**THE HIGH COURT AND HISTORICAL JUDGEMENT CAN ANY GOOD COME OUT OF TASMANIA?**

**ANDREW INGLIS CLARK AND SECTION 116 OF THE AUSTRALIAN**

**CONSTITUTION**

# In this paper I wish to ask

What role does history play in Australian Constitutional law;

What role has history played in Australian Constitutional Law;

What role should history play in Australian Constitutional Law;

# What role does history play in Constitutional law;

I wish to investigate this in relation to a still recurring issue: that of religious liberty and in particular the High Court’s judgement on the anti-establishment clause in Section 116 of the Australian Constitution.

The issue is complex but the case law is very simple. There is only one case - *A-G (Vic) ex rel*

*Black v Commonwealth* [1981] HCA 2: 91981) 146 CLR 559 otherwise known as the DOGS case of 1981. No case better illustrates the difference between legal and historical judgement.

In the DOGS case, Stephens J. said:

What it is which constitutes ‘establishing any religion’ has, of course, been central to the debate in this case [[1]](#footnote-1)

[[2]](#footnote-2)Although both judges and historians must make judgements as to what was done, when, how, why, and in what circumstance, historians do not have to make a choice between competing adversaries in a court of law. They are free to ask different questions: what original sources are available? What really happened? What situation did people find themselves in such that they acted one way and not another? What did they really mean when they wrote or were reported in surviving documents?

Historians interested in the meaning of Section 116 are not bound by rules of constitutional interpretation that forbid presentation of primary source material or similar ‘extrinsic’ evidence, — like Constitutional Convention Debates —as evidence of intention. Historians study change as well as continuities. They can accept that the past is a different country to be explored and questioned. They can roam far and wide in that past, aware that questions of the relationship between religion and the state have a long and troubled history – even in colonial Australia.

**Section 116 of the Australian Constitution says *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.*

This section, which until 1981 some citizens considered a ‘ religious liberty’ or ‘Bill of Rights’ type clause was based on the First amendment and Article 6.3 of the Constitution of the United States as follows:

**First amendment, Constitution of the United States: *Congress shall make no law respecting an establishment of religion****, or prohibiting the free exercise thereof…*

And

**Article 6.3 Constitution of the United States:** *…no religious test shall ever be required as a qualification to any office or public trust under the United States*

Section 116 of the Australian Constitution started its life in 1891 in the draft federal Constitution which Andrew Inglis Clark, presented to the Constitutional Convention in Sydney.

**Clause 46 of Clark’s 1891 draft declared, The Federal Parliament shall not make any law for the establishment or support of any religion, or for the purpose of giving any preferential recognition to any religion,** or for prohibiting the free exercise of any religion.

**Clause 81 of Clark’s1891 draft declared,**No Province [that is, state] shall make any law prohibiting the free exercise of any religion. 3

3 Tasmania is the only State to provide for religious freedom in itsconstitution. Section 46 of the *Constitution Act 1934* (Tas) provides:

Freedom of conscience and the free profession and practise ofreligion are, subject to public order and morality, guaranteed toevery citizen.

No person shall be subject to any disability, or be required to takeany oath on account of his religion or religious belief and noreligious test shall be imposed in respect of the appointment to or holding of any public office.

In Australian Constitutional law, the judges of the High Court have ‘chosen’ their history of Constitutional interpretation.

For example, until 1988, Justices of the Australian High Court rejected the idea that they could seek enlightenment as to the meaning of the constitutional text from statements made by the elected members attending the actual Constitutional Convention. All of the original Justices, Griffith, Barton and O’Connor had themselves participated.[[3]](#footnote-3) Yet since the first High Court of Australia met in Melbourne in 1903[[4]](#footnote-4) judges have been happy to consult commentaries rather than the original Convention Debates, 6 even when the commentaries have been seriously questioned.[[5]](#footnote-5)

The High Court’s rejection of access to the constitutional debates as primary sources , lasted many generations. In particular, the Barwick High Court reiterated this self-denying ordinance in the DOGS Court case in 1981. [[6]](#footnote-6)

This did not mean that the High Court did not ‘choose’ an historical meaning. Quite the reverse. In the DOGS case, the Australian High Court justices made very specific historical interpretative choices. The majority generally based their judgements upon the Quick and Garran 1901 commentary on Section 116.[[7]](#footnote-7) Although Quick was a delegate at the 1898 Convention, he was a not uninterested party.

The intentions of other ‘ Founding fathers’ were left out of the judgements.

In dissent Justice Murphy’s drew upon American precedents and the historical account of R.G. Ely who had looked at both the Constitutional Convention debates and the works of Andrew Inglis Clark.

 **J. Quick and R.Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) [[8]](#footnote-8)**

J. Quick and R. Garran said:

*By the establishment of religion is meant the erection and recognition of a State Church, or the concession of special favours, titles, and advantages to one church which are denied to others. It is not intended to prohibit the Federal Government from recognizing religion or religious worship. The Christian religion is, in most English speaking countries, recognized as a part of the common law. "There is abundant authority for saying that Christianity is a part and parcel of the law of the land."* *(Per Kelly, C.B., in Cowan v. Milbourn [1867], L.K. 2 Ex. 234.)*

Richard Ely in his Chapter 12 of his 1976 *Unto God and Caesar* compared Quick and

Garran’s account of what happened to the earlier versions of Section 116 at the Constitutional Conventions of the 1890s with the original documents and found, their factual account, their version of then current American cases on the First Amendment and their interpretation of the clause sadly wanting. 11

Ely noted that Higgins pointed out that the text of his religious liberty clause which he introduced to the Convention on 2 March 1898 was already in the American Constitution; [[9]](#footnote-9)that Edmund Barton, in his speech 2 March 1898 Constitutional Convention made it clear that the ‘no establishment provision prohibited the Commonwealth from recognising any religion as the religion of the State and from giving financial support to any religion.’ George Reid, in his interjection to Barton’s speech made it clear that he believed that the no establishment’ provision prevented the payment of money to any church. O’Connor assumed that it prevented ‘indirect’ as well as ‘direct’ dealing by the Commonwealth with religion. Barton and O’Connor were later Justices of the first High Court of Australia.

Ely concluded:

Quick and Garran’s analysis of the scope and meaning of Section 116, especially of the ‘no establishment’ provision, is so often shot through with mis-statement and tendentious rhetoric, that from the point of view of understanding the original meaning of this section of the Constitution [116] it simply should be disregarded.13

In 1981, this was all irrelevant. Quick and Garran’s account was allowed into the court as evidence of the intention of the Founding Fathers in 1900. The Conventional Debates were not.

**The Majority Judgements in the DOGS case:**

The majority judges in the DOGS case followed the interpretation of Quick and Garran. They held that the clause was merely a limitation on governmental power rather than a clause creating a right. Barwick CJ held that the word “for” required that a law must have the objective of establishment as “it expresses … a single purpose.”

Each of the justices came to slightly different definitions of establishment, but in effect, they changed the words “any religion” to the words “ a particular religion “ or “ a State church”.

Chief Justice Barwick held that establishment of any religion was ‘unambiguous’ and meant what he said it meant. He had

‘ *no need to attempt to give it meaning by analogy of, or by derivation from, that of the Bill of Rights or from the interpretations it had received.’ [[10]](#footnote-10)*

*…establishing a religion involves its adoption as* ***an institution of the Commonwealth, part of the Commonwealth "establishment****". [[11]](#footnote-11)*

Justice Gibbs said that ‘ there was ‘no reason to give Section 116 a ‘liberal interpretation ‘ [[12]](#footnote-12)

*I consider that the words "The Commonwealth shall not make any law for establishing any religion", where they appear in s.* [*116,*](https://jade.io/article/260323/section/395) *mean that the Commonwealth Parliament shall not make any law for conferring on a particular religion or religious body the position of a state (or national) religion or church.* [[13]](#footnote-13)

Justice Stephens went to the Oxford dictionary and discussed establishment in terms of

‘creating a State Church’ , but added that

‘*the relationship of establishment is created by the sum total of a range of laws and without a* *‘single element of those relations viewed in isolation itself creating establishment.’ [[14]](#footnote-14)*

Justice Mason considered the clause meant

*The authoritative establishment or recognition by the State of a religion or a church as a national institution. [[15]](#footnote-15)*

Justice Wilson with whom Justice Mason agreed, considered that while grants of power

‘*should be construed with all the generality which the words used will admit…the same is not true of a provision which proscribes power.’ [[16]](#footnote-16)*

He inferred

*A legislative intent to adopt a narrow notion of establishment, namely that which requires statutory recognition of a religion as a national institution…[[17]](#footnote-17)*

Aickin J. who the plaintiffs discovered had accepted a brief on the case while he was a QC,[[18]](#footnote-18) did not write a separate judgement. He agreed with the majority

Justice Murphy , in dissent said:

*The ordinary principle that constitutional provisions should be read not narrowly, but "with all the generality which the words admit", strongly supports the adoption of the more general reading, that is, the separation interpretation.[[19]](#footnote-19)*

He criticised the narrow interpretation taken by his fellow judges:

*To refuse to read the establishment clause with generality because so read it covers some of the ground covered by the other guarantees in s.* [*116*](https://jade.io/article/260323/section/395) *is to interpret s.* [*116*](https://jade.io/article/260323/section/395) *as if it were a clause in a tenancy agreement rather than a great constitutional guarantee of freedom of and from religion.*

He pointed out the consequences of the substitution of the words ‘any religion’ into ‘a State church’. It not only trivialised the section but turned the original meaning upside down.

