently religious practice.

Linked to the notion of requirement is the notion of qualification, since the constitutional prohibition is against religious tests being required as a qualification. Assistance in understanding the concept of qualification in the context of religious tests can be found from history. History confirms that religious test oaths and declarations, as well as mandatory participation in religious practices, can properly be seen as qualifications. The preamble to the *Roman Catholic Relief Act 1829*, for example, referred to

certain oaths and certain declarations ... [that] are or may be required to be taken, made, and subscribed by the subjects of His Majesty, *as qualifications* ... for the enjoyment of certain offices, franchises, and civil rights.¹⁵⁸

History indicates that a religious test is required as a qualification where in a real and practical sense it serves as a condition precedent or as a condition subsequent to holding the relevant office or position.¹⁵⁹ The various clergy disqualification provisions noted above provide an example of religious tests as conditions precedent since they are tests that must be satisfied before assuming office. The *Defence (Personnel) Regulations 2002* (Cth) provide for a religious test as a condition precedent since appointment is not permitted ‘unless’ the person ‘is a member of a church or faith group approved by the Religious Advisory Committee to the Services’.¹⁶⁰ The *First Test Act* involved a religious test as a condition subsequent. The Act provided that the persons to which it applied ‘shall take the said oaths ... in the next term *after* his or their admittance or admittances into’ any of the various offices and positions identified and that they ‘shall also receive the sacrament of the Lords Supper according to the usage

¹⁵⁵ Affirmations may, however, be used to effect a religious test. For example, Quakers, while having no objection to professing disbelief in transubstantiation, objected to oaths. The *Act of Toleration 1688*, 1 Wm & M, c 18, s 13 allowed Quakers to affirm rather than swear their disbelief.

¹⁵⁶ *Commonwealth Constitution* s 42 (emphasis added).

¹⁵⁷ *Defence (Personnel) Regulations 2002* (Cth) reg 110(2).

¹⁵⁸ 10 Geo 4, c 7 (emphasis added). The preamble to the *Oaths of Office Simplifying Act 1857* (NSW) makes a similar reference.

¹⁵⁹ The Supreme Court of New Jersey has also used the word ‘condition’ in a case applying a state religious tests prohibition: *New Jersey v Celmer*, 404 A 2d 1, 7 (Pashman J for Hughes CJ, Mountain, Sullivan, Pashman, Clifford, Schreiber and Handler JJ) (NJ, 1979).

¹⁶⁰ *Defence (Personnel) Regulations 2002* (Cth) reg 110(2).

of the Church of England within three months *after* his or their admittances'.¹⁶¹ The religious test present in the parliamentary standing orders compelling the Speaker and President to participate in a Christian religious practice operates as a condition subsequent in the same way. Like the *First Test Act*, the parliamentary standing orders require the relevant office-holder to participate in an inherently religious practice.¹⁶²

History also clearly indicates that the condition may operate in a practical rather than strictly legal sense. The *First Test Act*, for example, did not in its operative terms prohibit Catholics from holding office. Rather, that legislation set a condition for holding office that Catholics could not satisfy without forsaking their religious beliefs. Likewise, the parliamentary standing orders do not in terms prohibit non-Christians (or non-Protestants depending on the analysis of the prayers adopted) from holding office. They set a practical condition for holding office¹⁶³ that non-Christians (or non-Protestants) cannot satisfy without forsaking their conscientious religious beliefs or lack of religious belief.¹⁶⁴ Of course, a legal condition such as that operating for military chaplains under the *Defence (Personnel) Regulations 2002* (Cth) also satisfies the definition.

As noted above, the condition, whether strictly legal or practical, need not be contained in a law in order to attract invalidity by reason of the religious tests clause. This is because the religious tests clause prohibits religious tests 'whether by law or otherwise'.¹⁶⁵ This does, of course, make the analysis one of fact and degree.¹⁶⁶ It might, for instance, be going too far to suggest that since pacifism may be a tenet of some religions,¹⁶⁷ a religious test is thus involved for all combat roles in the military because a person would have to forsake their religious beliefs in order to accept appointment.¹⁶⁸ However, it would not be

¹⁶¹ *First Test Act* s 2 (emphasis added).

