CHURCH, STATE, AND CHARTER: CANADA'S HIDDEN ESTABLISHMENT CLAUSE

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"And everyone is grateful that politico-religious battles in Canada belong only to the past."

—Franklin Walker (1955)[1]

I. INTRODUCTION

Canada doesn't have an establishment clause; that is what we are told, time and time again, in books,[2] law review articles,[3] and occasionally even lower

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1. FRANKLIN A. WALKER, CATHOLIC EDUCATION & POLITICS IN UPPER CANADA: A STUDY OF THE DOCUMENTATION RELATIVE TO THE ORIGIN OF CATHOLIC ELEMENTARY SCHOOLS IN THE ONTARIO SCHOOL SYSTEM 317 (1955).

2. *See* Pauline Côté, *Public Management of Religious Diversity in Canada: Development of Technocratic Pluralism*, *in* REGULATING RELIGION: CASE STUDIES FROM AROUND THE GLOBE 422 (James T. Richardson, ed., 2004) ("clause 2a of the *Charter* contains no explicit parallel to the Establishment Clause of the First Amendment of the U.S. Constitution."); Elizabeth J. Shilton, *Religion and Public Education in Canada After the Charter*, *in* RELIGIOUS CONSCIENCE, THE STATE, AND THE LAW: HISTORICAL CONTEXTS AND CONTEMPORARY SIGNIFICANCE 217 (John McLaren & Harold Coward, eds., 1999) (describing Canada as "without an establishment clause"); Thomas L. Pangle, *The Accommodation of Religion: A Tocquevillian Perspective*, *in* THE CANADIAN AND AMERICAN CONSTITUTIONS IN COMPARATIVE PERSPECTIVE 5 (Marian C. McKenna, ed., 1993) (stating that Canada is "lacking of course an 'establishment clause'"); Irwin Cotler, *Freedom of Assembly, Association, Conscience and Religion*, *in* CANADIAN CHARTER OF RIGHTS AND FREEDOMS: COMMENTARY 201 (Walter S. Tarnopolsky & Gerald A. Beaudoin, eds., 1982)

court judgements.[4] Hogg's well-known treatise informs us that "[t]he establishment clause, which was intended to prohibit the establishment of an official church or religion in the United States, has no counterpart in s. 2(a) [of the Canadian Charter of Rights and Freedoms]."[5] Similarly, another popular treatise on Canadian constitutional law tells us that "[u]nlike the language of the First Amendment to the American constitution, which guarantees the free exercise of religion and prohibits the establishment of religion, section 2(a) of the *Charter* does not prohibit government support for religion nor does it require state neutrality with respect to religion."[6]

("How does the protection of freedom of religion dovetail with the absence of any guarantee against the establishment of religion[?]").

3. *See* Grant Huscroft, *Canadian and New Zealand Perspectives on the Separation of Church and State*, 41 BRANDEIS L.J. 507, 509 (2003) ("The Canadian Charter of Rights and Freedoms . . . does not specifically require a separation of church and state"); Richard Moon, *Liberty, Neutrality, and Inclusion: Religious Freedom Under the Canadian Charter of Rights and Freedoms*, 41 BRANDEIS L.J. 563, 563 (2003) ("The Charter, however, does not include any obvious equivalent to the Establishment Clause of the First Amendment of the United States Bill of Rights."); Shannon I. Smithey, *Religious Freedom and Equality Concerns Under the Canadian Charter of Rights and Freedoms*, 34:1 CAN. J. POL. SCI. 85, 90 (2001) ("Unlike the the [sic] United States Bill of Rights, the Canadian Charter of Rights and Freedoms contains no explicit limit on government support for religion."); Iain T. Benson, *Notes Towards a (Re)Definition of the "Secular,"* 33 U. BRIT. COLUM. L. REV. 519, ¶ 44 (2000) ("[T]here is nothing in the [Charter] that precludes government *encouragement* of religion. There is no non-establishment clause."); Paul Horwitz, *The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond*, 54 U. TORONTO FAC. L. REV. 1, 15 n.62 (1996) (stating that American Establishment Clause "lacks a direct parallel in the *Charter*"); Richard S. Kay, *The Canadian Constitution and the Dangers of Establishment*, 42 DEPAUL L. REV. 361, 361 (1992) ("Translated to the terminology of the United States Constitution, Canada has a free exercise clause but no establishment clause."); Robert A. Sedler, *Constitutional Protection of Individual Rights in Canada: The Impact of the New Canadian Charter of Rights and Freedoms*, 59 NOTRE DAME L. REV. 1191, 1222 (1984) ("section 2(a) of the Charter, dealing with religious freedom, omits a non-establishment component."); Patrick Macklem, *Freedom of Conscience and Religion in Canada*, 42 U. TORONTO. FAC. L. REV. 50, 74 (1984) ("there is no express separation of church and state provision in the Charter."); Paul Bender, *The Canadian Charter of Rights and Freedoms and the United States Bill of Rights: A Comparison*, 28 MCGILL L.J. 811, 820 (1983) ("the *Charter* contains no prohibition, as does the U.S. First Amendment, upon governmental 'establishment' of religion.").

4. *See* Rosenberg v. Outremont (City), [2001] R.J.Q. 1556, ¶ 28 ("Canada does not have a provision in its Constitution that is identical to [the establishment clause]."); Grant v. Canada (AG), [1995] F.C. 158, ¶ 10 (T.D.) ("it is obvious that the Canadian Constitution does not contain an explicit textual requirement that there be separation of church and state as exists in the anti-establishment clause of the Constitution of the United States."); Zylberberg v. Sudbury Board of Education (Director), [1988] O.A.C 23, ¶ 50 (Ont. Ct. App.) (noting "the absence of an establishment clause in s. 2(a).").

5. PETER HOGG, CONSTITUTIONAL LAW OF CANADA § 39-2, at 979 (4th ed. 1997).

6. R.J. SHARPE, ET AL., THE CHARTER OF RIGHTS AND FREEDOMS 88 (2d ed. 2002).

Although it is certainly true that the *Charter* (Canada's constitutional bill of rights) does not contain an explicit textual limitation on government establishments of religion, this prohibition is effectuated in other ways. Functionally, the *Charter* often mandates the separation of church and state in Canada. This "hidden establishment clause" can be seen in court decisions invalidating prayer at city council meetings,[7] religious education in public schools,[8] and national Sunday closing legislation.[9] Textually, state neutrality in religious matters can be guaranteed by a combination of the *Charter*'s equality guarantee in Section 15[10] and the religious freedom guarantee in Section 2(a),[11] the latter of which is worded broadly enough to potentially include both a "free exercise" and an "anti-establishment" component.[12] Relaxed rules on standing and the provision for multiculturalism in Section 27 of the *Charter* provide additional support (functionally and textually, respectively) for the separationist position.[13] Indeed, the rarely-quoted Supreme Court of Canada discussions of the interplay between secularism and religion in the *Charter* further undermine the conventional wisdom in this area.[14]

The next section of this Article summarizes how American courts have interpreted their Constitution's Establishment Clause and provides a brief historical overview of the relationship between church and state in Canada. Section III compares the actual results of similar anti-establishment cases in the United States and Canada. It concludes, functionally, that there is little difference between them. Section IV examines the way the Supreme Court of Canada and other courts have articulated the textual guarantee of religious freedom under the *Charter*, while Section V suggests that the *Charter*'s preamble and constitutional protection for denominational schooling do not undermine the general requirement that church and state remain separate.

"A good bit of the history of the West is a story of the ongoing struggle over what we now routinely call church and state, and their respective

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7. *See* Freitag v. Penetanguishene (Town), [1999] O.A.C 139.

8. *See* Canadian Civil Liberties Assn. v. Ontario (Minister of Education), [1990] O.R.2d 341 (Ont. Ct. App.).

9. *See* R. v. Big M Drug Mart, [1985] 1 S.C.R. 295.

10. Section 15(1) of the Charter provides that "Every individual . . . has the right to the equal protection and equal benefit of the law without discrimination . . . based on . . . religion . . . ." Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11, § 15(1).

11. The Charter states that "[e]veryone has the following fundamental freedoms: (a) freedom of conscience and religion . . . ." *Id.* at 2(a).

12. *See infra* Section IV.

13. *See infra* notes 122, 126 and accompanying text.

14. *See infra* Section IV.

purviews."[15] This history continues in Canada, with the *Charter* speeding up the gradual separation of the two in a process that began even before Confederation. If, as Chief Justice McLachlin asserts, "the Charter has ushered in a new era of protection for religious conscience in Canada,"[16] it appears that substantial credit should be given to the separationist spirit of the document.

II. BACKGROUND

A. The American Establishment Clause

The First Amendment to the United States Constitution begins: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."[17] The U.S. Supreme Court has interpreted this language as creating two distinct guarantees of religious freedom, labelling the first part the Establishment Clause and the second, the Free Exercise Clause.[18] Although a clear distinction is not always possible, the Free Exercise Clause usually applies to government burdens on a plaintiff's religious belief or practice, while the Establishment Clause applies when a government practice benefits one or more religious groups.[19] An important distinction between the two is that coercion is an essential element only in a Free Exercise Clause claim—legislation may be struck down under the Establishment Clause even if it does not directly burden anyone's religious beliefs.[20]

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15. Jean Bethke Elshtain, *A Response to Chief Justice McLachlin*, *in* RECOGNIZING RELIGION IN A SECULAR SOCIETY: ESSAYS IN PLURALISM, RELIGION, AND PUBLIC POLICY 36-37 (Douglas Farrow, ed., 2004).