*To read s.* [*116*](https://jade.io/article/260323/section/395) *as prohibiting only laws for establishing one religion or church, but permitting laws for establishing a number of religions or churches is inconsistent with the comprehensive terms of the prohibition. There is no warrant for reading "any religion" as "any one religion"; yet this is necessary if "establishing" refers only to the recognition or setting up of one national church or religion. Such a reading trivializes the section. It would allow laws for sponsoring and supporting (financially and otherwise) a number of religions (even in the most discriminatory and preferential way) as long as the laws stopped short of setting up one national church or religion*.[[20]](#footnote-20)

In relation to Barwick CJ’s emphasis on the difference between ‘for’ in the Australian and

‘with respect to’ in the American Constitution, Murphy J. he pointed to the (1901) Oxford Dictionary meaning which gave ‘with respect to’ as an equivalent meaning to ‘for’. [[21]](#footnote-21)

According to the majority judgements, the words’ any religion’ really means ‘a State religion’ or ‘a State church’.

However, if this meaning is given to “any religion’ and transferred to the remaining clauses, Section 116 reads:

**Section 116 of the Australian Constitution:**

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

In 1981 the plaintiffs believed that a Bill of Rights protection, a clause that they believed was a protective shield —had been turned into a sword.

The plaintiffs (the DOGS) subsequently opposed the extension of Section 116 to the States in the *Age* on 30 August 1988. [[22]](#footnote-22)Politicians in Canberra, most of whom initially supported the Referendum, waxed abusive, and Ray Nilsen, the co-ordinator of the High Court case rang the Catholic Education authorities and told them that if the Referendum succeeded he would be in the State Courts the next day. The Catholic Church authorities and the Coalition opposition opposed the referendum and it failed.

**The ‘History ‘ Chosen by the High Court Majority judges**

Barwick CJ refused to look at the Constitutional Convention Debates, but ‘chose’ his history

– from England, or was it from the Free Churches of Scotland

*..The meaning which "establishing" in relation to a religion bore in 1900 may need examination. But that is not because of ambiguity but to ensure that the then current meaning is adopted.. ..I am of opinion that there has been no real change in the significance of the words over the years which have intervened…what would be involved in establishing a religion has, in my opinion, remained constant…*. *establishing a religion involves its adoption as an institution of the Commonwealth, part of the Commonwealth "establishment". One can perceive these concepts in the decision of the House of Lords in General Assembly of Free Church of Scotland v. Lord Overtoun* [*(1904) AC 515*](https://jade.io/citation/2426456) *. I feel no doubt that this is the sense in which the relevant part of*

 *the language of s.* [*116*](https://jade.io/article/260323/section/395) *was used when our* [*Constitution*](https://jade.io/article/260323) *was formed.. [[23]](#footnote-23)*

Gibbs J was less interested in history than statutory interpretation, claiming that ‘the purpose for which Section 116 was inserted in the Constitution remain ‘obscure’[[24]](#footnote-24) but he also chose the interpretation of the Constitutional Convention debates offered by Quick and Garran. He asserted that

‘The natural meaning of the phrase ‘establish any religion’ is, as it was in 1900, to constitute a particular religion or religious body as a state religion or state church’ [[25]](#footnote-25)

Stephens J noted the plaintiffs’ reference to Australian colonial history and the nineteenth century abolition of State financial aid to churches and church schools, but observed the marked contrast existing between the language of the colonial Acts and the words of Section 116. He fell back on the interpretation of the Convention debates advanced by Quick and Garran [[26]](#footnote-26)

Mason J. did not reject the intentions of the Constitutional Convention delegates, but claimed they were unclear. He also relied on Quick and Garran as follows:

*Why it was considered necessary to include in the* [*Constitution*](https://jade.io/article/260323) *s.* [*116*](https://jade.io/article/260323/section/395) *or its first clause is not altogether clear. Mr. H.B. Higgins thought that the reference to Almighty God in the preamble might have yielded by implication a power in the Commonwealth Parliament to legislate upon the topics mentioned in the section. Quick and Garran considered that it may have been inserted to forestall any possibility of amending the* [*Constitution*](https://jade.io/article/260323) *by providing for any of the matters prohibited….. Reflection upon the question is speculative and it does not assist in the resolution of the problems which now arise. 30*

Wilson J. . was more sensitive about the historical background of Section 116 , but refused to delve deeply into it.

*While on present authority it is not permissible to seek the meaning of s.* [*116*](https://jade.io/article/260323/section/395) *in the convention debates, I may say that I find it interesting that in the course of the conventions the religion clause began as a denial of power to the States, then was re-addressed to both the States and the Commonwealth, and finally took its present form ….Be these things as they may, I believe it would be wrong to attach undue significance to the history of the clause. The actual words of the text supply the only firm ground on which to base a conclusion.*

Unlike the majority judges, Justice Murphy referred to American case law and history. He noted its explanation in Jefferson’s letter to the Danbury Baptists, [[27]](#footnote-27)and turned to the coauthor of the establishment clause James Madison . He also noted the 1975/76 historical research by Richard Ely on the influence of American developments on the framers of the Australian Constitution. [[28]](#footnote-28) He refused to be misled by the Quick and Garran account which had been seriously questioned by Ely.

 As a result Murphy followed a separationist interpretation.

**A lot has happened since the DOGS case of 1981.**

Firstly, *The* *Acts Interpretation Act Amendment Act* of 198433, Section 7 amended the original 1901 Act to include a Section 15AB. This permitted the use of extrinsic material in the interpretation of an Act to determine the meaning of a provision when it is ambiguous or obscure , or the ordinary meaning leads to a result that is manifestly absurd or unreasonable. In 1988 the Mason High Court reversed the original interpretative rule and the books of the Convention debates were read in open court. [[29]](#footnote-29)

As a result, many legal commentators and historians, confronted with recent issues of religion and the state have been revisiting the DOGS case. They have discovered what the plaintiffs could have told them in 1981 – that what was clearly a version of the religious liberty clauses in the American Constitution, has been rendered meaningless in the Australian context.

For legal commentators, the questions arising from the DOGS case include techniques of constitutional interpretation as well as well as the intentions of the American and Australian

Founding Fathers. Historians have an easier question: What did delegates to the

Constitutional Convention intend when they inserted Section 116 into the Australian Constitution? Who do you turn to ? Quick and Garran, Henry Bournes Higgins or the originator of Section 116 - Andrew Inglis Clark?

**Case law Since 1981**

In 1990, the narrow interpretation of Section 116 was upheld by French J. in a case of a marriage celebrant case. The applicant ‘s argument that the marriage register was a form of establishment was rejected. Following Barwick CJ and Gibbs J. in the DOGS majority judgement, French J. said that the only invalid Commonwealth legislation in relation to marriage, would be that it authorised a monopoly in religious marriages in favour of one particular denomination. [[30]](#footnote-30)

In 2011 Marella Harris and the Hoxton Park Residents Action Group sought to prevent the construction of the Malek Fahd Islamic School and mosque on residential land at Hoxton Park Road. They commenced proceedings in the Equity Division of the NSW Supreme Court based on the allegation that the funding was obtained by way of a grant made under the Schools Assistance Act 2008 (Cth) and the Education Act (1990) (NSW) and contravened Section 116 of the Constitution.

On the basis of the majority decision in the DOGS case, Rein J. in the first instance, found that ‘a law’ for ‘establishing any religion’ had to recognise that religion as a state religion, church of national institution’[[31]](#footnote-31) and dismissed the case. The Plaintiffs appealed.

But in the NSW Court of Appeal, Basten J. with whom Allsop and Beazley JA agreed, distinguished the *DOGS* case on the facts and considered the law as stated in 1981 might not be settled. He found the case differed in two respects from the DOGS case. First it alleged direct funding of a religious institution for religious purposes ; and secondly in his opinion, developments in constitutional law since the DOGS case in 1981, might allow submission to be made supporting a more flexible approach to the constraints of legislative power as set out in s 116. [[32]](#footnote-32)

He was in fact mistaken about the plaintiffs arguments in the DOGS case. In 1979 there was a Trial of Facts of 26 days in which the issue was whether religious schools were religious institutions or even more religious than State Schools. Evidence was provided by the plaintiffs that schools in Churchill and Geelong were used for church purposes. These have been referred to in the Justice Murphy dissent. [[33]](#footnote-33)

However, Basten J. was correct in stating that there had been developments in Constitutional law since the DOGS case. One was the admission of the Constitutional Convention Debates into the High Court as extrinsic evidence.