¹⁶² See also Beck, above n 136, 194.

¹⁶³ The condition takes the form of requiring participation in an inherently religious practice as a duty of the office as opposed to the *First Test Act* requiring office-holders to participate in an inherently religious practice while not in form making that practice a duty of the office as such. If this is indeed a meaningful distinction, the condition should still be seen as imposing a religious test. Otherwise, form would triumph over substance and the religious tests clause could be circumvented by the 'circuitous device' of formulating the test as a duty of the office: see *Kruger v Commonwealth* (1997) 190 CLR 1, 161 (Gummow J).

¹⁶⁴ Failure to comply with the standing orders is likely to result in dismissal. Inserting a prohibition on religious tests in the *Constitution* was described in the Convention Debates as 'giving a sufficient assertion in this *Constitution* to the principle that religion or no religion is not to be a bar in any way to the full rights of citizenship': *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 7 February 1898, 660 (Josiah Henry Symon). As a policy matter, it is not clear that the practice of reciting prayers is even conducive, let alone necessary, to satisfying the underlying purposes of the offices' constitutional roles.

¹⁶⁵ *DOGS Case* (1981) 146 CLR 559, 605 (Stephen J).

¹⁶⁶ Similarly, in the *DOGS Case*, Gibbs J said '[i]t may be a question of degree whether a law is one for establishing a religion': *ibid* 604.

¹⁶⁷ This was the religious belief at issue in *Krygger v Williams* (1912) 15 CLR 366 and *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116.

¹⁶⁸ In *Krygger v Williams* (1912) 15 CLR 366 the High Court rejected the argument that a law providing for compulsory military training, but which allowed conscientious objectors to be assigned non-combatant duties, was a law for prohibiting the free exercise of religion.

going too far to suggest that a religious test is involved for the parliamentary presiding officers since that test involves participation in a practice that is inherently religious in character. History provides numerous examples of religious tests with which analogies may be drawn to assist the analysis in any particular case.

V WHAT IS AN OFFICE AND WHAT IS A PUBLIC TRUST?

The religious tests clause prohibits religious tests for two classes of position: any office under the Commonwealth and any public trust under the Commonwealth. Fullagar J in *Crittenden v Anderson* plainly considered Members of Parliament to hold an ‘office or public trust under the Commonwealth.’¹⁶⁹ His Honour did not identify whether they held an office or a public trust or both. It may be that it is both. History suggests that a single position can properly be characterised as both an office and a public trust. In 1825, Governor Darling’s commission as Governor of New South Wales required him to take ‘the usual oath for the due execution of the office and trust of our Captain General and Governor in Chief’.¹⁷⁰ The position of Governor was plainly considered to be both an office and a public trust. There are, of course, likely to be examples of positions that are either an office or a public trust but not both.

In *Sykes v Cleary*, Mason CJ, Toohey and McHugh JJ said that ‘the meaning of “office” turns largely on the context in which it is found’.¹⁷¹ The expression in the religious tests clause is not limited to a particular class of office (other than that it exists under the Commonwealth), unlike other constitutional references to ‘office’. The context of s 116 of the *Constitution* is different to that of s 75(v), which gives the High Court original jurisdiction in all matters in which any of the constitutional writs or an injunction is sought against an ‘officer of the Commonwealth’. Whilst it may be fair to say that all officers of the Commonwealth within the meaning of s 75(v) hold office under the Commonwealth, those officers are not the only persons holding office under the Commonwealth. For example, High Court judges are not officers of the Commonwealth within the meaning of s 75(v)¹⁷² but it could hardly be doubted that they hold an office under the Commonwealth. Indeed, s 72 of the *Constitution* refers to all federal judges as holding an ‘office’. As well as federal judge, the *Constitution* identifies a number of other positions that are an ‘office’ including President of the Senate¹⁷³ and Speaker of the House of Representatives.¹⁷⁴

¹⁶⁹ (Unreported, High Court of Australia, Fullagar J, 23 August 1950), extracted in ‘An Unpublished Judgment on s 116 of the *Constitution*’, above n 4, 171–2.

