UNIVERSITY OF SOUTHERN QUEENSLAND

The Constitutional Context of Secularism, Religious Freedoms, and the State

A critical comparative study of the contemporary secular state reviewed in the context of the thoughts of George Jacob Holyoake.

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ABSTRACT

Three basic objectives are pursued in this thesis: (a) an analysis of the historical development of secularism and religious freedom across a number of jurisdictions, in the context of the theories regarding secular governance of the English thinker George Jacob Holyoake ; (b) analysis of various constitutional models regarding the relationship between organised religion and the state, through the examination by ultimate courts of issues that have arisen since the drafting of those constitutions; (c) an examination of how modern secular democracies have interpreted secular governance since the times and writing of Holyoake; and (d) recommendations for reform of secular government in light of this research.

This thesis is developed through three parts. Part I relates to the historical and contemporary philosophical development of secular government in England and Wales, in common law countries in the Americas and South Asia, including an examination of George Jacob Holyoake's theories, as well as civil law countries in Europe. Part II deals with the constitutional law in these jurisdictions identifying areas where individual religious freedom rights clash with public policy of the secular state. Part III relates to reform of such states where efforts to keep a "separation of church and state" have resulted in artificial and impractical results, and a constitutional theory is developed offering a solution.

CERTIFICATION OF THESIS

I certify that the ideas, experimental work, results, analyses, software and conclusions reported in this dissertation are entirely my own effort, except where otherwise acknowledged. I also certify that the work is original and has not been previously submitted for any other award, except where otherwise acknowledged.

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Signature of Candidate

Anthony Paul Meacham

28 February 2014

ENDORSEMENT

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Signature of Supervisor/s

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Date

PREFACE

This thesis developed from an interest I developed in constitutionally guaranteed religious freedom rights that originated with my Master degree studies. I found it interesting that, whilst specific issues such as the wearing of headscarves in the public sphere in France were evaluated in that country's context, no real comparison had been made across multiple jurisdictions to consider what issues other countries had in this area, and how they were addressed. I was curious about not only how other secular democracies addressed this issue, but more broadly, how other expressions of religious activity that ran counter to public policy were handled by the state,[1] whether the rights were extinguished, impaired, or accommodated, and what impact this had on other rights i.e. were religious rights advanced or given preference over other rights contained in the various constitutions.

I have always had an interest in the rights of minority viewpoints in a modern secular democracy relative to the collective will of the majority. The issue is often in the media, particularly when these views are made in the public square and for some reason cause conflicts with other individuals or the state. I had noted however that often these views are expressed intra-jurisdictionally, and my literature review determined there is little comparison of the religious freedom provisions of diverse secular states, the exception being perhaps Jacobsohn's *Wheel of Law*,[2] which examined the USA, India and Israel.

This thesis provides the opportunity to look at the treatment of religious pluralism in modern societies, particularly those where the changes have been gradual over perhaps the last half century, causing those communities to re-examine judicially the basic understanding and assumptions made about what the broad religious freedom provisions with their constitutions mean, and whether that meaning has changed over time in line with the increase in pluralism within those societies.

In doing so I hope to add to the scholarship in this area, particularly that done in Australia, India and the United States. I trust that the results of this thesis will show that the understandings of religious freedom have expanded to include a broader understanding of religion and religion and its role in society, as well as the increasing recognition of those who choose not to participate in religion, but who also have a role in the public sphere.

I have based this thesis on the law available to me at Canberra on 28 February 2014.

Tony Meacham
Theodore, Australian Capital Territory
28 February 2014.

[1] By 'state', for the purposes of this thesis, I mean 'sovereign state'.
[2] Gary Jeffrey Jacobsohn, *The Wheel of Law: India's Secularism in Comparative Constitutional Context* (Princeton University Press, 2003), which compared three countries (India, the United States and Israel).

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There have been so many people who have helped me in some way in this project of mine without whom I would not have completed the task. Foremost, I would like to express my deepest appreciation and thanks to my advisor Professor Reid Mortensen, Head of the School of Law and Justice at the University of Southern Queensland. You took me on as a candidate readily on transfer from another university, and have since provided me with a level of guidance, patience and advice that I will always remember. Without your supervision and constant help, this PhD thesis would not have been possible.

A would like to express my sincere gratitude to my wife, Dr Visalakshi Sen. She knows as much as I how long this journey from start to submission has been, and has supported me all along the way. I thank her for all she has given and sacrificed to allow me to complete this project. I owe her a great deal.

A special thanks to my family. Words cannot express how grateful I am to my parents who brought me up in an environment of learning which has carried through my life, and for their sacrifices in raising me. I thank my father, Maurie Meacham, for his support of my education over many years and his active interest, and my late mother Betty Meacham who gave me my love of reading and who had no doubt I would succeed. To my son, Sean Meacham, who always believed the old man could do this, thanks for the words of support. To Dr Arundhuti Sen and Dr Dejan-Krešimir Bučar, you have given me words of support for my endeavours for as long as I have known you, and have made the load lighter along the way.

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PART I

THEORETICAL DEVELOPMENT OF THE SECULAR STATE AND RELIGIOUS FREEDOM

CHAPTER 1

BRIDGING THE WALL OF SEPARATION

This thesis is multijurisdictional in scope. Contemporary issues of religious liberty have reached a pronounced level in constitutional law, owing to the heightened prominence of religious liberty in contemporary jurisprudence in many jurisdictions. The transcendence of national barriers by religious doctrines and a greater pluralism of societies have made issues of secularism and religious freedom in constitutional democracies a complex matter of global scope.

As many commentators observe,[3] the issues and solutions in one jurisdiction influence and inform others. The result is that more intra-jurisdictional analysis, as if the influences and pressures were home grown, is not in itself sufficient. Many secular jurisdictions have domestic religious freedom issues that appear very similar to those found internationally, and some are superficially similar. Some may be the same, but are described locally in different terms to the same issues elsewhere. This thesis will compare the most prominent issues to analyse juridical responses to them, using national constitutions and case law from constitutional disputes as the source of contemporary authority.

What has become also noteworthy over several decades, but in particular the last ten years, is that supreme and high courts all over the world are challenging previously unquestioned paradigms of national secular constitutional identity. Previously unquestioned understandings of what national constitutions have said about the role of religion in public policy, laws supporting education and employment and limits on religious activity and traditions are being re-evaluated, together with an ascendancy of the assertion of rights to be non-religious or of a non-majority religious persuasion, and have those rights considered equal to those held by the majority rather than just tolerated.

This is a thesis in constitutional law. It necessarily implicates - by way of context - philosophy, history and sociology. The issues of secularism and religious freedom will be viewed primarily through the lens of constitutional law.

I OBJECTIVES OF THESIS

The law has recorded encounters between organised religion and the state for centuries. This has over time evoked a great deal of thought on the role of religion in modern society, especially through the Enlightenment in Europe and the incorporation of Enlightenment understandings in modern constitutions. Enlightenment thought was disseminated across Europe, and to the European colonies established in other parts of the world, many of which continue to accept *diasporas* that continue to challenge the *status quo* regarding religion and state interaction in the public sphere.

[3] See generally Anne-Marie Slaughter, 'Global Community of Courts' (2003) 44 *Harvard International Law Journal* 191; Paul Schiff Berman, 'Global Legal Pluralism' (2007) 80 *Southern California Review* 1155 and Vicki C. Jackson, 'Constitutional Comparisons: Convergence, Resistance, Engagement' (2005-06) 119 *Harvard Law Review* 109.

In recent years some of these issues have come to public attention and interest in high profile litigation that has come before the courts. It has been as various as the crucifix cases in Italy and Germany,[4] the headscarf issue in France and Germany,[5] religious speech in public educational institutions in the United States,[6] and the issues arising from temple entry[7] and spousal maintenance in India.[8]

Often the issues arise from a clash of absolutes: a belief by religious practitioners that their constitutional rights are protected without limit, and the state which provides elsewhere in the constitution other freedoms such as free speech and public health and safety. Compromise is difficult. Many secular states have attempted different permutations of 'neutrality', often having no position on an issue involving religion for fear of invoking religious freedom litigation. Others have attempted to keep religion entirely out of the public sphere. Both methods attempt to avoid conflict, but do not always provide societal benefits for the remainder of the community.

In this thesis, I explore the middle ground, considering how religion in a secular liberal democracy may be accommodated without impacting upon broader state public policy objectives, yet allowing a role for religious and non-religious members of the community to make a contribution in the public space with minimal friction. The philosopher Robert Audi suggests a working hypothesis for a constitutional liberal democracy should include a "fidelity to essential premises standard" where democracy should incorporate, in its vision of a just society, enough to fulfil its essential underlying ideals, and include nothing inconsistent with them.[9]

The theoretical basis for this analysis will be made by analysing the contributions of the thinker George Jacob Holyoake, who in the nineteenth century followed developments from post-Enlightenment and Utilitarian thinkers to develop a body of thought on a change from religiously-influenced government and society to government that ostensibly tried to keep religion and government at bay. This he titled 'Secularism'.

I have three objectives. First, after explaining the development and nature of Holyoake's views and those that have derived from them, I aim to develop a theoretical basis for a constitution which can address the various forms of religious pluralism found in the jurisdictions considered in this thesis, but which also potentially apply to those outside of its scope. Secondly, I will outline where various models of 'secularism' have failed to produce convincing and practical solutions to problems in religious pluralism. Thirdly, I will highlight how reform may be achieved in secular constitutions in order to achieve a practical and workable solution to problems and issues currently attributed to keeping "church" and "state" apart.

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[4] Such as *Lautsi v Italy*, European Court of Human Rights (Application No. 30814/06) and Bundesverfassungsgericht [BVerfG] May 16, 1995 (Kruzifix-Urteil), 93 Entschiedungen des Bundesverfassungsgerichts [BVerfG] 1 (F.R.G.).
[5] Conseil d'Etat, 20 octobre 1999, Epoux Aït Ahmad, and BVerfG, 2 BvR 1436/02.
[6] *Rosenberger v Rector of the University of Virginia* 515 US 819 (1995).
[7] *Sri Venkataramana Devaru v State of Mysore* AIR 1958 SC 895.
[8] *Mohd. Ahmed Khan v Shah Bano Begum And Ors* 1985 SCR (3) 844.
[9] Robert Audi, *Religious Commitment and Secular Reason* (Cambridge University Press, Cambridge, UK, 2000) 31.

A *What is Religion? – Recent discussion in law and philosophy*

In writing a thesis relating to the secular state, necessarily the issue of religion, its role in the public sphere, and its relationship to government will arise often. This thesis looks at its influence upon the state, and efforts to keep it out of state deliberations and the drafting of laws, and at times efforts to do the reverse.

Defining religion has always been problematic. However, it will be necessary for the purposes of this thesis to have a working definition. The lack of a definition of religion has led to difficulty when the state wishes to make accommodations (from laws of general applicability) to religion such as in the area of taxation or other benefits, exemptions from military service, or from penalties applied in relation to the usage of narcotics.

In order to give religion and the religious such accommodations, and to apply some limits to the imposition of those limitations by the state, the highest courts in many jurisdictions have struggled to define what it is that they wish protected, or in order to maintain a secular state, what it is that the state must be separated from when separating "church and state".

It is helpful to briefly examine the scope of some efforts to do so to illustrate the difficulties that courts have in this area. Defining religion in order to separate it out from other beliefs or philosophies in order to give it special protections is a problem in itself. As the jurisprudence in a number of jurisdictions has shown,[10] drafting legislation and constitutions to define religion is fraught with inconsistencies and confusion. The drafters of these provisions usually did not define religion, as the meaning of religion presumably (at least to them) was self-evident at the time, and often was the predominant religious paradigm of the day. Douglas Laycock has argued that such a definition must include "any set of answers to religious questions, including the negative and sceptical answers of atheists, agnostics, and secularists."[11]

Although such a definition may often be a philosophical exercise, it has a practical legal aspect. For example asylum cases may be decided where there is a "well-founded fear of being persecuted for reasons of … religion", even though the 1951 Refugee Convention does not offer a definition for its purposes.[12] In the Australian High Court in *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)*[13] Mason ACJ and Brennan J, considering whether the Church of Scientology was eligible for the concessional tax treatment available to religions, noted that

> The chief function in the law of a definition of religion is to mark out an area in which a person subject to the law is free to believe and act in accordance with his [or her] belief without legal constraint. Such a definition affects the scope and operation of s 116 of the Constitution and identifies the subject-matters which other laws are presumed not to intend to affect.[14]

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[10] As will be discussed at length in subsequent chapters of this thesis, particularly in Chapters 5 and 6.
[11] Douglas Laycock, 'Religious Liberty as Liberty', (1996) 7 *Journal of Contemporary Legal Issues* 313, 326.
[12] *Convention Relating to the Status of Refugees* (July 28, 1951), articles 1 and 4, 19 U.S.T. 6259, 189 U.N.T.S. 137.
[13] ("Scientology case") [1983] HCA 40; (1983) 154 CLR 120 (27 October 1983)
[14] (1983) 154 CLR 120, 133 (Mason ACJ and Brennan J).

Traditionally courts in Europe, Australia and North America have seen religion in Christian terms. However, Mason ACJ and Brennan J in *Church of the New Faith*[15] held that the definition of religion went beyond theistic religions and that 'the test of religious belief to be satisfied by belief in supernatural things or principles and not to be limited to belief in God or in a supernatural being otherwise described'. Again in Australia, Latham CJ in *Adelaide Company of Jehovah's Witnesses Incorporated v Commonwealth*[16] noted that there is a wide variance in how religion is perceived, explaining that

> There are those who regard religion as consisting principally in a system of beliefs or statements of doctrine. So viewed religion may be either true or false. Others are more inclined to regard religion as prescribing a code of conduct. So viewed a religion may be good or bad. There are others who pay greater attention to religion as involving some prescribed form of ritual or religious observance.[17]

Finding any agreed indicia of religion is difficult. George Freeman has offered that, "there simply is no essence of religion, no single feature or set of features that all religions have in common and that distinguishes religion from everything else."[18] Accordingly, a constitution usually does not make a definition of religion.[19]

Each jurisdiction has its own religious traditions from which its understanding of religion derives. As time progresses and demographics change so too may the definitions change, as explained when its meaning is important in litigation. Often, as is illustrated in the United States Supreme Court by cases such as *Gillette v United States*,[20] *United States v Seeger*,[21] and *Welsh v United States*,[22] long held definitions will evolve even within one jurisdiction with changes in society. Other jurisdictions, Germany for example, have shied away from a comprehensive definition.[23] In South Africa, in *Christian Education South Africa v Minister for Education*, [24] Sachs J held that "religion is not just a question of belief or doctrine. It is a part of way of life, of a people's temper and culture." In Singapore, in *Nappalli Peter Williams v Institute of Technical Education*,[25] Chief Justice Yong thought that religion (in the context of Article 15[26] of the Constitution of Singapore) was about a citizen's "[f]aith in a personal God" or "belief in a supernatural being", and the "State commands no

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[15] At 140.
[16] (*Jehovah's Witnesses Case)* (1943) 67 CLR 116.
[17] (1943) 67 CLR 116, 123.
[18] George C. Freeman, III, 'The Misguided Search for the Constitutional Definition of "Religion" (1983) 71(6) *Georgetown Law Journal*, 1519, 1565.
[19] Such as in the USA, the United States Supreme Court, "[t]he word 'religion' is not defined in the Constitution.", *Reynolds v United States*, 98 US 145, 162 (1878).
[20] *United States v Gillette*, 401 US 437 (1971). In this case requests for religious exemption became difficult because of a lack of definition of religion.
[21] 380 U.S. 163 (1965).
[22] 398 U.S. 333 (1970).
[23] Gerhard Robbers, 'Religious Freedom in Germany' (2001) *Brigham Young University Law Review* 643, 663.
[24] 2000 (4) SA 757 (CC), [33].
[25] *Nappalli Peter Williams v Inst. of Technical Education,* [1999] 2 SLR 569, 577, *aff'g* Peter *Williams Nappalli v Inst. of Technical Educ., Singapore High Court* 351, 352 (High Ct. 1998).
[26] Article 15 guarantees freedom of religion in Singapore, and states: "Every person has the right to profess and practice his religion and to propagate it."

supernatural existence in a citizen's personal belief system." [27] There is no fundamental agreement in provisions across jurisdictions.

The constitutional cases exploring the nature of religion in order to permit exemptions or freedoms permitted have already filled many books and theses, and it is not my intention to restate them at length. It is beyond the scope of this thesis to propose a comprehensive definition which would encompass all three, indeed a thesis in itself, but the words of the eminent sociologist Émile Durkheim work best for this thesis:

> A religion is a unified system of beliefs and practices relative to sacred things, i.e., things set apart and forbidden--beliefs and practices which unite in one single moral community called a Church, all those who adhere to them.[28]

This thesis in constitutional law would take the aspect therefore that religion is a communal activity that seeks to retain its traditions and practices in the public arena. Western society has long sought to preserve such traditions and practices against those who would alter or remove them. Usually this has been against the state. Accordingly there is a long history of the articulation and claims of religious freedom against the state.

II SCOPE AND OUTLINE OF THESIS

This thesis will examine the constitutional provisions of a number of modern secular democracies. It will compare the issues addressed in Eastern constitutions such as that of India with often very similar issues encountered by Western democracies, such as the United States of America, Canada, Germany, France, Italy and, to some extent, Australia. These will be contrasted with solutions or accommodations achieved by democracies that are not commonly regarded as having a purely secular law - such as in England and Denmark.

Although there are many secular constitutions that may be incorporated into this study of older and newer democracies in Turkey, Southeast Asia, Africa and the Pacific, this thesis must necessarily limit itself to the regions outlined above for the purposes of clarity and brevity. Although some passing reference may be made to those other secular states, they will not form an integral part of this study.

The subject of the power of the state to regulate behaviour and practices, and the will of society to express its personal and community practices in a public forum (often against the wishes of a state wishing to maintain peace and good government between the wills of different communities) can fill volumes. This thesis will use Holyoake's philosophy as a basis for analysing this problem, and will discuss how Holyoake's views on secular government and religious freedom have succeeded or failed.

In Part I, I develop the theoretical basis for the contemporary constitutional provisions relating to religious freedom. This part will outline the the development of the current

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[27] 2 *SLR* 569, 576.
[28] Émile Durkheim, *The Elementary Forms of the Religious Life*, (London: Oxford University Press, 2001), 46.

secular state from the nineteenth century thoughts of Holyoake and his books, including *Principles of Secularism*, through to more contemporary thoughts of American, British and Indian writers and theorists. The development of the contemporary philosophical and legal underpinnings of secular government is explained. This Part will begin with an examination of Holyoake's principles, and the philosophical underpinnings of those views. Chief among the latter are the Utilitarians such as Jeremy Bentham and John Stuart Mill. From the examination of the beginnings of philosophical thought considering an enduring role for religion in a constitutionally enshrined secular public sphere, this part finishes with an overview of the forms that such constitutions have evolved into in Europe, North America and South Asia, and how they currently adapt to modern challenges to the secular state, whether adaptive or resistant.

Part II examines in more detail the contemporary models of the secular state that are commonly encountered, from the strict interpretations of French *laïcité* (that allow little of religion in the public sphere) through to a more relaxed interpretation in India (where all religions are claimed to have a place). Of particular interest in this part will be the treatment of the state to overt religious symbols in public spaces, and efforts by the state to impose religious values under the guise of secular intent. This part looks at much of the case law of the last half century that has explored and developed various issues where religion has intersected with public policy in areas such as religious dress and behaviour, as well as state imposed religiously inspired legislation mandating "days of rest". These cases will be evaluated for insights into the extent that religion seeks an influential role in the public sphere, and the limits and rationales that states place on it using their constitutional authority. Some cases will also be considered where the state has imposed values that are deemed by it to be in the interests of the community, but are themselves questioned as being *ultra vires* the constitution. Part II also considers the difficulties inherent in maintaining absolutes of interpretation of religious freedom provisions which are often themselves vague.

Part III will evaluate how a middle path may be achieved where (rather than arguing constitutional ideals in the abstract) the ideals of both religion and the secular state may be met at the same time to achieve mutually beneficial outcomes. This thesis will examine case law that has analysed matters involving the presence of religion in the public sphere, and will determine whether a strict separation of religion and government has proven to be an effective interpretation for that purpose. Using case law from Europe and Asia to support this proposition, it will determine that strict separation has been counterproductive. A limited role for religion in the public sphere where it can be shown to be in the public interest will be argued as a better model than 'strict' separation.

A normative theory of constitutional secularism will be advanced that will address the problems in finding an effective role for religion in the secular state by making reference to Holyoake's philosophy and drawing together the cases that have been examined in this thesis that have illustrated how secularism may incorporate religion successfully into the public sphere. This is of course a difficult task.

In conclusion, this thesis will examine the development of Western secularism as originally articulated by George Jacob Holyoake in his writings and speeches in the mid-nineteenth century. As secularism is a constitutional concept regarding the

relationship of the state with organised religion in the public sphere, this thesis will be examining the nature of this relationship from its theoretical underpinnings derived from the Enlightenment, commencing with the next chapter, through to the recent court cases that have examined this relationship in a number of jurisdictions, and will finish with an examination of contemporary trends and a normative theory that will encompass how best secularism may evolve across jurisdictions. There are of course differing views on what secularism is in the various jurisdictions. However, these arguments will be considered as the thesis progresses.

CHAPTER 2

HOLYOAKE: THE DEVELOPMENT OF SECULARISM

I GEORGE JACOB HOLYOAKE – A PRIMER

George Jacob Holyoake was a man substantially of the nineteenth century. He did not write any treatises that now grace bookshops and libraries as modern classics, nor is there identified with him a clear cut vision of the world and its people as he saw it. Indeed, his expressed views wandered as his interests and passions took him from being an advocate of workers' co-operatives, to being a lecturer at the Birmingham Mechanics' Institute. He had many roles in his life, primarily an avowed atheist, Owenite,[29] and coiner of the term 'Secularism'.[30]

Modern secularism, at least in the Western sense, is usually attributed to Holyoake[31] after his use of the term first in his 1871 book *The Principles of Secularism Illustrated*,[32] and in other writings.[33]

The theoretical framework for this thesis draws on Holyoake's thoughts and ideals, more than a century and a half ago, when Europe was beginning to evaluate how the Enlightenment impacted upon government. Holyoake's thought permeated the thinking of many in and outside of government at that time, and set the stage for modern secular constitutional government, articulating a solution to the unrest between the state and organised religion then extant in England.

It is difficult to describe Holyoake's theories with respect to the many matters on which he wrote, debated and made speeches,[34] including secularism. His published views and speeches on secularism were more about what secularism was not than what it was, as a result of having many public discussions with those who saw his views as contrary to established religion.[35] It would nevertheless not be incorrect to say that Holyoake's views on secularism are not a detailed and comprehensive argument. It has gaps, but there is a consistent thread in his statements and writings on secularism - particularly in his later years - as he warmed to the topic and developed his views. In this thesis I intend to collate those views consistent with his position on secularism from the numerous publications that he wrote, or to which he contributed.

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[29] As a businessman, Owen sought to improve the lives of his employees. He set up a textile factory in New Lanark in Scotland, an enterprise co-funded by his teacher Jeremy Bentham.

[30] Edward Royle, *Selected Pamphlets by G.J. Holyoake*, 1841-1904, Microform Academic Publishers <http://www.microform.co.uk/guides/R97234.pdf,>, 1.

[31] See T.N. Madan, 'Secularism in Its Place', (1987) 46 *Journal of Asian Studies* 747 and Nehaluddin Ahmad, 'The Modern Concept of Secularism and Islamic Jurisprudence: A Comparative Analysis', (2009) 15(1) *Annual Survey of International & Comparative Law* 75.

[32] George Jacob Holyoake, *The Principles of Secularism Illustrated* (London Book Store, London, 1871).

[33] George Jacob Holyoake, *Origin and Nature of Secularism* (London: Watts & Co, 1896), 50.

[34] "The habit of my thoughts is to run into speeches, as the thoughts of a poet run into verse", G.J. Holyoake, *Bygones worth remembering* (E.P. Dutton & Co, New York, 1905), 17.

[35] See generally Grant Brewin and George Jacob Holyoake, *Christianity and Secularism Report of a Public Discussion between Rev. Brewin and G. J. Holyoake* (London: Ward & co., 1853)

Holyoake's views on secularism are important because of the structural elements of his views that have relevance to today. In secularism he has provided a scaffold that is compatible with the structures of government that many, if not most, modern liberal democracies have chosen when developing a means for organised religion and the state to coexist in the same polity.

II HOLYOAKE'S PATHWAY TO SECULARISM

The thoughts of freethinkers[36] and secularists of the nineteenth century such as Holyoake did not appear suddenly and from nowhere. The eighteenth century had spawned a number of philosophers who challenged the accepted understanding of religious precepts, and science had begun to offer alternative and compelling views. As early as the late eighteenth century, the beginnings of a body of scientific and philosophical thinking that challenged long-held views were taking shape. The early to middle years of the nineteenth century were full of post-Enlightenment discussions and debates about matters from the nature of the human mind to the nature of the universe.[37] This conflict involved the cautious consideration of the new thinking by some theologians.[38]

This review of prior thinking led to the understanding that humanity was the product of its own passions, and that those forces influencing the will of humankind were that of reason and rational thought. The human was basically selfish, pursuing her own happiness and seeking the avoidance of pain. This allowed for the development of a secular system of ethics that built upon the Enlightenment, and the development of Utilitarian thinking that it permitted and which followed on from it.[39]

A *Post-Enlightenment, Utilitarianism and the public sphere*

[36] A philosophical viewpoint that holds opinions should be formed on the basis of logic, reason and empiricism and not authority, tradition, or other dogmas. In the first half of the nineteenth century, freethought was very much a development of Enlightenment rationalism. "Free thought being the precursor of Secularism, it is necessary first to describe its principles and their limitation. Free thought means independent self-thinking." (George Jacob Holyoake, *English Secularism: A Confession of Belief* (The Open Court Publishing Company, Chicago, 1896), 9.); "Free thought means fearless thought. It is not deterred by legal penalties, nor by spiritual consequences. Dissent from the Bible does not alarm the true investigator, who takes truth for authority not authority for truth. The thinker who is really free, is independent; he is under no dread; he yields to no menace; he is not dismayed by law, nor custom, nor pulpits, nor society—whose opinion appals so many. He who has the manly passion of free thought, has no fear of anything, save the fear of error." (George Jacob Holyoake, *English Secularism: A Confession of Belief* (The Open Court Publishing Company, Chicago, 1896), 10.)

[37] Edward Royle, *Victorian Infidels* (Manchester University Press, Manchester, 1974), 19-21.

[38] Thomas Burnett, a theologian, cautioned in 1690 that 'tis a dangerous thing to ingage (sic) the authority of Scripture in disputes about the Natural World, in opposition to Reason, lest Time, which brings all things to light, should discover that to be evidently false which we had made Scripture to assert'. (T. Burnett, *Telluris Theoria Sacra, or Sacred Theory of the Earth* (1690), preface, cited in Edward Royle, *Victorian Infidels* (Manchester University Press, Manchester, 1974), 16.

[39] Beginning with Jeremy Bentham. Edward Royle, *Victorian Infidels* (Manchester University Press, Manchester, 1974), 21-23.

Holyoake and the Utilitarians in the early nineteenth century operated in an intellectual environment influenced by the views of John Locke, an Enlightenment thinker who came before them. Locke was not a Utilitarian, but his thoughts and empiricism laid the foundations for those whose views included a role for the state that did not include enforcing its precepts, but who rather saw the state supporting individual rights and Utilitarian ideals.