The other was the academic commentaries resulting from a close examination of the historical narratives ‘ chosen’ by the majority judges. In the process some discovered, as Murphy J. had done, the work done by Tasmanian historians, and in particular R.G. Ely on the events and ideas surrounding the insertion of the religious liberty clause into the Australian Constitution. H.B. Higgins took centre stage with his Seventh Day Adventist friends in their academic papers. But it took longer for them to discover, back in 1891, the importance of Andrew Inglis Clark.

Meanwhile, in 2008 the question of freedom not only of, but from religion raised its head. Ron Williams, a secularist parent, from Toowoomba, reacted against the imposition of a chaplaincy program on his local State school. and Aided by ardent and determined secularists, he decided to put the High Court on trial. He came, with Max and Meg Wallace from the secular society to Melbourne to discuss the case with the plaintiffs in the DOGS case. They met up with Ray Nilsen. Ray, who had five university degrees, including a Masters in Psychology and a LLB, was a Christian in the dissenting tradition with a strong humanist streak. He only had a year to live, but was relieved that activists like himself were waking up to what had been lost in 1981.

The Williams cases, both of which were successful[[34]](#footnote-34),—but not on Section 116—generated media coverage, academic conferences and commentaries. In the first case The High Court ruled that in the absence of any statutory authorisation beyond a mere appropriation statute, the School Chaplaincy program was not a lawful basis for Commonwealth expenditure [[35]](#footnote-35)

When the Commonwealth funded the States Chaplaincy programs through legislation, Mr Williams went back to the High Court. [[36]](#footnote-36) The High Court held that the legislation was not supported by any constitutional head of power. The Commonwealth then turned to Section 96 grants to the States.

All High Court judges in 2012 said that, given ‘the significance of the place of s 116 in the Constitution’, the term ‘office’ in the final clause ‘ should not be given a restricted meaning.

It has been noted by Luke Beck from the University of Western Sydney that the rejection of

‘restricted’ meanings of terms used in Section 116, conflicts with the restricted meaning of ‘establishment’ majority judgements in the 1981 *DOGS* case.[[37]](#footnote-37)

**4. Commentaries on the Establishment Clause**

When the Constitution took effect in 1901, Quick and Garran argued that Section 116 was redundant as the Commonwealth had not been given the legislative power under [Section 51](https://en.wikipedia.org/wiki/Section_51_of_the_Australian_Constitution) to establish a religion or prohibit its free exercise. They also considered it self-evident that establishment meant ‘the erection and recognition of a State Church, or the concession of special favours, titles, and advantages to one church which are denied to others.’ [[38]](#footnote-38) In 1963, a lawyer, Clifford Pannam wrote that this provision was regarded "by all as having little practical value". Pannam considered the provision would only become significant if the High Court held that it applied to laws made by governments of the territories.[[39]](#footnote-39) Yet in 1964 Professor P.H. Lane, said that it was sufficient if a law ‘is merely directed towards, or tends to’ the establishment of religion. [[40]](#footnote-40)[[41]](#footnote-41)5

Within a decade after the *DOGS* case, there was growing disquiet about the High Court’s interpretation of the meaning of ‘establishment’ from secularists. Had the High Court favoured religion to the exclusion of non-religious beliefs? Could this problem only be solved by a separationist interpretation?

Since 1981, commentaries have either favoured a

* national church interpretation
* non-preferential / limited neutrality/non-discrimination interpretation or
* separationist/ strict neutrality iinterpretation

# The National Church Interpretation

In 1998 Joshua Puls, at that time a tutor at Newman College, the University of Melbourne,[[42]](#footnote-42) argued against the separationist interpretation as well as secularism as a ‘quasi religion’ in a long, learned article. He concluded that ‘Section 116 is adequate and appropriate if one does not expect it to do too much.’ [[43]](#footnote-43) and

‘*the effect of any constitutional provision as loaded with value judgments as one involving religion will inevitably be dependent not so much on the fine wording of that section but on the desired outcome sought by the judges applying it.’* [[44]](#footnote-44)

And in 2009, with the secularists’ promotion of the *Williams* (Chaplaincy) cases gaining public momentum, Jennifer Clarke, Patrick Keyzer and James Stellios in a Constitutional Law commentary for students, agreed with J, Puls that the court's narrow interpretation of the provision is consistent with the intention of the Constitution's drafters, who never intended for it to be a protection of individual rights,[[45]](#footnote-45)

# The Limited Neutrality, non-preferential, or non-discrimination Interpretation

The narrow view taken by the High Court of the ‘establishment’ clause in the DOGS case unearthed problems for the ‘free exercise clause’. The satisfaction of one might violate the other. Too strict a view of the non - establishment clause might amount to hostility to religion and constitute an infringement of free exercise. And what protection was offered to the exercise of non-religion ?

In 1992 Stephen McLeish now Justice McLeish of the Victorian Court of Appeal, and from Melbourne University and later Harvard argued for a limited principle of ‘neutrality’ in the federal government’s relationship with religion by suggesting that secularism could be defined as a ‘quasi-religion’. [[46]](#footnote-46)

McCleish complained that the High Court attempted to discern the meaning of Section 116 with unsuitable’ legalistic tools. The assumption that it was primarily concerned with legislative power rather than civil rights led the majority judges to examine a challenged law on its face rather than how it affected citizens in practice. 51 He suggested a qualified ‘neutrality’ rather than a ‘separation’ test.

McLeish’s research however, led him back into nineteenth century religious and education history and to the the historical circumstances surrounding the insertion of Section 116 into the Constitution. He discovered Andrew Inglis Clark and Tasmanian historians of the 1960s and 1970s like John Reynolds, Justice J. M. Neasey and R.G Ely who had realised the importance of the Tasmanian Attorney General and Supreme Court judge in regard to the 1891 draft of the Australian Constitution. 52

In 2009 academics Gonzalo Villalta Puig and Steven Tudor called for the court to broaden Section 116 by finding in it an implied right to the freedom of thought and conscience. In their view most Australians correctly "believe that the Constitution protects the right to freedom of thought and conscience just like it protects other civil and political freedoms", and the court should give effect to that belief.53

In 2013/14, Luke Beck, a graduate from Sydney University, and lecturer in the School of Law at the University of Western Sydney, looked into the Constitutional Convention debates and concluded that the standard account 54 of the concerns of Henry Bournes Higgins when he proposed the religious liberty were mistaken . Higgins’ real concern, he argued, was a realisation that the Commonwealth’s enumerated powers in Section 51 were wide enough to authorise legislation dealing with religion.55 In his questioning of the standard Quick and Garren interpretation, Beck drew upon the historical works of R.G. Ely,56 and Helen Irving. 57

In 2014, armed with the High Court decisions in the Hoxton Park School Chaplaincy cases, Beck went further. Although he was not prepared to say that the DOGS case majority judgement was ‘wrong’ he concluded that it was not authoritative.

He suggested that High Court reasoning on the meaning of the anti-establishment clause in

s.116 required reconsideration. It was too narrow. He argued for a limited neutrality position:

namely a prohibition on federal expenditure for religious purposes such as for religious activities, or instituting programs that result in a religion or multiple religions becoming

51, Ibid 207

52 Ibid , 217. H, Reynolds, ‘A.I. Clark’s American Sympathies and his Influence on Australian Federation’ (1958)

32 *ALJ* 62; J.M. Neasey, ‘Andrew Inglis Clark Senior and Australian Federation’ (1969) 15 *Australian Journal of*

*Politics and History* no 2, 1; R.G. Ely ‘ Andrew Inglis Clark and Church State Separation’ (1975) *8 Journal of*

*Religious History*, 271; R. G. Ely *Unto God and Caesar: Religious Issues in the Emerging Commonwealth 1891-*

*1906* ( Melbourne, Melbourne University Press, 1976)

1. Villalta Puig, Gonzalo; Tudor, Steven (2009). "To the advancement of thy glory? A constitutional and policy critique of parliamentary prayers"*. Public Law Review.* **20** (1): 56–78
2. Quick and Garren; Ibid Clifford Pannam, Ibid Justice Mason and Justice Wilson in the DOGS High Court case,

Ibid; JA La Nauze, The Making of the Australian Constitution (MUP 1972) 229; Reid Mortensen ,’Judicial

Inactivism in Australia’s Secular Commonwealth’ in Christine Parker and Gordon Preece (eds) *Theology and*

*Law: Partners or Protagonists* (ATF Press, 2005) 52,55; Carolyn Evans*, Legal Protection of Religious Freedom in*

*Australia* (Federation Press, 2012)70, DOGS case, (1981) 146 CLR 559,612, and 654

