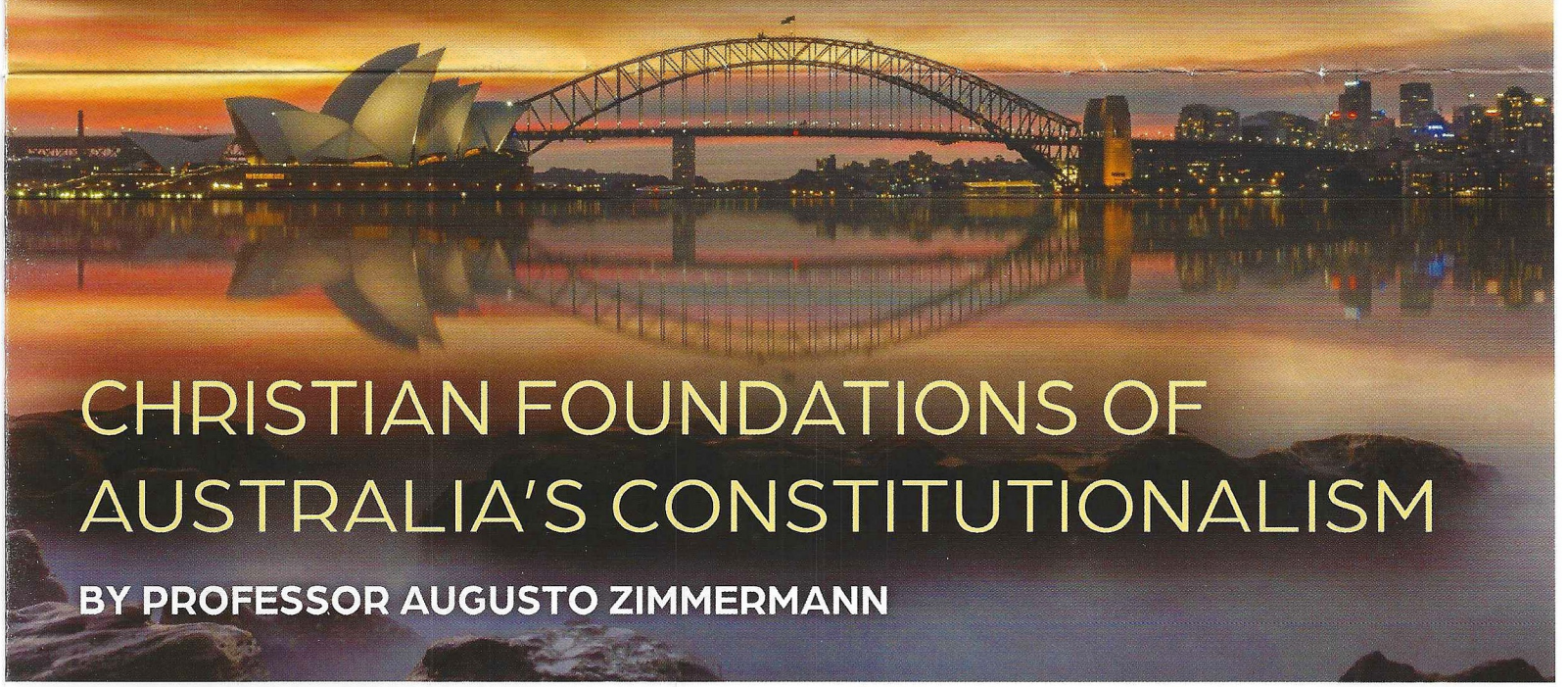
Family Voice AUSTRALIA
MAIN POINT
A quarterly essay on important social and political issues
JULY 2024

CONSTITUTING A CHRISTIAN COMMONWEALTH



CHRISTIAN FOUNDATIONS OF AUSTRALIA'S CONSTITUTIONALISM

BY PROFESSOR AUGUSTO ZIMMERMANN

While the Australian legal tradition cannot lay claim to the historical depth of America and England, it too was built on solid foundations derived from the Christian worldview. These foundations were largely inherited through Australia's reception of the English common law, as well as in addition to the adoption of the American system of federalism.

Australia has had Christian influences since its early colonization when Captain Arthur Phillip was instructed to take such steps as were necessary for the celebration of public worship.