Locke was one of the earliest modern theorists to consider a more secular public sphere in the West. Although Hobbes before him had argued that a uniformity of religion in society led to its effective function, Locke felt that more religious groups would prevent civil unrest. He considered the state to be limited in its coercive powers to protecting and enforcing religious rights. Governments exist to defend the rights which individuals have over their persons such as lives, liberties and estates. As long as someone's religious beliefs and practices do not intrude upon or intersect the rights of others, the state has no authority to suppress those beliefs or practices.[40] These views were very much based in Protestant theology.

Locke's thoughts were formed by the new perspectives of the Enlightenment, and he may be regarded as either an early Enlightenment thinker, or a progenitor of Enlightenment thinking. Locke was careful to express his views of rationality in terms that spoke to the strong religious views of his times and which did not denigrate the religious establishment. In the *Letter Concerning Toleration*,[41] Locke writes: "The public good is the rule and measure of all law-making." A number of his views on ethics encompassed the view that the state can make law for the common benefit of all. In particular, on the relationship between state and church, Locke considered that the role of government is limited to the protection of rights and the punishment of those who violate those rights.[42] He held that "[f]or law in its true notion, is not so much the limitation as the direction of a free and intelligent agent to his proper interest, and prescribes no farther than is for the general good of those under that law"[43] - a view that is consistent with John Stuart Mill's Harm principle, of which more will be discussed later.

The liberty of religion is then just an extension of the general right for individuals to be left alone. Locke felt that as a church is a voluntary association of those joining of their own accord, following rules made for those members, then the state should not punish those who do not belong and have not submitted to the rules of such

[40] "No one…neither single persons nor churches, nay, nor even commonwealths, have any just title to invade the civil rights or worldly goods of each other on pretence of religion. Those that are of another opinion would do well to consider with themselves how pernicious a seed of discord and war, how powerful a provocation to endless hatreds, rapines, and slaughters they thereby furnish to mankind. No peace and security, no, not so much as common friendship, can ever be established or preserved amongst men so long as this opinion prevails, that dominion is founded in grace and that religion is to be propagated by force of arms" (John Locke, *A Letter Concerning Toleration*, trans. William Popple, Merchant Books, USA, 2011), 13.

[41] John Locke, *A Letter Concerning Toleration*, trans. William Popple, (Merchant Books, USA, 2011), 49.

[42] J.D. Mabbott, *John Locke* (London, Macmillan, 1973), 176.

[43] John Locke, C. B. Macpherson, *The Second Treatise of Government* (Hackett Publishing, Cambridge, USA, 1980), Chapter 6, Sec. 57.

association.[44] Locke also made the important point that compelling religious belief by the state would simply drive those so oppressed into opposition or even sedition. Locke's view, therefore, was that the role of government is the protection of individual rights without interference in the beliefs of its citizens or the administration of their institutions.

However, Locke did believe that there were those whose views should not be accepted, that were excluded from toleration, and therefore should be suppressed by the civil administration. Generally these were people whose opinions were contrary to the existence of human society, or to those moral rules which preserved human society. These therefore were those whose opinions, in his view, threatened national security and stability. Locke's position excluded atheists and Catholics from the public sphere[45] - atheists as he felt that religion bound society, so those who were not religious in society were not bound to it,[46] and Catholics because he believed that their loyalty lay with a foreign sovereign.[47]

Holyoake drew on all these, Locke in the previous century for his views on the secular public space, and the later Utilitarians for their views on the common good, and how the common good could be exemplified by a secular public space.

B *Holyoake: the early years*

The nineteenth century into which Holyoake was born[48] was a period of rapid urbanisation and industrialisation. The intellectual and political climate was changing. New scientific ideas by those such as Charles Darwin, provoked thought as did new theological scholarship from Germany, examining the Gospel as historical documents, which influenced English thinking.[49] Early socialist thought, in the form of the views of Henri de Saint-Simon and Robert Owen, influenced the working class, of which Holyoake was part. He spent his early years working in a foundry with his father.[50]

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[44] John Locke, *A Letter Concerning Toleration*, trans. William Popple, (Merchant Books, USA, 2011), 48.

[45] True pluralism of views in the public sphere was not advocated until later by John Stuart Mill in *On Liberty* (1859) discussed later in this chapter.

[46] "those are not at all to be tolerated who deny the being of a God. Promises, covenants, and oaths, which are the bonds of human society, can have no hold upon an atheist. The taking away of God, though but even in thought, dissolves all; besides also, those that by their atheism undermine and destroy all religion, can have no pretence of religion whereupon to challenge the privilege of a toleration". (John Locke, *A Letter Concerning Toleration*, trans. William Popple, Merchant Books, USA, 2011), 78.

[47] "That Church can have no right to be tolerated by the magistrate, which is constituted upon such a bottom, that all those who enter into it, do thereby *ipso facto*, deliver themselves up to the protection and service of another prince.... [B]y this means the magistrate would give way to the settling of a foreign jurisdiction in his own country, and suffer his own people to be listed, as it were, for soldiers against his own government." (John Locke, *A Letter Concerning Toleration*, trans. William Popple, Merchant Books, USA, 2011), 77.

[48] In 1817.

[49] Edward Royle, *Victorian Infidels* (Manchester University Press, Manchester, 1974), 14.

[50] Robert Owen (1771 –1858) was a Welsh social reformer and one of the founders of utopian socialism and the cooperative movement. Owen's views developed into the utopian socialist philosophy known as 'Owenism', a communitarian and co-operative view that is associated with the development of the British trade union movement.

Until his 20s, Holyoake was quite religious, a member of a local Baptist group, and preached with such as John Collins who became a founder of the Chartist[51] church in Birmingham. At 17 he was a student and later tutor at the Birmingham Mechanics' Institute. There he became influenced by the views of Robert Owen, and became a 'social missionary'[52] for Owen's Society of Rational Religionists.[53] The Owenites aimed to raise the expectation of the working man, and preached the 'gospel of redemption through science, co-operation and 'community building''. This resulted in the Bishops in the House of Lords forcing limits on the Central Board of the Society. Holyoake, Charles Southwell and several others split from the Society as they did not wish to comply with the new regulations. They then commenced publication of an atheistic periodical, *The Oracle of Reason*.

Southwell was imprisoned for blasphemy, and Holyoake too was imprisoned in 1842. In prison Holyoake met Richard Carlisle, a republican and freethought agitator whose views he did not entirely share, but he admired Carlisle for his method of fighting for freedom of speech and of the press. After his six months in prison for blasphemy, Holyoake began to publish anti-theological pamphlets, beginning with *Rationalism: A Treatise for the Times* in 1845, a pamphlet that shows Holyoake's views moving from Owenism towards an early position on secularism.[54]

Robert Owen, as well as expressing views publicly on the alleviation of poverty and workers' rights, also had strong views on religion, arguing that Christianity ought to be opposed, not on anti-clerical or similar grounds, but rather for rational reasons as he believed religion was a cause of disharmony in the world. He was not, however, an advocate of the removal or replacement of religion, but sought respect for its views.[55] Additionally his views also reflected those of Jeremy Bentham, whom he

[51] Chartism was a Victorian era working class movement for political reform in Britain between 1838 and 1848. Their churches included hymns that emphasised liberty and worker's rights rather than traditional worship. Their dissatisfaction regarding the distribution of funds between the state and the Church of England, and its lack of support for the working class, caused a number of chartists to question the support of the state for established religion.(Harold Underwood Faulkner, *Chartism and the churches: a study in democracy* (New York : The Columbia University Press, 1916), 59.

[52] A full-time paid position as a 'professional Owenite'. John Fletcher Clews Harrison, *Robert Owen and the Owenites in Britain and America: The Quest for the New Moral World* (Taylor & Francis, London, 2009), 185.

[53] "The object of this Society, is, to arrange mankind universally into communities of a size to embrace all the necessary trades, arts and sciences, wherein there can be equitable exchange of all their products, without the intervention of the non-producing mercantile class; thus making property producers, as well as consumers of all; thereby producing the greatest degree of equality and virtue of which the peculiar organization of each man is susceptible." Lewis Masquerier, "The Universal Community Society of Rational Religionists," *The Boston Investigator* 9, no. 39 (December 4, 1839), 1.

[54] Holyoake's freethought was not of the same aggressive kind as Southwell's, so after the failure of the Owenite community in 1845, Holyoake sought to follow the philosophical and ethical aspects of Owenism, known as Rationalism. (Edward Royle, *Selected Pamphlets by G.J. Holyoake*, 1841-1904, Microform Academic Publishers <http://www.microform.co.uk/guides/R97234.pdf>, 3.)

[55] "As there are a very great variety of religious sects in the world (and which are probably adapted to different constitutions under different circumstances, seeing there are many good and conscientious characters in each), it is particularly recommended, as a means of uniting the inhabitants of the village into one family, that while each faithfully adheres to the principles which he most approves, at the same time all shall think charitably of their neighbours respecting their religious opinions, and not presumptuously suppose that theirs alone are right." *Rules and Regulations for the Inhabitants of New Lanark* (1800) cited in Frank Podmore, *Robert Owen Vol. 1* (Haskell House, New York, 1907), 88.

followed, and of later Utilitarians.[56] Holyoake was impressed with Owen's views when he first saw him in the late 1830s, and joined the Owenites in 1840. From 1850 Holyoake launched a new movement called Secularism based on principles he adopted from Owenism and Chartism.[57]

When Owenism began declining around 1845, Holyoake began reshaping that philosophy which had had a communal focus and began shaping it into a philosophy for individuals as well as society, advocating Rationalism and other positive aspects of the freethought movement.[58] In a line of thought that clearly anticipates his development of Secularism, Holyoake argued that Rationalism was

> The science of material circumstances. Rationalism advises what is useful to society without asking whether it is religious or not. It makes morality the sole business of life, and declares that from the cradle to the grave man should be guided by reason and regulated by science.[59]

By 1853 secularism and rationalism were doctrinally indistinguishable. The *Reasoner*[60] announced that year that "Secularism is the province of the real, the known, the useful, and the affirmative". Secularism had developed from what Holyoake had previously known as Naturalism, Rationalism and Cosmism, where their basic doctrines were much the same.[61]

Holyoake was also impressed with the thoughts of F.W. Newman[62] who, like him, had sought a universal morality grounded in human nature. Holyoake took as his own the belief of Newman who wrote that

> The human mind is a moral existence, having within itself moral tendencies, and a moral law, which is developed by culture; and that in the long past of mankind numerous great moral truths have established themselves in the conscience of nations, and especially of the most unbiased and most cultivated of individuals.[63]

In 1854 Holyoake spoke of secularism as "Conscience illustrated by common sense".[64] He sought to reconcile this view with Utilitarianism by observing that each checked the other, and that a "belief in the good elevated crude utility; a demand for the greatest

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[56] "It is therefore, the interest of all, that every one, from birth, should be well educated, physically and mentally, that society may be improved in its character, — that everyone should be beneficially employed, physically and mentally, that the greatest amount of wealth may be created, and knowledge attained, — that everyone should be placed in the midst of those external circumstances that will produce the greatest number of pleasurable sensations, through the longest life, that man may be made truly intelligent, moral and happy, and be thus prepared to enter upon the coming Millennium." (Robert Owen, *A Development of the Principles & Plans on which to establish self-supporting Home Colonies* (Home Colonization Society (London, 1841), 35)

[57] Edward Royle, *Victorian Infidels* (Manchester University Press, Manchester, 1974), 100-101.

[58] Edward Royle, *Victorian Infidels* (Manchester University Press, Manchester, 1974), 126.

[59] George Jacob Holyoake, *Rationalism: a treatise for the times* (J. Watson, London, 1845), 31.

[60] *The Reasoner*, 19 January 1853.

[61] 'Justification by conduct and sincerity, study of the order rather than the origin of nature, trust in science as the providence of man, and belief in a morality guaranteed by human nature, utility and intelligence." Edward Royle, Victorian Infidels (Manchester University Press, Manchester, 1974), 150.

[62] Francis William Newman (27 June 1805 – 7 October 1897), English scholar and writer.

[63] *The Reasoner*, 12 October 1853.

[64] Grant Brewin and George Jacob Holyoake, *Christianity and Secularism Report of a Public Discussion between Rev. Brewin and G. J. Holyoake* (London: Ward & co., 1853), 105.

happiness controlled the elitist implications of 'the most unbiased and most cultivated individuals' ".[65]

Although generally not listed amongst classic Utilitarian philosophers such as Bentham and Mill, Holyoake drew upon the Utilitarian thinking that was prominent in the mid-nineteenth century, at a time where Bentham's thought was well developed a generation before, and Mill was a friend and contemporary. He formed his philosophy when Utilitarian thinking was the political and legal orthodoxy in England, a position it held until at least the 1870s. The central core of Holyoake's views on secularism and philosophical methodology can be derived from the premises of Utilitarian legal philosophy. Holyoake's views have been considered to be a particular form of their thought, as it is "is based solely on considerations of practical morality with a view to the physical, social and moral improvements of society. It neither affirms nor denies the theistic premises of religion, and is thus a particular variety of Utilitarianism."[66]

The development of Secularism owed a debt to Utilitarianism, largely due to the work of James Mill and others, notably John Stuart Mill, and the earlier work of Jeremy Bentham whose doctrine that all behaviour is moral which is conducive to "the greatest happiness of the greatest number" had been quite influential around the time of the founding of the Secularist Movement.[67] Holyoake was one who felt its influence, as can be seen from 1846 to 1848 where he published a "Utilitarian Record" in connection with the *Reasoner*. In recognition of the debt of Secularism to Utilitarianism, Holyoake, at the end of 1851, referred to the persons composing the "Central Secular Society" as "Utilitarians."[68]

Holyoake's developed and refined views rested on Utilitarian ideals.[69] On their concept of the good Holyoake said that[70]

> All pursuit of good objects with pure intent is religiousness in the best sense in which this term appears to be used. A "good object" is an object consistent with truth, honour, justice, love. A pure "intent" is the intent of serving humanity. Immediate service of humanity is not intended to mean instant gratification, but "immediate" in contradistinction to the interest of another life. The distinctive peculiarity of the Secularist is, that he seeks that good which is dictated by Nature, which is attainable by material means, and which is of immediate service to humanity—a religiousness to which the idea of God is not essential, nor the denial of the idea necessary.

He developed this view in his major work *English Secularism: A Confession of Belief*[71] that pursuit of the good had a social focus:

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[65] Edward Royle, *Victorian Infidels* (Manchester University Press, Manchester, 1974), 134.
[66] *Encyclopedia Brittanica*, Cambridge University Press, 11th ed., Cambridge, 1911, Vol. XXIV, p. 573.
[67] ["Reasoner," 1846-1848 and January 14, 1852] cited in John Edwin McGee, *A History of the British Secular Movement*, Chapter 2 (Haldeman-Julius Publications, 1948).
[68] ["Reasoner," 1846-1848 and January 14, 1852] cited in John Edwin McGee, *A History of the British Secular Movement*, Chapter 2 (Haldeman-Julius Publications, 1948).
http://onlinebooks.library.upenn.edu/webbin/book/lookupid?key=olbp23391.
[69] See generally Part III of this chapter.
[70] George Jacob Holyoake, *The Principles of Secularism* (3rd Ed., Austin & Co., London, 1870), Chapter III.
[71] George Jacob Holyoake, *English Secularism: A Confession of Belief* (The Open Court Publishing Company, Chicago, 1896), 42.

> Goodness is the service of others with a view to their advantage. There is no higher human merit. Human welfare is the sanction of morality. The measure of a good action is its conduciveness to progress. The Utilitarian test of generous rightness in motive may be open to objection,--there is no test which is not,--but the Utilitarian rule is one comprehensible by every mind. It is the only rule which makes knowledge necessary, and becomes more luminous as knowledge increases. A fool may be a believer, but not a Utilitarian who seeks his ground of action in the largest field of relevant facts his mind is able to survey. Utility in morals is measuring the good of one by its agreement with the good of many.

These utilitarian principles were based primarily on the principles developed by Jeremy Bentham before his time, and John Stuart Mill, his contemporary.

III HOLYOAKE'S UTILITARIAN ANTECEDENTS

Holyoake was immersed in Utilitarianism. Utilitarianism was a popular and influential philosophy from roughly the latter few decades of the eighteenth to the middle of the nineteenth centuries. While it had adherents over Europe, its heartland was England, and constituted the largest contribution of the English to moral and political theory.[72] The most influential Utilitarians remain, naturally, Jeremy Bentham and John Stuart Mill.

Jeremy Bentham is credited with developing modern normative Utilitarianism, and although his main premises were published in the 1790s, Bentham's philosophy led to the major social reforms of the 1830s and 1840s. His last major work was his unfinished *Constitutional Code*, published posthumously,[73] which allowed his work to continue to be felt during the period of the reforms. John Stuart Mill's most famous works were written at this time and published in England: *On Liberty* was written in 1859, *Considerations on Representative Government* in 1861 and *Utilitarianism* in 1863.

In the West many thinkers such as Kant, Bentham and Mill have attempted to outline how one may exercise a perceived right to religious freedom in the public space, while sharing it with others wishing to exercise the same. The Utilitarian thinkers were early proponents of solutions in this regard, and have contributed to thinking about the development of rights to religious freedom within a modern secular democracy where these rights have either been incorporated into national constitutions, or are compatible with them. Holyoake's views were influenced by and derived from these thinkers, particularly from Bentham's *Principles of Legislation*,[74] and were approved by John Stuart Mill with whom he corresponded a great deal.[75] John Stuart Mill helped Holyoake financially, and sent him the first edition of his *Principles of Political Economy*.[76]

As explained by Jeremy Bentham, Utilitarianism's distinct position is that, as a "fundamental axiom, it is the greatest happiness of the greatest number that is the

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[72] John Plamenatz, *The English Utilitarians* (Blackwell, Oxford, 1958), 1-2.
[73] First published in *The Pamphleteer*, No.44, 1823.
[74] Bentham, Jeremy, *An Introduction to the Principles of Morals and Legislation* (1907). Library of Economics and Liberty <http://www.econlib.org/library/Bentham/bnthPML1.html>.
[75] John Stuart Mill approved the term Secularism "as a useful departure from the theologic thought of the day, ever obstructive of secular improvement." whom Holyoake notes in his memoir *54*.
[76] John Eros, 'The Rise of Organized Freethought in Mid-Victorian England' (1954) 2(1) *Sociological Review* 98, 104-5.

measure of right and wrong".[77] Utilitarians, in aiming to maximise the overall good, consider the good of others over oneself. Bentham argued, "[t]hat which is conformable to the utility or the interests of the community is what tends to augment the total sum of the happiness of the individuals that compose it."[78] A necessary corollary then is that individual rights would then need to be subordinated to community needs, otherwise the total sum of happiness would not be maximised.[79] In doing so, one is able to look beyond the benefits of bending society and its laws to meet the will of the majority to consider those who are not of the majority, and to consider that the maximum good is achieved when the overall good is met. Only then is the chaos of competing interests and preferences minimised.

The basic tenets of Utilitarianism vary according to who is asked and when, and have evolved over the years. However, they can be basically limited to the following four propositions: that pleasure is alone good or desirable for its own sake; that the equal pleasures of any two or more men are equally good; that no action is right unless it appears to the agent to be the action most likely, under the circumstances , to produce the greatest happiness; and that people's obligations to the government of the country in which they live, and that government's duties to them, have nothing to do with the way in which the government first acquired power.[80] Plamenatz quite reasonably states that these four propositions are, in "a definition of this kind ... like the great bed at Ware,[81] that will hold all the members of a large family, though the limbs of one or two of them hangs over its sides."[82] What brings Utilitarianism into the context of constitutional law is in the Utilitarian view that one ought to maximise the overall good, to consider the good of others as well as one's own good.[83]

Bentham's views were informed by Hobbes' views on human nature and David Hume's on social utility.[84] He sought to remove those laws that were of little utility, which led to unhappiness and achieved little or nothing. Mill considered that we have a capacity to consider the welfare of others when we make decisions. Regarding social policy, Mill considered rights were underwritten by utility, so that if a right or duty is harmful then that right is not genuine because it has little utility and works towards unhappiness.[85]

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[77] Jeremy Bentham, *A Fragment on Government* (London, T. Payne; P. Elmsly; and E. Brooke, 1776). Preface (2nd para.).
[78] Jeremy Bentham, *Theory of Legislation* (London: Trübner, 1864), 2.
[79] L.T. Hobhouse, Liberalism (1911), 2 cited in W. Friedmann, *Legal Theory*, 5th Ed. (Sweet & Maxwell, London,1967), 313.
[80] John Plamenatz, *The English Utilitarians* (Blackwell, Oxford, 1958), 4.
[81] The Great Bed of Ware is an extremely large oak four poster bed, built by Hertfordshire carpenter Jonas Fosbrooke in 1580. The bed measures 3.38m long and 3.26m wide (ten by eleven feet).
[82] John Plamenatz, *The English Utilitarians* (Blackwell, Oxford, 1958), 4.
[83] The concept of goodness in the utilitarian context was examined by the philosopher G.E. Moore, who was known for his defence of ethical non-naturalism, and his emphasis on common sense in philosophical method. He dismissed the hedonistic implications of classical Utilitarianism and agreed that we ought to promote the good, but believed that the good included far more than what could be reduced to pleasure. He felt "the happiness of all is the good of each." G.E. Moore, *Principia Ethica* (first published, Dover Publications, 1903) Barnes & Noble Publishing, 2005) § 62, 107.
[84] David Hume, *An Enquiry into the Principles of Morals* (A. Millar, London, 1777), Chap 5; Thomas Hobbes, *Leviathan* (Oxford at the Clarendon Press, London, 1651), Chapter 1.
[85] John Stuart Mill, *Utilitarianism* (London : Parker, Son, and Bourn, London, 1863), Chap 5.

Bentham and Mill were mainly concerned with applying Utilitarian principles to legal and social reform, a project that some see as the fundamental motivation behind the development of classical Utilitarianism, and as a desire to see useless, corrupt laws and social practices changed. To achieve this, a normative ethical theory would need to be employed as a critical tool. Developing the theory required strong views about what was wrong in society. For example, determining that some laws are bad required an analysis of why they were bad. For Jeremy Bentham, what made them bad was "their lack of utility, their tendency to lead to unhappiness and misery without any compensating happiness. If a law or an action doesn't *do* any good, then it *isn't* any good."[86]

Classical Utilitarianism has two basic features. The first is that we are all driven through human nature by the desire to be happy, and to avoid all that would make us otherwise. The second is that there is a principle of utility, of practicality in human nature, where people desire the greatest happiness possible. People wish to be happy, but are reasonable in how they wish to achieve it.[87] Mill's Utilitarianism, his 'greatest happiness principle', then is a means for the reconciliation of the diverse and conflicting wishes of many individuals, so that people will reconcile conflicting wants so that they may achieve the greatest happiness.[88] At a political level then the principle states that policy development in government must select that alternative which is likely to increase the general happiness.

However, although strongly influenced by it, not all of Holyoake's thinking was in concord with Utilitarian views. Jeremy Bentham was certain that society could survive and prevail without the support of religious institutions or beliefs. Bentham's views on religion were such that he expressed his disdain of organised religion quite aggressively and was an atheist from an early age. However, he also had "an irresistible urge to build a 'system' in which every discipline and science was to find its place and also to account for all aspects of social, political, and intellectual life."[89] While Holyoake agreed with the need to build a public system where all thought had its place, he did not express such a distaste for organised religion. This remains an important feature of Holyoakean secularism, and its capacity to accommodate the religious and non-religious.

Holyoake, in considering the Utilitarian principle of "the greatest happiness of the greatest number" suggested that there could then be a conflict between religion and secularism.[90] Holyoake did, however, differ with Mill at times about Utilitarian

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[86] Julia Driver, "The History of Utilitarianism", *The Stanford Encyclopedia of Philosophy* (Summer 2009 Edition), Edward N. Zalta (ed.), <http://plato.stanford.edu/archives/sum2009/entries/utilitarianism-history/>. Accessed 10 July 2013.

[87] Bentham's thoughts in this area were simplistic, equating happiness with pleasure. Mill however took the view that Bentham's thoughts in this area were overly simplistic. Mill considered that people were capable of discerning between simple pleasures and those of the high-minded intellectual, considering that people are likely to 'give a marked preference to the manner of existence which employs their higher faculties'. John Stuart Mill, *Utilitarianism* (London : Parker, Son, and Bourn, London, 1863), 12.

[88] Alan Haworth, *Understanding the Political Philosophers* (Routledge, Oxford, 2004), 190

[89] James E. Crimmins, "Bentham on Religion: Atheism and the Secular Society", (1986) 47(1) *Journal of the History of Ideas* 95, 112.

[90] P.B. Gajendragadkar, *Secularism and the Constitution of India* (Bombay: University of Bombay. 1971), 3.

principles. He wrote that, "I differ with diffidence from Mr Mill as to the propriety of carrying the Utilitarian doctrine into the domain of morals. Truth is higher than utility, and not utility the measure of truth. Conscience is higher than consequence. We are bound first to consider what is right."[91]

Mill's philosophy was also strongly influenced by the French thought of the previous century, especially that of Comte and those who followed Saint-Simon.[92] Mill was of the view that social change was possible and desirable but not necessarily inevitable. Like Tocqueville, Mill accepted that it was almost inevitable that society would move towards more and more democracy and equality of status. He felt that this was not in itself progress, but rather the problem faced by those who wished to promote progress.[93]

Mill found that of the possible forms of government, the most widely held view was that governments exist to preserve order and achieve progress in society. His views improve upon those of Bentham in that he strove to update earlier versions of Utilitarianism. Bentham saw Utilitarianism in simplistic terms that took a low view of human life, where Mill saw view that maximising pleasure to be a qualitative distinction between superior mental aspects relative to bodily pleasures. Mill's political philosophy of human progress then aligns the pursuit of superior pleasures with the advancement of human society.[94]

The cultivation of superior pleasures also requires a social freedom so that, in Mill's view, only a free society can be truly civilized. Accordingly, the core of Mill's Utilitarianism is that those actions, either by individuals or society, that produce the greatest happiness of the greatest number has transformed the original Utilitarianism to show that government does not exist merely to maximise the pleasure that citizens prefer. Rather, some pleasures are better than others and government should prefer that citizens are educated to pursue those higher pleasures. Such moral education then must be directed at man as a progressive being.[95]

Mill saw that an active life is better than passive obedience, and that a government which encourages active participation by its citizens is better than one which encourages passive obedience. Hence an individual, although coming before the state, may through education develop his special talents and make them available to the community. A government which encourages its citizens to develop the higher pleasures and the skills consonant with them is then better than one which may be more orderly but in which citizens follow passively the commands of the ruling group.[96]

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[91] George Jacob Holyoake, *Bygones Worth Remembering, Vol 1*. (E.P. Dutton & Co., New York, 1905), 31-32.
[92] Auguste Comte was a philosopher who is credited with founding the discipline of Sociology and the doctrine of positivism. Henri Saint-Simon was a socialist theorist who advocated that society should be directed by men of science rather than religious institutions.
[93] Leo Strauss and Joseph Cropsey (eds), *History of Political Philosophy* (Rand McNally, 1972, London, 3rd Ed.), 786-789.
[94] John Stuart Mill, *On Liberty* (Longmans, Green, and Company, London, 1865), Chapter II, 14.
[95] John Stuart Mill, *On Liberty* (Longmans, Green, and Company, London, 1865), Chapter II, 15.
[96] Leo Strauss and Joseph Cropsey (eds), *History of Political Philosophy* (Rand McNally, 1972, London, 3rd Ed.), 789-790.

Mill's Utilitarian views therefore saw a role for the state to improve its citizens through its higher ideals through education, and for both individuals and organisations to contribute as a result in turn to the community. There is nothing in his thought which saw that such contribution should be a one way street or that one should exclusively serve the other.