1. L. Beck, *Higgins’ Argument for Section 116 of the Constitution*, Legal Studies Research Paper No 14/45 May 2013, Sydney Law School, University of Sydney.
2. R. Ely , *Unto God and Caesar: Religious Issues in the Emerging Commonwealth, 1891- 1906*, (MUP) (1976)
3. H. Irving, *To Constitute a Nation: A Cultural History of Australia’s Constitution* (1999) ( Cambridge University

Press)

identified with the Commonwealth, and the Commonwealth from instituting programs that result in a religion or multiple religions becoming identified with the states and territories. [[47]](#footnote-47)

In 2016, Beck concentrated on the narrow purposive test used by Chief Justice Barwick and the Majority in the DOGS case, namely the definition of ‘ for’ in Section 116 as meaning ‘ for the sole purpose of’[[48]](#footnote-48) as opposed to the broader American First Amendment version of ‘with respect to’ . A substantial part of his analysis dealt with the Constitutional Convention Debates and what he believed was the intention of H. B. Higgins. He considered that Higgins regarded ‘for’ and ‘respecting’ as synonymous. [[49]](#footnote-49)

Beck was joined in his opinion that the DOGS case was no longer ‘authoritative by Professor

Reid Mortensen[[50]](#footnote-50) in Queensland. The 2012 *Williams (Chaplaincy)[[51]](#footnote-51)* cases prompted a Conference in Williams’ home town of Toowoomba at the University of Southern

Queensland on 4 October 2013. The papers presented at this Conference were published in a special issue of the University of Queensland Law Journal in 2014. [[52]](#footnote-52) Mortensen’s article in this Journal, :*The Establishment Clause: a Search for Meaning* argued that the *Williams* case revealed the impoverished condition of jurisprudence on section 116. He wrote:

…the plaintiff’s silence on the possible application of section 116 ‘s establishment clause is largely possible because, in the Defence of Government Schools case (‘the DOGS case’) the High Court rendered the clause meaningless…it does not seem worth the effort while the DOGS case is’settled law’.

But Mortensen could not and did not accept that Section 116 was meaningless. He also believed that the ‘win’ in the Williams case improved the prospects for the establishment clause to have a greater reach.

He immediately referred back to the Constitutional Convention debates of February/March 1898. He noted that Higgins and Richard O’Connor thought that it would replicate the operation of the American First Amendment, although neither seemed to have a full understanding of American case law at that time. He concluded that the blatant plagiarism of the American clauses may have been unthinking, but the fact that the clause is in the Australian Constitution in itself suggests that it should not be ignored.

He did not go further back to Inglis Clark, who could have told him in considerable detail what it all meant. He did however, complain that, although Section 116 was obviously based upon the American First Amendment, the High Court in the DOGS case had looked at it through a British lens, rendering it a Washminster mutation.,64 He was far from impressed by the majority’s historical references, noting the odd reference to the Scottish *Overtoun* 65case and Mason J’s reference to the established Episcopalian Church of Ireland in 1900 when it had been disestablished for 29 years. Mortensen concluded that the Dogs case was not the High Court’s finest moment.

Mortensen considered that if it were assessed purely on its merits, the DOGS case should be ripe for overruling. The DOGS majority national church interpretation of the establishment clause can only give effect to a limitation on Commonwealth power, if, without the clause, the Commonwealth could create a national church or religion. But the Commonwealth does not have such a power. The majority judgement in the DOGS case renders the clause meaningless.

As he searched for a meaning to the clause, Mortensen also rejected the separationist interpretation of Murphy J. 66

He chose, instead to promote the principle of non-discrimination. 67

What did he mean by this principle? A half way point to please everyone—and, as the Australian experience has proved — none. He wrote:

The aim of the principle of non-discrimination is to coordinate, sometimes through extremely messy arrangements, Australia’s religious and moral pluralism and to assure equal access to the public square.

# The Separationist/ Strict Neutrality Interpretation

65 Barwick J and Wilson J’s use of *Free Church of Scotland v Overtoun* [1904]AC 515 646, 656,677,694.

concerned whether a union of Presbyterian churches in Scotland wasconfroming to the idea of establishment held by one of the uniting churches – the Free Church of Scotland.. It referred to the Westminster Confession definition of 1643. 66 Ibid 123-125

67 Mortensen looked in detail at Australian precedents since the *DOGS* case casting his net widely. He discovered Family law cases where section 116 was given a non-discrimination interpretation for example, by Justice Carmichael in *Evers v Evers,* a custody case involving a Jehovah’s Witness parents where the mother’s convictions had lapsed.

[the] freedom I see…granted by section 116 is a freedom from the imposition of theological ideas:

Parliament and the courts cannot prefer Christianity to any other religion, or prefer any religion to none at all

And Planning Law cases where section 116 was used as a ‘signpost of religious equality. For example, a majority of the NSW Court of Appeal in *Municipal Council v Moslem Alawy Society*[1985] NSWLR 525 at 544 held that a house used for prayer and the reading of the Koran was a ‘place of public worship’ for town planning purposes, even though the general public had no access to it. Justice McHugh held that:

The preservation of religious equality has always been a matter of fundamental concern to the people of Australia and finds its place in the Constitution s 116.

The majority judges in the DOG’s case, defined what they considered was the prevailing late 19th century understanding in English legal circles of the nature of the act of legislatively ‘establishing’ religion.

In 1986 R. Ely tested not only the English definition but his own in his 1976 work, *Unto God and Caesar.* [[53]](#footnote-53)He did this by examining in a lengthy historico-legal study all of the Statutory establishments of religion in England from ca 1300 to 1900. [[54]](#footnote-54) He concluded that he and all the Australian High Court judges were mistaken. He distinguished two major kinds of religious ‘establishment’ in the English statutes during that period: the Erastian and the High Church interpretation. The High Church interpretation in turn took two forms: the Papal and the High Anglican. After considerable research he discovered that in the later 19th century, and during the preceding centuries, the Erastian interpretation held the centre ground. But, resulting from the Oxford Movement of the middle 19th century decades, the dominant Erastian interpretation became the subject of a vigorous but largely unsuccessful, High Anglican attempt to subvert and transform it.

Ely concluded that, beyond reasonable doubt, around the close of the nineteenth century the dominant English judicial understanding of the words’ establishing any religion’ was on Erastian rather than High Church lines.

The interpretation that found favour in the Australian High Court however, was that promoted by a minority of the established English church, namely the middle to late nineteenth century High Anglicans.

As a result, Ely argued that, although following English precedent had poor credentials, late nineteenth century England was the place to look for ‘meanings’ of the act of legislatively ‘establishing’ religion, the DOGS challenge would not so readily have failed if ‘establishing any religion’ was interpreted, as it clearly should have been, on Erastian lines. In the Erastian perspective, statutorily to ‘establish’ religion is to command, in due parliamentary form and make enduringly lawful, certain arrangements which substantially benefit religion within the realm. Such an arrangement might properly be the current Australian State Aid to religious schools situation. Could the States Grants Acts under challenge in the DOGS case also be described as ‘An Act to establish Godly and Useful Learning among the Young’.

By 1990, W. Sadurski, from Sydney University and later an eminent legal academic in Yale and Europe, regarded the strict separation interpretation of the non-establishment clause as the only escape from an ‘unattractive dilemna’of ‘either favour[ing] religion to the detriment of non-religious beliefs, or interpret[ing] genuinely secular beliefs as “religious”. [[55]](#footnote-55) This could only be resolved, he argued ‘by adopting the policy of strict neutrality. No aid and no disadvantage is to be triggered by a description of a certain belief or activity as ‘religious’.

In 1993 Justice Michael Kirby , attended an International Religious Liberty Association conference in Suva Fiji and gave a paper on ‘Religious Liberty in Multicultural Australia: Past Tolerance-Present Indifference- Future Problems ‘

He noted that although Australia has a constitutional recognition of the general separation of the public realm of government from the private realm of religion in the provisions of its national constitution, Section 116 had not proved very powerful in its application. In conclusion, he advocated a ‘system of religious liberty and the separation of civil and religious identity as an important condition of peace.’ 71 In discussion he invited DOGS plaintiffs present at the Conference to approach the High Court once more. They noted the predilections of the majority of members of the then current Court and graciously declined.

In 1994 [George Williams,](https://en.wikipedia.org/wiki/George_Williams_%28lawyer%29)72 a Professor at the University of NSW, condemned the court's literal interpretation of the Section 116 provision, saying the court has ‘transformed the Constitution into a wasteland of civil liberties’. He argued that as an "express guarantee of personal freedom", the provision should be interpreted broadly and promote "individual liberty over the arbitrary exercise of legislative and executive power"73

In 2002 Williams repeated his call for a broad interpretation of Section 116 in his *Human Rights under the Australian Constitution* 74

In 2006 Helen Irving 75from Sydney University, a researcher specialising in, amongst other things, the use of history in constitutional interpretation, addressed the ‘Separating Church and State: Keeping God out of Government’ national conference of the Rationalist Society of Australia held in Melbourne,that year. She claimed that, whereas one can say, with some qualifications, that there is a constitutional separation of church and state in the United States, the same cannot be said about Australia – despite having the same words in our Constitution.