16. Beverly McLachlin, *Freedom of Religion and the Rule of Law: A Canadian Perspective*, *in* Farrow, *supra* note 15, at 13. *See also* David H. Moore, Comment, *Religious Freedom and Doctrines of Reluctance in Post-Charter Canada*, 1996 BYU L. REV. 1087, 1139 (1996) ("The Charter thus appears to have worked a significant change in the direction of Canada's religious freedom jurisprudence.").

17. U.S. Const. amend. I.

18. *See, e.g.,* Lee v. Weisman, 505 U.S. 577, 591 (1992) ("The Free Exercise Clause embraces a freedom of conscience and worship . . . but the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs . . . ."). Terminology in this area can be confusing, as the Establishment Clause is, of course, a *prohibition* on the establishment of religion and thus embodies *anti*-establishment values in a larger political or philosophical sense. The use of "Establishment Clause" is almost universal, but occasionally one will see a reference to the "anti-establishment clause" of the First Amendment. Both refer to the same thing.

19. *See, e.g.,* JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES 13-14 (1995).

20. *See, e.g.,* Engel v. Vitale, 370 U.S. 421, 430 (1962) ("The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non[-]observing individuals or not.").

In a broad sense, judicial interpretation of each clause has revolved around the concept of neutrality.[21] In the Free Exercise Clause context, legislation that burdens religion may be declared unconstitutional only if it is not "generally applicable [and] religion-neutral . . . ."[22] Under the Establishment Clause, legislation must not discriminate between religions, endorse religion, or advance religion over non-religion.[23] Neutrality, like other broad concepts (such as "equality" or "liberty"), is widely accepted as a legitimate goal in principle but has proven far more contentious in practice.[24] This has created a large measure of doctrinal incoherence in the Court's interpretation of the Establishment Clause; many cases are determined by 5-4 shifting majorities or by plurality opinions.[25] Perhaps some of the difficulty comes from the fact that the Court examines a wide variety of practices under the Clause. One commentator has noted: "The potential forms of establishment may vary. There can be formal, de jure establishments or informal, de facto establishments. These establishments

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21. *See, e.g.,* Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future* 75 IND. L.J. 1, 10 (2000) ("[F]ormal neutrality has become the dominant theme under both the Free Exercise and the Establishment Clauses."); *see also* David C. Williams et al., Volitionalism and Religious Liberty, 76 CORNELL L. REV. 769, 889 (1991) ("Preservation of government neutrality toward, and avoidance of official discrimination between, religions is one recurring concern in religion clause cases.").

22. *See* Employment Div. v. Smith, 494 U.S. 872, 886 n.3 (1990) (A statute that is not religion-neutral and generally applicable can still be upheld if the government can demonstrate a compelling interest. Prior to this case, American interpretation of the Free Exercise Clause was more akin to the Canadian approach: all substantial burdens on religion had to be justified by a compelling interest.); *see generally* Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990). .

23. *See generally* Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Mitchell v. Helms, 530 U.S. 793 (2000); Larson v. Valente, 456 U.S. 228 (1982); Lemon v. Kurtzman, 403 U.S. 602 (1971) (Additionally, legislation must have a predominantly secular purpose and not create an excessive entanglement with religion.).

24. *See generally* Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 994 (1990) ("We can agree on the principle of neutrality without having agreed on anything at all. From benevolent neutrality to separate but equal, people with a vast range of views on church and state have all claimed to be neutral.") (footnote omitted); CHOPER, *supra* note 19, at 20 ("[T]he principle of neutrality may be formulated in a variety of ways, and the abstract notion of equality demands further content.") (footnote omitted).

25. *See, e.g.,* LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 155 (2d ed. 1994) ("Sometimes the justices make distinctions that would glaze the minds of medieval scholastics."); J. Woodford Howard, Jr., *The Robe and the Cloth: The Supreme Court and Religion in the United States*, *in* CANADIAN AND AMERICAN CONSTITUTIONS, *supra* note 2, at 46 ("Professional commentators, in turn, criticize the incoherence and unpredictability of the [Court's] decisions. Everyone has a favorite list of anomalies.").

may be symbolic or substantive in nature, and may render official a generic religion, a collection of faiths (or denominations), or just one faith."[26]

Examples of statutes or practices struck down under the Establishment Clause include government prayer at high school graduations,[27] tax exemptions solely for religious publications,[28] laws regulating the sale of kosher foods,[29] and the erection of plaques featuring the Ten Commandments in school classrooms.[30]

In highly controversial cases—such as those involving abortion or capital punishment—legal trends often follow political developments. The same holds true for judicial interpretation of the Establishment Clause: the Court is currently split largely on conservative/liberal lines, with the former more willing to allow government aid towards or involvement in religion. At least for the time being, however, the separation of church and state (expressed through government neutrality towards religion and between denominations) is a guiding principle of religious freedom in the United States.

B. Church & State Before the Charter

"It is axiomatic that religion has played a major role in the history of the United States and Canada, both in the shaping of each nation and in the formation of its own particular national character."[31] Many of the original settlers in the American colonies fled Europe to escape the religious persecution caused by established religions in their countries of origin.[32] Once settled in North America, however, the colonists often created religious establishments of their own.[33] Likewise, although the first European settlements, in what today is

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26. Rex Adhar & Ian Leigh, *Is Establishment Consistent With Religious Freedom?* 49 MCGILL L.J. 635, 642 (2004) (footnote omitted). *See also* Mitchell v. Helms, 530 U.S. 793, 869-70 (2000) (Souter, J., dissenting) (noting difficulty in applying a single rule to very disparate phenomena).

27. *See* Lee v. Weisman, 505 U.S. 577 (1992).

28. *See* Tex. Monthly, Inc. v. Bullock, 489 U.S. 1 (1989).

29. *E.g.*, Commack Self-Service Kosher Meats v. Weiss, 294 F.3d 415 (2d Cir. 2002); Barghout v. Bureau of Kosher Meat and Food Control, 66 F.3d 1337 (4th Cir. 1995).

30. *See* Stone v. Graham, 449 U.S. 39 (1980).

31. John S. Moir, *Canadian Religious Historiography—An Overview*, *in* CHRISTIANITY IN CANADA: HISTORICAL ESSAYS 136 (Paul Laverdure ed., 2002) (several of the essays in this book, all written by noted religious historian John Moir, are useful for gaining an understanding of the early relationship between church and state in Canada).

32. *See* Howard, *supra* note 25, at 26 ("The clauses were written against a backdrop of centuries of religious warfare, persecution, and intolerance abroad, not to mention their offshots in the colonies.").

33. Engel v. Vitale, 370 U.S. 421, 427 (1962) ("[W]hen some of the very groups which had most strenuously opposed the established Church of England found themselves sufficiently in control of colonial governments in this country . . . they passed laws making their own religion the official religion . . . ."); *see also* Cornelia H. Dayton, *Excommunicating the Governor's Wife:*

Canada, had different origins, they, too, quickly came under the sway of a government closely linked with a single church.

As early as 1627, Protestantism was outlawed in Canadian territory controlled by France and, by extension, the Catholic Church.[34] For several decades thereafter, the Catholic Church in New France acted as an arm of the State.[35] After the English conquest in 1760, Great Britain allowed limited religious freedom for Catholics while instructing governors to "hold the [Catholic] church on a tight leash, to restrict its freedom as much as possible, and to do everything they could to promote the interests of the Protestant religion."[36] Between 1750 and 1802, Protestantism became the official religion in Nova Scotia and Prince Edward Island, and it was a favoured religion in Newfoundland and Upper Canada (Ontario).[37] Historian Robert Choquette summarized early church/state relations in Canada:

> If Canada did not end up with the Church of England as a full-blown state religion, it was not for lack of trying by the government of Great Britain in the last quarter of the eighteenth century. The policy of establishment ran aground on the shoals of political, ethnic, social, economic, and religious diversity.[38]

Favoritism for the Church of England included special privileges in political appointments, the selection of military and legislative chaplains, and

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Religious Dissent in the Puritan Colonies Before the Era of Consciousness, *in* RELIGIOUS CONSCIENCE, THE STATE, AND THE LAW: HISTORICAL CONTEXTS AND CONTEMPORARY SIGNIFICANCE, *supra* note 2, at 29.

34. *See* ROBERT CHOQUETTE, CANADA'S RELIGIONS: AN HISTORICAL INTRODUCTION 133 (2004).

35. *See* CHURCH AND STATE IN CANADA 1627-1867: BASIC DOCUMENTS 21-22 (John S. Moir ed., 1967); D.A. SCHMEISER, CIVIL LIBERTIES IN CANADA 60 (1964) ("In the early days of Canada, when it was still part of the French Empire and known as the Colony of New France, the Roman Catholic Church was the established church. Secularism was absent, and the clergy were active in the daily affairs of the colonists."); *see also* Denise J. Doyle, *Religious Freedom in Canada*, 26 J. CHURCH & STATE 413, 414 (1984).

36. CHOQUETTE, *supra* note 34, at 145. *See also* John S. Moir, *The Search for a Christian Canada, in* CHRISTIANITY IN CANADA, *supra* note 31, at 13 ("In 1774, on the eve of that [American] Revolution, the Quebec Act gave the Catholic church in Quebec legal recognition along with Anglicanism, the religion of the monarch and supposedly of his subjects. The Act's purpose was to keep Quebec British by keeping it French and Roman Catholic . . . ." In other words, a limited alliance with the still-dominant Catholic Church in Quebec was seen as necessary to forestall the spread of the revolution occurring in the American colonies.).

37. *See* CHOQUETTE, *supra* note 34, at 162-63.