With respect to John Stuart Mill, Holyoake differed strongly in the area where Utilitarianism and religion intersected. Particularly in the matter of compelling non-believers to take an oath in court, Holyoake argued that[97]

> It was in connection with the controversy concerning the Oath that I received a letter from John Stuart Mill, which when published in the Daily News, excited much surprise. Mr Mill was of opinion, that the oath, being made the condition of obtaining justice, ordinary persons might take it. But one who was known to disbelieve the terms of it, and had for years publicly written and spoken to that effect, had better not take it. This was the well-known Utilitarian doctrine that the consequences of an act are the justification of it. Francis Place had explained to me that Bentham's doctrine was that the sacrifice of liberty or life was justifiable only on the ground that the public gained by it.
>
> A disciple should have very strong convictions who differs from his master, and I differ with diffidence from Mr Mill as to the propriety of carrying the Utilitarian doctrine into the domain of morals. Truth is higher than utility, and goes before it. Truth is a measure of utility, and not utility the measure of truth. Conscience is higher than consequence. We are bound first to consider what is right. There may be in some cases, reasons which justify departure from the right. But these are exceptions. The general rule is—Truth has the first claim upon us.
>
> To take an oath when you do not believe in an avenging Deity who will enforce it, is to lie and know that you lie. This surely requires exceptional justification. It is nothing to the purpose to allege that the oath is binding upon you. The security of that are the terms of the oath. The law knows no other. To admit the terms to be unnecessary is to abolish the oath.[98]

Holyoake was therefore bound to be more consistent in his views. Mill's position on secularism in general, however, was not much different from Holyoake's, emphasising the physical world (as distinct from the religious). On the "import of the word secular" he wrote that[99]

> There is no uncertainty about it. There is not a better defined word in the English language. Secular is whatever has reference to this life. Secular instruction is instruction respecting the concerns of this life. Secular subjects therefore are all subjects except religion. All the arts and sciences are secular knowledge. To say that secular means irreligious implies that all the arts and sciences are irreligious, and is very like saying that all professions except that of the law are illegal. There is a difference between irreligious and not religious, however it may suit the purposes of many persons to confound it. Now on the principles of religious freedom which we were led to believe that it was the purpose of this Association to accept, instruction on subjects not religious is as much the right of those who will not accept religious instruction as of those who will. To know the laws of the physical world, the properties of their own bodies and minds, the past history of their species, is as much a benefit to the Jew, the Mussulman, the Deist, the Atheist, as to the orthodox churchman; and it is as iniquitous to withhold it from them. Education provided by the public must be education for all, and to be education for all it must be purely secular education.

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[97] George Jacob Holyoake, *Bygones Worth Remembering, Vol. 1 (of 2)*, E. P. Dutton and Company, New York (1905), 31-32.
[98] Ibid.
[99] John Stuart Mill, "Speech on Secular Education," undelivered (1849). Found online on www.utilitarian.org/texts/education.html on 17 September 2013.

It has been suggested by Mill that some of his contemporaries saw Utilitarianism as 'godless',[100] implying that it is somehow without consideration of religious input. Mill addressed this in *Utilitarianism*,[101] where he argued that the presence of a deity depends on one's perception. Utilitarianism does not criticise organised religion, nor does it require it as a basis for its precepts. Rather it acknowledges religion, but does not need it to formulate a view of the public good. This serves as a basis for Holyoake's views on secularism which see it as a policy for the public good, the morality and value of which does not need to draw on theological views of the same.

Accordingly Utilitarianism is a secular philosophy, having its discourse set firmly in neither critiquing nor exhorting religion, but rather having a position on reform of the public space based on temporal values. The social and legal reform of greatest utility to the state and religion together in the public has been the development of the secular constitution. More importantly Mill saw that all may contribute to the betterment of society and not that elements of society should not be excluded from making their contribution.

Holyoake became the last person convicted of blasphemy in a public lecture. After his release he went onto enrol at University College London, and to continue to speak publicly. Although he was pleading for education, agitation and political action, he was held to be "[t]he mildest-mannered man in the ranks of public disputants," according to the *Northern Star*.[102] His harsh words at the time seem linked to the reasons for his gaoling.[103]

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[100] "We quite often hear the doctrine of utility denounced as a godless doctrine. If this mere assumption needs to be replied to at all, we may say that the question depends on what idea we have formed of the moral character of the Deity. If it is true that God desires the happiness of his creatures above all else, and that this was his purpose in creating them, then utilitarianism, far from being a godless doctrine, is the most deeply religious of them all. If the accusation is that utilitarianism doesn't recognise the revealed will of God as the supreme law of morals, I answer that a utilitarian who believes in the perfect goodness and wisdom of God has to believe that whatever God has thought fit to reveal on the subject of morals must fulfil the requirements of utility in a supreme degree.", John Stuart Mill, *Utilitarianism* (London : Parker, Son, and Bourn, London, 1863), Chap 2.

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[102] Joseph McCabe, *Life and Letters of George Jacob Holyoake Vol. I* (London, Watts & Co., 1908), 201. *The Northern Star and Leeds General Advertiser* was a chartist newspaper published in Britain between 1837 and 1852.

[103] Holyoake was not alone in being gaoled for his views on secularism and freethought. He wrote in *English secularism: a confession of belief* (Chicago: Open Court Publishing Co., 1896, 7) that "When I came into the field the combat was raging. Richard Carlile had not long been liberated from successive imprisonments of more than nine years duration in all. Charles Southwell was in Bristol gaol. Before his sentence had half expired I was in Gloucester gaol. George Adams was there; Mrs. Harriet Adams was committed for trial from Cheltenham. Matilda Roalfe, Thomas Finlay, Thomas Paterson, and others were incarcerated in Scotland. Robert Buchanan and Lloyd Jones, two social missionaries—colleagues of my own—only escaped imprisonment by swearing they believed what they did not believe,—an act I refused to imitate, and no mean inconvenience has resulted to me from it. I took part in the vindication of the free publicity of opinion until it was practically conceded. At

Some may find that some of Holyoake's early statements on religion and its public role do not necessarily coincide with those made later. Indeed, as Joseph McCabe has suggested, "[s]ome of his modern admirers may wonder if he had in those days all the refinement of his later years ..."[104] Although Holyoake was known for moderation of thought, he was considered to have changed his thinking in the early 1850s to newer forms of freethought.[105] His words appear thereafter to be the more measured and considered words for which he is better known. He admitted in 1853 that he did not continue to hold strong views on the need to continue to argue the error and irrationality of religion. He now went beyond simply advocating a form of atheism to replace religion.[106] Holyoake acknowledged the inconsistency with his past positions, telling Southwell that "Perpetual consistency with past opinions would exclude a man from growing wiser."[107] New evidence had led to the origins of his new position on secularism.

The Secular Society that he and Charles Bradlaugh established served a social and political purpose, and which advocated an end to privileges for the Anglican Church and for equal rights and freedoms for all religious and antireligious people and institutions.[108] The secularists made it possible for a nonbeliever to hold office, and helped discredit blasphemy laws. By the end of the nineteenth century, the aims of the secular societies had largely been achieved.[109]

IV HOLYOAKE'S THEORY OF SECULARISM

Holyoake organised the writings and lectures of the freethinkers with his first writings on secularism in *The Organization of Free-Thinkers*[110] in 1852.[111] These early writings tended to have an element of secularism as a moral system that was an alternative to the religious.[112] He made clear that secularism was not a negation of religion, but rather that it provided that if religion did not interfere with the state to its detriment, he was prepared to disregard it. Where religion was useful in the world he wished to engage with it.[113]

Holyoake cited with approval the thoughts of the Rev. Joseph Parker who said that "The cry that so-called secular education is Atheistic is hardly worth notice. Cricket

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the time when I was arrested in 1842, the Cheltenham magistrates who were angered at defiant remarks I made, had the power (and used it) of committing me to the Quarter Sessions as a 'felon', where the same justices could resent, by penalties, what I had said to them."

[104] Joseph McCabe, *George Jacob Holyoake* (London, Watts & Co., 1922), 17

[105] Holyoake's views were considered to have changed considerably between 1840 and 1866. (Edward Royle, *Victorian Infidels* (Manchester University Press, Manchester, 1974), 107.

[106] Edward Royle, *Victorian Infidels* (Manchester University Press, Manchester, 1974), 153.

[107] Grant Brewin and George Jacob Holyoake, *Christianity and Secularism Report of a Public Discussion between Rev. Brewin and G. J. Holyoake* (London: Ward & co., 1853), 9.

[108] Nikki R. Keddie, "Secularism & its discontents" (Summer 2003) 132 *Daedalus* 14, 15.

[109] Franklin L. Baumer, *Religion and the Rise of Scepticism* (New York, Harcourt, Brace & World (1960), 135.

[110] George Jacob Holyoake, *The Organization of Free-Thinkers* (James Watson, 1852). A small eight page document.

[111] John Eros, 'The Rise of Organized Freethought in Mid-Victorian England' (1954) 2(1) *The Sociological Review* 98, 109.

[112] This was not a common theme and is not present in his later writings on secularism.

[113] George Jacob Holyoake, *Secularism, the Practical Philosophy of the People* (London, 1854), 4.

is not theological; at the same time, it is not Atheistic."[114] This is an important point that a constitutional system that is not *for* religion need not be *against* religion.

He emphasised that his secular principles were not old ones served anew. He stated that, regarding the word 'secularism': "At first, the term was taken to be a "mask" concealing sinister features - a "new name for an old thing" - or as a substitute term for scepticism or atheism. If impressions were always knowledge, men would be wise without inquiry, and explanations would be unnecessary."[115]

In an early article in the *Reasoner*, Holyoake wrote:

> We do not say every man ought to give an exclusive attention to this world, because that would be to commit the old sin of dogmatism, and exclude the possibility of another man walking by a different light than that by which alone we are able to walk. But, as our knowledge is confined to this life, and testimony, conjecture, and probability are all that can be set forth with respect to another life, we think we are justified in giving the precedence to the duties of this state, and attaching primary importance to the morality of man to man.[116]

His views were not dismissive of Christian thought, but were now a more mature acceptance of its contribution to society, Holyoake therefore determined to replace words then in use which had negative connotations such as atheist, infidel, freethinker, and unbeliever, as he wanted as his primary concern to encourage a positive culture. He wanted to use a term that described what he was, not what he declined to be. He felt that the word 'secular' would encourage people to think of the problems of this world, and began to use the term from 1851.

This new emphasis in secularism now separated Holyoake from those such as Owen and Bradlaugh who disparaged Christianity. He saw that rather than denouncing or offering an alternative to religion, human activity could be applied to the improvement of the present life.[117] The purpose of secularism was then "to attack obstructive error; to ignore all other speculation; to advance an alternative philosophy; and to encourage secular improvements, unhindered by secular labels".[118]

Holyoake had invented the term 'secularism' to describe a social order separate from religion, yet without at the same time denigrating or criticising religion. To make his position distinct from those who continued to propose the abolition and denigration of Christianity, he argued that[119]

> [s]ecularism is not an argument against Christianity. It is one independent of it. It does not question the pretensions of Christianity; it advances others. Secularism does not say there is no light or guidance elsewhere, but maintains that there is light and guidance in secular truth, whose conditions and sanctions exist independently, and act forever. Secular knowledge is manifestly that kind of knowledge which is founded in this life, which relates to the conduct of this life, conduces to the welfare of this life, and is capable of being tested by the experience of this life.

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[114] Rev. Joseph Parker, D. D., *Times*, October 11, 1894.
[115] George Jacob Holyoake, *English Secularism: A Confession of Belief* (The Open Court Publishing Company, Chicago, 1896), 34.
[116] *The Reasoner*, 19 January 1853.
[117] *The Reasoner*, 19 January 1853, 4.
[118] Edward Royle, *Victorian Infidels* (Manchester University Press, Manchester, 1974), 152.
[119] G.J Holyoake, *The Principles of Secularism* (Austin & Co., London, 1871), 17.

On this Holyoake differed in his views from fellow secularists with whom he had associated and developed his thoughts, particularly Charles Bradlaugh.[120] Holyoake held that secularism should not be taking a position on the question of the correctness or otherwise of religion, and should be distinguished from strong freethought and atheism.[121] In *English Secularism*,[122] he made this distinction, defining secularism as:

> … a code of duty pertaining to this life, founded on considerations purely human, and intended mainly for those who find theology indefinite or inadequate, unreliable or unbelievable. Its essential principles are three: (1) The improvement of this life by material means. (2) That science is the available Providence of man. (3) That it is good to do good. Whether there be other good or not, the good of the present life is good, and it is good to seek that good.[123]

In particular Holyoake distinguished secularism from the extremes of atheism and theism, which some secularists like Bradlaugh did not. He explained that[124]

> Secularism neither asks nor gives any opinion upon (atheism or theism), confining itself to the entirely independent field of study – the order of the universe. Neither asserting nor denying theism or a future life, having no sufficient reason to give if called upon; the fact remains that material influences exist, vast and available for good, as men have the will and wit to employ them. … Considerations which pertain to the general welfare, operate without the machinery of theological creeds, and over masses of men in every land to whom Christian incentives are alien, or disregarded.

Holyoake also acknowledged the similarities of secularism and positivism, when from 6 July 1856 to 30 December 1857 he used as a subtitle for the *Reasoner*, which he was then editing as a secularist periodical, the words "Journal of Freethought and Positive Philosophy." He said that "[a] Secularist guides himself by maxims of Positivism,

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[120] His views on this caused him to split from those who wished to equate secularism with a strong anti-religious, pro-atheistic view. "At the time of what was called his 'Parliamentary struggle,' I was entirely with him and ready to help him. It was with great reluctance and only in defence of principle, to which I had long been committed, that I appeared as opposed to him. He claimed to represent Free Thought, with which I had been identified long before his day. My conviction was that a Free Thinker should have as much courage, consistency, and self-respect as any Apostle, or Jew, or Catholic, or Quaker. All had in turn refused to make a profession of opinion they did not hold, at the peril of death, or, as in the case of O'Connell and the Jews, at the certainty of exclusion from Parliament. They had only to take an oath, to the terms of which they could not honestly subscribe. Mr Bradlaugh had no scruple about doing this. In the House of Commons he openly kissed the Bible, in which he did not believe—a token of reverence he did not feel. He even administered to himself the oath, which was contrary to his professed convictions. This seemed to be a reflection upon the honour of Free Thought. Had I not dissented from it, I should have been a sharer in the scandal, and Free Thought—so far as I represented it—would have been regarded as below the Christian or Pagan level." George Jacob Holyoake, *Bygones Worth Remembering, Vol. 1 (of 2),* E. P. Dutton and Company, New York (1905), 28.

[121] "To maintain -- that, from the uncertainty as to whether the inequalities of human condition will be compensated for in another life -- It is the business of intelligence to rectify them in this world; and consequently, that instead of indulging in speculative worship of supposed superior beings, a generous man will devote himself to the patient service of known inferior natures, and the mitigation of harsh destiny, so that the ignorant may be enlightened and the low elevated." [G.J. Holyoake, "The Organization of Freethinkers" (James Watson, London, 1852)].

[122] George Jacob Holyoake, *English Secularism: A Confession of Belief* (The Open Court Publishing Company, Chicago, 1896), 34.

[123] This view resonates with the views of the classic Utilitarians that we ought to maximize the good, to bring about the greatest amount of good for the greatest number. This will be examined in more detail later in this chapter.

[124] George Jacob Holyoake, *English Secularism: A Confession of Belief* (The Open Court Publishing Company, Chicago, 1896), 37.

seeking to discern what is in Nature—what *ought* to be in morals—selecting the *affirmative* in exposition, concerning himself with the real, the right, and the constructive. Positive principles are principles which are provable."[125]

Towards the end of his life, Holyoake published his memoirs, aptly titled *Sixty Years of an Agitator's Life*. In it, he put his last word on what he felt secularism to be. He said that

> My argument was that a man could judge a house as to its suitability of situation, structure, surroundings, and general desirableness, without ever knowing who was the architect or landlord; and if as occupant he received no application for rent, he ought in gratitude to keep the place in good repair. So it is with this world. It is our dwelling place. We know the laws of sanitation, economy, and equity, upon which health, wealth, and security depend. All these things are quite independent of any knowledge of the *origin* of the universe or the *owner* of it. And as no demands are made upon us in consideration of our tenancy, the least we can do is to improve the estate as our acknowledgement of the advantage we enjoy. This is Secularism.[126]

What was Holyoake's theory of Secularism? Although he had much to say on a number of matters,[127] he wrote specifically on secularism in several books.[128] He did not address secularism's application specifically to constitutional law, but he did address secularism's role in public policy. Holyoake made clear that secularism was Utilitarian in nature, with the benefit of the greater society in mind when he said that

> A man may be a shareholder in a gas company or a waterworks, a house owner, a landlord, a farmer, or a workman. All these are secular pursuits, and he who follows them may consult only his own interest. But if he be a Secularist, he will consider not only his own interest, but, as far as he can, the welfare of the community or the world, as his action or example may tell for the good of universal society.[129]

and also

> A pure "intent" is the intent of serving humanity. Immediate service of humanity is not intended to mean instant gratification, but "immediate" in contradistinction to the interest of another life. The distinctive peculiarity of the Secularist is, that he seeks that good which is

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[125] GJ Holyoake, *The Principles of Secularism* (3rd Ed., Austin & Co, London, 1870), Chapter 3.
[126] George Jacob Holyoake, *Sixty Years of an Agitator's Life* (London: T. Fisher Unwin, 1900), 294. (Italics in the original.)
[127] These were writings spread throughout his thoughts on matters as diverse as reason (*A Logic Of Facts Or, Everyday Reasoning*), the co-operative movement (*The History of Co-Operation in England - Its Literature and Its Advocates* (London, F. Farrah, 1866.)), biographies (*John Stuart Mill as some of the working classes knew him* (London : Trübner & Co., 1873), *The life and character of Richard Carlile,* (London, Austin & Co. 1870), *Life and Last Days of Robert Owen, of New Lanark* (London : Trübner & Co., 1871.), *Life of Joseph Rayner Stephens, preacher and political orator* (London, Williams and Norgate [1881]) and public speaking (*Public speaking and debate* (London : T.F. Unwin, [1895])).
[128] Holyoake wrote on many things in his journey through life as he compiled life experiences that culminated in his theory of secularism. They included *The Principles of Secularism Illustrated,* London Book Store (1871), *The Origin and Nature of Secularism: Showing that where Freethought Commonly Ends Secularism Begins* (London: Watts & Co, 1896) and *English Secularism: A Confession of Belief* (The Open Court Publishing Company, Chicago, 1896).
[129] George Jacob Holyoake, *English Secularism: A Confession of Belief* ((The Open Court Publishing Company, Chicago, 1896)), 58. See also *The Principles of Secularism Illustrated* (Austin & Co., London, 1871), 11)

> dictated by Nature, which is attainable by material means, and which is of immediate service to humanity.[130]

A number of principles can however be gleaned from his writings that are relevant to secularism in the context of constitutionalism. These are:

1 Secularism is not synonymous with atheism.[131]
2 Secular principles do not offer an alternative to religious principles.[132]
3 Secularism deals with matters of this life.[133]
4 Secularism does not accept an external authority as its source or basis.[134]
5 Secular principles are open to critique and debate in the public sphere.[135]

These principles will be used in the analysis of contemporary constitutional provisions, and the laws derived from them, in chapters 4 to 8.

V EVOLUTION OF THE MEANING OF 'SECULARISM'

Harriet Martineau said shortly after Holyoake coined the term 'secularism' that

> The adoption of the term Secularism is justified by its including a large number of persons who are not Atheists, and uniting them for action which has Secularism for its object, and not

[130] George Jacob Holyoake, *The Principles of Secularism Illustrated* (Austin & Co., London, 1871), 12)

[131] "That this secular form of opinion implies Atheism is an error into which many fall. Secularism, like mathematics, is independent of theistical or other doctrine. Euclid did not ignore the gods of his day; he did not recognise them in geometry. They were not included in it. But if pagan theology undertook to contradict mathematical principle, Euclid might have joined issue thereupon." (George Jacob Holyoake, *Sixty Years of an Agitator's Life* (London: T. Fisher Unwin, 1900), 293.)

[132] "My argument was that a man could judge a house as to its suitability of situation, structure, surroundings, and general desirableness, without ever knowing who was the architect or landlord; and if as occupant he received no application for rent, he ought in gratitude to keep the place in good repair. So it is with this world. It is our dwelling place. We know the laws of sanitation, economy, and equity, upon which health, wealth, and security depend. All these things are quite' independent of any knowledge of the origin of the universe or the owner of it. And as no demands are made upon us in consideration of our tenancy, the least we can do is to improve the estate as our acknowledgment of the advantage we enjoy. This is Secularism." (*Sixty Years of an Agitator's Life* (London: T. Fisher Unwin, 1900), 294.) See also "Since the principles of Secularism rest on grounds apart from Theism, Atheism, or Christianism, it is not logically necessary for Secularists to debate the truth of these subjects." (*The Principles of Secularism Illustrated* (Austin & Co., London, 1871), 15).

[133] "Secularism is the study of promoting human welfare by material means; measuring human welfare by the utilitarian rule, and making the service of others a duty of life. Secularism relates to the present existence of man, and to action, the issues of which can be tested by the experience of this life — having for its objects the development of the physical, moral, and intellectual nature of man to the highest perceivable point, as the immediate duty of society: inculcating the practical sufficiency of natural morality apart from Atheism, Theism, or Christianity: engaging its adherents in the promotion of human improvement by material means, and making these agreements the ground of common unity for all who would regulate life by reason and ennoble it by service." (*The Principles of Secularism Illustrated* (Austin & Co., London, 1871), 11)

[134] "Secularism accepts no authority but that of Nature, adopts no methods but those of science and philosophy, and respects in practice no rule but that of the conscience, illustrated by the common sense of mankind." (*The Principles of Secularism Illustrated* (Austin & Co., London, 1871), 14).

[135] "The universal fair and open discussion of opinion is the highest guarantee of public truth—only that theory which is submitted to that ordeal is to be regarded, since only that which endures it can be trusted. Secularism encourages men to trust reason throughout, and to trust nothing that reason does not establish". (*The Principles of Secularism Illustrated* (Austin & Co., London, 1871), 15).

> theism. On this ground, and because, by the adoption of a new term, a vast amount of impediment from prejudice is got rid of, the use of the name secularism is found advantageous.[136]

Holyoake's more inclusive use of the word 'secularism' was seen as something different. His use of the term changed its general usage and application after the break from those whose views had diverged so much from his own. Originally secularism had had the meaning, after the Wars of Religion in Europe, to mean the removal of property or territory from ecclesiastical authorities. It also meant in Roman canon law the return to the outside world of a person who was in a religious order. The word 'secular' is derived from Middle English, from the Old French word *seculer*, which is itself derived from the Latin *saecularis*. In Middle English it had the connotation of 'this world' (as opposed to the divine).[137] Before the mid-19th century, the term was sometimes used with contempt. For the clergy, it was almost synonymous with the uninitiated or "ignorant".[138]

A *Secularism and constitutionalism*

Much discussion on the nature of secularism[139] as a constitutional concept underlying the nature of government and society has been made in the last few centuries. It took time for the term 'secular' to be adopted, and its usage lagged behind the formation of nation-states. When more democratic forms of government came to be established the political usage correspondingly increased. It has been described as a civil recognition of religious freedom.[140] It had the connotation of being anti-religious, but also non-religious. It meant liberation from religious tutelage or, in more traditional circles, to mean public and legal 'de-Christianisation'.[141]

There are many points of commonality between the Western and the Eastern traditions of secularism. There are of course many differences, given that many constitutions were drafted centuries apart and are also inheritors of very different cultural heritages. The migrants to the United States for example brought with them a European cultural history, and with that laws based on a long tradition of conflict between leaders of states and organised religion, where secularism developed in modern democracies as a solution to that conflict.

1 *Eastern traditions*

India however never had religion in a comparably organised form in the shape of the Brahmanical order sufficiently organised that it posed a threat to government, where

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[136] Harriet Martineau, *Boston Liberator* — Letter to Lloyd Garrison, November, 1853, cited in Chapter 2, *The Principles of Secularism Illustrated* (Austin & Co., London, 1871), 8.
[137] Nikki R. Keddie, "Secularism & Its Discontents" (2003) 132 *Daedalus* 14.
[138] Anil Nauriya, "Gandhi on Secular Law and State", *The Hindu*, Wednesday, Oct 22, 2003.
[139] Secularism is distinguished in this paper from secularisation as a concept. The latter pertains to the decrease of political and social influence of religion in contemporary times, and is a sociological issue of marginal relevance to this paper, and will be distinguished briefly in this thesis to prevent confusion. (see generally David Martin, *A General Theory of Secularization* (Harper & Row, USA, 1979) and Steve Bruce, *God is Dead: Secularization in the West* (Wiley, Malden, 2002)).
[140] David M. Brown, 'Freedom From Or Freedom For?: Religion As A Case Study In Defining The Content Of Charter Rights' (2000) *33 University of British Columbia Law Review* 551
[141] Peter L. Berger, *The Sacred Canopy – Elements of a Sociological Theory of Religion*, (Doubleday, New York, 1967) 106.

religion needed to be pressed out of the public sphere.[142] In ancient India the government never sought to press any particular school of religious thought upon the population, but rather permitted the teachings of Jainism, Buddhism, and later Judaism, Zoroastrianism, Islam and Christianity, as well as doctrines of agnosticism, atheism and materialism. In Europe and later in North America, no such freedom of religion developed. [143]

In more recent times, the Indian Supreme Court noted shortly after the drafting and ratification of the Indian Constitution that in the constitutions of the United States and Australia, freedom of religion was provided in absolute terms, leaving the courts to derive exceptions and limitations to those freedoms. However, Articles 25 and 26 of the Indian Constitution contain limits to the freedoms contained therein[144].

Marc Galanter, writing forty years ago,[145] discussed the then state of American and Indian secularism.

> In discussing the identification of secularism with formal religious neutrality or impartiality on the part of the state he said, in respect of India, that we avoid equating secularism with formal standard of religious neutrality or impartiality on the part of the state. No secular state is or can be merely neutral or impartial among religions, for the state defines the boundaries within which neutrality must operate.

Indeed, H.V. Kamath said[146] that

> When I say that a state should not identify itself with any particular religion, I do not mean to say that a state should be anti-religious or irreligious. We have certainly declared India to be a secular state. But to my mind, a secular state is neither a God-less state nor an irreligious state.

a view endorsed by former judge on the Indian Supreme Court, Justice Gajendragadkar, who considered that "secularism would be a purely passive force if it was content to base itself on the negative aspect of being anti-religion, anti-God, or anti-spiritual quest."[147]

It is often forgotten how the concept of secularism has changed most Western societies. For example:[148]

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[142] U.N. Ghoshal noted "the striking fact that this class (the Brahmans) throughout our history failed to assert (except in theory and in legend) its claim to control kings and emperors." U.N. Ghoshal, *A History of Indian Political Ideas* (1959), 32-33.

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[144] *Commissioner Hindu Religious Endowments, Madras v Sri Lakshmindra Tirtha Swamiar of Sri Srirur Math* (1954) S.C.R.1005, 1028-29.

[145] Marc Galanter, 'Hinduism, Secularism, and the Indian Judiciary', (1971) 21(4) *Philosophy East & West* 466, 479.

[146] C.A.D. VII, 825-6.

[147] Cited in Gurmukh Nihal Singh, *Land Marks in Indian Constitutional and National Development* (Atma Ram & Sons, Delhi, 2nd Ed. 1952), 175.