Sydney Law School and a Professor at the University of Warsaw, Centre for Europe. His most recent books include Constitutionalism and the Enlargement of Europe ( OUP 2012), Equality and Legitimacy ) OUP 2008), and Rights before Courts (Springer 2005 and 2014).

1. M. Kirby, ‘Religious Liberty in Multicultural Australia: Past Tolerance – Present indifference – Future Problems,’ International Religious Liberty Association, South Pacific Division, Pacific Congress, Suva, Fiji, 9 June 1993, 30.
2. Professor at the University of New South Wales who, as chair of the Victorian Human Rights Consultation

Committee in 2005 helped bring about Australia’s first State bill of rights, the Victorian Charter of Human Rights and Responsibilities

1. G. Williams, *‘*Civil Liberties and the Constitution – A Question of Interpretation’*. Public Law Review.* ***5*** *(2):*

82–103 at 90

1. *Williams, George (2002). Human Rights under the Australian Constitution. South Melbourne: Oxford University Press.*
2. Helen Irving was appointed to the Faculty of Law in 2001 and is the Director of the Julius Stone Institute of Jurisprudence. She is currently Pro-Dean (Staff Development). In 2005-2006 she held the Harvard Chair of Australian Studies as a Visiting Professor at Harvard Law School.

She announced that in 1981 the Australian High Court effectively got it wrong when it came to interpreting the Constitution from an ‘originalist’ perspective ,i.e. if you think the Constitution should mean what the framers or founders wanted it to mean. She argued that the framers of Australia’s Constitution intended Australia to be secular, erecting a ‘wall of separation between church and state’, following the United States example. But in the DOGS case the High Court interpreted the provision in such a way as virtually to deplete it of meaning.

When turning to the framers of the Constitution, she did not stop at the Constitutional Convention debates. She noted that Section 116 was incorporated into the Constitution in two phases; at the First Federal Convention in 1891 and at the second in 1897-98. She noted that, although it is suggested that Section 116 was only included in 1898 because of the inclusion of this statement of pious hope in Almighty God, because some feared at the time that this might lead to an association between the new Commonwealth and an official religion.

This account ignored the fact that the anti-establishment provision had been proposed at the First Federal Convention in the Inglis Clark draft and adopted. It was not and never was, meant to be merely a provision for mitigating the effect of recognising God in the Preamble.

She criticised the majority judgements, accusing Chief Justice Barwick of balancing his particular conclusion ‘on the head of a pin’- the difference in language between the United States and the Australian establishment clauses. She agreed with the Justice Murphy dissent.

In conclusion she said:

..*the High Court got it wrong when they concluded that section 116 was not intended as a broad statement of separation of church and state; and they got it wrong in suggesting that ‘establishment’ was intended to have a narrow meaning…the history of sectarians, and religious persecution, which the framers understood well, and which served as a background to their deliberations on both the reference to God in the preamble and their inclusion of a prohibition on religious laws, suggests that they had a wide purpose and scope in mind. They appreciated the multiple dangers inherent in allowing governments to involve themselves in religious matters. [[56]](#footnote-56)*

Most commentaries on the DOGS case now agree on one thing. The historical analysis of the meaning of the ‘establishment’ clause in 1900 were either odd, inadequate or just plain wrong.

But, what was really happening when Inglis Clark proposed his version of the American First

Amendment in the 1891 draft Constitution and Higgins finally persuaded a majority of Convention delegates to insert what became Section 116 into the Constitution? The commentaries raise more questions than they answer.

**What do Historians have to Offer?**

Historians can, and have gone back to the original Convention Debates.

In the last decade, historians and sociologists attempting to explain the erosion of religious liberty in Australia – most particularly ‘ freedom from religion’[[57]](#footnote-57)and the growth of glaring inequalities in educational opportunities [[58]](#footnote-58) are sometimes asking what really happened in the DOGS case in 1981. Others are exploring the meaning of the word ‘secular’ and charting both sacred and secular movements in recent Australian and American history.[[59]](#footnote-59) In their researches, many of these writers have discovered Richard Ely’s work on Section 116, on the limitations of the Quick and Garren 1901 Constitutional commentary, and on Andrew Inglis Clark.

Richard Ely in his Chapter 12 of his 1976 *Unto God and Caesar* compared Quick and Garran’s account of what happened to the earlier versions of Section 116 at the Constitutional Conventions of the 1890s with the original documents .He discovered that their factual account, their version of then current American cases on the First Amendment and their interpretation of the clause sadly wanting. [[60]](#footnote-60)

Ely noted that Higgins pointed out that the text of his religious liberty clause which he introduced to the Convention on 2 March 1898 was already in the American Constitution; [[61]](#footnote-61)that Edmund Barton, in his speech 2 March 1898 Constitutional Convention made it clear that the ‘no establishment provision prohibited the Commonwealth from recognising any religion as the religion of the State and from giving financial support to any religion.’ George Reid, in his interjection to Barton’s speech made it clear that he believed that the no establishment’ provision prevented the payment of money to any church. O’Connor assumed that it prevented ‘indirect’ as well as ‘direct’ dealing by the Commonwealth with religion. Barton and O’Connor were later Justices of the first High Court of Australia.

Ely concluded:

Quick and Garran’s analysis of the scope and meaning of Section 116, especially of the ‘no establishment’ provision, is so often shot through with mis-statement and tendentious rhetoric, that from the point of view of understanding the original meaning of this section of the Constitution [116] it simply should be disregarded.82

In 1981, this was all irrelevant. Quick and Garran’s account was allowed into the court as evidence of the intention of the Founding Fathers in 1900. The Conventional Debates were not.

Long before the DOGS High Court case in 1981, Australian colonial historians had charted the 1836 abandonment of the established English Church in colonial NSW;[[62]](#footnote-62) the abandonment of State Aid to religion in the 1860s,[[63]](#footnote-63) and the abandonment of State Aid to religious schools in the later nineteenth century. [[64]](#footnote-64)

So, when Edmund Barton and others told Henry Bournes Higgins in the 1898 Constitutional debate that there was no need for a religious liberty clause based on the American First Amendment in the Australian Constitution, it was not only because the Federal Parliament would not have express power to deal with religion. It was also because they believed they had solved ‘the religious’ problem. They had already separated religion from the State. [[65]](#footnote-65)[[66]](#footnote-66)

He said:

 ..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 of 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 non-existent.

Inglis Clark, Higgins, and other separationists were not convinced that there was no probability of such ‘enlightened’ communities retracing their steps. ? They wanted guarantees. Why?

Religious, mainly clerical leaders of the 1880s and 1890s had not always accepted their separation from either the public place, or, in the case of the Roman Catholic hierarchy, the public Treasury. The religious backdrop to the 1890s Federal Constitutional Conventions was punctuated by petitions. In the period 1897- 1898 there were two competing petitions: One, organised by the colonial Councils of Churches was a petition to recognise Almighty God in the Preamble. The other was a petition of what Higgins claimed to be 38,000 signatures organised by the 2000 plus Seventh Day Adventists recently arrived from the USA.87 They opposed the inclusion of the recognition clause in the preamble.

This story has been well documented by Ely and taken up by Seventh Day Adventist and other commentators88. What has not yet seen a wider audience is the work done by Ely in his doctoral thesis on the religious background of all of the Convention Delegates and the way they voted on the two religious clauses in the Constitution – the Preamble ‘ Recognition’ clause and Section 116. [[67]](#footnote-67)

Of the 54 delegates, thirty six (c 66.5%) had some sort of Anglican association; four

Catholic( 7.5%) four Presbyterian ; f ( c 7.5%) ; four Methodist (c 7.5%); two Jewish (

3.75%) one Congregationalist (c 2%); one Australian Church (Deakin) (c 2%) ; one theist - Higgins (2%); and one atheist – Trenwith ( c 2%) . In comparison with the national ratios, there was a large discrepancy between the Anglican and Catholic ratios. Anglicans represented about 42% and Catholics about 23% of the country as a whole.[[68]](#footnote-68) Those who voted for the inclusion of Section 116 in the Constitution, were more likely than not to be religiously ‘serious’ and Australian natives. Yet every social political and economic standpoint found a place in the separationist ranks. Ely remarked:

Perhaps the most interesting conclusion to be drawn from this analysis of the 2 March vote on Higgins’s clause stems from the very negativity of all but possibly one of the results – from the difficulty encountered in correlating federal level Church-State and Religion-State separationism with anything but itself. Such separationism transcended specific denominational, theological, nativist, non-nativist, class, political and economic links. It reflected the *zeitgeist. 91*

Of particular interest however, was the religious seriousness, the strong support for the recognition clause and the strong opposition to the insertion of Higgins religious liberty clause into the Australian Constitution by both Quick as a Victorian delegate to the Convention and Garren, initially as Reid’s Secretary and later as assistant to the drafting committee. 9[[69]](#footnote-69)[[70]](#footnote-70)[[71]](#footnote-71)Quick a loyal Methodist, and Garren, an active Anglican were strongly identified with the ‘recognition’ movement and against the insertion of Section 116. [[72]](#footnote-72)

But was the Quick and Garren account adopted by the majority judges in the DOGS case mistaken, and if so, how and why? Ely certainly thought so.