Under Governor Lachlan Macquarie's benign rule the Christian religion made considerable progress. In 1815, he personally appointed clergymen to every district of the new colony, ordering that all convicts attend Sunday church services. On the first Sunday of compulsory church service, Macquarie himself made sure he was in attendance. As Manning Clark noted, he believed Christian principles could render the next generation 'dutiful and obedient to their parents and superiors, honest, faithful and useful members of society'. Further, Macquarie attempted to educate children in these principles through the schools he established.

He considered these principles 'indispensable both for liberty and for a high material civilisation', and 'hoped to give satisfaction to all classes, and see them reconciled.'

At the time of English settlement in Australia, Christianity formed an integral part of the theory of English law and civil government. In his seminal 'A History of English Law', Sir William Holdsworth expressed the traditional view of the close relationship between Christianity and English law:

> *Christianity is part and parcel of the common law of England, and therefore is to be protected by it; now whatever strikes at the very root of Christianity tends manifestly to dissolution of civil government.*

Holdsworth did not make his terminology up out of thin air. In a 1649 case, an English court declared that 'the law of England is the law of God' and 'the law of God is the law of England.' In a 1676 case, Chief Justice

Lord Hale stated: 'Christianity is parcel of the laws of England, therefore to reproach the Christian religion is to speak in subversion of the law.' Lord Hale's statement achieved an almost axiomatic status, and retained this status throughout the nineteenth century, so that Holdsworth contended that the 'maxim would, from the earliest times, have been accepted as almost self-evident by English lawyers.' Chief Justice Raymond, for instance, paraphrased Hale by arguing that 'Christianity in general is parcel of the common law of England.'

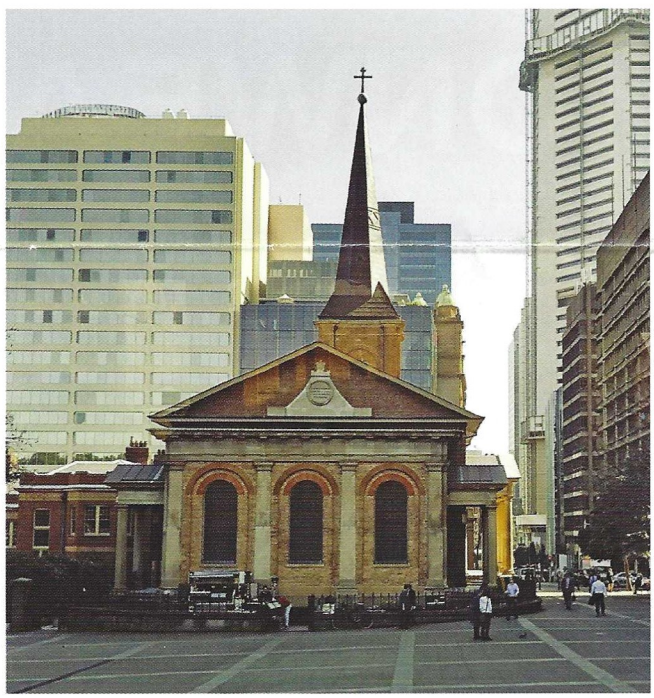
Sir William Blackstone matter-of-factly remarked that 'the Christian religion ... is a part of the law of the land.'

THE INHERITANCE OF ENGLISH LAW IN AUSTRALIA'S COLONIAL HISTORY

When New South Wales was established in 1788, the laws of England were transplanted into Australia in accordance with the doctrine of reception. The reception of English law into Australia was statutorily recognised by the *Australian Courts Act 1828 (Imp.)*. Section 24 of this Act stated that, upon enactment, all laws and statutes in force in England at that date were to be applied in the courts of New South Wales and Van Diemen's Land, so far as they were applicable. The supreme courts of the colonies were empowered to decide what English laws were applicable to the Australian situation, and to also develop the law thereafter.

As a result, the legal socio-political institutions of Australia found their primary roots in the legal and socio-political traditions of England. Indeed, the reception of English law into Australia was explicitly re-affirmed by the Privy Council in the case of *Cooper v Stuart* (1889).

Christianity was included in the law of the land applicable to the situation of the colonists. This being so, the early disregard of Aboriginal customary law was based on a combination of established common-law principles and a traditional interpretation of the 'Divine Law'. This is evident in the Supreme Court of New South Wales decision of *R v Jack Congo Murrell* (1836), where Justice Burton expressed his view that Aborigines 'had no law but only lewd practices and irrational superstitions contrary to Divine Law and consistent only with the grossest darkness.'