[148] Chris McGillion, "Secularism is simply respecting differences", *Sydney Morning Herald*, 24 November 2004. <http://www.smh.com.au/news/Chris-McGillion/Secularism-is-simply-respecting-differences/2004/11/23/1100972395081.html> on 24 November 2004.

> Until 1828 in Britain, public office was denied to any man who refused to assent to the doctrines of the Church of England. Until 1836 no couple (of whatever religion) could be married except before an Anglican clergyman. Until the late 1800s all teaching posts at Oxford and Cambridge were reserved for practising Anglicans, and even the mildest blasphemy could carry a six-month prison term.

Secularism today is not only a Western concept. It has also been considered by Muslim theorists, such as Shaikh Ali Abd al-Raziq,[149] a Sunni thinker, in his book *al-Islam wa Usul al-Hukm* which was written in 1925. In attempting to prove that Islam had no claim over politics he maintained that

> Muhammad … was no more than a messenger of a purely religious call that is, not coloured by any inclination to govern or by any claim for a state. The Prophet had no rule or government, nor did he establish a kingdom in the political sense of the word or its synonyms. He was none but a messenger like those preceding him: not a king or a builder of a State or a proponent of Monarchy.

He did however incur a great deal of criticism from his contemporaries for his controversial views.[150]

Secularism, however, in most Islamic countries is a fairly modern concept. Traditionally, it has been difficult in Islam to consider a separation of church and state as it is conceived of in Christianity. Christianity has a history of an elaborate ecclesiastical hierarchy that has competed with the political hierarchy in the Christian world. Much of the stagnation of Europe in medieval times is said to be as a result of competition between the church and state for control of land and of learning.[151] Secularism has been often confused in the Arabic speaking Muslim world with atheism, which has led to secularism as being part of a constitutional democratic model.[152] Abdou Filali-Ansary has said that "[t]o be a secularist has meant to abandon Islam, to reject altogether not only the religious faith but also its attendant morality and the traditions and rules that operate within Muslim societies."[153]

VI CONSTITUTIONS AND CONSTITUTIONAL IDENTITY

The role of the Courts in interpreting the Constitution can be difficult. As John Locke said in his *Letter Concerning Toleration*[154]

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[149] Nazih Ayubi, *Political Islam: Religion and Politics in the Arab World (*Routledge, Oxford, 1993), 54.

[150] He was condemned and isolated by the Egyptian *ulama* council, and dismissed from his position as a judge. See also Richard Mohr and Nadirsyah Hosen, 'Da Capo: law and religion from the top down' in Richard Mohr and Nadirsyah Hosen, *Law and Religion in Public Life: The contemporary debate*, (Routledge, Oxford, 2011), 1, 5.

[151] Ibid 50.

[152] Gerhard Hoffstaedter, 'Secular State, Religious Lives: Islam and the state in Malaysia' (2013) *Asian Ethnicity* 1, 2.

[153] Abdou Filali-Ansary, 'Muslims and Democracy' (1999) 10(3) *Journal of Democracy* 18, 20 cited in Gerhard Hoffstaedter, 'Secular State, religious lives: Islam and the state in Malaysia' (2013) 14(4) *Asian Ethnicity* 1, 2.

[154] John Locke, *A Letter Concerning Toleration* ((first published 1689), Rough Draft Printing (2011)), 17.

> It may indeed be alleged that the magistrate may make use of arguments, and, thereby draw the heterodox into the way of truth, and procure their salvation. I grant it; but this is common to him with other men. In teaching, instructing, and redressing the erroneous by reason, he may certainly do what becomes any good man to do. Magistracy does not oblige him to put off either humanity or Christianity; but it is one thing to persuade, another to command; one thing to press with arguments, another with penalties.

This thesis considers both the legal battles fought in the supreme and high courts of many countries, in order to compare them with the secular ideals and religious freedoms contained within their constitutions, and the legal history and philosophy that inform their creation and their contemporary understanding. Holyoake's work is the filter through which I evaluate the present and the recent past.

Legal philosophers provided a philosophical basis for Holyoake's views on conflict in the public arena, and while lawyers and judges sought the solution to problems through legal theory, the solution of how to address conflicting interests in the public sphere was generally addressed by neither lawyers nor legal philosophers, but by those who drew on their experience. Holyoake was not a constitutional lawyer, but contributed greatly like the legal philosophers of his time to solutions to problems of social policy and, of direct importance to this thesis, to the conception of the modern secular state in constitutional law.

Secularism as considered by Holyoake as a means of structuring the public sphere in secular democracies has long been incorporated into the development of constitutional thinking. In the eighteenth century the English politician and philosopher Viscount Bolingbroke[155] offered the following definition of a constitution[156]

> By constitution we mean … that assemblage of laws, institutions and customs, derived from certain fixed principles of reason, directed to certain fixed objects of public good, that compose the general system, according to which the community hath agreed to be governed.

Herman Finer looked at it more in terms of the individual and the state. He looked at it more in terms of a system that contains fundamental institutions containing the power relationships between the individual and associate constituents within a state. In his view, a "constitution is the autobiography of a power relationship", by which he meant the "spiritual values, awake or habitual, prevailing among the various groups which dwell together within a single nation".[157]

Not much has changed in general since then. Modern constitutionalism can be broadly said to involve limits on the powers of government, adherence to the rule of law, and the protection of fundamental rights.[158] All of these are examined but emphasis is

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[155] Oliver Goldsmith, *The works of the late Right Honourable Henry St. John, Lord Viscount Bolingbroke*, Volume 3, (J. Johnson, London, 1809) Letter X, 157.
[156] Sharada Rath, 'Constitution and Constitutionalism', in Surya Narayan Misra et al (eds.), *Constitution and Constitutionalism in India* (APH Pub. Corp., Michigan, 1999), 12.
[157] Sharada Rath, "Constitution and Constitutionalism", in Surya Narayan Misra, Subas Chandra Hazary and Amareswar Mishra (eds.), *Constitution and Constitutionalism in India* APH Pub. Corp., Michigan, 1999) 12.
[158] Michel Rosenfeld, 'Modern Constitutionalism as Interplay between Identity and Diversity', in Michel Rosenfeld (Ed.), *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* (Duke University Press, Durham, 1994), 3.

given to the last, the constitutional law that addresses fundamental rights in national constitutions, particularly those that relate to freedom of religion.

Often constitutional law will examine matters arising from clashes between the nature of national identity and values as articulated in a national constitution (often set long ago and rarely amended), and often in contrast with the ideals and values of a modern diversified society. Many modern constitutional law cases derive from communities which feel that their constitutions do not represent adequately their values. As Michel Rosenfeld notes,[159]

> [t]he clash between constitutional identity and other relevant identities, such as, national, ethnic, religious, or cultural identity, is made inevitable by the confrontation between contemporary constitutionalism's inherent pluralism, and tradition. … in a country with a strong constitutional commitment to religious pluralism, constitutional identity must not only be distinct from any religious identity, but also stand as a barrier against national identity becoming subservient to the fundamental tenets of any religion.

Rosenfeld points out that a working constitutional order must have at its base a predominant identity, where constitutional protection is usually accorded to the predominant identity, noting that "constitutional identity emerges as complex, fragmented, partial and incomplete. In the context of a living constitution, moreover, constitutional identity is the product of a dynamic process". Indeed, Thomas Jefferson made a similar point,[160] considering that periodic constitutional amendment and review was necessary for a well-functioning democracy, as "[e]ach generation is as independent of the one preceding, as that was of all which had gone before. It has then, like them, a right to choose for itself the form of government it believes most promotive of its own happiness …"

VII HOLYOAKE'S LEGACY

Holyoake was known by his contemporaries as a man who "was a shrewd observer and had a dry wit, but his thin, high-pitched voice made him a poor orator."[161] He had views that he spent his life defending and advocating, despite a society which, for the most part, he had difficulty convincing that there was another way of doing things. He advocated that people should have the right to hold views contrary to the majority, that they may hold office and succeed in court actions, and other have other dealings with the state without having to assert their belief in the religious views of the majority.

His views of secularism were not, when fully formed, that those who believed in religion should convert to a new way of thinking. He did not offer secularism as an alternative to the belief systems of others. He asked simply that those who chose to hold different views not be forced to assert unwillingly that they held the views of the majority, although knowing full well that the contrary was true.

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[159] Michel Rosenfeld, 'Law and the Postmodern Mind: The Identity of the Constitutional Subject' (1995) 16 *Cardozo Law Review* 1049.
[160] Thomas Jefferson to Samuel Kercheval, Monticello, July 12, 1816. <http://www.public.iastate.edu/~jwcwolf/Papers/Jefferson.html accessed on 12 August, 2013>
[161] Edward Royle, 'Holyoake, George Jacob (1817–1906)', *Oxford Dictionary of National Biography*, Oxford University Press, 2004 [http://www.oxforddnb.com/view/article/33964]

As a youth he felt that to hold that a lack of belief to be manifested by an individual freely, religion would be dismantled by appeals to reason and logic, thereby allowing a freedom to hold his own views without censure. In his thirties, after 1850, he had sufficient life experience, having met many lower and upper class people, the strongly religious and those who denounced them, to feel that the best way forward was to advocate that there was a place in the public sphere for both. He acknowledged that the religious wanted their values to be recognised in public policy, and also recognised that excesses in that regard were held by many to be contrary to the public interest.

Holyoake recognised that the solution was not for both parties to seek the removal of the other through rhetoric and legislation, but rather for the public space and the development of public policy to recognise and value all positions, with a view to meeting the needs of all. The modern world was changing and there needed to be a place for both ideas and their dissent to be accepted.

This chapter has described briefly Holyoake's life and the influences which brought him to his views on secularism that are associated with him today. His position was built not only on his experiences as a labourer, chartist and other roles in his youth, but also on the Utilitarian philosophy prevalent in his time that accorded much with what he felt was right, and upon which he built in his mature years.

Holyoake's views on secularism have been summarised in this chapter, and the sense of what he advocated has been adopted by many countries as the best way to give a place in the public sphere to speak by those who are members of what, in most countries, are pluralistic societies. What was an interesting idea many years ago in the mid-nineteenth century has is now even more relevant for constitutional drafting and interpretation. While some of the modern democracies such as France and the United States have constitutions created at the time of the Enlightenment, they and many other democracies which have developed constitutions since Holyoake have seen that modern pluralistic societies cannot function effectively for all its citizens if many are denied equal status and an equal voice.

Over more than a century and a half these democracies have formed constitutions broadly described as 'secular', often very different to each other to address local circumstances as has democracy itself. These modern 'secular' constitutions will be considered in Chapter 3 to see how consistent they are with Holyoake's original ideals.

In conclusion, it is fair to say that Holyoake draw upon the contemporary thinking of his times to slowly formulate his own views. The Enlightenment encouraged the development of principles regarding a new paradigm for organised religion and the state in the public space, and this allowed a variety of views to be considered and explored. Holyoake engaged with a number of these in his early years in matters such as new roles for unions and the working class and new business structures such as co-operatives. These were novel times where new forms of thinking were given space to grow or to fail. Holyoake tried a number of these. Initially he was swept up with others such as Southwell and Bradlaugh to simply oppose the status quo where it did not accord with reason. With more mature years he refined his thoughts as he broke from those with whom he was no longer in accord, seeing a less confrontationist pathway to social reform. Those thoughts fit most closely with the Utilitarian philosophies of Bentham and Mill, the latter whom he knew well.

Utilitarian thought fit better with the older Holyoake where it did not seek to destroy or vehemently oppose the religion that was seen by many at the time to be part of the problems of the working class, but rather it had at its heart a practical aspect that for the first time public policy could be made, not with religion excised from the public sphere as some would have it, but rather with it remaining in place contributing its views with all others for the common good.

Holyoake's principles of secularism developed from there to be useful in social and legal reform. In the area of constitutionalism these ideas allowed government to embrace all ideas in the laws it developed with a freer debate in its formulation and without the necessity for an external basis for its authority. Yet by not being in opposition to any religious orthodoxy but accepting its contribution Holyoake's secular principles have served as an effective basis for many modern constitutions and a lens through which to view those that came before him. The consideration of secular principles in constitutional development is examined in more detail in the next chapter.

CHAPTER 3

SECULARISM AND CONSTITUTIONALISM

I MODERN INTERPRETATIONS OF WHAT IS A SECULAR STATE

This chapter examines contemporary constitutions considered 'secular' to see how closely they conform to the original Holyoakean definition of the word, and how well religious freedoms may be preserved within them. Modern constitutions can be found in forms often described as 'hard' and 'soft' addressing religious pluralism differently. These forms will be examined in detail.

Defining what is "secular" has always been difficult whenever there is an intersection of law and religion, and goes back as far as Locke. In Locke's *Letter Concerning Toleration* he sought to distinguish the jurisdictions of organised Christianity from that of the government when he wrote: [1]

> [T]he church itself is a thing absolutely separate and distinct from the commonwealth. The boundaries on both sides are fixed and immovable. He jumbles heaven and earth together, the things most remote and opposite, who mixes these two societies, which are in their original, end, business, and in everything perfectly distinct and infinitely different from each other.

A common modern definition of secularism as a constitutional concept that clearly draws on Holyoake's work is the political separation of government and its institutions from religious institutions and its representatives, sustained and upheld in a national[2] constitution. The purpose is both to keep government free of religious influence or bias, as well as free of the imposition of government upon religion.

Thomas Jefferson said that "[e]ach generation is as independent of the one preceding, as that was of all which had gone before. It has then, like them, a right to choose for itself the form of government it believes most promotive of its own happiness …"[3] Many contemporary democracies differ in their constitutional arrangements, finding domestically acceptable paradigms for the roles of religion and government in the public sphere. Generally such models fall into one of two[4] descriptors.[5] The first is that secularism requires that the state be equidistant from all religions, not supporting any religion, and being neutral with respect to all. The second requires that the state have no relationship with any religion, and be equally distanced from all religions.

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[1] John Locke, *A Letter Concerning Toleration* (1689), trans. William Popple, (Merchant Books, USA, 2011), 24.
[2] or State/provincial constitutions.
[3] Letter to Samuel Kercheval, Monticello, July 12, 1816 (*The Letters of Thomas Jefferson 1743-1826*) < http://www.let.rug.nl/usa/presidents/thomas-jefferson/letters-of-thomas-jefferson/jefl246.php >.
[4] There are many shades of difference. With an emphasis on Europe, David Martin sees a number of regional variations across the continent. See generally David Martin, *On Secularization: Towards a Revised General Theory* (Ashgate Publishing Ltd., Farnham, 2005) (Chapter 5 – 'Religion, Secularity, Secularism and European Integration').
[5] Amartya Sen, *The Argumentative Indian* (Penguin UK, Colchester, 2006), 295-296.

Both views have in common that secularism is intended to prevent any religion having a privileged place in the activities of the state. In the first view there is no preclusion of the state from association with religion, only that there is an equal association with all religions. The relationship must be symmetrical, either in distance or in association. This first approach is that which has been dominant in many countries such as India, and is often titled 'soft' secularism. The second sense, 'hard' secularism, or 'mainstream secularism' denies any relationship with religion, dealing with it only incidentally.

The differences between many countries that now label themselves as secular, some overtly,[6] through their constitutions, lie in exactly how liberal they are and how that democracy operates.

The highest courts of many countries with modern secular constitutions have often been asked in recent years to review their underlying secular ideals in their constitutions, and whether contemporary views remain consistent with previous thinking, as well as whether they accord with modern concepts of constitutionalism. They are considering issues that have not been raised in the past, such as religious clothing in the public sphere in France, and the role of an increasingly assertive religious presence in politics in India and the United States.

The nature of changing demographics in many societies owing to migration or other changes, means that this is increasingly more difficult. Supreme courts must consider matters of religious freedom in newer contexts, considering the application of constitutional principles to novel circumstances. The courts often find it difficult to consider the demands of a modern plurality of religious views in the public sphere where "church" and "state" collide.

Some jurisdictions use an 'extremist secularism'[7] or 'militant secularism'[8] constitutional model that has a severe interpretation of what a secular state means, and which operates more as an anti-religion platform, than as a serious attempt to accommodate religious pluralism (as Holyoake proposed). Such models result in very stark treatments of religious difference where minority views receive very little accommodation. Indeed, it is difficult to find a reference to Holyoake and his thinking in the history of secularism of these states.[9] Accordingly, in identifying the outlier views of 'secularism' as being the only means of treating religion in the public sphere, these commentators have dismissed the majority of secular reasoning and secular states that are more compatible with the original thoughts of Holyoake. Constitutionalism that resonates with his moderate views is seen as the exception, rather than the rule.

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[6] For example, the word 'secular' was inserted into the preamble of the Indian constitution by the 42nd Amendment (1976).

[7] This term tends to have many meanings such as the opposite of 'religious extremism' with connotations of intolerance of religion, or even association with governments that have had a strong anti-religious agenda: BBC News UK, *Row after Pope's remarks on Atheism and Nazis*, 16 September 2010 <http://www.bbc.co.uk/news/uk-11332515 >

[8] The terms occur often in the media in the context of the state being perceived as actively working to remove religion from the public space such as in an article in 2012: BBC News UK, *Militant secularisation threat to religion, says Warsi*, 14 February 2012 <http://www.bbc.co.uk/news/uk-17021831>.

[9] Take for example generally Susan Jacoby, *Freethinkers* (Metropolitan Books, New York, 2004).

A *Paradigms of secular constitutionalism*

Robert Audi[10] has asked the question of "how a free and democratic society can achieve an appropriate harmony between religion and politics." He argues that the most direct path to a freedom of religion is through a liberal democracy, whilst at the same time acknowledging that religion can be a "divisive force in democratic politics."

Yet governments must also govern in accordance with what is usually a written constitution, a document that defines the basis of authority for laws that are passed by the state. In contemporary Europe, recent court cases and demographic changes have brought the issues of the constitutional identity of a secular state, and what contemporary form it should have, to the fore. Dominick McGoldrick describes it as a spectrum with a religion-free public sphere "as the only solution to ensuring genuine equality between members of majority and minority churches, agnostics, atheists or non-theists and eliminating religious and anti-religious tensions"[11] at one end. He argues that France and Turkey lie at the other end of the spectrum, describing their constitutional position as "militant secularism or, less pejoratively, as fundamentalist secularism. Religion is perceived as a threat to secularism and so must be kept at a distance from the state".[12] This is a useful tool to view these issues, as there are no clear models, no way to say there only a fixed number of ways to structure a secular state.

Midrange it can be said are countries such as Germany and Italy which are perceived to be much more accommodating to religion in the public sphere, and at the other end are countries with an established religion such as Denmark, Greece, England and Scotland, which have complex relationships with religion. They are essentially secular in practice in that, while religion is established, it is considered to have an influential but not controlling role. McGoldrick discusses the role of secularism in Europe[13] as "[t]here can be positive secularism where the state is regularly involved with accommodating religions but emphasises its neutrality as between them. Or there can be a more negative form of secularism whereby religion is protected from government establishment and state interference".[14]

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[10] Robert Audi, *Religious Commitment and Secular Reason* (Cambridge University Press, Cambridge, 2000) 3.

[11] Dominic McGoldrick, 'Religion in the European Public Square and in European Public Life - Crucifixes in the Classroom?' [2011] 11(3) *Human Rights Law Review* 451, 454.

[12] Dominic McGoldrick, 'Religion in the European Public Square and in European Public Life - Crucifixes in the Classroom?' [2011] 11(3) *Human Rights Law Review* 451, 454.

[13] Dominic McGoldrick, 'Religion in the European Public Square and in European Public Life - Crucifixes in the Classroom?', (2011) 11 *Human Rights Law Review* 451, 454

[14] This last shows a clear partisan position regarding secularism where there is a labelling of "good" and "bad" secularism, with McGoldrick holding the view that a good deal of public accommodation in the public sphere is judged as positive and beneficial. He feels that secularism is not a neutral constitutional position, and that "[t]he principle of state neutrality, as part of a doctrine of toleration, has been attacked by communitarians as being implausible, unrealistic, utopian, founded on a particular liberal theory and fundamentally insensitive to difference." The point of state neutrality would to my mind be intended to remove difference, otherwise the state would adopt a non-neutral and specific position constitutionally.

II CONSTITUTIONAL SECULARISM

A *'Mainstream secularism'*

The "separation of church and state"[15] is generally considered to be an aspect of a modern liberal democracy, usually identified with the United States of America, and considered 'mainstream'. This is because it is the paradigm most often associated with secularism in the public eye. The topic is always difficult to define. One commentator has argued in the American context that

> 'Church and State' … is a profoundly misleading rubric. The title triply misleads. It suggests that there is a single church. But in America there are myriad ways in which religious belief is organised. It suggests that there is a single state. But in America there is the federal government, fifty state governments, myriad municipalities, and a division of power among executive, legislative, administrative, and judicial entities, each of whom embodies state power. Worst of all, 'Church and State' suggests that there are two distinct bodies set apart from each other in contrast if not in conflict. But everywhere neither churches nor states exist except as they are incorporated into actual individuals. These individuals are believers and unbelievers, citizens and officials. In one aspect of their activities, if they are religious, they usually form churches. In another aspect they form governments. Religious and governmental bodies not only coexist but overlap. The same persons, much of the time, are both believers and wielders of power.[16]

These sentiments can be applied in varying, but certainly substantial, degrees in most jurisdictions. Church and state may overlap in some nations, such as in Germany where there is no real separation between the domains of the churches and the states (*Länder*) or in England where Christianity in the form of Anglicanism is established. In other nations such as Italy and Greece, the dominant religion will intervene in many aspects of secular life.[17]

As secular democracies review the role of religion in the state, religion finds itself at times becoming marginalised. Religion in general feels that its voice in the public sphere is no longer being heard, or has less influence than once it had. Cardinal Joseph Ratzinger (later Pope Benedict XVI) described secularism as a liberal consensus that had now evolved into a "worrying and aggressive" ideology.[18] He went on to say that

> Secularism is no longer that element of neutrality, which opens up space for freedom for all. It is beginning to change into an ideology which, through politics, is being imposed. … It concedes no public space to the Catholic and Christian vision, which, as a result, runs the risk of turning into a purely private matter, so that deep down it is no longer the same. …In this sense, a struggle exists and so we must defend religious freedom against an ideology which is held up as if it were the only voice of rationality, when instead it is only an expression of a 'certain' rationalism.

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[15] This will be examined in detail later in this chapter.
[16] John Noonan, *The Believer and the Powers That Are*, (1987), cited in Harold Berman, "Religious Freedom and the Challenge of the Modern State" (1990) 39 *Emory Law Journal* 149, 150.
[17] Ibid 272.
[18] "Papal contender attacks secularism", *Sydney Morning Herald*, 22 November 2004 http://www.smh.com.au/news/World/Papal-contender-attacks-securalism/2004/11/21/1100972262966.html.

In suggesting that religion had been very much marginalised in the public sphere he noted that[19]

> In politics, it seems to be almost indecent to speak about God, almost as it were an attack on the freedom of someone who doesn't believe. A secularism which is just, is a freedom of religion. The state does not impose a religion, but rather provides free space to those religions with a responsibility to civil society.

Clearly, then, religion seeks a place in the modern secular state in the public sphere.

B Characteristics of the secular state

Partha Chatterjee asked the question "What are the characteristics of the secular state?" and offered in response that "three principles are usually mentioned in the liberal-democratic doctrine on this subject."[20] These he says are liberty (where the state permits the practice of any religion), equality (where the state will not favour one religion over another), and neutrality (which requires the state not to prefer the religious to the non-religious). These elements appear in different degrees in the various models that are often considered.

Tariq Modood,[21] however, argues that while one understanding of contemporary secularism is that of a complete separation of religion and the state (or politics), it is not a sensible view given historical accuracy and contemporary reality. He gives the example of the writings of the Indian writer and political theorist Rajeev Bhargava.[22] Bhargava considers that "in a secular state, a formal or legal union or alliance between state and religion is impermissible" and that for mainstream western secularism, separation means mutual exclusion".[23] Bhargava's argument is that the best modern development of secularism in the West has been developed in the USA and France. Modood designates these as the "mainstream conception of secularism",[24] a term I shall adopt for the moment for the purposes of discussion below.

C *What is a non-secular state?*

Just as there are many views on how much separation is necessary to achieve that separation of the state from the influence of organised religion, there are also a number of different models currently being used to achieve that in varying degrees that will be examined in more detail later in this thesis. In doing so, the will necessarily be some contrast with those states not usually considered 'secular'.

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[19] "Papal contender attacks secularism", *Sydney Morning Herald*, 22 November 2004 http://www.smh.com.au/news/World/Papal-contender-attacks-securalism/2004/11/21/1100972262966.html>.

[20] Partha Chatterjee, 'Secularism and Tolerance', in Rajeev Bhargava (ed.), *Secularism and its Critics* (Delhi: Oxford University Press, 1998), 358.

[21] Tariq Modood, 'Moderate Secularism, Religion as Identity and Respect for Religion' (2010) 81 (1) *The Political Quarterly* 4, 5.

[22] Currently Senior Fellow and Director at the Centre for the Study of Developing Societies (CSDS), Delhi, and previously Professor of Political Theory at the Jawaharlal Nehru University, Delhi (http://www.csds.in/faculty_rajeev_bhargava.htm).

[23] R. Bhargava, 'Political secularism', in G. Levey and T. Modood, eds, *Secularism, Religion and Multicultural Citizenship* (Cambridge University Press, Cambridge, 2009), 88, 103.

[24] Tariq Modood, 'Moderate Secularism, Religion as Identity and Respect for Religion', (2010) 81 (1) *The Political Quarterly* 4, 5.

A state religion (also called an official religion, established church or state church) is a religious body officially endorsed by the state. Practically, a state without a state religion is a secular state. State religions are examples of the official or government-sanctioned establishment of religion, as distinct from theocracy. It is also possible for a national religion to become established without being under state control.

These are not however diametric opposites. There are shades of grey in between. The degree and nature of state backing for denomination or creed designated as a state religion can vary. It can range from mere endorsement by the state and financial support, with freedom for other religions to practise, to prohibiting any competing religious body from operating and to persecuting the followers of other sects.

In some cases, a state may have a set of state-sponsored religious denominations that it funds; such is the case in Alsace-Moselle in France under its local law,[25] following the pattern in Germany.

There are a number of countries where the official religion has an institutionalised tolerance for minority religions, and often whilst an officially recognised religion, often has little day to day influence in state policy may be grouped together. Although in the UK for example the Church of England is the officially established religion in England (with the Church of Scotland recognised as officially established in Scotland),[26] there is little policy influence upon the secular government. The main political parties are secular, but the upper House of the UK Parliament has the Church of England represented by twenty-six bishops (the Lords Spiritual).[27] By contrast, in Greece, the established religion can have a much more dominant role, tending to relegate minority religions close to the status of being merely tolerated. [28]

For the purposes of this thesis, those constitutions that have state churches or religions where the religion has no formal control of the state are considered secular. Non-secular states are then those where the endorsed religion has some formal control over the state.

D *Do Non-secular states make space for other faiths?*

As noted above, determining the level of control of religion over the state is often difficult to determine. Often religion will have some control, such as in Finland where the Evangelical Lutheran Church of Finland and the Finnish Orthodox Church have

[25] The 1905 French law on the separation of the churches and state (*Loi du 9 décembre 1905 concernant la séparation des Églises et de l'État*), established state secularism in France and ceased all state funding of religion. Because Alsace-Lorraine, now known as Alsace-Moselle, was at that time part of Germany, the 1905 law did not apply.

[26] In the early part of the 20th Century the Church of Wales split from the Church of England and became disestablished. The *Welsh Church Act 1914* (UK) provided for the separation of the Church in Wales) from the rest of the Anglican Church, and for the simultaneous disestablishment of the Church in 1920.