The historian J.A. La Nauze has been held accountable by Stephen McLeish for giving air to the Quick and Garren account that Section 116 was inserted in the Constitution in response to H. B Higgins concern that the recognition of God in the Preamble might justify intolerant or restrictive religious legislation.[[73]](#footnote-73) But this is not entirely fair on La Nauze. When Quick and Garran dealt with the Inglis Clark guarantee of religious liberty namely

‘ A State shall not make any law prohibiting the free exercise of any religion’

included in the draft federal Constitution handed down by the 1891 Convention, Quick and Garren remarked:‘How such a clause crept into the Bill of 1891 it is difficult to conjecture’ La Nauze remarked briefly, but aptly that ‘Inglis Clark could have told them” [[74]](#footnote-74)

So who was Inglis Clark, the Tasmanian Attorney General and in 1898 Supreme Court Judge, who first placed a religious liberty clause in his 1891 draft of the Australian Constitution, and what were his reasons for doing so.

In the last twenty years, interest in the Tasmanian responsible for the first draft of the Australian Constitution has increased a thousandfold.

But before that, Clark dropped off the historians’ radar for many decades. He had few wealthy and powerful friends on the mainland, and died, in 1908, disappointed in his ambition of a position on the Australian High Court. But the descendants of his Hobart family and friends always knew about him. They knew about his house ‘Rosebank’ in Hamden Road, Battery Point. They knew about the shipyard of his anti-transportation father-in- law, Ross, and his final resting place in what remains of the Sandy Bay cemetery. They knew he was an Americanophile and an admirer of the Italian democrat, Giuseppe Mazzini. The historian John Reynolds resurrected his memory in the 1960s, and Richard Ely connected him to issues of religious liberty in the 1970s. By 2001, with Federation centenaries in vogue, books on his life and work were launched and scholars came from all over Australia to Hobart to celebrate his contribution to the Australian polity.

Like Quick and Garrran, Clark published a commentary on the Constitution in 1901 ( second edition in 1905) But he did not attend the 1898 Convention, preferring instead a visit to America to visit Justice Oliver Wendell Holmes. Nor did he comment on Section 116 in his Constitutional commentary. It is not surprising that Clark fell into semi-oblivion. But although he was not present at the 1898 Convention he had been active in the Tasmanian House of Assembly debates on the Draft Commonwealth Bill in 1897.

And there is other evidence in his manuscript papers concerning his adherence to a strong separationist position. .In this context I would like to refer to two papers in manuscript, one in The Clark Paper, an 1885 essay entitled ‘Denominational Education’[[75]](#footnote-75) and the other is in a 1901 notebook sold at a Christie’s auction in 1996 . The notebook contained poems by Clark, an intensively worked-over handwritten fragment of his 1901 *Studies in Australian Constitutional Law*, and a short essay entitled ‘The Preamble to the Constitution of the Commonwealth of Australia.’This essay was published by R.Ely in the *Australian Law Journal* in 2001

# Tasmanian Debate on the Draft Commonwealth Bill 1897

On ‘recognition’ Clark was one of the minority in the Tasmanian House of Assembly who unsuccessfully opposed it. He believed that those opposed as well as those who were indifferent, represented the majority. Acknowledgement of God could only come from individuals. ‘Recognition’ practically compelled ‘a minority to stand before the world as having desired it also…From a religious standpoint it would be irritating; he would think his worship had been violated and desecrated. ‘[[76]](#footnote-76)

Clark also proposed an amendment to what had been Clause 81 in his original draft, and was now Section 109. His proposals was to add to the words ‘No State shall make any law prohibiting the free exercise of any religion’ the words’ nor appropriate any portion of its revenue or property for the propagation or support of any religion’. It passed the Assembly on the voices.

In relation to the amended Section 109 he wrote a Memorandum to the 1898 Convention. He argued that in no way were forms of religion to be aided or impeded by the provincial legislatures.

In its present form Section 109 secures religious equality for all the citizens of a State, so far as it prevents the State from placing the adherents of any form of religion under any disadvantage or restriction in the exercise of it in comparison with adherents of other forms of religion; but it does not secure perfect religious equality to all the citizens so far as the granting of any special privileges or favours or endowments to particular forms of religion is concerned. And the object of the amendment is to secure perfect religious equality in both directions, but preventing any particular benefit or support being given to any form of religion. [[77]](#footnote-77)

In the event, the Convention not only declined to accept Clark’s amendment, but omitted

Clark’s Section 109 altogether. Clark’s bid to constitutionally entrench freedom of and from forms of religion in the States failed. It was left to H. B. Higgins, armed with petitions against the ‘recognition’ clause in the Preamble to insert a comparable clause relating to the Commonwealth rather than the States on March 2 1898. The result, as John La Nauze remarked, was that ‘the States were left free if they wished, to legislate for religious intolerance. Justice Wilson, following the Quick and Garran account, refers to the rejection of Clark’s amendment as follows:

It will be recalled that the 1898 Convention was invited to adopt a form of words for the religion clause which would have placed the present issue beyond doubt, when an amendment from Tasmania to the effect that the clause include the words ‘nor appropriate any portion of its property for the propagation or support of any religion’ was proposed and defeated.

But

‘Be these things as they may, I believe it would be wrong to attach undue significance to the history of the clause. The actual words of the text supply the only firm ground on which to base a conclusion. [[78]](#footnote-78)

So thought six of his fellows on the bench.

# Clark on Denominational Education

This paper was an argument against the ‘payment by results’ system which was being used by religious interest to regain the State Aid to their schools which had been withdrawn in 1854. In this paper Clark proved himself a ‘hard liberal’ a man with a deep believe that the liberal political order evolving towards true freedom of the individual, civic and religious order – was a fragile plant, vulnerable to subversion within and perils without. [[79]](#footnote-79)

He wrote

‘..*if the state should restore to the Roman Catholic portion of the population the whole of that portion of its revenue which it derives from them as citizens to be expended by them in establishing and maintaining a social organisation sufficiently separate from the state to permit it to be sufficiently permeated with Roman Catholic teaching …then the state…must refuse it; because the concession of it would be a recognition of the propriety of* ***an imperium in imperio****, and a divided sovereignty is simply political emasculation and asthenia*.

And later,

*Separate grants by the state in aid of denominational schools upon the principle of payment by results must necessarily amount to state endowment of particular forms of religion.*

# The Preamble to the Constitution of the Commonwealth of Australia.[[80]](#footnote-80)

Clark , the ‘hard’ liberal who believed in fundamental laws for the protection of the natural rights of the individual beyond the reach of the majority of the hour, wrote fighting words on the recognition of God in ‘The Preamble to the Constitution of the Commonwealth of Australia’. He wrote tortuously, but fiercely. To require, he wrote

…a minority of citizens to expatriate themselves in order to escape from membership of a nation or community which by a vote of a majority of its members undertakes to make a corporate confession of any religious doctrine or belief is to use political, and consequently physical, force in the name of religion as clearly and directly as it was at any time used for the burning or expulsion of heretics.

In this paper Clark chose his most trenchant criticism, not for Catholics, who were but being consistent in imposing a declaration of the existence of God upon the people of Australia , but for Protestants whose ‘fundamental doctrine was the essentially and absolutely individualistic character of relations of each human soul to its creator.’ Not unsurprisingly, Clark by at this stage of his life, like Oliver Wendell Holmes, a Unitarian. His remarks pertinently illustrate

Milton’s allegation that ‘New Presbyter is but Old Priest write large.’ [[81]](#footnote-81)

# What role should history play in Constitutional Law

The issues of freedom of conscience, religious liberty and religion and the state are perennial and raise their head, in different guises in every generation. What, for example would be the fate at the High Court level of a Commonwealth ban on the hijab or burqa?

When a problem of interpretation arises under the Australian Constitution, is the judicial duty to consult the historical records to discover the original intentions of the founders?[[82]](#footnote-82) or Should they regard the constitutional document as having been set free in 1901 from the intentions, beliefs, and wishes of those who drafted it, a document to be viewed by each succeeding generation with the eyes of their own times? [[83]](#footnote-83)

1. *A-G (Vic) ex rel Black v Commonwealth* [1981] HCA 2: 91981) 146 CLR 559 at 605 [↑](#footnote-ref-1)
2. Julius Stone, a Law Professor at the University of New South Wales and his descriptions of the judicial method were initially controversial but later, influential, particularly with judges like Justices Lionel Murphy and Michael Kirby. His notions of the ‘ leeways for judicial choice’ and the categories of ‘ indeterminate illusory and competing reference’ were challenging to the then accepted orthodoxy – the declaratory theory, the theory that the law is pre-existing, which judges define and declare of the judicial function. 2008 See Julius Stone*, Legal System and Lawyers Reasonings* (1964), Stanford University Press.