ST JAMES CHURCH IN SYDNEY

This reception of Christian legal principles was perhaps best encapsulated in Justice Hargraves's famous comment for the Supreme Court of New South Wales in *Ex Parte Thackeray* (1874):

> *We, the colonists of New South Wales, "bring out with us" . . . this first great common law maxim distinctly handed down by Coke and Blackstone and every other English Judge long before any of our colonies were in existence or even thought of, that 'Christianity is part and parcel of our general laws'; and that all the revealed or divine law, so far as enacted by the Holy Scripture to be of universal obligation, is part of our colonial law....*

Christianity's embedment in the common law was not only acknowledged, but unconditionally adopted by the court in Thackeray. The pronouncement exemplifies the judicial recognition of the Christian heritage of the common law. The court took the major step of declaring the supremacy of Christian legal principles—namely, that the divine or revealed law is applicable, and superior, to colonial laws – and that 'all the revealed or divine law, so far as enacted by the Holy Scripture to be of universal obligation', are applicable, and superior, to colonial laws. Further, Justice Burton's characterisation of Aboriginal laws as 'irrational superstitions' by virtue of their contradiction of 'Divine Law' constitutes a direct recognition of Christian legal doctrine as extending to Australian law. The colonial courts thus overtly recognised the Christian foundations of legal principles that were founded in the common-law system.