[27] The Church of Scotland is not represented. The Churches of Wales and Ireland, being disestablished (Ireland in 1871), are also not represented.

[28] Michael Rosenfeld, 'Can Constitutionalism, Secularism and Religion be reconciled in an Era of Globalization and Religious Revival?' (2009) 30 *Cardozo Law Review* 2333, 2350.

the right to collect church tax from their members,[29] with the assistance of the state, when the state collects its own tax. In addition to membership tax, businesses also participate by a way of taxation in contributing financially to the church.

However, formal control is usually stipulated in the national constitution. A number of constitutions show some formal acknowledgement of the place of religion in society, or the historical contribution it has made.

For example, section 2 of the Constitution of Argentina, states that "[t]he Federal Government supports the Roman Catholic Apostolic religion", yet does not establish that religion nor separate it from the state. In Myanmar article 19, of the constitution states that "The State recognizes the special position of Buddhism as the faith professed by the great majority of the citizens of the State", while stating in article 20 that the state recognises Christianity, Islam, Hinduism and Animism as the religions existing in the Union on the date on which the State Constitution comes into force. Norway removed its state church in 2012, yet the Norwegian King is required to be a member of the Church of Norway. The amended Article 2 of the constitution now says simply that Norway's values are based on its Christian and humanist heritage, together with a right to freedom of religion.[30]

However, there are still countries where the constitution clearly shows that organised religion has a formal controlling influence. While there are many countries with varying religious affiliations, most provide for an established religion, yet at the same time provide for freedom of religion. For example, the Principality of Liechtenstein in Europe, provides in Article 37 of their 1921 constitution[31] that

> 1) Freedom of religion and conscience shall be guaranteed for all.
> 2) The Roman Catholic Church is the National Church and as such shall enjoy the full protection of the State; other denominations shall be entitled to practice their creeds and to hold religious services within the limits of morality and public order.

Denmark's Constitution of 1953 provides that a member of the royal family[32] must be a part of the established religion,[33] the Church of Denmark - which is Lutheran. There are however no restrictions on other members of the population.[34]

Many Muslim-majority countries recognise Islam as their state religion. There are too many of these states to examine in detail, but a number of general principles may be established. Nehaluddin Ahmad recently examined the concept of secularism in the

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[29] Members of the church pay an income-based church tax of between 1% and 2%, depending on the municipality. (http://www.vero.fi/en-US/Tax_Administration/Taxation_in_Finland/Taxation_in_Finland (26824)).
[30] http://www.lovdata.no/all/tl-18140517-000-002.html#2.
[31] http://www.llv.li/verfassung-e-01-02-09.doc.pdf.
[32] "The King shall be a member of the Evangelical Lutheran Church." (Constitution of Denmark, Section 6).
[33] "The Evangelical Lutheran Church shall be the Established Church of Denmark, and, as such, it shall be supported by the State." (Constitution of Denmark, Section 4).
[34] "The citizens shall be entitled to form congregations for the worship of God in a manner consistent with their convictions, provided that nothing at variance with good morals or public order shall be taught or done." and "No person shall for reasons of his creed or descent be deprived of access to complete enjoyment of his civic and political rights, nor shall he for such reasons evade compliance with any common civic duty." (Constitution of Denmark, Sections 67 and 70).

Muslim world and acknowledged that just as there are many perceptions of secularism in the Western world, there are many views on what that concept means to Islamic government.[35] However, as general principles, he explains that

> Islam has … laid down certain rights for non-Muslims who may be living within the boundaries of an Islamic state and these rights necessarily form part of the Islamic constitution. In Islamic terminology, such non-Muslims are called *Zimmis* (the covenanted), implying that the Islamic state has entered into a covenant with them and guaranteed their protection. The life, property and honour of a *Zimmis* is to be respected and protected in exactly the same way as that of a Muslim citizen.[36]

In particular he notes that "[t]he Islamic state should not interfere with the personal rights of non-Muslims, who have full freedom of conscience and belief and are at liberty to perform their religious rites and ceremonies in their own way. They may propagate their religion. These rights are irrevocable."

There are therefore perceptions of the modern state that broadly include both secular, and non-secular states. Of the former, it has been noted that there is not one clear constitutional structure of such a state. Rather there have been models that have evolved to meet domestic circumstances.

III FORMS OF THE 'SECULAR' STATE

In the previous chapter, Holyoake's views on a post-Enlightenment model of government that removed a privileged position for religion in matters of state was examined, noting that these broad principles are compatible with those adopted by many modern democracies over the last two centuries. These principles are adapted to local conditions, rather than uniformly aiming to fit all. The need for a role for religion, although unprivileged, in the public sphere has been judged in various jurisdictions to be in the spectrum from marginal to none, through to strongly influential. Although not privileged in most major constitutions there are wide variations.

The terms 'secularism' and '*laïcité*' are often used as synonyms in describing constitutions where religion has no official public role. However, they are not the same. The former describes where the state accommodates religious pluralism, but the latter describes the rather unique situation of France from where the term derives, where there is little tolerance for religion in the public sphere. There is no real term for the circumstance where the state's treatment of religion does not accommodate religious pluralism, yet is not as extreme in its treatment of religion as that of France. Although not compatible with the model as proposed by Holyoake, the term 'secularism' is also used in such countries as the United States, and where secularism is understood to mean the active separation of the state from religion, where it may be

[35] Nehaluddin Ahmad, 'The Modern Concept of Secularism and Islamic Jurisprudence: A Comparative Analysis', [Vol. XV, 2009] *Annual Survey of International and Comparative Law* 75.
[36] Nehaluddin Ahmad, 'The Modern Concept of Secularism and Islamic Jurisprudence: A Comparative Analysis', [Vol. XV, 2009] *Annual Survey of International and Comparative Law* 75, 98.

inferred that without such separation religion may be seen to be favoured.[37] This will be examined further and in more detail in Chapter 10 of this thesis.

Models separating religion and the state in the public sphere can be classified may ways and by many writers, depending on their perspective. Susanna Mancini in Italy sees the different secular models as representing "radically different models for managing the relationship between the state and religion and for accommodating religious diversity."[38] Michel Rosenfeld offers five[39] and Veit Bader of the Netherlands offers twelve distinct 'secularisms'.[40] Mancini uses four in her analyses,[41] a method which is quite common. What is remarkable is that there is no consideration of the constitutions of secular democracies in these models anywhere else, outside the USA and Europe, in the writings of these and similar commentators.

Almost all of the commentators write of a 'Western' perspective of secularism. Most of them use the American 'separation of church and state' perspective derived originally from the writings of Thomas Jefferson, and taken up later by the US Supreme Court,[42] as the only reasonable and contemporary lens through which to view all other methods and to judge them.[43]

More contemporary theorists have then considered how competing rights in the secular public sphere may be examined and measured against the rights of others. Contemporary thinking is leaning now in the direction as suggested by Slavica Jakelić[44]

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[37] Such was the case recently in the USA when the House of Representatives approved legislation permitting federal money to rebuild churches and synagogues damaged by Hurricane Sandy, "despite concern that such aid could violate the doctrine of separation of church and state". (For example *New York Times*, "House Approves Storm Aid for Religious Institutions", 18 February 2013 < http://www.nytimes.com/2013/02/19/nyregion/house-approves-federal-aid-for-churches-damaged-by-hurricane-sandy.html?emc=tnt&tntemail1=y&_r=0 >.)

[38] Susanna Mancini, 'Religious Symbols in the Public Space: The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence', (2009) 30 *Cardozo Law Review* 2629, 2642.

[39] Michael Rosenfeld, 'Can Constitutionalism, Secularism and Religion be reconciled in an Era of Globalization and Religious Revival? (2009) 30 *Cardozo Law Review* 2333, 2348-9. He offers a militant secularist model (France and Turkey); agnostic secularist model (USA); confessional secular model (Italy and Germany); the official religion with institutionalised tolerance for minority religions (UK, Scandinavia, Greece); and the millet based model, with collective self-government for each religious community (Israel).

[40] Veit Bader, 'Constitutionalizing Secularism, Alternative Secularisms or Liberal-Democratic Constitutionalism? A Critical Reading of Some Turkish, ECtHR and Indian Supreme Court Cases on "secularism" ' (2010) 6(3) *Utrecht Law Review* 8, 14.

[41] Susanna Mancini, 'Religious Symbols in the Public Space: The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence', (2009) 30 *Cardozo Law Review* 2629, 2642.

[42] First seen in *Reynolds v United States*, 98 US (8 Otto.) 145 (1878) where the Court considered that Jefferson's comments "may be accepted almost as an authoritative declaration of the scope and effect of the [First] Amendment" (Waite CJ), and later in *Everson v Board of Education* 330 US 1 (1947), "[i]n the words of Thomas Jefferson, the clause against establishment of religion by law was intended to erect a wall of separation between church and state." (Black J).

[43] See generally Matthew Scherer, 'Landmarks in the Critical Study of Secularism', (2011) 26(4) *Cultural Anthropology* 621, and William E. Connolly, *Why I am not a Secularist* (University of Minnesota Press, Minneapolis, 1999).

[44] Slavica Jakelić, 'Secularism: A Bibliographic Essay' (2010) 12(3) *The Hedgehog Review* 49

> Secularism has origins in the West but has long ceased to be its property. It is a global phenomenon with an equally global crisis. For theoretical and empirical purposes, therefore, secularism should be thought of in the plural rather than in the singular. Similarly, while secularism has been a source of marginalization and sometimes even a hostile negation of religions, it cannot be reduced to antireligiousness. It is also a moral orientation toward the world and in the world, often guided by a vision of a just society for all or developed as a strategy that should mitigate the challenges of religious pluralism. Secularism may indicate a worldview, an ideology, a political doctrine, a form of political governance, a type of moral philosophy, or a belief that the scientific method is sufficient to understanding the world in which we live.

The modern secular state attempts to address these competing rights, measuring up the secular ideals of the constitution and the government that draws its laws from it, against the wishes of members of the public to exercise their religion in the public sphere, without those rights being curtailed unnecessarily, and the state not being perceived as being bent to their wishes.

The standard paradigms of "separation of church and state" and "*laïcité*" are often presented as the ideal, the standard, that secularism is and that governments aim to achieve. Yet in Asia and the Indian subcontinent, there are constitutions underlying secular democracies that find local (and different) solutions to the role of the state and religion in the public sphere, and that do not find their way into classic analysis. India even today, works to find a working model that is unlike that of Europe or the USA, yet is influenced by legal commentary and discourse on the paradigms mentioned above. In 1947, shortly before Independence, Mahatma Gandhi was reported in *Harijan*[45]:

> Gandhiji expressed the opinion that the state should undoubtedly be secular. It could never promote denominational education out of public funds. Everyone living in it should be entitled to profess his religion without let or hindrance, so long as the citizen obeyed the common law of the land. There should be no interference with missionary effort, but no mission could enjoy the patronage of the state as it did during the foreign regime."

Justice Chinnappa Reddy explained the contemporary Indian position when he explained that "[o]ur tradition teaches tolerance; our philosophy preaches tolerance; our Constitution practices tolerance; let us not dilute it".[46]

For the purposes of later analysis I shall examine briefly common descriptions or groupings of those models considered to be exemplars of secularism by many who comment on this field.

IV HARD AND SOFT 'SECULARISM'

Many commentaries work from the premise that there are only two contemporary exemplars of secularism. This much discussed model - perhaps because of its dogmatic positions - may well be titled "extreme secularism" or "militant secularism" in the sense that its extremism or militancy is decidedly against religion having a role in the public sphere. However, there is a case for denying that it is a model exemplar; rather that it is not secularism at all in the manner that Holyoake envisaged.

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[45] Anil Nauriya,"Gandhi on secular law and state", *The Hindu*, Wednesday, Oct 22, 2003.
[46] *Bijoe Emmanuel v State of Kerala* (1986) 3 SCC 615.

A *'Hard' secularism*

'Hard' secularism has been variously described as 'exclusive', 'assertive', 'aggressive', 'strong', 'intolerant', 'statist', or 'malevolent' secularism. [47]

Charles Taylor has illustrated a not uncommon representation of secularism that "[t]o put it briefly, there are two important founding contexts for this kind of regime, the US and France"[48] where the development of the secular state has had but two pathways, that of these two countries. Some views have also been inclusive of Turkey, with France being similar.[49] Many commentaries work from this premise that there are only two contemporary exemplars of secularism. The adoption of secularism by many other world liberal democracies is rarely discussed.

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Holyoake considered that the term 'secularism' was not an apt description of constitutions that are critical of religion in general and of religion in the public sphere in particular. He observed that[50]

> Some societies, simply anti-theological, have taken the secular name, which leads many unobservant persons to consider the term Secularism as synonymous with atheism and general church-fighting; whereas Secularism is a new name implying a new principle and a new policy. It would be an imposter term were it merely a new name intended to disguise an old thing.

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[47] See generally Veit Bader, 'Constitutionalizing Secularism, Alternative Secularisms or Liberal-Democratic Constitutionalism? A Critical Reading of Some Turkish, ECtHR and Indian Supreme Court Cases on "secularism" ' (2010) 6(3) *Utrecht Law Review* 8, 9. However, there are differing views on which countries are included in this description. On this see also Richard Mohr and Nadirsyah Hosen, 'Da Capo: law and religion from the top down' in Richard Mohr and Nadirsyah Hosen, *Law and Religion in Public Life: The contemporary debate*, (Routledge, Oxford, 2011), 1, 8 where such countries see secularism almost as a civic religion, consistent with their revolutionary origins, including also Turkey and where 'secular forces' resist the spread of religious influences.

[48] Charles Taylor, 'The Meaning of Secularism', (2010) 12(3) *The Hedgehog Review,* 23, 26. Taylor also in 'Why we need a radical redefinition of secularism' (in Eduardo Mendieta and Jonathan Van Antwerpen (eds), *The Power of Religion in the Public Sphere* (Columbia University Press, New York, 2011, 38-39) expands on this point suggesting the U.S. model of 'secularism 'through the First Amendment was intended (in the words of Judge Joseph Story) to "exclude all rivalry among Christian sects" and that "Christianity ought to receive encouragement from the state". In the alternative Taylor points at the rise of French *laïcité* as a struggle and stand for independence against a powerful church. Other writers using only the US and France as exemplars of secularism include Sarah Nirenberg, 'The Resurgence of Secularism: Hostility towards Religion in The United States and France' (2012) 5 *Washington University Jurisprudence Review* 131.

[49] See generally Ahmet T. Kuru, *Secularism and State Policies toward Religion: The United States, France, and Turkey* (Cambridge University Press, Cambridge, 2009), Amélie Barras, 'Using Rights to Re-invent Secularism in France and Turkey', (2008) EUI RSCAS; 2008/20; Mediterranean Programme Series, European University Institute (http://cadmus.eui.eu/handle/1814/8870), Pierre Birnbaum, 'On the Secularization of the Public Square: Jews in France and in the United States' (2008-2009) 30 *Cardozo Law Review* 2431.

[50] George Jacob Holyoake, *Sixty Years of an Agitator's Life* (London : T. Fisher Unwin, 1900), 294.

The number of countries falling into this category include France and the United States, and will serve as illustrative of this category.

1 *France*

This 'hard' approach is the dominant paradigm in France, with its national policy of *Laïcité*. The French paradigm of treatment of religion has a long pedigree, although the recent controversies regarding the wearing of scarves by schoolchildren have polarised opinion in France more than any other issue on recent times. Some have seen it as a "clash of civilisations"[51] and others as "part of Europe's own identity crisis".[52]

France has made for itself a separation of church and state stricter than most other nations. This legal structure has been a fundamental distinguishing feature of all constitutions since Napoleonic times. The French Constitution makes it firmly clear that no religion may be established as the legal state religion, that religion is part of the private sector, and that no state funding may be used to fund religion (other than Haut-Rhin, Bas-Rhin, and Moselle, which were not part of France at the time of the making of the 1905 Constitution).[53]

This separation of church and state dates back to the French Revolution when control of France's social and political order was fought between the state and the Roman Catholic Church. The 1801 concordat signed between Napoleon and the Vatican re-established church control over its own internal affairs, and the restoration of the monarchy in 1814 strengthened those ties. However, the Republican victory in 1876 brought back anticlerical attacks by the state, which resulted in the 1905 constitution that formally separated church and state.[54]

2 *United States of America*

The United States, with a publicly stated position of strict separation of religion and state from the time of Thomas Jefferson as a 'wall of separation',[55] is often considered to have a more moderate position. Thomas Jefferson's wall paradigm was first taken up by the Supreme Court in *Reynolds v United States*[56] with the Court

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[51] 'Opinion divided on wearing headscarf', *The Hindu*, March 27, 2004 http://www.hindu.com/2004/03/27/stories/2004032700830500.htm; Shada Islam, 'Debating French Islam', *Outlook India*, 3 February, 2004 <http://www.outlookindia.com/article.aspx?222842.>

[52] Peter Frey, 'Continental Divide', 19 April, 2004, *Sydney Morning Herald* <http://www.smh.com.au/articles/2004/04/18/1082226632822.html>.

[53] J. Christopher Soper and Joel S. Fetzer, 'Explaining the Accommodation of Muslim Religious Practices in France, Britain, and Germany' (2003) 1 *French Politics* 39, 46.

[54] J. Christopher Soper and Joel S. Fetzer, 'Explaining the Accommodation of Muslim Religious Practices in France, Britain, and Germany' (2003) 1 *French Politics* 39, 47.

[55] The metaphor of a "wall of separation between church and state" was written by Thomas Jefferson in a letter to the Danbury Baptist Association in 1802. He discussed in that letter the First Amendment to the United States Constitution, writing "Believing with you that religion is a matter which lies solely between Man and his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church and State."

[56] 98 US 145, 164

observing "that it may be accepted almost as an authoritative declaration of the scope and effect of the [first] amendment."[57] However, over the last 60 years it has had difficulty being true to this ideal and the US Supreme Court decisions are becoming more hostile to organised religion.[58]

Black J expanded on the 'wall' metaphor by stating that "[t]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach." However, whether the wall could be breached and by how much, have been tests of the secular[59] constitution, illustrated by a number of significant constitutional cases which have reached the US Supreme Court, to be evaluated in Part II.[60]

The United States Supreme Court, through Black J, expanded upon the Court's understanding of the Jeffersonian metaphor[61]:

> Neither a State nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a State nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.

The United States Constitution's First Amendment Religion Clause contains two provisions relating to freedom of religion known as the Free Exercise and

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[57] *Reynolds v United States* (1878) 98 US 145, 164 (Waite CJ). He went on to note that "Congress was deprived of all legislative power over mere [religious] opinion, but was left free to reach [only those religious] actions which were in violation of social duties or subversive of good order."

[58] Cases such as *Sherbert v Verner*, 374 US 398 (1963) (denying unemployment compensation to someone who lost their job because it conflicted with her religion), *Wisconsin v Yoder*, 406 US 205 (1972) (state required attendance at school beyond 8th grade, but parents argued breach of religious freedom), *Oregon v Smith*, 494 US 872 (1990) (religious use of illegal drugs not permitted despite religious freedom argument), *Lemon v Kurtzman*, 403 US 602 (law must have a legitimate secular purpose, with no primary effect of advancing or inhibiting religion); Lee v Weisman, 505 US 577 (prayers led by religious authorities in public schools at graduation ceremony), *Van Orden v Perry*, (545 US 677 (2005) and *McCreary County v ACLU of Kentucky*, 545 US 844 (displays of Christian religious text in and outside legislature and courts).

[59] The United States Constitution is a secular document for several reasons. Article 6, section 3 states that federally elected and appointed officials "shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a qualification to any Office or public trust under the United States. There are two significant elements of this provision. First, this establishes *no* religious test for public office, an unusual provision in that country and outside at the time. Second, the section provides for affirmation, which meant that the framers of the constitution did not wish to have a religious oath to enable someone to take office. The second provision is the First Amendment to the Bill of Rights, ratified in 1791. (The Bill of Rights is a term used to describe the first ten amendments to the US Constitution).

[60] The first 150 years of US history did not present many opportunities for such cases, as the First Amendment to the US Constitution had not yet been applied to the states. Initially, the First Amendment applied only to Congress and the federal government. However, following the US Civil War, the adoption of the 14th Amendment (due-process clause) required that "no state shall … deprive any person of life, liberty or property without due process of law …." In *Everson* v *Board of Education* in 1947 it was established that the establishment clause is one of the "liberties" protected by the due-process clause.

[61] 330 US 1 (1947), 16.

Establishment Clauses. The Religion Clause states that: "Congress shall make no law respecting an establishment of religion or prohibiting the Free Exercise thereof", known respectively as the establishment and Free Exercise clauses.[62]

There is an ongoing battle between organised religion and advocates of the secular model for many years. In her recent book, "Freethinkers", Susan Jacoby goes so far as saying that "[d]uring the past two decades, cultural and religious conservatives have worked ceaselessly to delegitimize American secularism and relegate its heroes to a kook's corner of American history".[63] Of today, she says that "[s]ince the terrorist attacks of September 11, 2001, America's secularist tradition has been further denigrated by unremitting political propaganda equating patriotism with religious faith." [64] In Jacoby's view, the introduction of a secularist government and constitution following the American Revolution has been sorely tested over the last two centuries and continues to be so again.

The USA may nevertheless still be included in this grouping of militantly secular states. To be so, as is the case with France, is not necessarily to show an active state antagonism to religion, but rather to deny a place for religion in the public sphere. There can be a number of reasons for this, such as a fear that the state by acknowledging religion in its public policy may be in some form favouring religion or impairing religious freedom. These issues will be examined in detail in later chapters of this thesis.

However, whilst the Supreme Court endeavours to separate church and state, and follows a broad view of best leaving religion in the personal sphere, organised religion continues to bristle at being treated neutrally, to be just another organisation or institution with an opinion in the public sphere, or worse.[65] Accordingly, the US Supreme Court continues to deal with cases where religion continues to object to its limitation to the private sphere. Indeed, it has at times been annoyed at being so constantly tested, as illustrated in *Abingdon Township School District v Schempp*:[66]

> While none of the parties to either of these cases has questioned these basic conclusions of the Court [relating to the meaning and applicability of the Establishment Clause], both of which have been long established, recognized and consistently reaffirmed, others continue to question

[62] Some are of the view that the two provisions should be considered separately, looking at the establishment provision in isolation to the free exercise of religion provision. Beschle suggests that the lack of a specific establishment provision in the constitutions of many countries, whilst still having free exercise of religion provisions, suggests that they may be considered separately when being considered in the United States. Having said that, he also notes that the United States Supreme Court is also disinclined to use international jurisprudence when looking for solutions to interpretation of their own constitution): Donald L. Beschle, "Does the Establishment Clause Matter? Non-establishment Principles in the United States and Canada" (2002) 4 *University of Pennsylvania Journal of Constitutional Law* 451.

[63] Susan Jacoby, *Freethinkers: A History of American Secularism* (New Metropolitan Books, New York, 2004), 1.

[64] Susan Jacoby, *Freethinkers: A History of American Secularism* (New Metropolitan Books, New York, 2004), 50.

[65] See generally Stephen L. Carter, 'Evolutionism, Creationism, and Treating Religion As a Hobby' (1987) *Duke Law Journal* 977, Frederick Mark Gedicks, 'Public Life and Hostility to Religion' (1992) 78 *Virginia Law Review* 671, Richard S. Myers, 'The United States Supreme Court and the Privatization of Religion' (2001) 6 *Catholic Social Science Review* 223, Richard John Neuhaus, *The Naked Public Square* (Wm. B. Eerdmans Publishing Co, Grand Rapids, 1984), Chapter 5.

[66] 374 US 203 (1963), 217.

> their history, logic and efficacy. Such contentions in the light of the consistent interpretation of the cases of this Court, seem entirely untenable and of value only as academic exercises.

In the USA, the 'wall of separation' mentioned earlier by Justice Black, has been for some years slowly dismantled, through constant exemptions and inconsistency of treatment. Religion has been acknowledged more overtly in recent years and continues to be so. In *Walz v Tax Commission,*[67] the Supreme Court held the practice of granting churches exemptions from property tax constitutional. Brennan J found "secular purposes" for the church exemptions in this case, finding churches "contribute to the well-being of the community in a variety of non-religious ways,"[68] and that they "contribute to the pluralism of American society."[69]

This view was formalised in *Lemon v Kurzman*[70] the next year, where the court emphasised that to avoid clashing with the Establishment Clause a statute must have a secular purpose, it must neither advance nor inhibit religion, and must not foster an excessive government entanglement with religion. Whilst *Lemon* has not been formally repudiated by the Supreme Court, "it has not been relied upon by a majority to invalidate any practice since 1985", and "a majority of the justices sitting in 2011 have criticized it".[71] By 1997 the entanglement aspect of *Lemon* had become noticeably unworkable, as it was acknowledged by the Supreme Court in *Agostini v Felton*[72] that "[n]ot all entanglements [have] the effect of advancing or inhibiting religion. Interaction between church and state is inevitable, and we have always tolerated some level of involvement between the two."[73]

Accordingly, the outcome, whatever the reasons given, is the same as that for France: the state's interpretation of its religious freedom provisions of its constitution is that there can be no official acknowledgement by the state of religion in any public space whether it is in government support,[74] public education[75] or even symbols found on government land.[76] These contradictions will be examined in detail in later chapters in this thesis.

Some of the discourse in this area can be quite assertive against the role of religion in the public sphere in these countries. Take for example Elisabeth Zoller, a France based academic, who argues[77] that the

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[67] 397 US 664 (1970).
[68] *Walz v Tax Commission*, 397 US 664 (1970), 687.
[69] *Walz v Tax Commission*, 397 US 664 (1970), 689.
[70] Known as the 'Lemon Test': 'Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v Allen*, 392 US 236, 243 (1968); finally, the statute must not foster "an excessive government entanglement with religion." (403 US 602 (1971)).
[71] Geoffrey R. Stone et al, *The First Amendment* (4th Ed., Aspen Publishers, New York, 2012), 671.
[72] *Agostini v Felton*, 521 US 203 (1997).
[73] *Agostini v Felton*, 521 US 203, 232 (1997).
[74] *Zelman v Simmons-Harris*, 536 US 639 (2002).
[75] *Engel v Vitale* 370 US 421 (1962), and *Abington School District v Schempp* 374 US 203 (1963).
[76] *Van Orden v Perry*, 545 US 677 (2005), *McCreary County v ACLU*, 545 US 844 (2005) and Salazar v Buono 559 US 700 (2010).
[77] Elisabeth Zoller, '*Laïcité* in the United States or The Separation of Church and State in a Pluralist Society' (2006) 13 *Indiana Journal of Global Legal Studies* 561, 564.

> secular cultures of France and the United States share an explanation for this secularism: the same Enlightenment philosophy nourished their respective revolutions. France is the daughter of Jefferson, as the United States is the heir of Voltaire. The essential teaching of these philosophers on the relationship between church and state is that religion is a private affair and must remain such, and that religion cannot expect from the state anything other than perfect neutrality.

On separation of religion from the state she states that "[t]he separation between religion and politics is a fundamental criterion that distinguishes a modern democracy from an ancient one"[78] and that

> [m]odern democracy does not chase religion from civic life, but rather obligates it to be a personal affair, distinct and separate from public affairs. In this sense, modern democracy requires the separation of church and state because it must, in order to survive and achieve, drive religion out of the sphere reserved for politics in the city: that is to say, the public sphere.[79]

This particular position implies a number of things. The first is that other modern democracies are excluded from that definition if they do not drive out religion, or that in some fashion they remain backward by retaining or inviting religion into public discourse. Ancient democracies appear then to have remained in a pre-Enlightenment state, somehow still at the bidding and direction of organised religion. Also, she infers that religion is somehow toxic and must be driven out for modern democracy to survive.