‘*In the area of free speech properly so-called, the constant weighing of values through an adjustment of the particular interests in conflict will inevitably go on. More rational sub-categories of free speech are likely to emerge only if the adjustment of conflicting interests involved in particular cases is consciously made, and not concealed by illusory general tests and slogans*.’ Julius Stone, *Social Dimensions of Law and Justice*(1966) 230.

 [↑](#footnote-ref-2)
3. Municipal Council of Sydney v Commonwealth [1904] HCA 50; (1904) 1 CLR 208, 213 (Griffith J CF, Barton and O’Connor JJ); Baxter v Commissioners of Taxation (NSW) [1907] HCA 76; (1907) 4 CLR 1087, 1104-5 (Griffith CJ, Barton and O’Connor JJ), cf [↑](#footnote-ref-3)
4. The Chief Justice was Sir Samuel Griffith, former Premier and former Chief Justice of Queensland.The other judges were Sir Edmund Barton, the first Prime Minister of Australia and Leader of the Constitutional Conventions which led to Australia becoming a Federation in 1901 and Richard Edward O'Connor, a former

Minister of Justice and Solicitor-General of New South Wales and the first Leader of the Government in the Senate. Inglis Clark from Tasmania expected to receive an appointment in 1906 but was bitterly disappointed when this was denied him

 [↑](#footnote-ref-4)
5. R. Ely, Unto God and Caesar, (1976) MUP pp 89-102. [↑](#footnote-ref-5)
6. *A-G (Vic) ex rel Black v Commonwealth* [1981] HCA 2: 91981) 146 CLR 559, 577-8 Barwick CJ . …as to the use of the Convention debates: the settled doctrine of the Court is that they are not available in the construction of the Constitution: and, in my opinion, rightly so. An academic exercise to explain historically why the [Constitution](https://jade.io/article/260323) was cast in a particular form is one thing. To identify the meaning of the words in which the [Constitution](https://jade.io/article/260323) is expressed by examination of its discursive development is quite another. The former, in my opinion, has no place in the task of construing the text of the [Constitution](https://jade.io/article/260323) except perhaps in the case of an ambiguity in that text which cannot otherwise be resolved….Secondly, the use of historical material generally is, in my opinion, subject to the same observations and limitations. (at p578) [↑](#footnote-ref-6)
7. John *Quick and Robert Garran, [1901]. The Annotated Constitution of the Australian Commonwealth. Sydney: Legal Books (1995)* 951 [↑](#footnote-ref-7)
8. Op.cit. 287-90,951-311 R. Ely Ibid 88,- 102. [↑](#footnote-ref-8)
9. Constitutioasl onvention Debates 1898, vol. 2 pp. 1779 ff 13 Ely, Ibid 102. [↑](#footnote-ref-9)
10. *Attorney-General (Vic) (Ex rel Black) v Commonwealth* [[1981] HCA 2,](http://www.austlii.edu.au/au/cases/cth/HCA/1981/2.html) (1981) 146 [CLR 5](https://en.wikipedia.org/wiki/Commonwealth_Law_Reports)80, [High Court](https://en.wikipedia.org/wiki/High_Court_of_Australia) Australia 579 [↑](#footnote-ref-10)
11. Ibid 582 [↑](#footnote-ref-11)
12. Ibid 603 [↑](#footnote-ref-12)
13. Ibid 604 [↑](#footnote-ref-13)
14. Ibid 605-607 [↑](#footnote-ref-14)
15. Ibid 616 [↑](#footnote-ref-15)
16. Ibid 653,612 [↑](#footnote-ref-16)
17. Ibid p. 653 [↑](#footnote-ref-17)
18. M.J. Ely *Erosion of the Judicial Process*, [↑](#footnote-ref-18)
19. Ibid p.623 [↑](#footnote-ref-19)
20. Ibid p.624 [↑](#footnote-ref-20)
21. Ibid 622 [↑](#footnote-ref-21)
22. *The Age,* 30 August 1988 pp 22-23. [↑](#footnote-ref-22)
23. Ibid p 582 [↑](#footnote-ref-23)
24. Ibid p 603 [↑](#footnote-ref-24)
25. Ibid p 598 [↑](#footnote-ref-25)
26. Ibid p. 609. Quick and Garran Annotated Constitution p. 951 30 Ibid p.612 [↑](#footnote-ref-26)
27. Library of Congress Jefferson's Letter to the Danbury Baptists <https://www.loc.gov/loc/lcib/9806/danpre.html>Accessed 06/06/2017

*Believing with you that religion is a matter which lies solely between man & his god, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof;" thus building a wall of eternal separation between Church & State. Congress thus inhibited from acts respecting religion, and the Executive authorised only to execute their acts, I have refrained from prescribing even those occasional performances of devotion, practiced indeed by the Executive of another nation as the legal head of its church, but subject here, as religious exercises only to the voluntary regulations and discipline of each respective sect.*  [↑](#footnote-ref-27)
28. Ibid p. 628 ; R.G. Ely, *Unto God and Caesar*, (1976) MUP, pp 93, 95-96, 99-100 33 *Acts Interpretation Amendment Act* (Cth) 1984 No. 27 of 1984, Section 7. [↑](#footnote-ref-28)
29. *Cole v Whitfield*, [1988] HCA 18; (1988) 165CLR 360, 385 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ). [↑](#footnote-ref-29)
30. *Nelson v Fish* (1990) 21 FCR 430. [↑](#footnote-ref-30)
31. *Hoxton Park Residents’ Action Group Inc v Liverpool City Council* [2010] NSWSC 1312 , [31] [↑](#footnote-ref-31)
32. *Hoxton Park Residents Action Group Inc v Liverpool City Council (No 2)* (2011) 256 FLR 156, 166 [32-34].

Also see L. Beck, ‘Dead Dogs? Towards a Less Restrictive Interpretation of the Establishment Clause: Hoxton Park Residents Action Group v Liverpool City Council (No.2) *University of Western Australia Law Review*, March 2014, Vol. 37, Issue 2. 59-73. [↑](#footnote-ref-32)
33. *Attorney-General (Vic) (Ex rel Black) v Commonwealth* [[1981] HCA 2,](http://www.austlii.edu.au/au/cases/cth/HCA/1981/2.html) (1981) 146 [CLR 5](https://en.wikipedia.org/wiki/Commonwealth_Law_Reports)80, [High Court](https://en.wikipedia.org/wiki/High_Court_of_Australia) Australia 579 at p.633

 [↑](#footnote-ref-33)
34. *Williams v Commonwealth* (No 1) (‘School Chaplains Case’) [2012] 248 CLR 15. Williams v Commonwealth (No. 2) [2014] HCA 23 [↑](#footnote-ref-34)
35. . For discussion of this aspect of the case, see Shipra Chordia, Andrew Lynch and George Williams, ‘Williams v Commonwealth: Commonwealth Executive Power and Australian Federalism’ (2013) 37 *Melbourne University*

*Law Review*, 189; Gabrielle Appleby and Stephen McDonald, ‘Looking at the Executive Power through the High Court’s New Spectacles’ (2013) 35(2) *Sydney Law Review* 253; Benjamin B Saunders, ‘The Commonwealth and the Chaplains: Executive Power after Williams v Commonwealth’ (2012) 23 *Public Law Review*, 153. [↑](#footnote-ref-35)
36. *Williams v Commonwealth* ( No. 2) [2014] HCA 23 . [↑](#footnote-ref-36)
37. L. Beck, ‘The Establishment Clause of the Australian Constitution: Three Propositions and a Case Study’ *Adelaide Law Review*, (2014) Vol. 35, 225 at 228.