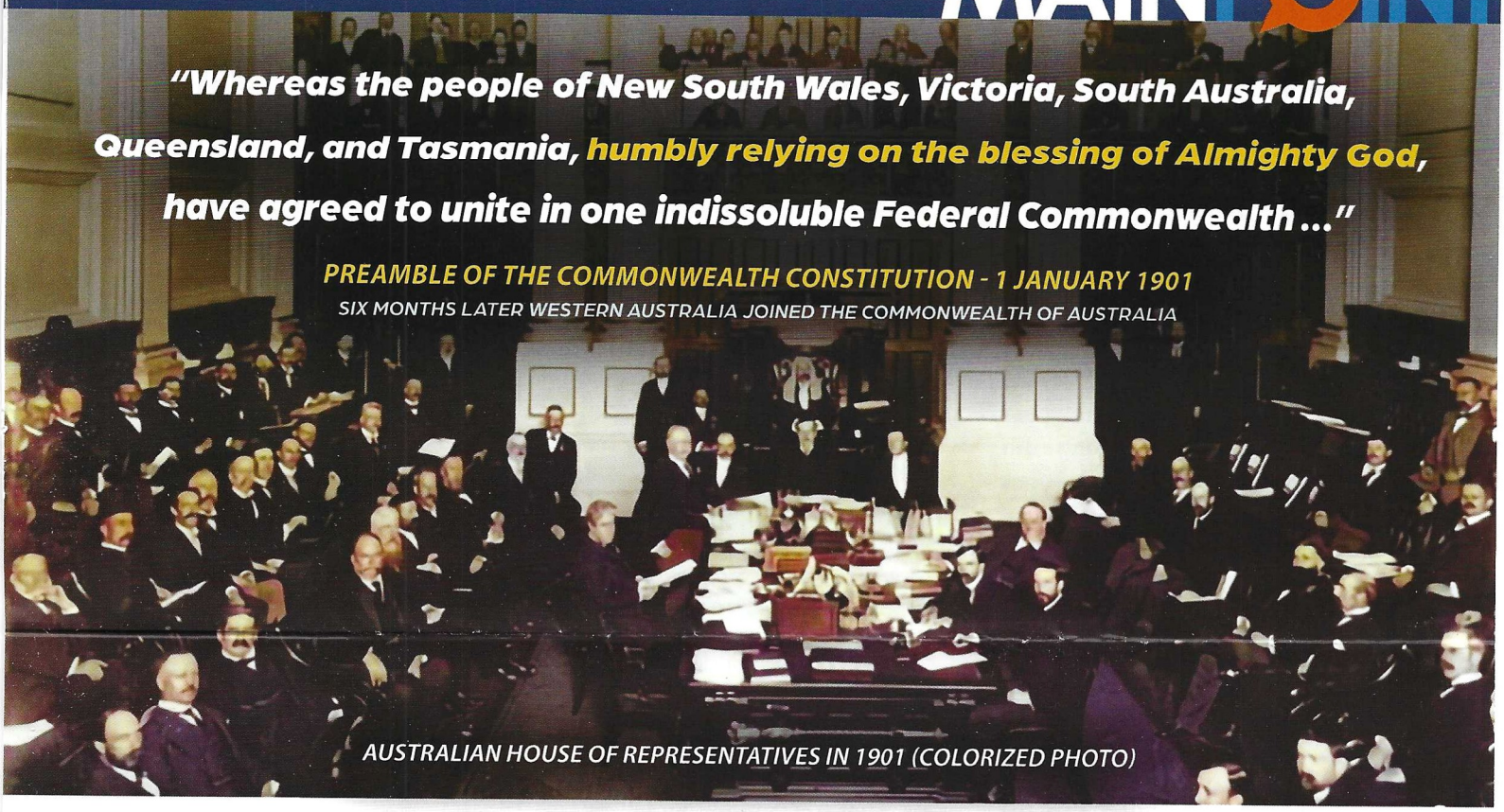
CONSTITUTING A CHRISTIAN COMMONWEALTH

The *Constitution of Australia Bill* was passed by the Imperial (British) Parliament on 5 July 1900. One of the Constitution's most distinguished co-authors, Sir John Downer, declared: 'The Commonwealth of Australia will be, from its first stage, a Christian Commonwealth'.

Sir Henry Parkes, known as 'the Father of Australia's Federation', believed that Christianity comprised an 'essential part' of Australia's common law. Sir Henry also stated in 1885: 'We are pre-eminently a Christian people—as our laws, our whole system of jurisprudence, our Constitution... are based upon and interwoven with our Christian belief.'

On the day following the referendum concerning the draft of the Constitution, which was held in New South Wales, Victoria and Tasmania on 3 June 1898, Alfred Deakin humbly offered a prayer of thanksgiving for all the progress that had been made, asking for Christ's blessing on the endeavour: 'Thy blessing has rested upon us here yesterday and we pray that it may be the means of creating and fostering throughout all Australia a Christlike citizenship.'

The Christian belief of the Australian Framers made its way directly into



AUSTRALIAN HOUSE OF REPRESENTATIVES IN 1901 (COLORIZED PHOTO)

the preamble of the Commonwealth Constitution:

'Whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth ...'

John Quick (one of the drafters of the Constitution) and Robert Garran (who played a significant role in the Australian Federation movement) wrote in their standard commentary on the Australian Constitution:

> *This appeal to the Deity was inserted in the Constitution at the suggestion of most of the Colonial Legislative Chambers, and in response to numerous and largely signed petitions received from the people of every colony represented in the Federal Convention.*

Speaking at the constitutional convention, Patrick Glynn of South Australia explained that it was to Australia's credit that the new nation would have '[t]he stamp of religion ... fixed upon the front of our institutions.'

SYMBOLIC ACKNOWLEDGEMENTS OF THE CHRISTIAN FAITH

Christian practices deeply permeate Australia's legal traditions. Religion is still taught in Australia's public schools, and the Bible is still present in every court of the land. Furthermore, prayers are conducted prior to opening proceedings at both state and federal Parliaments. Standing Orders for the House and Senate determine that the presiding officer must read a prayer for Parliament, which is followed by the Lord's Prayer before calling for the first item of business. With all Parliamentary members remaining standing, the Speaker concludes the opening proceedings with this prayer:

> *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.*

At her enthronement Queen Elizabeth II solemnly promised to 'maintain the Laws of God and the true profession of the Gospel' and to 'continue steadfastly as the Defender of Christ's religion'. The monarch also committed herself 'to the utmost of [her] power maintain the Laws of God and the true profession of the Gospel.' As the Governor-General is bound by the Monarch's oaths to 'maintain biblical principles and Christianity as the law of Australia', it is, therefore, evident that Christianity continues to play a symbolic role in contemporary Australian law.

HISTORICAL BACKGROUND OF AUSTRALIA'S CONSTITUTIONALISM

An overriding concern among the Australian framers was the implementation of a system that prevented monopolization by the new Commonwealth government.

This anti-monopolistic attitude also guided the founding fathers as they drafted section 116, the part of the Constitution that deals with Australian religious life. This section, inspired by the American First Amendment, states:

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

The Australian Framers never intended to achieve a 'true separation' between religion and state at all levels of government. Instead, their intention was to reserve the power to make laws with respect to religion to the Australian states.