38. *Id.* at 165. *See also* Cotler, *supra* note 2, at 186 ("the Church of England was, if not the established church, at least for a while the privileged church in Upper Canada from 1791 until the Freedom of Worship Act of 1851 . . . .") (footnote omitted).

marriage laws.[39] However, two particular kinds of establishments caused enormous controversy during the first half of the nineteenth century.

The first was known as the Clergy Reserves. In the *Constitutional Act* of 1791, one-seventh of all public land in Upper and Lower Canada was allotted to support Protestant clergy.[40] Income from this land, comprising almost two and one-half million acres, was channelled solely to the Church of England.[41] Not surprising, this provoked intense jealously among other religious denominations, and such controversy was viewed as a contributing cause to the failed rebellion of 1837.[42] To placate some of the denominations, the Reserves were partially opened to other denominations in 1840.[43] Still, the mere existence of the Reserves led to a "bitter and noisy"[44] dispute, which was seen as especially problematic to voluntarists (denominations opposed to government support of religion) who were "eager to abolish, not share, an establishment which [to them] was unbiblical, political, and injurious to other denominations."[45] After several more years of controversy, the Reserves were finally abolished in 1854.[46]

A second, similar outcry rose up over the related issue of rectory endowments. In 1836, the government erected forty-four rectories for the Church of England and endowed them with land from the Clergy Reserves.[47]

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39. *See* Moir, *supra* note 36, at 15.

40. *See generally* E.R. STIMSON, HISTORY OF THE SEPARATION OF CHURCH AND STATE IN CANADA 27, 28, 32 (2d. ed. 1887) (This unscholarly and somewhat amusing book is focussed entirely on the Clergy Reserves. In consecutive sentences, the Reserves are described as a "bone of contention" and an "apple of discord."). *See also* CHURCH AND STATE IN CANADA 1627-1867, *supra* note 35, at 159-266; CHOQUETTE, *supra* note 34, at 220-22; Doyle, *supra* note 35, at 416-17.

41. *See* Moir, *supra* note 36, at 14.

42. *Id.* at 16.

43. *See* Daly v. Ontario, [1999] 44 O.R.3d 349, ¶ 18 (Ont. Ct. App.); John S. Moir, *Loyalism and the Canadian Churches*, *in* CHRISTIANITY IN CANADA, *supra* note 31, at 79; *accord* Doyle, *supra* note 35, at 416 ("The Act did not state clearly that only the Anglicans could benefit from the clergy reserves. The reserves were for a 'Protestant clergy.' The interpretation of this clause . . . caused bitter disputes for over fifty years.")

44. Moir, *supra* note 36, at 17.

45. *Id.* at 15. *See also* Doyle, *supra* note 35, at 416-17 ("While the Church of England wanted to have an unequivocal statement of its position as the state Church, there were others who believed that church and state should not be closely linked and that churches should be supported by the voluntary contributions of their membership.").

46. *See* CHURCH AND STATE IN CANADA 1627-1867, *supra* note 35, at 243-45 (reprinting statute of abolition).

47. *See* STIMSON, *supra* note 40, at 142-43. According to Stimson, "In 1836 the people of Canada were startled, and great indignation was manifested, by the discovery that . . . Governor Colborne . . . had created forty-four rectories of the Church of England. . . . This act of the Governor in Council was generally regarded as a breach of public faith, an unwarranted exercise of power, and a daring violation of the rights of the people . . . ." *Id.* at 142. *See also* Moir, *supra* note 35, at 196-211.

"The voluntarist reaction to this development was immediate and loud—the rectories were illegal and provocative."[48] Legislation allowing for the endowment of rectories was repealed in 1851.[49]

The *Clergy Reserves Act* of 1854 not only abolished the Reserves, it proclaimed an intention to "remove all semblance of connexion between Church and State . . . ."[50] Indeed, to both Choquette and noted religious historian John Moir, the abolishment of the Reserves was a major turning point. Choquette calls it the "end of an era in the relations between the churches and state in Canada,"[51] while Moir, probably overstating the case, called the Reserves "the last vestige of establishment,"[52] and argued that, along with the secularization of King's College, the 1854 Act "created practical separation of church and state in Canada . . . ."[53] The result was that by the time of Confederation in 1867, a state of "legally disestablished religiosity"[54] prevailed in Canada. To Moir, this meant that "Canadians in fact assume the presence of an unwritten separation of church and state, without denying an essential connection between religious

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48. Moir, *supra* note 36, at 16.

49. *See* Doyle, *supra* note 35, at 417-18. This repealing statute contained an important provision which remains in effect in Ontario and Quebec:

> The free exercise and enjoyment of religious profession and worship, *without discrimination or preference*, provided the same be not made an excuse for acts of licentiousness, or a justification of practices inconsistent with the peace and safety of the Province, is by the constitution and laws of this Province assured to all Her Majesty's subjects within the same.

Religious Freedom Act, R.S.O., ch. R 22 (199) (emphasis added). *See also* Freedom of Worship Act, R.S.Q., ch. L-2.

50. Moir, *supra* note 36, at 17.

51. CHOQUETTE, *supra* note 34, at 223.

52. Moir, *The Canadianization of the Protestant Churches, in* CHRISTIANITY IN CANADA, *supra* note 31, at 46.

53. Moir, *supra* note 43, at 80. Most Canadian colleges and universities apparently became secular much later than King's College. *See, e.g.,* CHOQUETTE, *supra* note 34, at 298 ("It was only during the last third of the twentieth century that the confessional ties of most of Canada's colleges and universities were severed.").

54. CHURCH AND STATE, *supra* note 35, at xiii; *see also id*. at xix ("In both the Maritime colonies and in the Province of Canada practical disestablishment, meaning in truth the abolition of a few Anglican privileges, was complete by 1867."); Doyle, *supra* note 35, at 419 ("Confederation marked the end of the struggle for the recognition of religious equality. The people of Canada had rejected the supremacy of any state church."); Peter Beyer, *Modern Forms of the Religious Life: Denomination, Church, and Invisible Religion in Canada, the United States, and Europe*, *in* RETHINKING CHURCH, STATE, AND MODERNITY: CANADA BETWEEN EUROPE AND AMERICA 189, 207 (David Lyon & Marguerite Van Die eds., 2000) (noting "the rough simultaneity of Confederation and disestablishment").

principles and national life or the right of the churches to speak out on matters of public importance."[55]

With the exception of denominational schools and the reference to "God" in the *Charter*'s preamble,[56] what signs of establishment remain? There are still some remnants of an earlier age, but they appear to be of the relatively minor, non-coercive type of symbolism that is referred to as "ceremonial deisms"[57] in the United States. For example, the Canadian national anthem makes reference to a deity,[58] the House of Commons opens with an avowedly non-denominational prayer,[59] and the Queen, as formal head of state, is required by English law to practice Protestantism.[60] Otherwise, one is hard pressed to think of any legislation or practices in Canada that would constitute a clear violation of the American Constitution's Establishment Clause as interpreted by the United States Supreme Court. Indeed, over forty years ago, Schmeiser's *Civil Liberties in Canada* discussed "how completely the idea of establishment has been rejected. All religions are equal before the law, and no special legal advantages or privileges are gained through membership in any denomination."[61]

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55. CHURCH AND STATE, *supra* note 35, at xiii. Practically speaking, it might be fair to say that disestablishment in Quebec was adopted as a governing principle only during the 1960s "Quiet Revolution." *See, e.g.,* David Seljak, *Resisting the "No Man's Land" of Private Religion: The Catholic Church and Public Politics in Quebec*, *in* RETHINKING CHURCH, *supra* note 54, at 132 (noting that before the Quiet Revolution, "The [Catholic] Church controlled virtually all education, health care, and social services for French Quebeckers, who formed the majority of the population."). *See also* Gregory Baum, *Catholicism and Secularization in Quebec*, *in* RETHINKING CHURCH, *supra* note 54, at 149-65; Peter Beyer, *Roman Catholicism in Contemporary Quebec: The Ghosts of Religion Past?*, *in* THE SOCIOLOGY OF RELIGION: A CANADIAN FOCUS 133-55 (1993).

56. *See* discussion *infra* Part V.

57. This is not to imply that ceremonial deisms are not problematic in their own right, but for the most part they have not been found unconstitutional in the United States. An example in the American context is the phrase "In God We Trust" on currency. *See, e.g.,* Jeremy Patrick, *Ceremonial Deisms* 62:1 Humanist 42 (2002); Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083 (1996). An example in the Canadian context might be the recent controversy over whether the Governor-General should have a "Christmas Tree" or a "Holiday Tree." *See* Editorial, *Barking Up the Wrong Tree*, OTTAWA CITIZEN, November 29, 2005, at D4.

58. *See* Douglas Farrow, *Of Secularity and Civil Religion*, *in* RECOGNIZING RELIGION, *supra* note 15, at 161.

59. *See* Freitag v. Penetanguishene (Town), [1999] O.R.3d 301 (Ont. Ct. App.).

60. *See* Kay, *supra* note 3, at 361; *see also* O'Donohue v. Canada, 2003 C.R.R.2d 1.

61. SCHMEISER, *supra* note 35, at 55. Schmeiser's 1964 book noted, however, that "[e]ven today in Canada separation of Church and State is not a meaningful term. Problems which arise are usually settled by notions of fairness or justice, rather than by mechanical references to a separation formula." *Id.* at 56.