¹⁷⁰ ‘Governor Darling’s Commission’ in Library Committee of the Commonwealth Parliament, *Historical Records of Australia: Series I — Governors’ Despatches to and from England* (1922) vol 12, 99, 101.

¹⁷¹ (1992) 176 CLR 77, 96–7.

¹⁷² *Federated Engine Drivers’ and Firemen’s Association of Australasia v Colonial Sugar Refining Co Ltd* (1916) 22 CLR 103, 109 (Griffith CJ), 117 (Isaacs, Gavan Duffy and Rich JJ).

¹⁷³ *Commonwealth Constitution* s 17.

¹⁷⁴ *Ibid* s 35.

Another limited class of office is referred to in s 44(iv) of the *Constitution*, which disqualifies from election to the Commonwealth Parliament any person holding an ‘office of profit under the Crown’. In *Sykes v Cleary*, the High Court held that a permanent employee of a government department who was not assigned to any particular position within the public service (a so-called ‘unattached officer’) held an office of profit under the Crown.¹⁷⁵ Of significance for the religious tests clause, that case shows that individuals holding employment within government departments hold an office.¹⁷⁶ This should be an uncontroversial proposition and is indeed one that was assumed in *Church of Scientology Inc v Woodward*. Thus military chaplains, like other military personnel, hold an office under the Commonwealth.¹⁷⁷

Interestingly, as originally drafted the *Constitution* did not refer to Members of Parliament as holding an office. Rather, it described them as having a ‘place’ or a ‘seat’.¹⁷⁸ It was only after a constitutional amendment relating to casual vacancies in the Senate that Senators were referred to in the text of the *Constitution* as ‘holding office’.¹⁷⁹ Members of the House of Representatives are not referred to anywhere in the text of the *Constitution* as holding an office. Of course, the absence of a constitutional textual reference to holding office is not determinative of the question whether Members of Parliament, or any other person, can properly be said to hold an office for the purpose of the religious tests clause.

Regardless of whether Members of Parliament hold an office, their place is plainly one of public trust. Indeed, the United States Supreme Court has referred to legislators as holding a public trust¹⁸⁰ and the *Additional Petition and Advice* of 26 June 1657 described Members of the English Parliament as holding a place of public trust.¹⁸¹ In *Ex parte Garland*,¹⁸² the United States Supreme Court considered the validity of legislation that operated to exclude those who had held official positions in the Confederate States during the Civil War from practising as lawyers. In an opinion with which Fuller CJ, Swayne and Davis JJ agreed, Miller J referred to ‘places of high public trust, the administration of whose functions are essential to the very existence of the government’¹⁸³ and considered lawyers to hold such a place.¹⁸⁴ Similarly, the *Roman Catholic Relief Act*

¹⁷⁵ (1992) 176 CLR 77, 97 (Mason CJ, Toohey and McHugh JJ).

¹⁷⁶ In addition, s 84 of the *Constitution* describes public servants as holding an office.

¹⁷⁷ *Defence (Personnel) Regulations 2002* (Cth) reg 110(1) describes military chaplains as being appointed ‘in the Chaplains’ Branch of the Australian Navy, the Royal Australian Army Chaplains’ Department or the Chaplains’ Specialisation of the Australian Air Force.’

¹⁷⁸ References to ‘place’ are found in *Commonwealth Constitution* ss 13–15, 19–20, 37–8, 45. References to ‘seat’ are found at ss 15, 17, 35, 42, 48.

¹⁷⁹ *Commonwealth Constitution* s 15, as amended by the *Constitution Alteration (Casual Senate Vacancies) Act 1977* (Cth).

¹⁸⁰ *US Term Limits Inc v Thornton*, 514 US 779, 903 (Thomas J for Rehnquist CJ, Thomas, O’Connor and Scalia JJ) (1995).