What makes this history interesting is that France too declared its secular government and constitution immediately after *their* revolution, for many of the same reasons as the US did. Whilst the US did not suffer from the same internal religious problems as France, many of the first migrants to the US were escaping the religious dominance of the Church of England. As in France, the new constitution was not intending to abolish religion, but rather protect the religious rights of all by not installing one to the detriment of others, at least at the federal level in the beginning.

B *'Soft' secularism*

Charles Taylor has argued that "[s]ome kind of distancing is obviously required by the very principle of equidistance and inclusion which is the essence of secularism. But there is more than one formula that can satisfy this. Complete disentanglement of government from any religious institutions is one such, but far from the only one."[80]

This view has been sometimes characterised as 'soft' secularism, presumably because of its lack of a harsh treatment of organised religion. Other descriptors have included 'inclusive', 'passive', 'moderate', 'evolutionary', 'weak', 'tolerant', 'liberal',

[78] Elisabeth Zoller, 'Laïcité in the United States or The Separation of Church and State in a Pluralist Society' (2006) 13 *Indiana Journal of Global Legal Studies* 561, 564.
[79] Elisabeth Zoller, '*Laïcité* in the United States or The Separation of Church and State in a Pluralist Society' (2006) 13 *Indiana Journal of Global Legal Studies* 561, 564.
[80] Charles Taylor, "Modes of Secularism", in Rajeev Bhargava (ed.) *Secularism and its Critics* (Delhi: Oxford University Press, 1998), 52.

'benevolent' or 'ameliorative' secularism, *laïcité plurielle, positive, de gestion,* and *bien entendue.*[81]

In the democratic systems discussed above as 'hard secularism', the model is an absence of religion from the public sphere and in public discourse. The presence of religion as a symbol endorsed by the state or as a policy position based on its premises is seen as anathema to the model of neutrality advocated by the state.

However, these models of a strict separation of church and state are not the only ones viable for a secular state. Given the absence of an inflexible paradigm, many models have evolved in the last century or so that have met local needs.

Many countries have adapted secularism in a form that, as Mehta suggests, becomes suited to local circumstances and political realities. A number of countries have recently been contesting constitutional cases to determine the contemporary understanding of the role of religion in the public sphere. These 'soft' secular constitutional provisions are secular states in the Holyoakean sense. Although each is different in structure, a common feature is an accommodation of religion in the public sphere, and a recognition of religious diversity.

1 *Europe other than France*

The 'Confessional Secular' paradigm is common in central European regions such as Bavaria in Germany, and in Italy. These countries in particular have had significant and long historical religious influences. Accordingly in recent times, even when nominally becoming constitutionally secular, they still identify politically with the majority religion even though they do not officially favour it. The majority religion is often the legal vestige of an earlier established religion.

For instance, the crucifix is sometimes seen as a symbol of national or state identity. This has been borne out by recent decisions in constitutional courts and the European Court of Human Rights, where religious symbols in public schools have been held to be cultural icons.[82] Rosenfeld acknowledges, however, that there are significant variances within this model, depending on whether for example there is one dominant religion, such as Catholicism in Italy, or whether there is more than one in the country, such as either Protestantism or Catholicism in some regions of Germany.[83]

(a) Germany

The church-state provisions of the German Constitution as they presently stand derive from a compromise between the inability of the framers of the Constitution to agree on new proposals regarding that relationship. Article 140 of the Basic Law incorporates Articles 136, 137, 138, 139 and 141 of the Weimar Constitution. These articles of the Basic Law and the Weimar Constitution loosely collected form the "Free

[81] Veit Bader, 'Constitutionalizing Secularism, Alternative Secularisms or Liberal-Democratic Constitutionalism? A Critical Reading of Some Turkish, ECtHR and Indian Supreme Court Cases on "secularism" ' (2010) 6(3) *Utrecht Law Review* 8, 9.
[82] See in Chapter 8 of this thesis: "Religious Displays in State Schools".
[83] Michael Rosenfeld, *Law, Justice, Democracy and the Clash of Cultures: A Pluralist Account* (Cambridge University Press, Cambridge, 2011), 155.

Exercise of religion" and "no establishment of official religion" provisions, reflecting broadly those provisions of the United States First Amendment to its Constitution. The Free Exercise of religion in Germany is articulated in Article 4.[84]

The freedom of faith (*Freiheit des Glaubens*) in German law, whilst broadly relating to the principle of religious and ideological freedom, has not historically meant a universal right to express religious convictions. There has been a distinction constitutionally between the dominant Catholic, Evangelical (ie Lutheran)and Reformed churches relative to minor religious sects. The right to public expression of religion prior to 1848 was limited to the major religious groups. Following the Frankfurt and Weimar Constitutions, Article 4 has provided for the protection of all belief systems.

Discrimination based on religious belief or association is prohibited under Article 3(3), which states that persons may not be favoured or disfavoured based on "faith" or religious opinions". Article 33(3), which incorporated Article 136 of the Weimar constitution, gives equal civil and political rights on all Germans. They are also not precluded from public office and the civil service based on "religious affiliation". This Article also ensures that Germans do not have to disclose their religious convictions, participation in a religious exercise, or have to take a religious oath. Whilst Article 56 contains a reference to God in the oath of office for the federal president, the oath may be taken "without a religious affirmation".[85]

Germany's Article 137 is analogous to the common secular constitutional clause found in constitutions such as the US and Australia[86] that "there shall be no establishment of any official religion". Whilst that article recognises churches as "religious bodies", and gives them corporate privileges and rights, the Weimar Constitution provision that "[t]here shall be no state church" is specifically provided for in Article 137(1) of the Basic Law.

(b) India

Pratap Bhanu Mehta once suggested in respect of the Indian understanding of the secular state that "secularism, like cricket and democracy, is a quintessentially Indian game that just happens to have been invented elsewhere."[87] The Vice-President of India added to the argument that secularism has a long pedigree in India, when S. Radakrishnan stated that, "[t]he religious impartiality of the Indian state is not to be confused with secularism or atheism. Secularism as here defined is in accordance with the ancient religious tradition of India."[88]

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[84] It provides:

> (1) Freedom of faith, of conscience, and freedom of creed, religious or ideological (*weltanschaulich*), shall be inviolable.
> (2) The undisturbed practice of religion is guaranteed.
> (3) No one may be compelled to take up arms against his conscience. Details shall be regulated by federal law.

[85] Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, (Duke University Press, London, 1989), 445.

[86] *Australian Constitution*, s116.

[87] Pratap Bhanu Mehta, 'Hinduism and Self Rule', in Larry Diamond, Marc F. Plattner and Philip J. Costopoulos (eds), *World Religions and Democracy* (JHU Press, Baltimore, 2005), 64.

[88] Dr S. Radakrishnan, Vice-President of India, 1952-1962.

Outside Europe and North America, which have been strongly influenced by Western secular thought, India has consciously sought to create a modern secular democracy designed for its particular needs and demography. From the Independence of India in the late 1940s, there have been two broad perceptions of India. The first was that of the first Prime Minister of India, Jawaharlal Nehru. His view – 'dharma nirapeksata' – was based on a separation of religion from politics, first noted in the Karachi Resolution of the Congress on Fundamental Rights (1931) which provided "that the state shall observe neutrality in regard to all religions". The contrary position was advocated at that time by Mohandas K. Gandhi - 'sarva dharma sambhava' – which was based on an equal respect of all religions. He rejected the idea of a separation of religion and politics,[89] after he saw that communalists were using religion to divide the Indian people, and began to advocate the separation of religion from politics, saying in 1942 that 'Religion is a personal matter that should have no place in politics."[90]

Jitendra Dash expanded on this noting that

> the Gandhian concept of Secularism, *Sarva Dharma Samabhava* (equal respect of all religions) … is better suited to our multi-religious, multi-ethnic polity. This is a progressive concept: the polity not only respects all religions but also accommodates and recognises the importance of religion in the shaping of politics. There is a difference between the concepts of *Sarva Dharma Nira Pekshata* and *Sarva Dharma Samabhava*: the former sees religion as something that would ultimately fade away with modernization; the latter sees religion as something vital in the functioning of a polity.[91]

Provisions for religious freedom in India in its constitution make clear that religion is a personal concern, and not a concern of the state. The state need only interfere where the religious affairs of the individual interfere with public order, morality and health. M. Ayanthsayanam Ayyangar, a member of the Constituent Assembly said, "we are pledged to make the state a secular one. I do not, by the word 'secular' mean that we do not believe in any religion and that we have nothing to do with it in our day-to-day life. It only means that the states cannot aid one religion or give preference to one religion against another." [92]

Secularism then, in the sense of a conflict between church and state, has not been debated in India, in the way it has in Europe and the US. There has never been a church and state conflict in India as none of the religions have ever developed an autonomous corporate institution of "church" as did Christianity. Religion in India has been organisationally dispersed, and accordingly leaders of the Indian community have come from the middle classes who were broadly secular in their orientation. In the history of India, whilst the various religious traditions have founded some states they were not ruled by a theocracy. Accordingly, the state institutions, and their laws

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[89] Brenda Cossman and Ratna Kapur, 'Secularism: Bench-Marked by Hindu Right', *Economic and Political Weekly* (September 21, 1996) 2613, 2614.
[90] Cited in
[91] Jitendra Narayan Dash, "Religion and Polity: The Constitutional Scenario in India", in Surya Narayan Misra, Subas Chandra Hazary and Amareswar Mishra (eds.), *Constitution and Constitutionalism in India* (APH Publishing Corporation, New Delhi, India, 1999), 88.
[92] M.S. Prasad, "Secularism and Right to Freedom of Religion in India", in Verinder Grover (Ed.), *Foundations of Political System and Sociological Aspects: (Vol 7) The Constitution of India* (Deep & Deep, New Delhi, 1999), 643.

and policies, have not derived their policies and laws from any one political tradition.[93]

India's leaders even prior to independence, whilst not yet in political control of the future independent India, were still quite clear on what they understood secularism to mean, well before the constitution had been drafted. Jawaharlal Nehru (India's first Prime Minister) noted, "Some people think it means something opposed to religion. That obviously is not correct. What it means is that it is state which honours all faiths equally and gives them equal opportunities; that, as a state, it does not allow itself to be attached to one faith or religion, which then becomes the state religion."[94] He went on to say that secularism puts "religion on a different plane from that of normal political and social life. Any other approach in India would mean the break-up of India."[95] Later, his daughter, Prime Minister Indira Gandhi expanded on that saying "[s]ecularism is neither a religion nor indifference to religion but equal respect for all religions; not mere tolerance but positive respect – without it there is no future for the nation".[96]

In this model typified by India, rather than attempting to keep a strict separation of the state from perceptions of religious favouritism, the government acknowledges politically all major religious groupings, while discouraging partisan political acknowledgement of any one group. For example, Rajeev Bhargava emphasises India's distinctiveness to classic European notions of secularism.[97] He argues that

> Seven features of Indian secularism make it distinctive. First, its multi-value character. … Second, because it was born in a deeply multi-religious society, it is concerned as much with inter-religious domination as it is with intra-religious domination. … Third, it is committed to the idea of principled distance, poles apart from one-sided exclusion, mutual exclusion and strict neutrality or equidistance. Fourth, it admits a distinction between depublicization and depoliticization as well between different kinds of depoliticization. … Fifth, it is marked by a unique combination of active hostility to some aspects of religion (a ban on unsociability and a commitment to make religiously grounded personal laws more gender-just) with active respect for its other dimensions (religious groups are officially recognized, state-aid is available non-preferentially to educational institutions run by religious communities, no blanket exclusion of religion as mandated by western liberalism). Sixth, it is committed to a different model of moral reasoning that is highly contextual and opens up the possibility of different societies working out their own secularisms. … Seventh, it breaks out of the rigid interpretative grid that divides our social world into the western modern and

[93] Mahendra Prasad Singh, "Secularism and Communalism in India: Dialectics and Dilemmas" in Verinder Grover (Ed.), *Foundations of Political System and Sociological Aspects: (Vol 7) The Constitution of India* (Deep & Deep, New Delhi, 1999), 635. The modernising of India evolved as a reaction against the British Raj, which developed a form of secularism, based on a common focus towards nation building, and a common citizenship and law. This focus on the creation of the Indian state did not consider a state that would require a strict separation between the state and organised religion, because of the lack of an autonomous and corporate theological identity. There was also a feeling at the time of the creation of India not to create rifts between religious communities.
[94] Sarvepalli Gopal, *Jawaharlal Nehru: An Anthology* (Oxford University Press, New Delhi, 1980), 330.
[95] Sarvepalli Gopal, *Jawaharlal Nehru: An Anthology* (Oxford University Press, New Delhi, 1980), 330-331.
[96] Ipseeta Satpathy, 'Secularism: The Key to Unity and Integrity in India', in Surya Narayan Misra, Subas Chandra Hazary and Amareswar Mishra (eds.), *Constitution and Constitutionalism in India* (APH Publishing Corporation, New Delhi, India, 1999), 90-91.
[97] Rajeev Bhargava, 'The Distinctiveness of Indian Secularism', in T.N. Srinivasan (ed.) *The Future of Secularism* (Oxford University Press, New Delhi, 2006), 27.

> traditional, indigenous non-western. Indian secularism is modern but departs significantly from mainstream conceptions of western secularism.[98]

(d) Australia

Australia's constitution was influenced in its design by both the UK and the US, creating a political structure known as the 'Washminster" system with an upper house, the Senate, representing state interests, and a written constitution.[99] However, with respect to secularism, the *Australian Constitution* reflects much more of its British forebears as it gives effect to that system much more than the American. Despite Australia's Constitution having an analogue of the American Establishment Clause,[100] Australia's government has a willingness to incorporate religion into public policy and service delivery - such as welfare and social welfare. It is untrammelled by the US *Lemon* test concept of an inappropriate entangling of government with religion.

The modern secular state is often defined, as noted earlier, in terms of Thomas Jefferson's famous "wall of separation" model, and places the state and religion's public policies into two distinct camps - neither influencing the other, but each having its place. In Australia this model is acknowledged but distinguished, where it has been observed that[101]

> Whilst there may be a 'wall of separation' between Church and State [in the United States] this wall has only increased the desire of these neighbours to look over the wall into each other's yard, constantly paranoid that the other is silently shifting the wall during the night. In contrast, the less distinct division between Church and State in Australia seems to have facilitated a more peaceful, more reasonable, and ironically arguably more separate cohabitation.

Reid Mortensen examined appeals to the concept of 'the separation of church and state' in Australia in such diverse areas of public discourse as the delivery of welfare, stem cell research and the former religious office of an appointed Governor-General.[102] Mortensen describes Australia's government as being "soft secular",[103] as judges have been inactive in failing to flesh out the 'Establishment Clause' of section 116 of the *Australian Constitution*,[104] determining that it places no real restrictions on the Commonwealth and that there is an absence in the constitutions of the various Australian states to describe the relationship between them and religion.[105]

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[98] Rajeev Bhargava, 'Political Secularism', in J. Dryzek, B. Honig, and A. Phillips (eds), *The Oxford Handbook of Political Theory* (Oxford University Press, Oxford, 2006), 636.
[99] Elaine Thompson, 'The "Washminster" Mutation', in *Responsible Government in Australia* (Patrick Moray Weller & Dean Jaensch eds., Drummond, Melbourne, 1980) 32, 32
[100] *Australian Constitution*, s 116.
[101] J. Puls, 'The Wall of Separation: Section 116, The First Amendment and Constitutional Religious Guarantees' (1998) 26 *Federal Law Review* 139, 163.
[102] Reid Mortensen, 'Judicial (In)Activism in Australia's Secular Commonwealth' (2005) 8(1) *Interface* 52.
[103] Reid Mortensen, 'Judicial (In)Activism in Australia's Secular Commonwealth' (2005) 8(1) *Interface* 52, 53.
[104] "The Commonwealth shall not make any law for establishing any religion …"
[105] Reid Mortensen, 'Judicial (In)Activism in Australia's Secular Commonwealth' (2005) 8(1) *Interface* 52, 68.

He notes that the 'hard secularism' of constitutional governance of the US has been forged over the last sixty years,[106] but a lack of enthusiasm for it in Australian political debate means that the concept of separation "lacks persuasive power". He considers Australian courts are unlikely to move in a direction comparable to the US approach to separation,[107] particularly since *Agostini v Felton.*[108]

Despite appeals to keep religion out of the public sphere, Mortensen acknowledges the often overlooked contribution of religion in areas such as education, hospitals and the delivery of welfare services in Australia.[109] However, there have been few constitutional cases before the Australian High Court that would have permitted judicial activism on the role of organised religion in the Australian public sphere.[110]

V SECULARISM AND RELIGIOUS PLURALISM

Some jurisdictions such as India have implemented a secular constitution not so much as to remove discrimination against religion, but rather to foster good relations with religion by deliberately not establishing any religion in a multi-religious community. However, some consider secular that constitutions are meant to quell community disharmony, rather than aspiring in Holyoakean terms to preserve a place for religion in the public sphere.

Pluralism is generally understood to be fundamentally "an ethic of respect that values human diversity. … In contrast to *multiculturalism* … pluralism emphasises individual choices as well as collective compromise and mutual obligation as routes to peace, stability and human development."[111] This concept differs from mere tolerance in that differences are embraced.

In 2010 the question was asked in *The Hedgehog*: "Does religious pluralism need secularism?"[112] Jennifer Geddes suggested that secularism might be part of the answer.[113] Rajiv Bhargava contributes that "[i]t is time we shifted focus away from doctrines underpinning some western secular states and towards the normative practices of a wide variety of states, including the best practices of non-Western states such as India. … Of all available alternatives, secularism remains our best bet to help us deal with ever deepening religious diversity and the problems endemic to it." [114]

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[106] Reid Mortensen, 'Judicial (In)Activism in Australia's Secular Commonwealth' (2005) 8(1) *Interface* 52, 54.
[107] Reid Mortensen, 'Judicial (In)Activism in Australia's Secular Commonwealth' (2005) 8(1) *Interface* 52, 69.
[108] 521 US 203 (1997).
[109] Reid Mortensen, 'Judicial (In)Activism in Australia's Secular Commonwealth' (2005) 8(1) *Interface* 52, 54.
[110] See *Williams v The Commonwealth of Australia &* Ors [2012] HCA 23. Known as the 'School Chaplains Case', the Australian High Court did not make a determination on whether the appointing of religious workers, in the role of 'school chaplain' was prohibited by s 116 of the Constitution, as the Court held that the school chaplain engaged by third party to provide services at a school did not hold office under the Commonwealth. The s116 question was therefore not addressed.
[111] Beverly Boutilier, *Defining Pluralism*, Pluralism papers No. 1, Global Centre for Pluralism (www.pluralism.ca).
[112] *The Hedgehog Review* (Vol. 12 no. 3, 2010).
[113] *The Hedgehog Review* (Vol. 12 no. 3, 2010), Editorial.
[114] Rajeev Bhargava, 'States, Religious Diversity, and the Crisis of Secularism', (2010) 12(3) *The Hedgehog Review* 8.

On the subject of Religious pluralism, Jürgen Habermas has argued that[115]

> The constitutional freedom of religion is the appropriate political answer to the challenges of religious pluralism. In this way, the potential for conflict at the level of citizens' social interaction can be restrained, while at the cognitive level deep reaching conflicts may well continue to exist between the existentially relevant convictions of believers, believers of other denominations, and non-believers.

A *Secularism as a political solution in a pluralistic society*

Some have seen secularism as not just a constitutional concept to be appreciated in the abstract, but also as a political policy to be used as a means of state policy, particularly in India.

Some have seen the role of secularism as being an enforced buffer between religious communities in a pluralistic society. In India the term 'secularism' is often used to mean communal harmony and the absence of religious divisiveness. However, as K.N. Panikkar has argued,[116]

> … communal harmony … is not secularism, which is a condition in which religion … is a purely personal affair of the individual. It should not intervene in interpersonal relationships or institutional functioning. If secularism is to be a reality, therefore, it is not sufficient to have a secular state, there must also be a secular society. If the society is not secular the state is likely to depart from secular principles …

He concluded that "the greatest success of communalism has been to vitiate human interpersonal relations in society into a religious relationship, which affected the secular ethos adversely. Social relations thus came to be guided not by secular considerations but by religious identity." [117]

VI DOES IT MATTER WHAT FORM THE SECULAR STATE TAKES?

Since the Enlightenment, and certainly since the days of Holyoake, modern states have drafted constitutions and interpreted the laws drawn from them in terms of what they perceive to be the proper relationship of religion and the state in the public sphere. Some have declared overtly, like India, that the state is secular, and that the state deals with religion equably accordingly to constitutional provisions. Some such as France declare that religion has little public role. Other permutations, all deemed secular by the countries that have adopted them occur around the world.

This chapter has identified that the secular concepts developed by Holyoake, and identified in Chapter 2 of this thesis, can now be seen in many forms. Many generally conform to the ideals expounded by Holyoake. Others, particularly models of hard secularism, take the name of 'secular' but are difficult to see as having as inclusive a role for religion in public affairs than had been envisaged by him. However, Holyoakean thought does not prescribe just one way of doing things, but allows a

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[115] Jürgen Habermas, "Religion in the Public Sphere" (2006) 14(1) *European Journal of Philosophy* 1, 4.
[116] K.N. Panikkar, 'Short on Secularism', *Frontline* February 13-26, 2010. (www.frontline.in)
[117] K.N. Panikkar, 'Short on Secularism', *Frontline* February 13-26, 2010. (www.frontline.in)

range of 'church-state models' that aim to include both the religious and non-religious in the public sphere.

Part I of this thesis has analysed the rise and development of secularism as envisaged by George Jacob Holyoake. His ideas are compatible with modern thinking of an inclusive public environment for modern pluralistic communities. However, not all communities have been comfortable with the idea of secularism, and the courts in many countries today deliberate over how matters such as government funding, education, or even overt religious symbolism fit into a modern world where secular principles are not seen as a good fit.

Part II of this thesis, in Chapters 4 through 8, examines some of these issues through the decisions of supreme courts in interpreting novel circumstances in the light of secular constitutional principles, and evaluates some of the modern solutions and trends that seek to address the needs of modern complex societies to address the needs of contemporary religious communities within a secular constitutional environment.

PART II: CONFLICTS BETWEEN THE STATE AND RELIGIOUS FREEDOM

CHAPTER 4

CONTEMPORARY ISSUES IN RELIGIOUS FREEDOM

I INTRODUCTION

In Part I of this thesis I examined the history of the secular state, and in particular the philosophies of George Jacob Holyoake who articulated in detail a view on how religion and the state could occupy the public sphere to the benefit of both. Part II, commencing with this chapter, will look at contemporary and ongoing issues that have challenged long held positions on the role of religion in the public sphere. These issues will be examined in detail in subsequent chapters of this Part. This chapter will examine these issues in overview.

Holyoake advocated a public space where both religion and the state could meet their respective ideals without rancour. This does not mean that each may operate without limit. The secular constitutions of the various nations generally each have provisions for the protection of religious freedoms. Often these will come with some limitations, either explicit or implied, that the state may impose for the common good. This Part will consider in the next chapter limitations to religious expression by individuals in the context of enabling both religion and the state to occupy the public sphere in a manner that permits both to achieve their core objectives. In this Part this will involve an analysis of those objectives, such as the need for limitations on religion for the purposes of matters such as public safety or advancing disadvantaged religious groups, and limitations on the state to prevent state bias towards religion in its public policy positions. Part II will conclude with the efforts in some countries to direct religion beneficially to achieve outcomes that the state believes is for the common good rather than anti-religious motives.

I will examine and illustrate issues where the secular state, with its model of secular government based on concepts of religious freedom outlined in its constitutional framework, meets with expressions of dissatisfaction by elements of the community. These may be individuals who feel that their mode of chosen or inherited religious activity, expression or dress has been impaired by laws drawn by the state, or those who feel that the state has been too accommodating to such individuals and bring the state to account to provisions in their constitutions which provide for the role of religion in that state.

A *Rights in conflict*

Holyoake argued that religion and the state could co-exist in the public space, and that in a liberal democratic state neither should seek to deny the other, and should not be in conflict. Yet both the state and other players in the public space cannot co-exist unlimited without conflict.

In a liberal democracy there is the premise of popular sovereignty, and the institutionalisation of citizens' rights, generally through the mechanism of a written constitution. Hobbes, in *Leviathan*, considered that a free man is a person "in those things, which by his strength and wit he is able to do, is not hindered to doe what he

has a will to" and who freely performs his actions so that he "may refuse to do it if he will".[1] Locke, in his *Essay Concerning Human Understanding*, said that "Liberty, 'tis plain, consists in a power to do or not to do; to do or forbear doing as we will. This cannot be denied."[2] Therefore, according to Locke, men enjoy equal rights under the law of nature.[3] And no one may exercise authority in a liberal polity unless by that person's consent. Political authority in a liberal polity then rests in the consent of the governed, given freely. Governments are created by popular consent in order to protect life, liberty and property.

These Hobbesian and Lockean concepts, developed before the Enlightenment, also found prominence in Utilitarian thought. Freedom, according to John Stuart Mill's *On Liberty*, is that only self-protection permits society to restrict liberty, and hence for only the probable harm to others is adequate grounds for coercion.

> The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control … That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection … to prevent harm to others.[4]

Ronald Dworkin acknowledges this argument[5] stating that

> Of course we can define the various political virtues in such a way that conflict is indeed inevitable. Suppose we define equality in the way that certain socialists did: equality means everyone having the same wealth no matter what choices he makes about work or leisure or consumption or investment. We can define liberty in the way that John Stuart Mill and Isaiah Berlin have: someone's liberty is his freedom to do whatever he might wish to do free from the interference of others. Then we will certainly have a conflict between liberty and equality. In order to protect the equal distribution of wealth, we will have to prohibit theft, which is a denial of liberty.

However, *Dworkin* finds the conceptions of liberty and equality to be twofold. He acknowledges the classic approach of conflict, the first of which he calls the flat conception, and the latter the dynamic. Whether there is conflict he says depends on how they are conceived, suggesting that one cannot say that one's liberty is infringed when one is prevented from committing murder. Liberty cannot be said to have been infringed when no wrong has been done. Put in this way, liberty is only liberty to do whatever we wish so long as we do not infringe upon the rights of others. Not all conflicts are necessarily a conflict that causes harm to others.[6]

In a secular state as envisioned by Holyoake, therefore, a religious freedom should be recognised by the state as a public expression. In a democracy, including the majority of those countries studied in this thesis, it is acknowledged that there must be some

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[1] Thomas Hobbes, *Leviathan* (Oxford at the Clarendon Press, London, 1651), Chapter XXI.
[2] John Locke, *Essay Concerning Human Understanding* (1690), II XXI 15.
[3] See also John Locke, *Second Treatise on Civil Government* (1690), Chapter 4, §22. The natural liberty of man is to be free from any superior power on earth, and not to be under the will or legislative authority of man, but to have only the law of nature for his rule."
[4] John Stuart Mill, *On Liberty* (1863), 13; see also Robert Audi, *Religious Commitment and Secular Reason* (Cambridge University Press, Cambridge, 2000), 28.
[5] Ronald Dworkin, 'Do Values Conflict? A Hedgehog's Approach', (2001) 43 *Arizona Law Review*251, 253.
[6] Ibid, 256.

limitation to personal freedoms, in the interests of all, with those limitations being accepted as a limit on government power in the interests of all. Constitutions therefore must somehow support personal freedoms and rights, whilst acknowledging some level of limitation. This is particularly the case where religious freedoms must be recognised. However the right of others not to have their own rights infringed by those freedoms also needs to be recognised. Habermas has argued that in conflicts between rights in the public sphere, the parties themselves must reach agreement on the positive liberty to practise a religion of one's own and the negative liberty to remain spared from the religious practices of the others.[7]

A freedom of religion is a bundle of rights often at odds with each other. Isaiah Berlin said of this conflict:

> If the claims of two (or more than two) types of liberty prove incompatible in a particular case, and this is an instance of the clash of values at once absolute and incommensurable, it is better to face this intellectually uncomfortable fact than to ignore it, or automatically attribute it to some deficiency on our part which could be eliminated by an increase in skill or knowledge, or, what is worse still, suppress one of the competing values altogether by pretending it is identical with its rival – and so end by distorting both.[8]

This statement illustrates both sides of the argument. One, that a freedom is unfettered otherwise it is not a freedom at all; the other, that to limit where two freedoms clash to prevent that clash, the limitations change the nature of what is being ostensively protected. Deciding where to draw this line is the subject of a number of cases examined in the following chapters. These rights in conflict often relate to state imposed limitations to religious expression.