Indeed, given the political climate in the United States, Canada today may have an even greater de facto separation of church and state in areas other than denominational schooling. "God is seldom mentioned in Parliament or the press,"[62] "officials assiduously try to separate religion from politics,"[63] and "[i]t is commonplace for scholars and judges to regard Canada . . . as secular . . . ."[64] The causes of this trend might be traced, at least in part, to the increase in non-Christian religions in Canada[65] and the rise of "religious nones," persons who claim no affiliation with an organized religion.[66] Choquette sums it up nicely:

> Although English Protestant and French Catholic Canada secularized at different times and in different ways, the end result is almost identical, that is to say a contemporary Canada whose institutions, symbols, leaders, and discourse make little reference to God or the supernatural. Some would argue that even the consciences and value systems of Canadians are largely secularized.[67]

The following sections examine the extent to which the *Charter* has increased this secularization.

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62. David Lyon, *Introduction, in* RETHINKING CHURCH, *supra* note 54, at 10.

63. Ron Csillag, *Mixing God and Politics*, TORONTO STAR, June 5, 2004 at M6. The views of the four major candidates for Prime Minister in the 2006 Federal election are reproduced in "Faith and Politics." *Faith and Politics*, TORONTO STAR, Jan. 21, 2006, at M6.

64. John Von Heyking, *The Harmonization of Heaven and Earth?: Religion, Politics, and Law in Canada*, 33 U. BRIT. COLUM. L. REV. 663, 667 (2000).

65. *See* RETHINKING CHURCH, *supra* note 54, at 4 ("in contemporary Canada the Christian monopoly on religious identity no longer obtains. There always were pockets of difference, but today many faith traditions are found in Canada."); Zylberberg v. Sudbury (Bd. of Educ.), [1988] O.R.2d 641 (Ont. Ct. App.) ("Since World War II, Ontario has changed from a population composed almost entirely of Christians to an ethnically diverse, multireligious and multicultural society.") For example, in 1951, 96% of Canadians were either Catholic or Protestant; in 1999 only 71% still claimed affiliation with one of these two groups. *See* STATISTICS CANADA, CANADIAN CTR. FOR JUSTICE STATISTICS PROFILE SERIES, RELIGIOUS GROUPS IN CANADA 3 (2001).

66. *See generally* Merlin Brinkerhoff & Marlene Mackie, *Nonbelief in Canada: Characteristics and Origins of Religious Nones, in* SOCIOLOGY OF RELGION: A CANADIAN FOCUS, *supra* note 55, at 109, 110-13 (describing rise in religious nones from 4.4% in 1971 to between 10.2 and 12.1% in 1990); Statistics Canada reported that 16% of Canadians reported having no religious affiliation, compared to 7% in 1981. STATISTICS CANADA, *supra* note 65, at 3.

67. CHOQUETTE, *supra* note 34, at 354-55; Although not strictly relevant to the separation of church and state, other useful sources for information on religious freedom in Canada before the Charter include THOMAS R. BERGER, FRAGILE FREEDOMS: HUMAN RIGHTS AND DISSENT IN CANADA 163-89 (1981) ; David M. Brown, *Freedom From or Freedom For?: Religion as a Case Study in Defining the Content of Charter Rights*, 33 U. BRIT COLUM. L. REV. 551, 552-60 (2000); *see also* Doyle, *supra* note 35.

III. THE HIDDEN ESTABLISHMENT CLAUSE

The theory that the *Charter* contains a "hidden" establishment clause arises from a comparison of U.S. Supreme Court and Supreme Court of Canada holdings in similar cases involving the separation of church and state. Fundamentally, the analysis is a functional[68] one of the type promulgated by the legal realist[69] school of thought: rhetoric and constitutional text aside, what will the courts actually *do* when faced with similar issues? Frederic Schauer sums up the view as one where:

> [F]ormal texts explain only a small part of differences among legal outcomes, and thus differences in textual style are likely less important in generating divergent outcomes than are differences in background and political culture, judicial acculturation, and the moral dispositions and policy preferences of individual judges. Conversely, similarities in political culture, judicial acculturation, and judicial policy preference would be expected to produce substantial similarities in outcome even in the face of substantial differences in the formal law.[70]

The argument in this section is that, whether due to similarities in political culture, judicial preferences, or increasing secularism, Canada and the United States respond to church-state issues in similar manners.[71] The American Bill of

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68. *See, e.g.,* Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1228 (1999) ("Functionalism claims that particular constitutional provisions create arrangements that serve particular functions in a system of governance. Comparative constitutional study can help identify those functions and show how different constitutional provisions serve the same function in different constitutional systems.") (footnote omitted).

69. *See id.* at 1232 n.30 (linking functionalism and legal realism). *See also id.* at 1235 ("[F]unctional inquiries are inherently empirical. They prompt the courts to make some assessment of the way institutions work in the real world—how will courts work when given information of a certain sort . . . .").

70. Frederick Schauer, *Constitutional Invocations*, 65 FORDHAM L. REV. 1295, 1296 (1997).

71. On freedom of religion broadly, this point is made by Shilton, *supra* note 2, at 217 ("Our courts have been hesitant to date to justify distinctions between Canadian and American jurisprudential outcomes in religion cases by resort to semantic differences between constitutional guarantees . . . ."); *accord* Horwitz, *supra* note 3, at 15-16 ("[D]espite our differences, Canadian and American courts have often achieved similar results in freedom of religion cases . . . ."). Of course, exercises of this sort must be done carefully, as noted by Kay, *supra* note 3, at 370 ("[E]very exercise of comparison must be undertaken with a careful attention to the differences in context that are inevitably present.").

Rights was an important influence on the wording of the *Charter*,[72] and American court decisions continue to have an important impact on Canadian decisions.[73] The hidden establishment clause argument does not suggest that either Canada or the United States have necessarily achieved a "rational" or "complete" separation of church and state, but only that they resolve such issues in a similar way. As with all good theories, this one is empirically falsifiable: have there been any occasions where the Supreme Court of Canada declined to separate church and state but, faced with a similar issue, the United States Supreme Court has? Except for constitutionally-guaranteed denominational schools, it would seem that Canadian jurisprudence closely tracks that of the United States on traditional separation of church and state issues, regardless of any textual differences between the American Constitution and the *Charter*.

A. Sunday Closing Laws

Any discussion of religious freedom in Canada inevitably involves the Supreme Court of Canada's 1985 decision in *R. v. Big M Drug Mart*,[74] a case involving the constitutionality of the Federal *Lord's Day Act*. The Act, with limited exceptions, forbade the sale of goods or merchandise on Sundays.[75] After a corporation was criminally charged for illegally selling goods under the Act, the Court was given its first opportunity to apply the religious freedom guarantee of section 2(a) of the *Charter*. The Court interpreted section 2(a) as meaning that legislation with either a religious purpose or a coercive religious effect would violate the religious freedom guarantee.[76] Because the Act's

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72. *See* William R. McKercher, *The United States Bill of Rights: Implications for Canada, in* THE U.S. BILL OF RIGHTS AND THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS 7, 19 (William R. McKercher ed., 1993.

73. *See, e.g.,* Robert A. Sedler, *The Constitutional Protection of Freedom of Religion, Expression, and Association in Canada and the United States: A Comparative Analysis*, 20 CASE W. RES. J. INT. L. 577, 618 (1988) ("The Supreme Court of Canada has specifically recognized the relevance of the American constitutional experience in interpretation of the Charter."); *see also* Horwitz, *supra* note 3, at 15 ("American jurisprudence is unquestionably useful, both for an understanding of the role of religion in a liberal democracy and for a specific analysis of the content of s. 2(a) . . . .").

74. [1985] S.C.R. 295. *See, e.g.,* Benjamin Berger, *The Limits of Belief: Freedom of Religion, Secularism, and the Liberal State*, 17 CAN. J. L. & SOC'Y 39, 57 (calling *Big M* "a foundational opinion on the meaning of religious freedom"); *see also* Heyking, *supra* note 64, at 667 (calling *Big M* "the fundamental religious freedom case in Canada"); *see also* Janet Epp Buckingham, *Caesar and God: Limits to Religious Freedom in Canada and South Africa* 15 S.C.L.R. (2d) 461 (2001) (referring to the "seminal" *Big M* case). *See generally* Mike Brundett, *Demythologizing Sunday Shopping: Sunday Retail Restrictions and the Charter*, 50 U.T. FAC. L. REV. 1 (1992). Because *Big M* and some of the other cases in this section have been discussed *ad nauseum* in the legal literature, only brief summaries have been provided here.

75. The R. v. Big M Drug Mart Ltd., [1985] S.C.R. 295, ¶¶ 5-8.

76. *See id.* ¶¶ 78-84.

"religious purpose, in compelling sabbatical observance, has been long-established and consistently maintained by the courts of this country[,]"[77] the Court easily found that the Act violated section 2(a) and struck it down accordingly. Applying the purpose rule one year later, however, the Court found that an Ontario Sunday closing law had a legitimate secular purpose in creating a common rest day for workers, and upheld its constitutionality.[78]

The Court's ruling that a religious purpose could invalidate legislation is important because, strictly speaking, it is irrelevant to the question of whether an individual's religious freedom has been burdened by the law. In other words, it closely tracks the American rule under the Establishment Clause where legislation can also be struck down for having a primarily religious purpose.[79] Indeed, the Supreme Court of Canada's rulings in regard to Sunday closing laws were substantially similar to rulings on the issue made by the United States Supreme Court almost twenty-five years earlier. In *McGowan v. Maryland*,[80] the United States Supreme Court upheld a state's Sunday closing law on the ground that it had a legitimate secular purpose, but the Court was careful to point

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77. *Id.* ¶¶ 78, 164; *see* Berger, *supra* note 74, at 54 ("The Supreme Court of Canada considered the purpose and nature of the legislation, and, while recognizing that there are both secular and religious aspects to the law, decided that from both a historical and theological perspective, there was sufficient Christian content to characterize this law as having a religious purpose.").