¹⁸¹ The *Additional Petition and Advice* of 26 June 1657 supplemented the *Humble Petition and Advice* of 25 May 1657 and together they were effectively the constitution of the English Protectorate.

¹⁸² 71 US 333 (1866).

¹⁸³ *Ibid* 382.

¹⁸⁴ *Ibid* 384.

1829 referred to ‘place[s] of trust or employment, relating to the government of any city, corporation, borough, burgh, or district’.¹⁸⁵ Thus, it might be said that a person holds a public trust if they exercise public or governmental functions.¹⁸⁶ The United States Supreme Court has also referred to notaries as holding an office of trust,¹⁸⁷ and police officers as holding a position of public trust.¹⁸⁸ And, as noted above, the first Members of the Executive Council in New South Wales were required to take ‘the usual oath for the due execution of their ... trust’.¹⁸⁹

VI WHEN IS AN OFFICE OR PUBLIC TRUST UNDER THE COMMONWEALTH?

The final matter for analysis is consideration of when an office or public trust is ‘under the Commonwealth’. In most cases, the analysis should be straightforward. Commonwealth officials hold their office under the Commonwealth. Thus, chaplains of the Australian Defence Force hold an office under the Commonwealth.

The proposition that the parliamentary presiding officers each hold an office under the Commonwealth should be uncomplicated. However, certain provisions of the *United States Constitution* might be read as suggesting otherwise. The *United States Constitution* describes the Speaker of the House of Representatives, who is a Member of Congress, as one of its ‘[o]fficers’.¹⁹⁰ But the *United States Constitution* also provides: ‘and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.’¹⁹¹ The only immediately apparent way of reconciling those two provisions would be to say that whilst the Speaker holds an office it is not one ‘under the United States.’¹⁹² Those provisions also suggest that Members of Congress do not hold an office under the United States. Nonetheless, *Crittenden v Anderson* considered it as given that Members of the Commonwealth Parliament hold their office and/or public trust under the Commonwealth. Since the parliamen-

¹⁸⁵ 10 Geo 4, c 7, s 19. A similar expression is found in the *Corporations Act 1661*, 13 Car 2, c 1, s 4.

¹⁸⁶ See also *Tito v Waddell [No 2]* [1977] Ch 106; *Dixson v United States*, 465 US 482 (1984); *R v Boston* (1923) 33 CLR 386, 405–12 (Higgins J).

¹⁸⁷ *Torcaso v Watkins*, 367 US 488, 490 (Black J for Warren CJ, Black, Douglas, Clark, Brennan, Whittaker and Stewart JJ) (1961) In addition, overseers of the poor and the highways have been described by counsel as holding places of public trust in argument before the Supreme Court: *Trustees of Dartmouth College v Woodward*, 17 US 518, 611 (Marshall CJ for the Court) (1819).

¹⁸⁸ *Gilbert v Homar*, 520 US 924, 932 (Scalia J for Rehnquist CJ, Stevens, O’Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg and Breyer JJ) (1997).

¹⁸⁹ ‘Governor Darling’s Commission’ in Library Committee of the Commonwealth Parliament, *Historical Records of Australia: Series I — Governors’ Despatches to and from England* (1922) vol 12, 99, 101.

¹⁹⁰ *United States Constitution* art I § 2.

¹⁹¹ *Ibid* art I § 6.

¹⁹² See generally Seth Barrett Tillman, ‘Interpreting Precise Constitutional Text: The Argument for a “New” Interpretation of the Incompatibility Clause, the Removal and Disqualification Clause, and the Religious Test Clause — A Response to Professor Josh Chafetz’s *Impeachment and Assassination*’ (Working Paper, Faculty of Law, National University of Ireland, 2011) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1622441>.

tary presiding officers are Members of Parliament there is no reason why the same conclusion should not hold.¹⁹³ And, of course, drafting anomalies in the *United States Constitution* cannot be allowed to decide the meaning of the *Australian Constitution*.