II LIMITS TO RELIGIOUS EXPRESSION

Those who seek to express their religion publicly must, to be consistent with Holyoake's views, be able to have this expression to be recognised by the state, or at least disregarded. However, some limitation imposed by the state in order to coexist with it is also necessary should that expression come into conflict with the state's administration. The state often will generally only consider limitations that are intended to benefit the whole community.

In most, if not all, jurisdictions religious freedom is not an absolute right. Some constitutions expressly limit the right, such as the *Constitution of India* for public order,[9] and some like the United States are open ended. Religious expression can be made by religious individuals or organisations, or it may be made by the state.

There is a long history of the state imposing its will, ostensibly for the greater good, upon citizens with the intention of limiting some liberties in order to maximise the good of all. When this rationale is not accepted there are often those who wish to test the veracity and legal basis of the state to do so through actions that often end up in supreme courts through a mixture of the novel nature of the litigation and the theretofore vaguely defined constitutional provisions.

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[7] Jürgen Habermas, "Religion in the Public Sphere" (2006) 14(1) *European Journal of Philosophy* 1, 4.
[8] Isaiah Berlin, *Four Essays on Liberty* (Oxford University Press, Oxford, 1969), 1.
[9] Article 19 in the *Constitution of India* 1949.

The issues involved, and the decisions held by various supreme courts, are examined in the next chapter, Chapter 5.

III PERCEPTIONS OF STATE BIAS TOWARDS RELIGION

Whilst many constitutional cases that reach the ultimate courts on religious rights often consider claims by individuals that the state has infringed their rights unconstitutionally, there are a number of occurrences where the state has passed legislation, or has undertaken action, that has been considered unconstitutional because of its religious purpose or content. In these cases the state has been brought to account by individuals rather than the reverse.

Holyoake's secularism principles required that religion and the state co-exist amicably in the public sphere. Accordingly, while there ought to be limitations on religion to do so, so should an equal obligation apply to the state. In this the state should not apply unreasonable or unwarranted limitations on religion, and should not itself advocate a religious position not shared by all. If the state is constitutionally secular, it should not be overtly favouring a religious community in its actions. This is not to be confused with incidental actions, such as when the state supports education through transport concessions.[10]

The understanding that the state will as best as possible remain neutral in religious matters can often be strained, with the state being sometimes perceived as supporting religion in some way, contrary to its constitutional responsibilities. This perception is not always warranted, but the popular understanding of that obligation by those who wish to keep it to account changes over time, and is not always helped by inconsistent decision making in this area by some courts. On this more will be said later, particularly in respect of the US Supreme Court over the last ten years.

Most cases of this nature are unusual because, in a secular state, support by the state for an overtly religious purpose appear on the surface to be obviously *ultra vires*. The rationale often offered is that the primary purpose for the legislation is of a 'secular', ie non-religiously motivated purpose, and that the fact that the legislation used to affect public policy is in accord with religious doctrine is merely incidental. Sometimes issues will occur when a teacher or other employee of the state acts with its authority. If the state supports such an individual in his or her actions, the matter becomes a debate in the courts on public policy.

The public objectives of religion and the state may often be entwined, often because they may be seeking the same objectives through separate paths, such as in education or social work. At times the state may appear to be working to achieve religious ideals rather than secular ones. Often overt religious behaviour by servants of the state, or by state institutions, will be considered by observers as an implied or overt endorsement of religion by the state. In a secular state this causes a clash between a public body

[10] Such as in the US case of *Everson v Board of Education*, 330 US 1 (1947), where the Supreme Court held that public subsidies towards transport of school children in the case of private religious schools supported religion. The Court held that the support applied to all school children equally and was not a direct support or endorsement of religion.

and a religious practitioner's wish to display religious community affiliation through religious clothing or static displays.

Although the state may have reason to limit the religious expressions and practices of individuals, the state too may wish to express religious ideals, ostensibly on behalf of the community as a whole. This activity by the state clearly works against Holyoakean ideals, which even for benign purposes, do not permit religion to work as an unfettered player in the public arena. The ideal is for the state to be neutral towards religion, neither supporting it nor identifying it for specific impediment.[11] Some jurisdictions have gone so far as to argue that the state should also treat all religions equally.[12]

Yet, many states, despite their official secular constitutional position, overtly legislate in favour of the majoritarian religious position for partisan political reasons, rather than taking the more difficult neutral or inclusive position suggested by Holyoake's views. Such legislation runs the obvious risk of being seen to have a bias in all things in favour of the majority, and consequently of being seen as treating all other members of the community less favourably.

Religion pervades the public sphere and it is not reasonable to suggest it can or should be excised. For the most part this presence is incidental, and understood by the public to be so. Where difficulties arise is usually when deliberative action is taken by government through its actions, its speech or its legislation and these have a religious context or content.

These cases of state religious activity in the public sphere usually fall into one of two types. Depending on one's perspective, there are actions that have a general intent and purpose such as support of education[13] where the support of religion is generally considered incidental, and those that are specific in purpose such as directed behaviours in the public arena such as school prayers,[14] flag salutes[15] or oaths,[16] which are generally argued to have a social and educative benefit.[17]

However, broad based policies of any legislature will, as is the nature of politics, have an agenda meant to reflect the majority cultural view, often informed by a religious

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[11] The Quebec government in Canada in 2008 endorsed this, noting in a report on cultural differences that "it is widely acknowledged that the secular State must be neutral in respect of all religions. To this we must add that the State must not take sides as regards religion and non-religion." Gérard Bouchard & Charles Taylor, *Building the Future: A Time for Reconciliation, Report of the Consultation Commission on Accommodation Practices Related to Cultural Differences* (Quebec: Gouvernement du Québec, 2008), 44.

[12] In the US case of *Larson v Valente*, 456 US 228, 244-45 (1982). The US Supreme Court held that a Minnesota law placed a disproportionate burden on certain religions that obtained most of their funding from member contributions.

[13] These will necessarily include religious schools.

[14] To be examined further in Chapter 8 of this thesis.

[15] To be examined further in Chapter 9 of this thesis.

[16] Such as test oaths (an oath required of an applicant or candidate for public employment or political office to determine his fitness. ("Test Oath." *Merriam-Webster.com*. Merriam-Webster, n.d. Web. 29 Sept. 2013. <http://www.merriam-webster.com/dictionary/test oath>.)). See also generally Charles Herbermann, ed. "English Post-Reformation Oaths". *Catholic Encyclopedia* (Robert Appleton Company, New York, 19131913).

[17] Michael E. Smith, 'The Special Place of Religion in the Constitution', (1983) Vol. 1983, *The Supreme Court Review* 83, 100.

perspective. Members of the majority will naturally see the policy as coincident with their own views, think it reasonable and often think nothing more of it. As societies become less homogenous, creating such broad based programs will not always be perceived by all as being socially beneficial, and at times even coercive to the majority view. Many of the cases examined have polarised society because the means taken by the state in its practices and legislation have not met the support of all, and indeed, been found by the appellants to be either personally harmful, or argued to be counter to the state's application of its powers under the national constitution.

Some of these issues will be explored in a number of areas in this thesis, such as Chapter 6, where this thesis looks at jurisprudence related to government sponsored religious symbols, Chapter 7 where issues arise when the state either supports schools through funding, or legislates for religious practices in public school systems, and in Chapter 8 where some government policies, such as mandated 'days of rest' have had a clear religious purpose.

IV RELIGIOUS SYMBOLISM

Cultures with a strong religious history, although constitutionally secular, may have a great deal of religious symbolism pervading both the private and public sectors. In the private sphere, religious individuals may wear religious symbols either because it is obligatory, or where it is not do so as a form of identification with the community from which their family derives, or even when the individual has recently joined.[18] The state may, although secular, be pressed by or feel an obligation to a largely religious community to enact legislation or take actions that have at their heart religious ideals. These states attempt to meet the Holyoake ideals of an inclusive religious polity, but are also cognisant of their constitutions that may not permit an overt support of religion. There is often a fine line between achieving public benefit through secular means, and meeting public benefit through religious dictate.

Many states in last ten years have followed a hard line on private religious symbolism exhibited by their agents, such as teachers,[19] for fear that their acquiescence of such symbols implies a support by the state for the underlying religious ideals. Some have occurred in very ordered state institutions such as prisons[20] or the military,[21] or in schools where the state fears the practices upset the reasons for the uniformity.[22]

Susanna Mancini has observed, in the wake of the 2009 case of *Lautsi v Italy*,[23] decided by the European Court of Human Rights (ECtHR), that court decisions involving religious symbols have complex implications. She notes that this case highlighted the difficulty that constitutional democracies are experiencing in

[18] See generally Laura Barnett, *Freedom of religion and religious symbols in the public sphere* (Government of Canada Publications, 13 October 2004).
[19] e.g. *Kaya v Canada (Minister of Citizenship and Immigration)*, 2004 FC 45.
[20] Malcolm David Evans, *Manual on the Wearing of Religious Symbols in Public Areas* (Council of Europe, 2009), 114.
[21] *Goldman v Weinberger*, 475 US 503 (1986).
[22] Such as in France: *Conseil d'Etat,* 27 November 1996, *Ligue islamique du Nord et autres; M. et mme Wissaadane et autres; M. et mme Jeouit.*
[23] *Lautsi and Others v. Italy* [GC] - 30814/06 Judgment 18.3.2011 [GC] (18 March 2011).

attempting to reconcile religion and constitutionalism in the secular public place. Additionally she noted that religion and the state's core identity in such societies become increasingly entangled when such decisions threaten the state's core identity, especially in a modern environment of globalisation and large scale migration. Solutions for such come in the form of calls for social cohesion and reinforcement of a collective social identity, usually behind familiar religious symbols. In the European context, such cases call into question the role European courts play in reconciling disputes between religious majorities and minorities in constituent states.[24]

Mancini has also suggested that the claims of even-handedness in these issues are superficial:

> In both conflicts over majority as well as over minority symbols, courts and legislators tend to secularize the meaning of religious symbols and interpret them according to the sensitivities, prejudices, and claims of the majority. On the one hand, the religious significance of majority (Christian) symbols is watered down and interpreted in "cultural" terms, not as the symbols of a given religion, but rather as indicia of the historical and cultural dimensions of national identity. On the other hand, minority-and particularly Islamic-symbols are interpreted as expressions of cultural and political values and practices which are at odds with liberal and democratic ones. The wearing of traditional female Islamic clothing, for example, is often prohibited or limited because it supposedly clashes with gender equality. The practical result of this attitude is that crucifixes may be displayed in the public schools because secularized Christianity represents a structural element of the western constitutional identity, while the wearing of Islamic symbols is either banned or restricted because it represents values and practices that are cast as illiberal and undemocratic.[25]

A *Religious dress*

On many occasions the religious obligation felt by many to wear a conspicuous item of clothing as a display of religious identity in the public arena has given rise to litigation. These items have commonly been headdress such as skullcaps or scarves, pendants or even weapons.[26] These cases are not limited to one particular religious persuasion. A Jewish Air Force Officer for example, was the subject of the American case of *Goldman v Weinberger*,[27] regarding military dress codes, and a Sikh teacher wearing a ceremonial knife in Canada in *Peel Board of Education v Ontario Human Rights Commission*.[28]

Islamic headdress, however, is the source of the majority of these cases. Cases of objection to Islamic headdress in public places have occurred in Canada, such as the teacher[29] in *Kaya v Canada (Minister of Citizenship and Immigration*,[30] and cases in

[24] Susanna Mancini, 'The Crucifix Rage: Supranational Constitutionalism Bumps Against the Counter-Majoritarian Difficulty', (2010) 6 *European Constitutional Law Review* 6, 7.
[25] Susanna Mancini, 'The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence', (2008-09) 30 *Cardozo Law Review* 2629, 2631.)
[26] Vinay Lal, 'Sikh Kirpans in California Schools: The Social Construction of Symbols, Legal Pluralism, and the Politics of Diversity' (1996) 22(1) *Amerasia Journal* 57.
[27] *Goldman v Weinberger*, 475 US 503 (1986). This case is assessed in more detail in Chapter 6.
[28] *Peel Board of Education v Ontario Human Rights Commission*, Court File #1170/89 (Supreme Court of Ontario - Divisional Court.
[29] to be discussed in detail later in Chapter 7
[30] 2004 FC 45.

France,[31] Switzerland,[32] Germany,[33] and Turkey[34] and, recently, in the United Kingdom regarding how people with their face completely covered may be witnesses in court.[35] Many of these cases have been adjudicated in extra-national judiciaries such as *Şahin v Turkey*,[36] which was decided in the European Court of Human Rights.

Related cases have involved the display of religious symbols by the state. Cases such as those mentioned above have involved a secular ideal to which religious individuals have been expected to conform. The reverse may often happen, even in secular states, such as Italy[37] and the USA.[38] Although the dominant religion in those states may not have an official or established constitutional role, politically it can wield a great deal of influence.[39] This often manifests as religious symbolism or educational policies which are overtly religious, such as crucifixes in religious schools or public school curricula with religious content outside of classes set aside for religious instruction.

As well as state imposed religious symbolism, there have also been examples of public legislation passed to impose religiously based ideals, such as that to enforce a religious day of rest, as in the United States and Canada.[40] Often this legislation is couched in secular terms, such as the need for a uniform 'day of rest', where none has been popularly requested or advocated, but which happens to coincide with religious doctrine and lobbying. These cases will be reviewed in Chapter 8, together with other cases illustrating efforts by the state to change religious freedom and practices through its own imprimatur, often being seen to be both unconstitutional and unhelpful to the religion being advocated.

V EFFORTS TO MOULD A PUBLIC CULTURE – CLASHES WITH RELIGIOUS FREEDOM

Some governments have subtly sought to create and shape the culture of their nations through their treatment of religion. Some methods have been benign and have sought to build community harmony and solidarity, as the government through key

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[31] *Conseil d'Etat,* 27 November 1996, *Ligue islamique du Nord et autres; M. et mme Wissaadane et autres; M. et mme Jeouit.*
[32] *Dahlab v Switzerland*, February 15, 2001 – Application No. 42393/98
[33] *BVerfGE 93, 1 1 BvR 1087/91"Kruzifix-Urteil".*
[34] *Şahin v Turkey* ECHR no. 44774/98.
[35] *The Queen v D(R)* [2013] Blackfriars Crown Court (H.H. Judge Peter Murphy) (September 18, 2013). Expressing a "pressing need for a court to provide a clear statement of law for trial judges who have to deal with cases in which a woman wearing the niqaab attends Court as a defendant", the judge explained: "I accept that there are different considerations in these instances. For example, the public has a strong interest in encouraging women who may be the victims of crime from coming forward, without the fear that the court process may compromise their religious beliefs and practices. On the other hand, the rights of the defendant in any resulting criminal proceedings must also be protected. So there is a potential for a challenging conflict of competing public interests. A defendant may, of course, be a witness; but this does not define her role in the proceedings. As a defendant, she plays the central role throughout proceedings, and unlike a witness, she is brought before the court under compulsion and does not appear as a matter of choice."
< http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/The%20Queen%20-v-%20D%20(R).pdf >
[36] *Şahin v Turkey* ECHR no. 44774/98.
[37] TAR, Mar.17, 2005, n. 1110, para 16.1.
[38] *Salazar v Buono*, 130 S. Ct 1803 (2010)
[39] Geoffrey C. Layman, 'Religion and Political Behavior in the United States: The Impact of Beliefs, Affiliations, and Commitment from 1980 to 1994', 61(2) 1997 *The Public Opinion Quarterly* 288.
[40] This type of legislation has often been labelled 'blue laws'.

institutions such as schools and the courts and other methods of communication and information dissemination determines what is consistent and contrary to the public ethos.

Some methods may be overt, such as those in the *Constitution of India* which seek to smooth over the errors and conflicts of the past with the banning of untouchability and a common civil code.[41] Some are still seeking a voice, such as the United States Supreme Court, analysing government speech and actions in relation to old issues, such as the Theory of Evolution or new, such as whether to share in holiday celebrations, and which holidays, which over time may reflect a differently constituted populace from that which first drafted the Constitution.[42]

These issues will be examined in depth in Chapter 8 of this thesis.

VI RELIGIOUS IDENTITY AND SECULARISM

This thesis in later chapters will explore the interpretation of national secular constitutions when coming across issues of religious identity. These cases may involve religious symbols worn by individuals or displayed on public lands. The state will do so whether from political expedience or to foster a sense of community. Individuals often do so either out of a sense of religious obligation, or to show that religion is a strong part of their identity.

These symbols often create two types of conflict. The first can arise with individuals when measured against other constitutional rights where the state may consider that limits for reasons such as public safety or harmony may be required. This is particularly so in France since 2004.[43] The second source of conflict arises when religion is used as a public identity, demonstrated through displays by the state (or endorsed by the state) of crucifixes or other overt symbols in public areas or schools.[44] These issues and their resolution will be addressed later in this Part, particularly in Chapter 6 of this thesis.

In many states the courts struggle with religious identity. This is not a philosophical issue as the determination of religious identity of an individual or organisation is often necessary in order to avoid inadvertent establishment, to permit statutory

[41] Article 15 of the Indian Constitution was enacted in 1950 and prohibits any discrimination based on caste. Article 17 enacted at the same time declared any practice of untouchability as illegal. Article 16 forbids discrimination with regard to employment, but permits preferable treatment for the 'backward classes'.

[42] See generally Gene Shreve, 'Religion, Science and the Secular State: Creationism in American Public Schools' (2010) 58 *The American Journal of Comparative Law* 51.

[43] Since the introduction of legislation banning the wearing in public spaces of overt religious symbols. (*Loi n° 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics*" ("Law #2004-228 of March 15, 2004 concerning, as an application of the principle of the separation of church and state, the wearing of symbols or garb which show religious affiliation in public primary and secondary schools").

[44] Susanna Mancini, 'Religious Symbols in the Public Space: The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence', (2009) 30 *Cardozo Law Review* 2629, 2642.

accommodations such as tax exemptions,[45] and for conscientious objection to military service.[46] In India religious identity is important in applying personal laws for various communities relating to marriage and transfer of property, for applying positive discriminatory laws to address inequalities in employment and other areas for minority religious groups and for the administration of certain religious properties.[47]

Where some religious identities are seen to be preferred by the state, there can be communal or civil difficulties. In the USA for example an establishment or favour attached to one religious persuasion can lead to "turmoil, civil strife, and persecutions" as Black J argued in *Everson v Board of Education*[48] when describing why the religion clauses of their constitution were drafted.[49] Those who advocate for a greater place for religion in the public sphere argue that the fears of communalism attached to a form of religious establishment (in a secular state) are unwarranted in a modern context, and that they do not occur in modern states with established religions such as England or Scotland.[50] Yet, even England or Scotland have communities that request accommodation for their particular practices in schools and employment, a request for some space in the public sphere.[51]

Just the same, some inequality in setting up a state position of neutrality is still created. As Robert Audi has noted: [52]

> Any governmental religious preference … creates some tendency for greater power to accrue to the preferred religion. … [Even if this does not directly restrict anyone's liberty], concentration of power in a religious group as such easily impairs democracy, in which citizens should have equal opportunities to exercise political power on a fair basis. … Moreover, where a state establishes or prefers a given religion, we may anticipate (though it is perhaps not inevitable) that certain laws will significantly reflect the world view associated with that religion.

More pessimistically, it has been argued that 'if neutrality can never translate to equality, then the public square as a space equally open and accessible to all citizens is also a theoretical (as well as practical) impossibility'.[53]

If religious identity was not important in the public sphere, and one identity preferred over another, then its insistent presence would in all likelihood, not be so strident. These cases in many countries cover a wide range of issues. Often it is necessary in many jurisdictions to identify oneself or one's organisation as religious in order to gain taxation concessions. Identifying as a member of certain caste in India for

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[45] See *Walz v Tax Commission of the City of New York* (1970) 397 US 664 (1970), where the US Supreme Court held that taxation benefits derived from donations to religious organisations did not violate the Establishment Clause of the First Amendment to the US Constitution.
[46] See for example *United States v Seeger*, 380 US 163 (1965).
[47] Marc Galanter, 'Hinduism, Secularism, and the Indian Judiciary', (1971) 21(4) *Philosophy East & West* 466, 468.
[48] *Everson v Board of Education*, 330 US 1 (1947), 8-9.
[49] A similar view more contemporaneous with the drafting of the US Constitution occurs in Madison's *Memorial and Remonstrance*, §11.
[50] Anthony Ellis, 'What is Special about Religion?' (2006) 25(2) *Law and Philosophy* 219, 223.
[51] See generally T. Modood, 'Anti-Essentialism, Multiculturalism and the Recognition' of Religious Groups', (1998) 6(4) Journal of Political Philosophy 378.
[52] Robert Audi, *Religion in the Public Square* (Rowman & Littlefield, Lanham, 1996), 6.
[53] Meira L. Levinson, 'Liberalism versus Democracy? Schooling Private Citizens in the Public Square' (1997) 27 *British Journal of Political Science* 333, 343 note 27.

example gains positive benefits in employment, if one belongs to a Scheduled Caste or Tribe.[54] The loss of that benefit through religious conversion brings a range of cases, as the individual no longer meets the criterion for the benefit.[55] In the United States religious identity brought a range of cases seeking what is an essential feature of religion that would permit exemption from military service.[56]

As a result of globalism and large-scale migration, a number of issues have arisen in recent years where the nature of the relationship between the state and religion has changed markedly. Holyoake allowed for a greater role for religion in the public sphere and many secular states are addressing the issues that arise when this happens, often creating novel issues that have not previously been dealt with. Utilitarian principles are being increasingly applied by the state, determining how freely individuals or communities may express their religious views publicly by considering the possible harm to the rest of society. The state similarly is being curtailed in its expression of majoritarian religious views or its support through legislation of religious practices.

Steven Smith sees the changing paradigm in these terms:

> The principal historical justification for our constitutional commitment to religious freedom was a religious rationale. The justification relied upon religious premises and worked within a religious world view. Moreover, quite apart from its historical significance, the religious justification is also the most satisfying, and perhaps the only adequate justification for a special constitutional commitment to religious liberty. Today, however, religious freedom, at least as it has come to be understood, forbids governmental reliance upon religious justifications as a basis for public policies or decisions.[57]

Smith does not negate a place for religion in the public sphere, nor suggest that its views are now irrelevant. However, he points out that religion cannot now depend, as it has in the past, on having a prima facie right to accommodation or having the ear of government in the formulation of public policy. Often, it must make its case anew, and these overtures have been the content of a number of cases considered in supreme courts in a number of countries.

In conclusion, this chapter has sought to examine broadly and introduce in overview the issues that challenge the modern secular state, and the responses by the supreme courts that often change their societies - if only to re-examine how they see their response to religious pluralism in this new century. Contemporary issues testing the modern secular state include the need to limit religious expression in the public sphere, the perception by the citizens of some states that legislation is being passed that

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[54] A policy known as 'Reservation', authorised under Article 16 of the *Indian Constitution*: 'Equality of opportunity in matters of public employment'. See generally Hemlata Rao, *Scheduled Castes and Tribes, Socio-economic Upliftment Programmes* (APH Publishing, New Delhi, 1994).
[55] Marc Galanter and Jayanth Krishnan, 'Personal Law Systems and Religious Conflict: A Comparison of India and Israel' in Gerald James Larson, *Religion and Personal Law in Secular India: A Call to Judgment* (Indiana University Press, Bloomington, 2001), 277.
[56] Particularly in *Gillette v United States*, 401 US 437 (1971). See also *United States v Schwimmer* 279 US 644 (1929), *United States v Macintosh*, 283 US 605 (1931), *Hamilton v Regents of the University of California*, 293 US 245 (1934), *Girouard v United States*, 380 US 163 (1965), *United States v Seeger*, 380 US 163 (1965) and *Welsh v United States*, 398 US 333 (1970).
[57] Steven D. Smith, 'The Rise and Fall of Religious Freedom in Constitutional Discourse' (1991) 140(1) *University of Pennsylvania Law Review* 149, 149.

favours religion due to political influence and, with more increasingly pluralistic societies, the state response to those who which to make overt by wearing symbols their cultural and community identity. Holyoake advocated a place for religion in the secular state. However, there are some who feel that their religious identity is being lost in the plurality and the neutral public sphere.

The next chapter, Chapter 5, is the first to look at these issues in depth. It will consider the claimed right for religious freedom, to believe and to practise, and the limits that are applied by various jurisdictions to that freedom and why. This is a complex area of jurisprudence for this thesis because, following Holyoake I advocate a place for religion in the public sphere. To limit its presence to any significant extent would be no freedom at all.

CHAPTER 5

SECULARISM AND THE LIMITS TO RELIGIOUS EXPRESSION

I LIMITS ON EXPRESS FREEDOMS

Holyoake did not seek to limit religion in the public sphere. He saw the concept of limitation as having negative connotations.[1] He did, however, acknowledge that religion should have a place in the public sphere. Indeed he encouraged free exchange of views when he stated that "where debate is forbidden the charlatan is king."[2]

It appears at first sight that limiting any basic claimed freedom is counter-intuitive. A freedom is generally understood as an unfettered ability to do or say something. Isaiah Berlin explained that freedom can be both positive and negative. Positive liberty or freedom "is involved in the answer to the question, 'What, or who, is the source of control or interference that can determine someone to do, or be, this rather than that?'"[3] He argued further, "liberty in the negative sense involves an answer to the question: 'What is the area within which the subject — a person or group of persons — is or should be left to do or be what he is able to do or be, without interference by other persons'."[4]

Hence the general understanding of liberty is in Berlin's positive sense. However, limitation of a freedom is in the context of Berlin's Negative Liberty, considering the answer to who can determine how and when you act. In the context of constitutional law, that limitation is in the hands of the state. One may operate freely, limited only by yourself, unless the state determines you may not. Such limitations upon the state should however be in the public interest.

The Utilitarian views of Bentham and Mill led to the concept of maximising utility, usually through the maximising of happiness and the reduction of suffering. The greatest happiness is applying these principles to society as a whole. Permitting religion a role in the public sphere meets this ideal because religion, like other views, adds to the pool of views contributing to public policy. Holyoake said on that:

> Free expression involves consideration for others, on principle. Democracy without personal deference becomes a nuisance; so free speech without courtesy is repulsive, as free publicity would be, if not mainly limited to reasoned truth. Otherwise every blatant impulse would have the same right of utterance as verified ideas. Even truth can only claim priority of utterance, when its utility is manifest. As the number and length of hairs on a man's head is less important to know, than the number and quality of the ideas in his brain.[5]

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[1] Joseph McCabe, *Life and Letters of George Jacob Holyoake, Vol. 1* (London, Watts & Co., 1908), 208.
[2] George Jacob Holyoake, *The Jubilee History of the Leeds Industrial Co-op Society* (Leeds, Central Co-operative Offices, 1897), 183.
[3] Isaiah Berlin, 'Two Concepts of Liberty', in Isaiah Berlin, Four Essays on Liberty, (Oxford University Press, Oxford, 1969), 121-2.
[4] Isaiah Berlin, 'Two Concepts of Liberty', in Isaiah Berlin, *Four Essays on Liberty*, (Oxford University Press, Oxford, 1969), 121-2.
[5] George Jacob Holyoake, *English Secularism: A Confession of Belief* (The Open Court Publishing Company, Chicago, 1896), 15.