78. *See* R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713. *See also* Moore, *supra* note 16, at 1115 ("The critical difference producing the opposing outcomes in *Big M* and *Edwards* appears to be that Ontario's Retail Business Act boasted an objective . . . that was arguably secular and that could justify the burdens it imposed on religious freedom, while the Lord's Day Act could not elude its religious objective.") (footnote omitted)). The Court also found that any coercive effects of the legislation were justified under section 1 of the Charter. *See Edwards*, 2 S.C.R. 713, ¶¶ 118-121.

79. *See, e.g.,* McCreary County v. ACLU Kentucky, 125 S.Ct. 2722 (2005). This fact was recognized by the Supreme Court of Canada in *Big M* itself. *See* R. v. Big M Drug Mart, [1985] 1 S.C.R. 295, ¶ 82 ("This approach to the relevance of purpose and effect is explicit in the American cases."). There appears to be ambiguity in the Canadian caselaw as to exactly what is meant by a religious purpose. That is, are the statutes invalid for having religious purpose *simpliciter* or invalid only if their purpose is to actually *coerce* someone into participating in an unwanted religious practice? *Compare* Islamic Sch. Fed'n v. Ottawa Bd. of Educ., [1997] 145 D.L.R.4th 659, 662 (Ont. Div. Ct.) (asking simply whether the statute had a secular or a religious purpose) *with* Grant v. Canada, [1995] 1 F.C. 158, ¶ 80 (T.D.) ("[I]it is necessary to demonstrate that the religious purpose is such as to either constrain an individual's chosen religious practice or expression or to compel or coerce participation in religious practices or observances which the individual would not freely choose."). The difference between the two interpretations is subtle but important, as it would presumably be far harder to show that a legislature actually intended to coerce non-believers than to show that a statute was passed to advance or endorse religion generally. Under either interpretation, an interesting issue is the degree to which a statute's purpose can or should be inferred from its text and effects.

80. 366 U.S. 420 (1961). *McGowan* is the best known of the U.S. Sunday closing cases; several others are cited in Heyking, *supra* note 64, at 677 n.53.

out that Sunday closing laws in other jurisdictions could be struck down if they had a religious purpose.[81] Distinct constitutional provisions aside, the rule in each country mandates that a Sunday closing law is constitutional only if the government can articulate a secular purpose for its existence.

B. Religious Education in Public Schools

Students who went to Ontario public schools in the late 1980s witnessed firsthand what one commentator has called "a major . . . shift in defining the meaning of freedom of religion"[82] in Canada. As a result of two landmark Ontario Court of Appeal decisions, "it is now relatively settled law that majoritarian religious indoctrination and coercive religious practices are impermissible within the public school system."[83] In the first case, the Court of Appeal struck down the practice of beginning each school day with the recitation of the Lord's Prayer and Bible readings;[84] in the second case, the teaching of Christianity and its tenets as a matter of religious obligation was found unconstitutional.[85] Although for each practice the schools had a policy for excusing students who didn't wish to participate, the Court found that religious exercises and confessional education in public schools are inherently coercive activities that violate section 2(a) of the *Charter* because they force students to make a religious declaration to be excused or suffer the judgment of their peers and teachers.[86] According to a later court, the decisions "signify the end of an

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81. *See* McGowan, 366 U.S. at 453 ("We do not hold that Sunday legislation may not be a violation of the 'Establishment' Clause if it can be demonstrated that its purpose . . . is to use the State's coercive power to aid religion.").

82. Brown, *supra* note 67, at 584. In Ontario, there are three general kinds of schools: public schools, Catholic ("separate" or "denominational") schools, and private ("independent") schools. Both public and Catholic schools receive government funding and oversight, and are considered state actors for the purposes of the Charter. *Id.* at 596-97. *See, e.g.,* Adler v. Ontario, [1996] 3 S.C.R. 609, ¶ 49 (discussing application of the Charter); CHOQUETTE, *supra* note 34, at 295 (noting that separate schools fall under jurisdiction of provincial ministries of education).

83. Shilton, *supra* note 2, at 213.

84. *See* Zylberberg v. Sudbury Board of Education, [1988] 65 O.R.2d 641 (Ont. Ct. App.). *See also* Manitoba Ass'n for Rights & Liberties v. Manitoba, [1992] 82 Man. R.2d 39 (Q.B.); Russow v. British Columbia, [1989] B.C.J. No. 611 (S.C.). *See generally* Banafsheh Sokhansanj, *Our Father Who Art in the Classroom: Exploring a Charter Challenge to Prayer in Public Schools*, 56 SASK. L.R. 47 (1992).

85. *See* CCLA v. Ontario (Minister of Education), [1990] 65 D.L.R.4th 1 (Ont. Ct. App.).

86. *See* Zylberberg v. Sudbury Board of Education, [1988] 65 O.R.2d 641, ¶ 38 (Ont. Ct. App.) ("The peer pressure and the class-room norms to which children are acutely sensitive . . . are real and pervasive and operate to compel members of religious minorities to conform with majority religious practices."); CCLA v. Ontario, [1990] 65 D.L.R.4th 1, ¶ 24 (Ont. Ct. App.) ("[T]eaching students Christian doctrine as if it were the exclusive means through which to develop moral thinking and behaviour amounts to religious coercion in the class-room. It creates a direct burden on religious minorities and non-believers who do not adhere to majoritarian beliefs."). In addition

era of majoritarian Christian influence, and mark the beginning of . . . secularism in education, based on an awareness of a changing societal fabric and Charter protection for minority rights to freedom of religion."[87]

Over forty years ago, similar practices were struck down by the United States Supreme Court under the Establishment Clause. In *Engel v. Vitale*,[88] the Court struck down the practice of opening the school day with a short nondenominational prayer; a year later, in *School District v. Schempp*,[89] the Court invalidated the recitation of the Lord's Prayer and Bible verses. Although the Court in *Engel* was careful to note that coercion was not a prerequisite of an Establishment Clause violation,[90] it, like the Ontario Court of Appeal decades later, found that giving students the choice of observing majoritarian religious practices or excusing themselves constituted undue pressure.[91] Once again, although there are differences in precise rationale used, practices struck down by using the Establishment Clause in the United States were invalidated in Canada through the *Charter*'s guarantee of freedom of religion.

C. Prayer at Legislative Assemblies

Shortly after the *Charter* first took effect in 1982, one commentator stated "[t]he absence of an establishment component in section 2(a) will also prevent constitutional challenge in Canada to practices such as the use of chaplains in legislative bodies . . . ."[92] Fifteen years later, in *Freitag v. Penetanguishene (Town)*,[93] the Court found that a city council's commencement of each meeting with a recitation of the Lord's Prayer violated the *Charter*'s guarantee of freedom of religion. The case was brought by a resident of the city who often attended city council meetings and argued that he felt pressured to stand and say the prayer, even though he was never legally or physically coerced into doing so.[94] The Court's rationale is easy to follow: since *Big M* ruled that government practices may neither have the purpose nor effect of imposing religion on non-

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to holding that the practices constituted a form of indirect coercion, equality arguments were discussed in each case. However, the judgements are ambiguous as to whether non-sectarian practices would be more acceptable. *See* Shilton, *supra* note 2, at 212.

87. Bal v. Att'y Gen. of Ont., 21 O.R.3d 681, 684 (Gen. Div.), *aff'd*, 34 O.R.3d 484 (Ont. Ct. App.).

88. Engel v. Vitale, 370 U.S. 421 (1962).

89. Sch. Dist. v. Schempp, 374 U.S. 203 (1963).

90. *See Engel*, 370 U.S. at 430.

91. *See id.* at 431 ("When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.").

92. Sedler, *supra* note 3, at 1222 n.111.

93. [1999] 47 O.R.3d 301 (Ont. Ct. App.).

94. *See id.* ¶¶ 5, 26.

believers, the Court examined the purpose of starting every meeting with the Lord's Prayer. The Court found that the purpose was "to impose a specifically Christian moral tone on the deliberations of the Town Council" and therefore the plaintiff's freedom of religion was violated.[95] Building on the earlier education decisions, the Court also found the invocations coercive, and stated that "[j]ust as children are entitled to attend public school and be free from coercion or pressure to conform to the religious practices of the majority, so everyone is entitled to attend public local council meetings and to enjoy the same freedom."[96]

Although not decided, the Court implied that a legitimate purpose in solemnizing the meeting could be constitutionally achieved through a non-denominational prayer and a moment of silence, as is now the practice of the House of Commons.[97] Five years later, this was exactly the ruling of the Ontario Superior Court when faced with a challenge to a city council's use of a non-denominational prayer that had been adopted after the *Freitag* decision.[98] The result, that sectarian prayers are forbidden but "non-denominational" prayers are allowed, is unlikely to be satisfactory to either strict separationists or religious accommodationists, but is exactly the same rule applied in American Establishment Clause jurisprudence.

In the 1983 case *Marsh v. Chambers*,[99] the U.S. Supreme Court deviated from its standard Establishment Clause test and found prayers or invocations by deliberative public bodies were constitutional when "there was no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief."[100] The rule that prayers by legislative bodies are constitutional if non-denominational but unconstitutional if sectarian is now well-settled and followed by lower courts.[101]

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95. *Id.* ¶ 25.

96. *Id.* ¶ 34. A similar challenge to the recitation of the Lord's Prayer by the Ontario Legislative Assembly was rejected on jurisdictional grounds. *See* Ontario (Speaker of the Legislative Assembly) v. Ontario (Human Rights Commission), [2001] 54 O.R.3d 595 (Ont. Ct. App.). *See generally* Michael D. Mysak, *Houses of the Holy? Reconciling Parliamentary Privilege and Freedom of Religion*, 12 NAT'L J. CONST. L. 353 (2001).