Another interesting question is whether state officials can be said to hold office under the Commonwealth. In *Torcaso v Watkins*,¹⁹⁴ the United States Supreme Court considered the validity of a provision in the *Maryland Constitution* that ‘no religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God’.¹⁹⁵ Consistent with that provision, it was a requirement for notaries public in Maryland to declare their belief in the existence of God. The Supreme Court held that such a requirement violated the First and Fourteenth Amendments of the *United States Constitution*. However, in a footnote the Court said that because the case was being decided on those grounds ‘we find it unnecessary to consider appellant’s contention that [the religious tests clause of the *United States Constitution*] applies to state as well as federal offices.’¹⁹⁶ The Court thus left open the idea that a person holding a state office or public trust might still be said to hold that position ‘under the United States’.¹⁹⁷

In *Silverman v Campbell*, the Supreme Court of South Carolina appears to have held precisely that.¹⁹⁸ The case concerned two identical provisions of the *South Carolina Constitution*, which provided: ‘No person who denies the existence of a Supreme Being shall hold any office under this *Constitution*.’¹⁹⁹ Consistent with those provisions, an atheist was prevented from becoming a notary public. The South Carolina Supreme Court held that the provisions violated not only the First Amendment but also the religious tests clause of the *United States Constitution*.²⁰⁰ Unhelpfully, it did not provide any discussion of why this was so. It has been suggested that ‘the most likely explanation is that the court considered state offices to be “under the United States”’.²⁰¹ This suggestion does not explain why that was considered to be the case.

¹⁹³ *Commonwealth Constitution* ss 17, 35.

¹⁹⁴ 367 US 488 (1961).

¹⁹⁵ *Maryland Constitution* art 37.

¹⁹⁶ *Torcaso v Watkins*, 367 US 488, 489 n 1 (Black J for Warren CJ, Black, Douglas, Clark, Brennan, Whittaker and Stewart JJ) (1961).

¹⁹⁷ In *Ex parte Garland*, 71 US 333, 397 (Miller J for Fuller CJ, Miller, Swayne and Davis JJ) (1866) the dissenting opinion denied that the First Amendment and the religious tests clause could have any operation in the states. The prevailing jurisprudence now is that the Fourteenth Amendment has had the effect of extending the protections of the First Amendment to the states: see *Cantwell v Connecticut*, 310 US 296 (1940); *Everson v Board of Education of Ewing*, 330 US 1 (1947).

¹⁹⁸ 486 SE 2d 1 (SC, 1997).

¹⁹⁹ *South Carolina Constitution* arts VI § 2, XVII § 4.

²⁰⁰ *Silverman v Campbell*, 486 SE 2d 1, 2 (Finney CJ, Toal, Moore, Waller and Burnett JJ agreeing) (SC, 1997).

²⁰¹ James Lowell Underwood, ‘The Dawn of Religious Freedom in South Carolina: The Journey from Limited Tolerance to Constitutional Right’ (2002) 54 *South Carolina Law Review* 111, 145 n 170.

It should be apparent that the expression ‘the Commonwealth’ might be seen as being used in two different senses in s 116. As it appears in the phrase ‘[t]he Commonwealth shall not make any law’, the Commonwealth is conceived of as a lawmaking entity. By the first three clauses of s 116 the Commonwealth is prohibited from making certain sorts of laws, but the states are not. As it appears in the phrase ‘under the Commonwealth’, the Commonwealth need not be conceived of as a lawmaking entity. It might be conceived of in the sense of the Australian nation, a political entity, of which the states are a part.²⁰²

The second possibility appears consistent with the language of the *United States Constitution*. The First Amendment provides that ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof’. The American establishment and free exercise clauses, like their Australian cousins, are directed in terms at a lawmaking entity. In contrast, the American religious tests clause uses the words ‘under the United States’, which is more obviously a reference to a political entity than to a lawmaking entity. Moreover, the connection of the American religious tests clause with the oaths clause might also be said to support the second possibility:

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the *United States and of the several States*, shall be bound by Oath or Affirmation, to support this *Constitution*; but no religious Test shall ever be required as a Qualification to any Office or public Trust *under the United States*.²⁰³