 [↑](#footnote-ref-37)
38. [Quick & Garran, Ibid](https://en.wikipedia.org/wiki/Section_116_of_the_Constitution_of_Australia#CITEREFQuick_.26_Garran1901)  951 - 952 [↑](#footnote-ref-38)
39. Pannam, Clifford L. (1963). "Travelling Section 116 with a U.S. Road Map*".* [*Melbourne University Law Review.*](https://en.wikipedia.org/wiki/Melbourne_University_Law_Review) [↑](#footnote-ref-39)
40. (1): 41–90 at 41*.* [↑](#footnote-ref-40)
41. P.H. Lane, ‘Commonwealth Reimbursements for Fees at Non State Schools’ (1964) 38 ALJ 130 at 132. [↑](#footnote-ref-41)
42. Joshua Puls was also seconded in 1996 to the Royal Household of the Prince of Wales and the Duchess of Cornwall as assistant Private Secretary and later became the official Secretary to the Governor of Victoria and Executive Director of the Cabinet Office in Victoria’s Department of Premier and Cabinet. [↑](#footnote-ref-42)
43. J. Puls, ‘ The Wall of Separation: Section 116, the First Amendment and Constitutional Religious Guarantees, Federal Law Review, Vol 26, 139 at 160 [↑](#footnote-ref-43)
44. Ibid 164 [↑](#footnote-ref-44)
45. Clarke, Jennifer; Keyzer, Patrick; Stellios, James *(2009). Hanks' Australian Constitutional Law: Materials and Commentary (8th ed.). Chatswood, NSW: LexisNexis Butterworths.* [↑](#footnote-ref-45)
46. S, McLeish, ‘ Making Sense of Religion and the Constitution: A Fresh Start for Section 116’ *Monash University Law Review*(1992) Vol 18, No 2. 207 at 228 [↑](#footnote-ref-46)
47. L. Beck, ‘ The Establishment Clause of the Australian Constitution: Three Propositions and a Case Study,’

(2014) *Adelaide Law Review*, Vol 35, 225-250 [↑](#footnote-ref-47)
48. Carolyn Evans noted that this was [↑](#footnote-ref-48)
49. L. Beck, ‘The Case against Improper Purpose as the Touchstone for Invalidity under Section 116 of the

Constitution,’Federal Law Review, (2016) (Forthcoming) [↑](#footnote-ref-49)
50. Reid Mortensen is the Professor of Law and Head, School of Law and Justice University of Southern Queensland, Australia. [↑](#footnote-ref-50)
51. *Williams v Commonwealth*, (2012) 288 ALR 410. [↑](#footnote-ref-51)
52. R. Mortensen, ‘The Establishment Clause: A Search for Meaning,’ *University of Queenslamd Law Journal*, (2014) Vol. 33(1) 109 64 Ibid 2014. [↑](#footnote-ref-52)
53. Richard Ely*, Unto God and Caesar: Religious Issues in the Emerging Commonwealth, 1891-1906*, Melbourne, 1976, at p. 95

In the English sense, a law could be said to ‘establish’ religion, if it conferred on any church, in a substantial way, the kind of legal and financial privileges that the Church of England in the eighteenth and nineteenth century did enjoy, but that other English churches of that time did not. [↑](#footnote-ref-53)
54. R. Ely ‘ The View from the Statute: Statutory Establishments of Religion in England ca. 1300 to ca 1900.’ *University of Tasmania Law Review* 91986) Vol. 8 No 3, 225 [↑](#footnote-ref-54)
55. W. Sadurski, ‘Neutrality of Law Towards Religion ( 1990) 12 *Syd LR* 421, 452. Wojciech Sadurski is a visiting Professor of Law at Yale Law School as well aas the Challis Professor in Jurisprudence at the University of [↑](#footnote-ref-55)
56. Helen Irving, ‘Same Difference? A comparison of the ‘Establishment Clause’ in the Australian and United States Constitution, *Rationalist Society of Australia website,* posted by Meredith Doig, 18 November 2014 [↑](#footnote-ref-56)
57. C.M.Evans, *Legal Protection of Religious Freedom in Australia*, (2012) Federation Press, 71 [↑](#footnote-ref-57)
58. M. Maddox, ‘No school will Lose a Dollar’, *Taking God to School: The end of Australia’s Egalitarian Education*, (2014) , Allen & Unwin, [↑](#footnote-ref-58)
59. T.Stanley (ed),  *Religion after Secularization in Australia*, 2015, , Palgrave Macmillan USA; D. Mayrl, *Secular*

*Conversion: Political Institutions and Religious Education in the United States and Australia, 1800-2000,* (2016), Cambridge University Press; B.R.Morris, *Sacred to Secular:Why a corrupted Christianity demands a Secular solution,* (2015) Plain Reason, S.A. [↑](#footnote-ref-59)
60. R. Ely Ibid 88,- 102. [↑](#footnote-ref-60)
61. Constitutional Convention Debates 1898, vol. 2 pp. 1779 ff 82 Ely, Ibid 102. [↑](#footnote-ref-61)
62. B. Fletcher, ‘The Anglican Ascendancy 1788-1835,’ and P. Curthoys, ‘State Support for Churches 1836-1860’ in *Anglicanism in Australia,: A history*, 2002 edited by B. Kaye, T. Frame, C. Holden, and G. Treloar, MUP. [↑](#footnote-ref-62)
63. J. Gregory, *Church and State: Changing Government Policies towards Religion in Australia; With Particular Reference to Victoria since Separation*, 1973, North Melbourne Cassell Australia. [↑](#footnote-ref-63)
64. A.G. Austin, *Australian Education 1788-1900*, 1963 MUP; J. Gascoigne, *The Enlightenment and the European Origins of Australia*, 2002, Cambridge University Press. [↑](#footnote-ref-64)
65. *Constitutional Debates*, Melbourne 1898, vol.2 p1770-72 87 R. Ely, Unt God and Caesar, 24-30,55-6,82,86,138n, 142,n. [↑](#footnote-ref-65)
66. [↑](#footnote-ref-66)
67. R.G. Ely, God the Churches and the Making of the Australian Commonwealth, (1975) PhD thesis, University of Tasmania, pp 160-216. [↑](#footnote-ref-67)
68. Denomination ratios for the Commonwealth and in each state, are calculated on the basis of the 1901 census*.*

*Official Year Book of the Commonwealth of Australia*, No. 1, Melbourne, 1908, p. 174. In 1901, 39.7% of the

Australian population described themselves as Church of England; 22.7% as Catholic and 33.7% as other Christian. In the Convention Debates, the Seventh Day Adventists – a minority group of about 2000 souls- became prominent. Jews, Hindus, Muslims and Buddhists were small in number and very quiet. Rationalists, Unitarians and freethinkers, unless they were Andrew Inglis Clark or H.B. Higgins, were even quieter. The 2016 Australian census indicates that Australia is far less religious – and Christian – than it was in 1898. Those ticking the ‘no religion box’ accounted for 26,9%; all Christian faiths combined accounted for 51%; Islam for [↑](#footnote-ref-68)
69. .6% and Buddhism 2.4%. Responses to the religion question in 2016 Census Source: ABS 2016 Census [↑](#footnote-ref-69)
70. R. Ely Ibid 173 [↑](#footnote-ref-70)
71. La Nauze, The Making of the Australian Constitution (1972) 135. [↑](#footnote-ref-71)
72. Ely Ibid 143 notes 35 and 36. [↑](#footnote-ref-72)
73. S, McLeish, ‘ Making Sense of Religion and the Constitution: A Fresh Start for Section 116’ Monash University Law Review, (1989) Vol 18, No 2. 1992, 2017 at 229

 [↑](#footnote-ref-73)
74. La Nauze, *The Making of the Australian Constitution*,(1972) 228 [↑](#footnote-ref-74)
75. R. Ely , ‘Protecting Commonwealth from Church: Clark’s ‘Denominational Education’, and Beyond, Chapter 8 in *A Living Force; Andrew Inglis Clark and the Ideal of Commonwealth*, ed. Richard Ely, with Marcus Haward and James Warden, Centre for Tasmanian Historical Studies, University of Tasmania, 2001 140-183 [↑](#footnote-ref-75)
76. Parliament of Tasmania, Debate on the Draft Commonwealth Bill, 1897, Hobart 1897 266-7. [↑](#footnote-ref-76)
77. A Inglis Clark, Proposed Amendments to the Draft of a Bill to Constitute the Commonwealth of Australia ( 1 September 1897) ( Records of the Aistralasian Federal Convention of 1897-1898: National Archives of Australia, AA 1971.506, item series 12/9, F162 Clark here refers to equality but not to liberty.

 [↑](#footnote-ref-77)
78. *Attorney-General (Vic) (Ex rel Black) v Commonwealth* [[1981] HCA 2,](http://www.austlii.edu.au/au/cases/cth/HCA/1981/2.html) (1981) 146 [CLR 5](https://en.wikipedia.org/wiki/Commonwealth_Law_Reports)80, at 654 [↑](#footnote-ref-78)
79. This awareness of the vulnerability of the liberal order is also clear in his ‘ Why I am A Democrat.’ Ibid, Chapter 3. [↑](#footnote-ref-79)
80. R. Ely, ‘ Andrew Inglis Clrk on the Preamble of the Australian Constitution, ‘ 2001 The Australian Law Journal, Vol 75, 36-43. [↑](#footnote-ref-80)
81. [↑](#footnote-ref-81)
82. Greg Craven ‘Heresy or Orthodoxy:Were the Founders Progressives? (2003) *Federal Law Review*, Vol. 31, 87-129 [↑](#footnote-ref-82)
83. M. Kirby, ‘Constitutional Interpretation and Original Intent: A Form of Ancestor Worship’, 2000 Melbourne

University Law Review, Vol. 24 (1) at <http://www.austlii.edu.au/au/journals/MelbULawRw/2000/1.html>Accessed 20 July 2017 [↑](#footnote-ref-83)