97. *See id.* ¶ 52.

98. *See* Allen v. Renfrew (County), [2004] O.J. No. 1231 (Ont. Sup. Ct.). *Cf.* R. v. Scott, [2004] C.M.A.J. No. 2, ¶ 5 (finding section 2(a) violated by requirement that soldiers take part in prayer and holding that "[t]he 'non-denominational' character of the prayer was wholly irrelevant . . . . A prayer is always and by definition religious. That character does not change depending upon the organized religion with which it may or may not be associated.").

99. Marsh v. Chambers, 463 U.S. 783 (1983).

100. *Id.* at 794-95.

101. Compare Simpson v. Chesterfield County, 404 F.3d 276, 279 (4th Cir. 2005) (upholding "non-sectarian invocation[s]") with Wynne v. Great Falls, 376 F.3d 292 (4th Cir. 2004) (striking down explicitly Christian invocations).

D. Church Property Disputes

The rule for over thirty years in the United States has been that when a religious organization splits apart or has other internal disputes over church property, courts are forbidden from inquiring into matters of doctrine or faith in resolving the issue.[102] The reason, of course, is that "there is substantial danger that the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs."[103] Since the advent of the *Charter*, indications are that Canadian courts are moving in a similar direction. For example, Alvin Esau writes that:

> There is supposedly no Canadian theory of the separation of church and state standing in the way of judges attempting to muddle through religious documents and entertain the conflicting testimony of religious experts . . . . However, when we look at the performance of the Canadian courts . . . the gap between the American and the Canadian approach is not as wide as might be thought.[104]

For example, in 2004 the Supreme Court of Canada noted, in a different factual context, that "[s]ecular judicial determinations of a theological or religious dispute, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion."[105] In practice, both American and Canadian courts appear to limit themselves to enforcing religion-neutral contract terms, often under the auspices of corporate or charitable-society legislation.[106]

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102. *See* Serbian Eastern Orthodox Dicoese v. Milivojevich, 426 U.S. 696 (1976). *See generally* Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts Over Religious Property*, 98 COLUM. L. REV. 1843 (1998).

103. Serbian Eastern, 426 U.S. at 709. *See also* Denise J. Doyle, *Religious Freedom and Canadian Church Privileges*, 26 J. CHURCH & ST. 293, 306 (1984) ("It would be counter-productive for the separation of church and state if the civil courts entered into decision-making for churches or corrected decisions made in church disputes . . . .").

104. Alvin J. Esau, *The Judicial Resolution of Church Property Disputes: Canadian and American Models* 40 ALTA. L.R. 767, 814 (2003).

105. Syndicat Northcrest v. Amselem, [2004] S.C.J. 551, ¶ 50.

106. *See id.* ¶¶ 68-69; Doyle, *supra* note 103, at 307. Although no cases have come to my attention, I suspect that the issue of tax exemptions for religious bodies would be upheld under the Charter as a non-discriminatory benefit provided to a wide variety of both religious and secular not-for-profit organizations. *See, e.g.,* Doyle, *supra* note 103, at 300 ("The churches and their agencies receive taxation exemptions as part of a larger category of registered charities. Registered charities are organizations, many having no religious affiliation, that do not work primarily for profit."). Tax exemptions for churches, as part of a larger scheme, have been found

Although Canada has reached similar results under section 2(a) of the *Charter* as the United States has under its Establishment Clause in the areas of Sunday closing laws, religious education in public schools, prayers at legislative bodies, resolution of church property disputes, and more,[107] many issues have simply never arisen so far in Canadian courts. For example, there appear to be no appellate opinions on religious monuments (such as the Ten Commandments) in public places or on government funding of specific religious groups. Although only time will tell how such issues will be resolved, broad statements made by judges and scholars about the meaning of section 2(a) suggest that government neutrality towards religion will remain the deciding factor. These statements are discussed in the following section.

IV. THE NEUTRALITY PRINCIPLE

If past conduct is a reliable guide to future actions, it appears that the United States and Canada will follow similar paths on most church-state questions. However, do these results match the rhetoric? Should the decisions of Canadian courts in this area be considered inconsistent with the way in which the Supreme Court of Canada and other commentators have articulated the principles underlying the Charter's guarantee of religious freedom? A review of caselaw and legal literature indicates that neutrality has been a guiding principle of section 2(a) since the beginning.

Big M, the Sunday closing case, set the tone for the SCC's views on how the separation of church and state is reflected in section 2(a). In response to government claims that the Sunday closing laws had to be upheld because the

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constitutional under the American Establishment Clause. *See* Walz v. Tax Commission, 397 U.S. 696 (1970).

107. A fifth similarity would merit greater attention, but the case never advanced beyond a Québec trial court. In Rosenberg v. Outremont (City), [2001] Q.J. No. 2858 (Qc. Sup. Ct.), the constitutionality of eruvin on municipal property was upheld. In the Court's words, "an eruv is a notional concept by which an otherwise open area is closed by the attachment of barely visible wires or strings to freestanding structures. The purpose of an eruv is to avoid the prohibition in Jewish Law of removing things from one domain to another on the Sabbath and on Holidays . . . . [W]ithout an eruv, an Orthodox Jew is effectively housebound on the Sabbath and religious holidays if he or she wishes to or is required to take anything out of the house and bring it on to other property." Id. ¶ 7. Individual religious freedom (of non-Orthodox Jews) and state neutrality were raised by the municipality as grounds for refusing to allow eruvin to be attached to city property. However, the Court found that the city could not prohibit the eruvin, in part because "the [city] is not being asked to expend public funds, to advance the precepts of Orthodox Judaism, or to associate itself or its citizens in any way with the erection of eruvin." This holding accords with the weight of American precedent decided under the Establishment Clause. See Tenafly Eruv Ass'n v. Tenafly, 309 F.3d 144 (3d Cir. 2002); ACLU-NJ v. Long Branch, 670 F. Supp. 1293 (D. N.J. 1987); Smith v. Community Bd. No. 14, 491 N.Y.S.2d 584 (N.Y. Sup. Ct. 1985), aff'd, 133 A.D.2d 79 (N.Y. App. Div. 1987).

Charter's guarantee of religious freedom allegedly lacked an establishment clause, the Court stated that the American dichotomy between "free exercise" and "establishment" cases was not an appropriate or helpful one for the *Charter*.[108] According to the Court:

> [T]he applicability of the Charter guarantee of freedom of conscience and religion does not depend on the presence or absence of an 'anti-establishment principle' in the Canadian Constitution . . . . The acceptability of legislation or governmental action which could be characterized as state aid for religion or religious activities will have to be determined on a case by case basis.[109]

The proposition that section 2(a) incorporates, to an unclear degree, both "free exercise" and "anti-establishment" values in a unitary guarantee of religious freedom can be supported by the language of the text itself: "Everyone has the following fundamental freedoms: (a) freedom of conscience and religion . . . ."[110] In other words, the *Charter* is not restricted to protecting only the free *exercise* of religion, but "freedom of . . . religion" in a larger sense. This is important because freedom of religion has long been perceived as including a prohibition on the government identifying itself closely with a single religion.[111]

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108. *See* R. v. Big M Drug Mart, [1985] 1 S.C.R. 295, ¶¶ 102-105 ("In my view this recourse to categories from the American jurisprudence is not particularly helpful in defining the meaning of freedom of conscience and religion under the Charter.").

109. *Id.* at 341. *See also*, Smithey, *supra* note 3, at 93 ("It is clear in *Big M Drug Mart* that, even though the text of the Charter does not explicitly limit government sponsorship of religion, the Canadian Supreme Court has fashioned an anti-establishment principle by requiring the government to avoid sectarian favouritism."); Lorraine Weinrib, *Do Justice to Us! Jews and the Constitution of Canada, in* NOT WRITTEN IN STONE: JEWS, CONSTITUTIONS, AND CONSTITUTIONALISM IN CANADA 66 n.43 (Daniel J. Elzar, et al. eds., 2003) ("While the *Charter*'s protection of freedom of religion and conscience does not expressly countermand establishment of religion, non-establishment values are clearly engaged in the interpretation of this provision.").

110. Charter, § 2(a). *See generally* Lorraine E. Weinrib, Book Review, *The Religion Clauses: Reading the Lesson,* 8 Sup. Ct. L. Rev. 507, 517 (1986) ("[T]he free exercise and anti-establishment values of the American Bill of Rights text enter the Charter as a unity within section 2(a). The bifurcation of these values . . . need not arise under the Charter."); Sokhansanj, *supra* note 84, at n.24 ("Canada has neither an establishment nor a free exercise clause, but rather constitutional protection of freedom of religion which incorporates elements of both American provisions.").