It appears open to interpret that provision, when read as a whole, as meaning that officers ‘of the United States and of the several States’ hold their offices ‘under the United States’. Thus, it would not be strange if the American religious tests clause had a state-based operation. Similarly, the *Australian Constitution* distinguishes between ‘of the Commonwealth’ and ‘under the Commonwealth’. Thus, Isaacs J’s words, in a s 75(v) case, appear to be lacking in precision: ‘How can it be said that a State Judge holds a Commonwealth office? ... He holds his position entirely under the State’.²⁰⁴ Whilst a state judge does not hold a Commonwealth office, this does not necessarily mean that a state judge’s office is not one ‘under the Commonwealth’.

In the *DOGS Case*, Barwick CJ was highly sceptical of the assistance that a comparison with the American establishment clause might provide in understanding the Australian establishment clause. However, his Honour did not entirely dismiss the utility of comparisons with the *United States Constitution*:

²⁰² During the Second Reading Debate in the House of Commons on 21 May 1900 for the Commonwealth of Australia Constitution Bill 1900 (Imp) 63 & 64 Vict, c 12, one Member of Parliament appears to have considered that the religious tests clause would operate at a state level. He considered that the effect of the clause would be ‘that there should be no possible disability upon religious grounds in any sense in Australia’ and ‘that religion shall be no bar of any kind throughout the length and breadth of Australia’: United Kingdom, *Parliamentary Debates*, House of Commons, 21 May 1900, vol 83, 798–800 (William Redmond).

²⁰³ *United States Constitution* art VI cl 3 (emphasis added).

²⁰⁴ *R v Murray; Ex parte Commonwealth* (1916) 22 CLR 437, 452.

In the case of ambiguous language in our own text, language reasonably capable of bearing more than one meaning, a consideration of the American text and of its judicial interpretation, particularly that which preceded the expression of the Australian text, may assist to determine which of those meanings the language of our text should bear.²⁰⁵

The language of the Australian religious tests clause is ambiguous. The root of the problem lies in the word 'under'. Does it mean 'of' such that the prohibition is limited to Commonwealth offices and public trusts? Or does it mean 'within' such that the prohibition applies to state offices and public trusts as well? The second possibility runs counter to the clearly expressed intentions of Higgins, who proposed what became s 116. His idea was 'to make it clear beyond doubt that the powers which the states individually have of making such laws as they like with regard to religion shall remain undisturbed and unbroken'.²⁰⁶ Nevertheless, both options appear to be open as a textual matter. Furthermore, it is not always the case that the words chosen by legislative drafters are sufficient to carry their subjective intentions into effect.

VII CONCLUSION

Edmund Barton's optimism that the Commonwealth would never require a religious test has proved to be false. It would appear, as this article demonstrates, that occupying the positions of Speaker of the House of Representatives, President of the Senate and chaplain in the Australian Defence Force is conditioned on the satisfaction of a religious test. Barton's other claim that religious tests had been wiped out across Australia at the time of Federation has also proved to be false. Disqualification of people from colonial, and then state, legislatures for religious reasons was the norm. Additionally, the law relating to oaths combined with the limited availability of affirmations of allegiance served to effect religious tests for office. If the policy goals motivating the religious tests in the contemporary examples are considered important then serious consideration should be given to ways in which those goals might be achieved in a way that is consistent with the *Constitution*.

The religious tests clause represents an important guarantee of religious freedom, and one that potentially has a wider scope of operation than the other clauses of s 116. The inclusion of such a provision in the *Constitution* was described at the Constitutional Convention at Melbourne as an 'assertion in this *Constitution* to the principle that religion or no religion is not to be a bar in any way to full rights of citizenship'.²⁰⁷ On this basis, at least, the religious tests clause can properly be described as 'a provision of practical use and value'.²⁰⁸

²⁰⁵ *DOGS Case* (1981) 146 CLR 559, 578.

²⁰⁶ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 2 March 1898, 1769 (Henry Bournes Higgins).

²⁰⁷ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 7 February 1898, 660 (Josiah Henry Symon).

²⁰⁸ Quick and Garran, above n 109, 952.