THE ESTABLISHMENT CLAUSE

Recognising the potential for exploitation of the new federal system by individual religious bodies, section 116 guards against a situation in which members of one denomination might dominate federal Parliament, thus introducing legislation to establish their own body as the National Church, or introducing religious tests to favour admission of individuals from their own body to the Commonwealth bureaucracy, etc. And yet, this does not amount to a complete rejection of the people's religious sentiments, because the Australian Constitution itself expressly recognises the legitimacy of religion in the public square when, in its Preamble, it declares that the Australian people are 'humbly relying on the blessing of Almighty God.'

It is therefore erroneous, although increasingly popular, to assert that the establishment clause in the Australian Constitution was aimed at enshrining secularism. Far from seeking to banish religion from Australian government and society, its framers intended a laissez-faire environment that ensured no particular religious body would enjoy unfair advantage on account of federal government endorsement. An accompanying benefit is that section 116 also protects religious bodies in Australia against unwanted intrusions of the federal government. Thus the inclusion of section 116 was aimed at establishing a limitation only on the powers of the federal government to legislate with respect to religion. This was expressed by the High Court in the Jehovah's Witnesses Case in 1943, where Chief Justice Latham stated: 'The prohibition in § 116 operates not only to protect the freedom of religion, but also to protect the right of a man to have no religion. No federal law can impose any religious observance.'

In 1981, the High Court offered its first significant decision construing Australia's establishment clause in the so-called DOGS case. It involved the validity of federal financial support for religious schools by means of a series of grants to the States. Most of the private schools benefiting from this aid were religious schools, and the Australian Council for the Defence of Government Schools (DOGS) challenged the grants, arguing that government funding of church schools amounted to an "establishment" of religion.

The argument was rejected in a six-to-one decision. The majority held that section 116 does not prohibit federal laws to assist the practice of religion, or to provide financial support to religious schools on a non-discriminatory basis..

In his majority ruling Wilson J contended that a "narrow notion of establishment" is necessary not only to preserve traditional practices and legal provisions, but also to make sense of other legal provisions that are contained in section 116. As he put it, if the establishment clause were to be read so broadly as to require "strict separation" between church and state, then it is hard to see what room would be left for the operation of traditional practices such as the coronation oath and the opening prayers at the several of our nation's State and Federal Parliaments, not to mention the explicit acknowledgment of "Almighty God" in the Preamble of the Constitution.

Justice Mason took a similar view. He argued that establishment required only 'the concession to one church of favours, titles and advantages [that] must be of so special a kind that it enables us to say that by virtue of the concession the religion has become established as a national institution, as, for example, by becoming the official religion of the State.'

The meaning and scope of church-state separation was again addressed by the High Court in a challenge to the constitutional validity of the National Schools Chaplaincy Program (NSCP). In Williams v Commonwealth (2012), the High Court refused to do what the plaintiffs expected: to rely on section 116 and to declare the chaplaincy program a violation of church-state separation. Instead, by a six-to-one majority the Court ruled that the executive power found in section 61 of the Constitution does not authorize federal officials to enter into funding agreements, or to authorize payments for it from the Consolidated Revenue Fund. In sum, the Court invalidated any funding for all such programs initiated by the Commonwealth government without explicit statutory authorization, and not because there is a violation of the establishment clause.

As a result of this case, the federal government rushed through new legislation to ensure the program (and more than 400 programs that amount to as much $37 billion, or up to 10 per cent of all federal expenditure) could continue.

CONCLUSION

This article has discussed the Christian roots of Australia's constitutionalism. As mentioned, the inclusion of the words 'humbly relying on the blessing of Almighty God' in the Australian Constitution exemplifies the country's religious, and specifically Christian, heritage. It can, at the very least, be said that Judeo-Christian values were so embedded in Australia so as to necessitate the recognition of God in the nation's founding document.

It has also been said that a people without historical memory can easily be deceived by the power of foolish and deceitful philosophies. Although undeniably diminished and rarely acknowledged, Christianity has an enduring role in the Australian legal system. Despite the best efforts of radical secularists and historical revisionists, the Australian legal system has a distinct Judeo-Christian tradition that has prevailed till the present day. In these days of political correctness and moral relativism, it is always important for us to be reminded of the Judeo-Christian heritage of the Australian people, which still permeates most of the laws and socio-political institutions of Australia. To state this is not to be 'intolerant' but to stress an undeniable historical truth.

This article was abriged with permission. It was published in full with references in The Western Australian Jurist *Vol. 5 (2014),* www.austlii.edu.au/au/journals/WAJurist/2014/4.pdf

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