111. *See, e.g.*, Adhar & Leigh, *supra* note 26, ¶ 38 ("The two limbs or clauses of the [First Amendment] suggest that religious freedom itself could be envisaged as comprising two elements: non-establishment and free exercise. We agree with those who contend that the two clauses are not in opposition but are complementary, both tending toward the same end."); McCreary, *supra* note 79, at 2746 ("The First Amendment expresses our Nation's fundamental commitment to

Because the free exercise of religion cannot flourish in a nation with an established church, a prohibition on state support for religion is an important instrumental means of achieving religious freedom in the narrow sense.[112]

Government neutrality in religious affairs is a recurring concern. For example, three judges of the Supreme Court of Canada recently wrote that:

> [I]t is no longer the state's place to give active support to any one particular religion . . . The state must respect a variety of faiths whose values are not always easily reconciled. . . . As a general rule, the state refrains from acting in matters relating to religion. It is limited to setting up a social and legal framework in which beliefs are respected and members of the various denominations are able to associate freely in order to exercise their freedom of worship . . . In this context, the principle of neutrality must be taken into account in assessing the duty of public entities, such as municipalities, to actively help religious groups.[113]

Similarly, lower court judges have stated that "Canada is a secular state, with freedom of religion,"[114] that "[t]o prefer one religion over another . . . contravenes the provisions of the Charter relating to freedom of conscience and religion,"[115] that the *Charter* "would certainly prevent any instrument of the State from establishing an official religion or discriminating against a particular

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religious liberty by means of two provisions—one protecting the free exercise of religion, the other barring establishment of religion.").

112. *See, e.g.,* Macklem, *supra* note 3, at 74 ("[I]t is important to recognize that concomitant with the protection of a certain religion is the non-protection of another. This selective protection by the state has the effect of limiting religious freedom in general. On these grounds, a separation of church and state principle . . . can be read into section 2(a)."); Adhar & Leigh, *supra* note 26, ¶ 41 ("[S]eparation is an important instrumentalist means toward the larger end of protecting religious freedom.").

113. Congregation des temoins de Jehovah v. Lafontaine (Village), [2004] S.C.C. 48, [2004] S.C.J. No. 45, ¶ 68 (LeBel, J., dissenting). *See also* Chamberlain v. Surrey Sch. Dist., [2002] 4 S.C.R. 710, ¶ 211 (per LeBel, J.) ("Freedom of religion is not diminished, but is safeguarded, by the state's abstention from favouring or promoting any specific religious creed."); Rodriguez v. British Columbia (AG), [1993] 3 S.C.R. 519, ¶ 59 (Lamer, C.J. dissenting) ("[T]he Charter has established the essentially secular nature of Canadian society and the central place of freedom of conscience in the operation or our institutions.").

114. Reed v. Canada, [1989] 3 F.C. 259, ¶ 6 (T.D).

115. MARL v. Manitoba (Minister of Education), [1992] 94 D.L.R.4th 678, 686.

religion,"[116] and that "[t]he separation of church and state is a fundamental principle of our Canadian democracy and our constitutional law."[117]

This general concern for state neutrality towards religion is reflected in the test the SCC applies when faced with a freedom of religion question. As discussed in the last section, the first question asked under the test is whether the statute or activity has a religious or secular purpose.[118] If it has a legitimate purpose, the next question is whether it is religiously coercive.[119] For separation of church and state purposes, the key aspect of the coercion test is that the Court has articulated and applied it in an extraordinarily broad manner, reaching a wide variety of tangible and intangible government burdens on religious belief:

> [I]ndirect coercion by the state is comprehended within the evils from which s. 2(a) may afford protection. . . . . It matters not, I believe, whether a coercive burden is direct or indirect, intentional or unintentional, foreseeable or unforeseeable. All coercive burdens on the exercise of religious beliefs are potentially within the ambit of s. 2(a).[120]

A broad interpretation of "coercion," such as the one applied to prevent religious exercises in schools or sectarian invocations at legislative assemblies, makes it far more likely that litigants will succeed in challenging government-sponsored religious activities or rituals. Legal scholar Richard Moon notes, for example, that "the Canadian courts have taken such a broad view of religious coercion that any form of state support for the practices or beliefs of a particular

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116. Rosenberg v. Outremont (City), No. 500-05-060659-008, [2001] Q.J. 2858, ¶ 42 (Québec Sup. Ct.).

117. Hall v. Powers, [2002] O.R.3d 423, ¶ 31.

118. *See supra* § III.A.

119. *See, e.g.,* Freitag v. Penetanguishene (Town), *supra* note 93, ¶ 17 ("The court [in *Big M*] set out the proper approach when considering whether legislation infringes a guaranteed Charter right: one must look first at the purpose of that legislation; if its purpose is constitutionally benign, one looks also to its effects."). *See also* Kay, *supra* note 3, at 363 ("The Court in *Big M Drug Mart, Ltd.* relied on an expansive definition of freedom of religion . . . . The reasoning was . . . [that] the state could take no action which had *either the purpose or the effect* of coercing or otherwise putting pressure on the religious choices of individuals").

120. R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713, ¶ 96 (per Dickson, C.J.). *See also* Brown, *supra* note 67, ¶ 27 ("[Dickson's] description of freedom as being the absence of coercion or constraint, direct or indirect, justifies a broad examination of the impact of any state action on the religious beliefs and practices of an individual. Legislation relying on subtle pressure stands on no better constitutional footing than that which relies on direct proscription or compulsion"); Moon, *supra* note 3, at 565-66 ("[T]the Canadian courts have taken a broad view of 'coercion.' The courts have held, in a range of cases, that state support for a particular religion, or for religion in general, amounts to religious compulsion or restriction . . . .").

religion, or for religious over non-religious belief systems, might be viewed as coercive and therefore contrary to s. 2(a)."[121] Similarly, Richard Kay suggests that "the Court has necessarily brought into question many state actions that, on their surface, make no restriction on behavior but merely aid or approve religion."[122]

How does this work in practice? Examples from American jurisprudence are illustrative. For example, in the well-known cases challenging the erection of Ten Commandments or other religious monuments on public property under the Establishment Clause, standing is obtained by showing that the plaintiff suffered an "injury in fact" by direct and unwelcome contact with the religious display. This can include, but does not require, a finding that the plaintiff changed his regular route to avoid the allegedly unconstitutional monument.[123] Although relevant only to standing in the American cases, a plausible argument could be made that unwelcome contact or avoidance of a similar display constitutes "indirect coercion" under Canadian religious freedom jurisprudence. Similarly, if a Canadian government body were to give subsidies to a particular denomination but refrain from giving to others, this could be viewed as indirectly coercing or punishing the less-favoured denominations.

This last example raises important equality concerns and could conceivably be brought under the equality guarantee of section 15. However, many cases decided under the religious freedom guarantee of section 2(a) have included discussions of equality without being specifically grounded on the equal protection provision of the *Charter*.[124] It appears reasonable to conclude that

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121. Moon, *supra* note 3, at 563-64. Moon goes on to argue convincingly that the Canadian caselaw represents a shift in the "wrong" that religious freedom protects against from "coercion" to "exclusion." *See id.* at 567-68.

122. Kay, *supra* note 3, at 364. Adhar & Leigh, *supra* note 26, ¶ 76 (noting the difficulty in defining "coercion" once it moves into the realm of "subtle" or "indirect" pressure).

123. *See* Marc Rohr, *Tilting at Crosses: Nontaxpayer Standing to Sue Under the Establishment Clause*, 11 GA. ST. U. L. REV. 495, 510-19 (1995); *see also* June M. Ross, *Standing in Charter Declaratory Actions*, 33 OSGOODE HALL L.J. 151 (1995); *see also* GÉRALD-A. BEAUDOIN & ERROL MENDES, CANADIAN CHARTER OF RIGHTS AND FREEDOMS (4th ed. 2004).

124. *See* Zylberberg, *supra* note 86, ¶ 38; *see also* CCLA, *supra* note 86, ¶ 24. Other examples include *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295, 337, where the Court spoke about the "sectarian Christian" nature of the Sunday closing laws and *Freitag v. Penetanguishene (Town)*, [1999] 47 O.R.3d 301 (Ont. Ct. App.), where the Court of Appeal paid particular attention to the specifically Christian nature of the challenged practice. *See also* Smithey, *supra* note 3, at 97 ("equality concerns have been very important to judicial interpretation of the Charter's religious freedom provisions . . . judges have often struck down government policy that favoured a particular religious viewpoint"); Hogg, *supra* note 5, at 52-50 to 52-51 (suggesting that the Sunday closing and school religious exercise cases could "easily be viewed as equality cases in which benefits are conferred on Christians that are denied to the adherents of other religions"); Macklem, *supra* note 3, at 74 ("It can be argued that protection of a certain religion constitutes state-sanctioned discrimination insofar as it represents unequal treatment on religious grounds").

section 2(a) includes an equality component, just as the American Establishment Clause includes a strict prohibition on preferring some religions over others.[125] The multiculturalism provision of the *Charter* lends some support to this interpretation.[126]

By requiring that statutes and practices have neither a religiously coercive purpose nor effect, the Supreme Court of Canada has made neutrality the touchstone of its religious freedom jurisprudence, in both theory and application. This move towards secularism in government affairs is bemoaned by many,[127] but is now well-established both by law and social consensus. The next section discusses the last major vestiges of an earlier time when government support for religion was seen as legitimate: denominational schooling and the *Charter*'s Preamble.

V. COMPLICATIONS

It would be disingenuous to claim that the existence of publicly-funded denominational schools for particular religions in Canada is a minor breach of the separation of church and state. As one commentator notes, "[f]ar from building a wall between church and state, when it comes to separate schools the Canadian Constitution builds a wall around the Roman Catholic Church and its relationship with the . . . government."[128] Indeed, denominational schooling rights, though recently removed or weakened in Newfoundland and Quebec,[129]

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125. *See* Larson v. Valente, 456 U.S. 228 (1982). *See generally* Jeremy Patrick-Justice, *Strict Scrutiny for Denominational Preferences: Larson in Retrospect*, 8 N.Y. CITY L. REV. 53 (2005).

126. Section 27 of the Charter requires that fundamental freedoms "be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." *See generally* Joseph Eliot Magnet, *Multiculturalism and Collective Rights*, *in* Beaudoin & Mendes, *supra* note 123, at 1261-1316. This provision, although never decisive, has been invoked by courts in support of religious freedom in cases that helped to disestablish majoritarian religions. *See, e.g.,* R. v. Big M Drug Mart, [1985] 1 S.C.R. 295 at 337-338; Freitag v. Penetanguishene (Town), 47 O.R.3d 301, ¶ 46.

127. *See, e.g.,* Heyking, *supra* note 64; *see also* Benson, *supra* note 3; *see also* Brown, *supra* note 67.

128. Huscroft, *supra* note 3, at 509. Background on the denominational schooling issue can be found in John S. Moir, *The Origin of the Separate Schools Question in Ontario, in* CHRISTIANITY IN CANADA, *supra* note 31; C.B. SISSONS, CHURCH AND STATE IN CANADIAN EDUCATION: AN HISTORICAL STUDY (1959); WALKER, *supra* note 1; CHOQUETTE, *supra* note 34, at 285-307.

129.

> In 1997, the government of Newfoundland changed [its] confessional school system into a nonconfessional one, one year after the government of Quebec changed its confessional school boards into language-based ones . . . . In 2001, Quebec also abolished its confessional public schools and made them into French or English School.

still exist in Ontario, Alberta, and Saskatchewan.[130] These rights, created as part of the so-called "Confederation Compromise,"[131] are immune from challenge under the Charter's religious freedom or equality provisions.[132] In Ontario, for example, millions of dollars are spent on Catholic schools while other religious groups, regardless of size, are unable to obtain similar funding.[133]

Far from undermining the general theme of religious neutrality found in the *Charter*, however, the denominational schooling provisions of the Constitution reinforce the fact that, absent an explicit textual exception, benefits must be provided on a non-discriminatory basis.[134] Indeed, outside of the context of denominational schools, it becomes hard to conceive a modern-day Canadian government explicitly limiting benefits or services to members of a particular religious group—for political reasons it is unlikely they would even try, and for *Charter* reasons it is extremely unlikely they would succeed. The continued existence of denominational schools, entrenched as they are in the Constitution, has become a political question rather than a legal one, but their presence cannot logically distract from the theory that the *Charter* otherwise mandates the separation of church and state.

A more interesting question involves the effect of the *Charter*'s preamble, which states: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law . . . ."[135] Does this reference to God,

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See CHOQUETTE, *supra* note 34, at 454 n.2. Through use of the notwithstanding clause, some religious education in public schools still continues in Quebec. *See* Rheal Seguin, *Quebec Moves Closer to Secular Curriculum*, GLOBE & MAIL, May 5, 2005, at A4.

130. *See* Trinity W. Univ. v. B.C. Coll. Of Teachers, [2001] 1 S.C.R. 772, ¶ 34.

131. *See* Adler v. Ontario, [1996] S.C.R. 609, ¶ 29.

132. *See id*; *see also,* Reference Re Bill 30, [1987] 1 S.C.R. 1148.

133. *See*, *e.g.*, David Matas, *Waldman v. Canada: Religious Discrimination in the Constitution*, 11:3 CONST. FORUM 99 (2000).

134. *See, e.g.*, Hogg, *supra* note 5, at 1277 ("The public funding of the schools of a religious denomination without comparable provision for the supporters of the schools of other religious denominations would be forbidden by s. 15. . . . . To the extent that a denominational school system is protected, or even contemplated, by s. 93, no s. 15 challenge is open.") (footnoted omitted). Of course, getting rid of denominational school rights does not necessarily mean that religious schools are barred from government funding. For example, under a controversial United States Supreme Court decision, vouchers given to students for use at a secular or religious private school of their choice was found constitutional under the Establishment Clause because the voucher plan did not discriminate between religions or between religious and secular schools. *See* Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

135. Preamble, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.). The history of the preamble is discussed by George Egerton, *Trudeau, God, and the Canadian Constitution: Religion, Human Rights, and Government Authority in the Making of the 1982 Constitution, in* RETHINKING CHURCH, *supra* note 54, at 99-106. A more interesting question is the effect of the Charter's preamble, which states that: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law . . . ."

which does not exist anywhere in the United States Constitution, alter the *Charter*'s conception of religious freedom? For example, one commentator asserts that the preamble "would presumably preclude strict 'no establishment' arguments that have emerged in U.S. Supreme Court rulings against any role for, or privileging of, religion in public life."[136] On the other hand, judicial interpretation of the reference to God has rendered the preamble an "orphaned text"[137] and "an embarrassment to be ignored."[138] The Ontario Court of Appeal, for example, stated that:

> It is a basic principle in the construction of statutes that a preamble is rarely referred to and, even then, is usually employed only to clarify operative provisions which are ambiguous . . . . Whatever meaning may be ascribed to the reference in the preamble to the 'supremacy of God', it cannot detract from the freedom of conscience and religion guaranteed by s. 2(a) which is, it should be noted, a 'rule of law' also recognized by the preamble.[139]

Unfortunately, only one law review article has ever been devoted to the preamble, and it is, to put it nicely, quite metaphysical.[140] More research into the philosophical and linguistic meaning of the provision is clearly required.

I want to tentatively suggest that the preamble, like the *Charter* itself, is liberal in the best sense of the word. That is, it reflects the traditional liberal

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136. Egerton, *supra* note 135, at 112 n.26. *See also* Zylberberg v. Sudbury Board of Education (Director), [1988] O.R.2d 641, ¶ 86 (Ont. Ct. App.) (Lacourciere J.A., dissenting) ("[I]t does lend credence to the view that a strict separation of church and state is not contemplated by the Charter . . . .").

137. Douglas Farrow, *Of Secularity and Civil Religion, in* RECOGNIZING RELIGION, *supra* note 15, at 143.

138. Brown, *supra* note 67, at 561.

139. Zylberberg v. Sudbury Board of Education (Director), [1988] O.R.2d 641, ¶ 44 (Ont. Ct. App.). *See also* O'Sullivan v. Canada, [1991] 84 D.L.R. (4th) 124, 134 (T.D.) ("[R]ecognition of the supremacy of God . . . goes no further than this: it prevents the Canadian state from becoming officially atheistic . . . . The preamble's recognition . . . does not prevent Canada from being a secular state."); Weinrib, *supra* note 109, at 47 ("The Supreme Court of Canada combined its generous reading of the *Charter's* freedom of religion guarantee with a minimalist reading of its preamble . . . . Justice Dickson did not simply ignore it; he neutralized it by emphasizing its ecumenical character.") (footnote omitted). *But see* Allen v. Renfrew (County), [2004] O.R.3d 742, ¶¶ 19-20 (Ont. Sup. Ct.) (relying on preamble).

140. *See* Brayton Polka, *The Supremacy of God and the Rule of Law in the Canadian Charter of Rights and Freedoms: A Theologico-Political Analysis*, 32 MCGILL L.J. 854 (1987). As this article went to press, a new article on the Charter's Preamble appeared. *See* Jonathon W. Penney & Robert Jacob Danay, *The Embarrasing Preamble? Understanding the Supremacy of God and the Charter*, 39 U. BRIT. COLUM. L. REV. 287 (2006).

conception that religion ("the Supremacy of God") and government ("the rule of law") have their respective spheres and that an intermingling of the two is dangerous for each of them.[141] Religion is a deeply-seated question of faith and conscience, best left to individuals, their families, and their social communities, while government assiduously keeps its distance from religious questions and concerns itself with the more mundane question of how to ensure a functioning civil society. This division does not mean that religious persons or ideas are barred from the public square,[142] just as it does not mean that the government will never intervene in the affairs of religious persons or organizations when overriding values are at stake.[143] It does mean, however, that strict neutrality on religious questions is seen as the guiding principle for government bodies when the two spheres are forced to interact. Viewed in this light, the preamble both reflects and supports the *Charter*'s general theme of separation, neutrality, and equality towards religion.

VI. CONCLUSION

The theory that the *Charter* contains a "hidden" establishment clause is premised on two arguments. First, that a close examination of church and state cases decided under the *Charter*'s religious freedom guarantee appear strikingly similar in result and reasoning to those decided under the American Constitution's Establishment Clause. Second, that an analysis of the cases and legal commentary show that neutrality is increasingly viewed as the only legitimate and appropriate relationship between government and religion. If these two arguments are valid, the separation of church and state is the reality of and a requirement for Canadian democracy.

Many controversial religious freedom issues faced in the United States have not as yet arisen in Canada. When they do, one or two big cases will either cement this conception of neutrality and separationism or point to a different path. For now, however, the words of the Supreme Court of Canada in *Big M* appear to be true: "With the Charter, it has become the right of every Canadian

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141. *See*, *e.g.*, John Rawls, *The Idea of Public Reason Revisited, in* THE LAW OF PEOPLES 166 (1999) ("The reasons for the separation of church and state are these, among others: it protects religion from the state and the state from religion") (footnote omitted).

142. For a discussion the legitimacy of religious views in public deliberations, *see e.g.*, Chamberlain v. Surrey School District, [2002] S.C.R. 710, ¶¶ 17-19; Jonathan Chaplin, *Beyond Liberal Restraint: Defending Religiously-Based Arguments in Law and Public Policy*, 33 U. BRIT. COLUM. L. REV. 617 (2000).

143. *See*, *e.g.*, R.B. v. Children's Aid Society of Metropolitan Toronto, [1995] S.C.R. 315 (upholding forced blood transfusion of Jehovah's Witness minor).

to work out himself or herself what his or her religious obligations, if any, should be and it is not for the state to dictate otherwise."[144]

144. R. v. Big M Drug Mart, [1985] S.C.R. 295, ¶ 135.