There is clearly a utility to society in free speech, which includes not only the utterances and expressions of individuals, but also the views of organisations and organised religion. Without considering others though, as Holyoake pointed out, democracy is the less for it. In order to do so in a liberal democracy, free expression which would include religious activity and views in the public sphere, requires some consideration or limitation in order to maximise the utility of everyone's contributions - including that of religion.

Often it is not clear to the casual observer where the limits to religious expression and practice may be found or applied. Nor is it often clear how the need for these limits, if at all, is perceived by the average citizen or the state. For example, in January and February 2013 a dispute arose in the Australian Capital Territory (ACT) Legislative Assembly between Government and Opposition benches when the Speaker of the ACT Assembly insisted that all members of the Assembly attend a religious service to precede the first day of the sitting of the Assembly for the year. The Territory Government tabled the motion to ban the Assembly from being affiliated with religious services in order to put an end to the controversy caused by the Speaker's actions.[6]

The clear concern of the ACT Government was any link between religion and the Assembly in the public sphere. It was not explained what detriment such a link would cause, or whether there was any formal policy of the Territory Government on such matters. What is curious about the event was the lack of any authority by the ACT Government to support the assertion that any link would actually be drawn with the Government, whether something similar had happened before to justify such a response, or indeed what harm could come of it. Yet, a number of secular states in recent years have interpreted their religious freedom provisions to require intervention by the state in a similar fashion, such as France and Germany.[7]

This chapter will examine many such incidents where the state has indicated some sort of overt or incidental acknowledgement of religion and has found a limitation of religious freedoms to be in the best interests of the state. Often though, as with the ACT Assembly, there is little evidence of the harm to the state by religion in the public sphere that the actions purport to address. If there is some publicly proven utility to limiting religion by the state, such as public safety, then such activity meets the principles advocated by the Utilitarians and Holyoake. This must apply similarly to the state. What harm there is in religious contributions to the public sphere must be weighed up against the harm to society in allowing it unfettered.

A *The Harm Principle*

John Stuart Mill first considered in his treatise *On Liberty* that it was necessary at times to limit the rights of individuals with respect to the state and to each other, in

[6] Lisa Mosley, 'Assembly church services banned', *ABC News*, 14 February 2013 < http://www.canberratimes.com.au/act-news/assembly-church-services-to-get-axe-20130213-2edne.html>.

[7] These would include the Islamic headscarf cases in France and Germany, where the governments concerned have limited their use without proof of perception of offence to secular values.

what he termed the 'harm principle'.[8] This principle considered that the rights and freedoms of an individual or group may freely extend until they infringe the rights of others. This has been the basis for modern rights discourse in the Western world.

Mill discussed the question of religious freedom in his essay *On Liberty*, more than a century ago discussing the liberty of individuals. Yet, in respect of religious freedoms, in surprisingly contemporary language, he stated that

> minorities, seeing that they had no chance of becoming majorities, were under the necessity of pleading to those whom they could not convert, for permission to differ. It is accordingly on this battle-field, almost solely, that the rights of the individual against society have been asserted on broad grounds of principle, and the claim of society to exercise authority over dissentients openly controverted. The great writers to whom the world owes what religious liberty it possesses, have mostly asserted freedom of conscience as an indefeasible right, and denied absolutely that a human being is accountable to others for his religious belief. Yet so natural to mankind is intolerance in whatever they really care about, that religious freedom has hardly anywhere been practically realized, except where religious indifference, which dislikes to have its peace disturbed by theological quarrels, has added its weight to the scale. In the minds of almost all religious persons, even in the most tolerant countries, the duty of toleration is admitted with tacit reserves.[9]

Here then is where secular government intersects with religious freedom. In the same essay he noted that, "[t]he only purpose for which power can rightfully be exercised over any member of a civilised community against his will is to prevent harm to others."[10] His argument was based on what government is well placed to do, and what limits should be applied to it and its powers. In this context, harm is not merely the impediment to the individual's ability to pursue the good unmolested, but harm is also actions that are injurious to others.[11]

So, should the state interfere in religious affairs, to infringe on what religious people feel they wish, or often feel obligated, to do? As a principle, Mill's thoughts provide only a guide, not an obligation, upon government. That guide also does not extend to *when* it is best for the state to intervene.[12] The only guide for the state is that society should only interfere with a harmful action, if doing so is in the general interest.

In November 1933, Mahatma Gandhi argued that there were many situations in which it was necessary for the state to interfere with religion.[13] On when these limitations may be applied, Mill in *On Liberty* says that only self-protection permits society to

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[8] As noted in Chapter 2

[9] John Stuart Mill, *On Liberty* (Longmans, Green, and Company, London, 1865), Chapter 1.

[10] Ibid.

[11] 'Encroachment on their rights; infliction on them of any loss or damage not justified by his own rights; falsehood or duplicity in dealing with them; unfair or ungenerous use of advantages over them; even selfish abstinence from defending them against injury—these are fit objects of moral reprobation, and, in grave cases, of moral retribution and punishment. And not only these acts, but the dispositions which lead to them, are properly immoral, and fit subjects of disapprobation which may rise to abhorrence' (John Stuart Mill, *On Liberty* (Longmans, Green, and Company, London, 1865), Chapter 4, 46.)

[12] "Mill does certainly not pretend that the [harm] principle is a sufficient condition for legitimate use of coercion against individuals; it specifies only a necessary condition .... It tells us when we may restrict liberty, not when we ought to." Jorge Menezes Oliveira, "Harm and Offence in Mill's Conception of Liberty," <http://www.trinitinture.com/documents/oliveira.pdf>, 3

[13] Anil Nauriya, "Gandhi on secular law and state", *The Hindu*, Wednesday, Oct 22, 2003.

restrict liberty, and hence for only the probable harm to others is adequate grounds for coercion.[14] This has been acknowledged judicially, in *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth*,[15] where Australian Chief Justice Latham discussed Mill and the state's right to limit liberty in certain circumstances[16] in relation to the question whether the state had the power to dissolve the Jehovah's Witnesses. He said:

> John Stuart Mill in his *Essay on Liberty* critically examines the idea of liberty, and his discussion of the subject is widely accepted as a weighty exposition of principle. The author had to make the distinction which is often made in words between liberty and licence, but which it is sometimes very difficult to apply in practice. He recognized that liberty did not mean the licence of individuals to do just what they pleased, because such liberty would mean the absence of law and of order, and ultimately the destruction of liberty. … I think it must be conceded that the protection of any form of liberty as a social right within a society necessarily involves the continued existence of that society as a society. Otherwise the protection of liberty would be meaningless and ineffective. It is consistent with the maintenance of religious liberty for the State to restrain actions and courses of conduct which are inconsistent with the maintenance of civil government or prejudicial to the continued existence of the community.

Jurisprudence in jurisdictions such as India and the USA has attempted to determine how, if at all, there can be a limit to religious freedoms where such limits have political repercussions. The state has great difficulty in implementing programs of general application such as public safety, education and health whilst at the same time attempting to respect the religious rights permitted in their constitutions. The state will often limit rights in general, and religious rights in particular, if they conflict with the rights of others. One such conflict is when religious activity in the public sphere impacts upon the state's administration of public order or public safety.

There are three general reasons why the state may seek to limit religious freedoms. The first is strict control of state institutions such as prisons, the military, and courts. Here such limitations are deemed necessary in order not to impair the administration of state functions. The second is more incidental, where the offered reason for interference is a general state policy, usually for the general benefit of the population, such as health, safety and civil order. The third limitation occurs when the overt manifestation of religious beliefs is considered to be identifying with the state, which would cause public policy problems of claims of favouritism, sponsorship or unbalanced treatment of one religious persuasion over another. The first two of these are recognised under Article 18(3) of the *International Covenant on Civil and Political*

[14] John Stuart Mill, *On Liberty* (Longmans, Green, and Company, London, 1865), Chapter 1.
[15] *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116.
[16] This case was brought by the Jehovah's Witnesses, who applied to the Australian High Court for an injunction to restrain the Australian government from acting on their property under *National Security (Subversive Organisations) Regulations* 1940. Although the actions of the government were to act (during the Second World War) upon an organisation deemed subversive, the Jehovah's Witnesses argued that the regulations contravened the express constitutional protections for freedom from religious discrimination contained in section 116 (which provide for religious freedom) of the *Australian Constitution*.

Rights[17] as permissible grounds of limitation.[18] The last is the most controversial and often inexplicable.

It is not sufficient for an individual to act contrary to general laws based purely on religious objections. Where such objections are raised in opposition to law, the state must consider whether such limitation of religious activity is warranted. In the United States, Frankfurter J in a statement in the first flag salute case, *Minersville School District v Gobitis*[19] observed that

> Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion of restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizens from the discharge of political responsibilities.[20]

Religious people must therefore still recognise the laws of the state. Scalia J, expanding on the opinion at the head of this chapter in *Oregon v Smith*[21] noted that

> The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action of a religious objector's spiritual development.'[22]

However, although personal freedoms may be limited, so may the reach of the state. Richard Fallon observed that constitutional rights are intended to limit the power of government. Government should "provide for the common defense, care for the needy, promote a thriving economy, and protect the environment."[23] In doing so, however, rights become subordinate to these ideals in the striving to maximise utility.

II LIMITS ON RELIGIOUS FREEDOMS FOR THE PURPOSES OF PUBLIC ORDER

When may the state interfere with society for the public good? Louis Henkin[24] observed that

> Governments, and students of government, frequently confront "private rights" with the "public good," implying tension between them that requires choice or accommodation. That implication might well be modified by a footnote that:
> -the promotion, protection, and enjoyment of private rights are also a public good;

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[17] *International Covenant on Civil and Political Rights*, G.A. Res. 2200A. "Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."

[18] Peter G. Danchin, 'Suspect symbols: Value Pluralism as a Theory of Religious Freedom in International Law', (2008) 33(1) *Yale Journal of International Law* 1, 5.

[19] 310 US 586, 594-95 (1940), overruled by *West Virginia Board of Education v Barnette*, 319 US 624 (1943).

[20] *Employment Division, Department of Human Resources of Oregon v Smith* 494 US 872, 879 (1990) (quoting *Minersville School District v Gobitis*, 310 US 586, 594-95 (1940)).

[21] *Employment Division, Department of Human Resources of Oregon v Smith* 494 US 872.

[22] *Employment Division, Department of Human Resources of Oregon v Smith* 494 US. 872, 879 (1990) (quoting *Lyng v Northwest Indian Cemetery Protective Association*, 485 US 439, 451 (1988)).

[23] Richard H. Fallon, Jr., 'Individual Rights and the Powers of Government', (1992-93) 27(2) *Georgia Law Review* 343, 343.

[24] Louis Henkin, 'Privacy and Autonomy', (1974) 74(8) Colombia Law Review 1410.

> - often the public good is an accommodation or choice between private rights, as when a society decides whether someone has the right to publish about me what I assert a right to suppress;
> -the public good may be seen as the sum of private goods to which the individual has a right; for example, some have asserted the right to live in a secure, healthful, attractive environment, or in a world at peace.
>
> That the tension is often, perhaps always, essentially between two or more private rights, or between two or more public goods, helps explain the accommodations and the choices which good societies make, and helps render difficult resolutions acceptable.

In addressing this tension, how are these competing 'rights' to be addressed when limiting them for the public good for the purposes of public order? How is public order defined, and is the problem addressed pre-emptively or after the fact? Some of the issues discussed below are of both forms, with the state for example addressing problems in India relating to aggressive proselytism after communal disturbances have arisen,[25] or in the United States the state attempting to remove symbols of religion from the public space before perceived issues of state support of religion (and hence accusations of establishment or undue religious influence upon the state) arise.[26]

Holyoake stated that "[s]ecularism purposes to regulate human affairs by considerations purely human."[27] Secularism therefore plays a part in constitutionalism by regulating the state and its players using means and reasoning not influenced directly by reference to the supernatural. Religious members of the community are regulated, as are all others, by secular considerations. Utilitarian thought, and Holyoake's views on secularism, would suggest that religious freedoms should enable a large liberty of individual religious expression, but be regulated so as to meet the Utilitarian ideal of maximising happiness in society. Mill's views on the state interfering only if in the general interest to prevent harm become difficult to apply. Those who are religious will naturally believe that their actions are beneficial to society. So where will the public interest lie?

A difficulty in this area is that many religious practitioners see religion in all facets of their daily lives, and hence their activity in the public sphere is a natural extension of their private practice.[28] Rex Ahdar and Ian Leigh have observed that in this regard, "Given that religious practice can take so many forms and that, indeed, all of life can be invested with a sacred quality (and be seen to derive from a religious motivation), some limitation may seem obvious."[29] Yet others would argue that limitation is inimical to the concept of a freedom to practise religion in the public space because religion has priority over the state, and that "the essence of religious liberty, understood as a natural law right … is not a right that human authorities confer on those whom they rule - a dispensation."[30] Eugene Volokh notes the flaw in this

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[25] *Rev. Stainislaus v State of Madhya Pradesh & Ors*, 1977 AIR 908, 1977 SCR (2) 611.
[26] *Chaplinsky v New Hampshire*, 319 US 624 (1943).
[27] George Jacob Holyoake, *The Principles of Secularism Illustrated*, London Book Store (1871), 28.
[28] Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (2nd Ed. Oxford University Press, Oxford, 2013), 344.
[29] Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* ((2nd Ed. Oxford University Press, Oxford, 2013), 347.
[30] Michael Stokes Paulsen, 'The Priority of God: A Theory of Religious Liberty' (2013) 39 *Pepperdine Law Review* 1159, 1160. He observes further that "Religious freedom only makes entire sense as a social and constitutional arrangement on the supposition that God exists (or very likely exists); that God makes claims on the loyalty and conduct of human beings; and that such claims,

argument by observing that "If most citizens doubt that God commands us to do anything, then they can't well act based on the supposed priority of God's commands … religious liberty makes no sense in a mostly irreligious country."[31]

The United States Supreme Court acknowledged that such regulation could limit actions but not belief. Waite CJ, regarding federal territorial laws in *Reynolds v United States*,[32] said:

> Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?[33]

In the major secular democracies, the state has sought to address the limitation of religious freedoms in a number of ways, mainly under the rubric of concerns of the expressions of such freedoms impacting upon public safety. It is of course hard to define where the limitation needs be applied.

The state, however, usually has a constitutional obligation for ensuring peace and order within the state. On this, in *Grace Bible Church Inc. v Reedman*,[34] a South Australian case involving state regulation of education, White J observed "[t]here is nothing in [the] common law which inhibits or is capable of inhibiting the power of the Parliament of the State to make laws for the peace, welfare and good government of this state, including laws that affect the freedom of religious worship and religious expression."[35]

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rightly perceived and understood, are prior to, and superior to, the claims of any human authority." and that "The state-conferred-dispensation view, which I think is the dominant view today, is not really religious liberty, in the sense of freedom of religious exercise from ultimate state control. It is a cipher, shadow, or parody of religious liberty. At bottom, what justifies religious liberty - the only thing that makes it at all sensible as a liberty distinct from other liberties - is some shared sense that true religious obligation is more important than civil obligation and that, consequently, civil society must recognize this truth. Religious liberty is the legal duty of civil society to defer to the plausibly true free exercise of genuine religious faith." In response to this, Eugene Volokh asked, "Would it really advance religious freedom in a multidenominational society for courts to decide which practices have "plausible claims to religious truth," and what the "clear, universal moral command of God" might be? I don't think so. The Court has rightly refused to get into the business of judging religious truth, or interpreting religious doctrine. Both religious believers and the Justices, I think, are better off that way." (Eugene Volokh, 'The Priority of Law: A Response to Michael Stokes Paulsen', (2013) 39 *Pepperdine Law Review* 1223, 1224).

[31] Eugene Volokh, 'The Priority of Law: A Response to Michael Stokes Paulsen', (2013) 39 *Pepperdine Law Review* 1223, 1223.

[32] *Reynolds v United States*, 98 US 145 (1878).

[33] *Reynolds v United States*, 98 US 145 (1878), paragraph 5, in response to a question regarding the defence of religious belief or duty.

[34] *Grace Bible Church Inc. v Reedman*, (1984) 36 S.A. ST. R. 376.

[35] This view was tested in another Australian state some twenty years later in *Evans v State of New South Wales* (2008) 168 FCR 576 when regulations were made under the *World Youth Day Act 2006* (NSW). Police were permitted under Clause 7 of the regulation to direct people near World Youth Day (a youth-oriented event organized by the Catholic Church) areas to cease conduct that caused "annoyance or inconvenience to participants in a World Youth Day event". The Full Federal Court examined the meaning of the word "conduct" in the regulations, and took the view that if the New

Peace, welfare and good government were uppermost in the considerations of India when it sought to address these issues from the time of independence more than sixty years ago. Prior to independence the Indian national movement had a strong commitment to secularism, and defined secularism at that time to mean a separation of religion from politics, state neutrality toward or equal respect for all religions and, most particularly for the Indian context, an opposition to communalism.[36] These principles were examined shortly after independence in *State of Bombay v Narasu Appa Mali*, where Chagla CJ explained that

> A sharp distinction must be drawn between religious faith and belief and religious practices. What the state protects is religious faith and belief. If religious practices run counter to public order, morality or health or a policy of social welfare upon which the state has embarked, then the religious practices must give way before the good of the people of the state as a whole …[37]

This view offered by Chagla CJ is clearly in line with utilitarian thinking and the views of the role of religion in the thinking of Holyoake. There is clearly a public utility inherent here in ensuring that limitations are only applied when there is a breach in public order. Utilitarianism, as outlined in Chapter 2, is a normative view that emphasises the maximising of utility, usually in a way that maximises happiness and reduces suffering. India set its public policy in this direction from early on in the republic's life, commencing with the national reformist agenda that began shortly after Independence. Even before Independence the national movement was committed to the creation of an egalitarian society, opposing all forms of inequality.[38]

In 1955 the *Hindu Code Bill*[39] was enacted with the intent to change Hindu personal law, seen by many as an attempt by the state to alter practices and traditions protected by the right to religious freedom.[40] The single code of personal law for all Hindu citizens removed the complications inherited from interpretations of the colonial courts and replaced them with a code that "legalized inter-caste marriage; it legalized divorce and prohibited polygamy; it gave to the daughters the same rights of inheritance as the son, and permitted the adoption of daughters as well as of sons.".[41]

South Wales Parliament intended to interfere with fundamental rights and freedoms, it must do so in the clearest of language. *(Evans v State of New South Wales*, (2008) FCR 576, 593.

[36] Bipan Chandra et al, *India after Independence 1947-2000*, (Penguin Books India, New Delhi, 2000), 26.

[37] MANU/MH/0040/1952 at paragraph 5. A case addressing the validity of the *Bombay prevention of Hindu Bigamous Marriages Act*, 1946.

[38] Bipan Chandra et al, *India after Independence 1947-2000* (Penguin Books India, New Delhi, 2000), 26.

[39] This was a series of laws called the Hindu Marriage Bill, the Hindu Succession Bill, the Hindu Minority and Guardianship Bill, and the Hindu Adoptions and Maintenance Bill.

[40] B.R.Ambedkar (Law Minister and chief architect of the Indian constitution) addressed these objections stating that, "The religious conceptions in this country are so vast that they cover every aspect of life from birth to death. There is nothing which is not religion and if personal law is to be saved I am sure about it that in social matters we will come to a standstill…There is nothing extraordinary in saying that we ought to strive hereafter to limit the definition of religion in such a manner that we shall not extend it beyond beliefs and such rituals as may be connected with ceremonials which are essentially religious." Cited in Partha Chatterjee, 'Secularism and tolerance' in Rajeev Bhargava (ed), *Secularism and its Critics* (Delhi: Oxford University Press, 1998), 356.

[41] Partha Chatterjee, 'Secularism and tolerance' in Rajeev Bhargava (ed), *Secularism and its Critics* (Delhi: Oxford University Press, 1998), 356-7.

So where do religion and the state meet? In India, religious freedoms assured under Articles 25 and 26 of the Indian Constitution are subject to limitations to preserve public order, and are not absolute, subject to Articles 25(2) and 19(2)[42]. These limits were addressed in *Ramji Lal Modi v State of UP*[43] in 1957 and reinforced in *Gulam Abbas v State of UP*[44] in 1984. In *Ramji Lal Modi's Case* the constitutionality of Section 295A of the *Indian Penal Code, 1860*[45] was queried, in a matter relating to a law punishing statements deliberately intended to hurt the religious feelings of any class. The law was held to be valid as it is a reasonable restriction aimed to maintaining the public order. The Supreme Court held that the section was valid and reasonable and was covered under the head of public order.

III PUBLIC SAFETY – LIMITS ON PROSELYTISM AND CONVERSION

International human rights conventions are unclear on the issue of proselytism in the context of religious freedoms. Article 9 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms 1953*[46] provides that freedom of thought, conscience and religion including a right to change those and to practise and manifest such, limited only by state provisions for public safety and order.[47]

Yet whilst providing for the right to change religion, within the convention proselytism is addressed only indirectly, leaving a consistent view unclear. Within some jurisdictions, notably India, active proselytism causes a great deal of domestic conflict. On this Stahnke observes that:

> [T]he effect of international human rights obligations on conflicts engendered by proselytism has been minimal. International bodies have either not dealt extensively with the problem or have not been particularly aggressive in defining the parameters of the freedom to engage in proselytism. This silence, or reluctance to deal with proselytism issues, may be the result of the widely divergent practices of states, ranging from severe limitations on the activity in all of its forms to broad freedom to engage in the activity regardless of the effect it may have on the target. [48]

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[42] "Nothing … shall … prevent the State from making any law … in so far as such law imposes reasonable restrictions on the exercise of the right conferred … in the interests of … the security of the State, friendly relations with Foreign States, public order, decency or morality …"

[43] AIR 1957 SC 620: 1957 SCR 860.

[44] (1984) 1 SCC 81.

[45] Chapter XV (Sections 295-298 of the *Indian Penal Code*) relate to offences relating to religion.

[46] < http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG.>

[47] Article 9 – Freedom of thought, conscience and religion

> 1 Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2 Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

[48] Tad Stahnke, 'Proselytism and the Freedom to Change Religion in International Human Rights Law'[1999] *Brigham Young University Law Review* 251, 339.

While limits upon society by the state upon proselytism and conversion for the purposes of utilitarian ideal of maximising happiness can be rationalised for the purposes of public safety, what particular safety threats can be perceived by the state? The practices of some religions such as Christianity and Islam which have a strong conversion ethic have been seen as a threat to public order.[49]

Less commonly seen as a limitation on religious freedoms in secular states is the limitation upon those who wish to convert others to their world view. In countries where this activity is often seen as unwelcome or threatening, the state will step in, using the rationale that proselytising by its nature will upset those who do not wish to be subject to the entreaties of others to change.[50] The state must, however, consider the implications of limiting such activity as "the limits of proselytism are dictated by a reasonable need to avoid intrusion into the privacy of religious communities, collectivities, or congregations eager to preserve their identity. This is especially true in those cases where the religious element is combined with ethnic and cultural characteristics consolidated over the course of centuries."[51]

In South Asia, proselytism and attempts at conversion create a great deal of civil strife and jurisprudence. In India, the issues of state limitations to religious practices extend to the practice of some religions to proselytism or propagation of their religion through conversion of others, usually Hindus. Although British India had no anti-conversion laws, many Princely States had enacted anti-conversion legislation before Independence.[52]

Freedom of religion in India was made explicitly subordinate to the state's need for public order. Although the right to propagate one's religion is permissible under Article 25 of the Indian Constitution, it is not without limits.[53] In *Ramjilal Modi v*

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[49] Natan Lerner, 'Proselytism, Change of Religion, and International Human Rights' (1998) 12 *Emory International Law Review* 477, 477.

[50] John Gray notes Singapore's solution, which does not solve the issue: "In Singapore there is full freedom of religious practice and belief, but proselytism is forbidden. In prohibiting missionary activity Singapore does not protect what in liberal societies is regarded as the unfettered exercise of the right to religious freedom. Yet, perhaps partly for that reason, Singapore has in recent times avoided religious strife better than have some liberal regimes." (John Gray, *Two Faces of Liberalism* (Polity Press, Cambridge, 2000), 112).

[51] Natan Lerner, 'Proselytism, Change of Religion, and International Human Rights' (1998) 12 *Emory International Law Review* 477, 557-558.

[52] The Raigarh *State Conversion Act* 1936, the Patna *Freedom of Religion Act* of 1942, the *Sarguja State Apostasy Act* 1945 and the Udaipur State *Anti-Conversion Act* 1946. In the Indian Parliament in 1954 the *Indian Conversion (Regulation and Registration) Bill* and in 1960 the *Backward Communities (Religious Protection) Bill*, were withdrawn for lack of support. The proposed *Freedom of Religion Bill* of 1979 was opposed by the Minorities Commission due to the apparent bias. However, in 1967-68, Orissa and Madhya Pradesh enacted the *Orissa Freedom of Religion Act* 1967 and the *Madhya Pradesh Dharma Swatantraya Adhiniyam* 1968. (Arpita, Anant, 'Anti-conversion laws', *The Hindu*, Tuesday, Dec 17, 2002 (17 June 2009 (http://www.hindu.com/thehindu/op/2002/12/17/stories/2002121700110200.htm))

[53] The nature of this limitation was explored in *Rev. Stainislaus v State of Madhya Pradesh* where the Orissa and Madhya Pradesh Acts prohibited forcible conversion. Rev. Stainislaus was prosecuted under sections 3, 4 and 5(2) of the *Madhya Pradesh Swatantraya Adhinivam* 1968. Stainislaus challenged the constitutional validity of the Madhya Pradesh Act in the High Court of Madhya Pradesh and the constitutional validity of the Orissa *Freedom of Religion Act*, 1967 was challenged in the High Court of Orissa. In the Madhya Pradesh High Court Stainislaus argued that the *Madhya Pradesh Act* violated his rights under Article 25(1) of the Constitution, and that the legislation was

State of Uttar Pradesh,[54] just a decade after Independence, the Indian Supreme Court held that as rights to freedom of religion are guaranteed by Articles 25 and 26 'it cannot be predicated that freedom of religion can have no bearing whatever on the maintenance of public order or that a law creating an offence relating to religion cannot under any circumstances be said to have been enacted in the interests of public order'".[55] Accordingly, these Articles, while guaranteeing freedom of religion, were expressly made subject to public order.

The reason for state concern regarding proselytism in India was explained by A.N. Ray CJ for the court in *Rev. Stainislaus v State of Madhya Pradesh*[56] in terms of "[i]f an attempt is made to raise communal passions, e.g. on the ground that someone has been forcibly converted to another religion it would in all probability give rise to an apprehension of a breach of the public order affecting the community at large".[57] In examining the Madhya Pradesh *Dharma Swatantraya Adhiniyam, 1968*[58] the Court observed that:

> What is penalised is conversion by force, fraud or by allurement. The other element is that every person has a right to profess his own religion and to act according to it. Any interference with that right of the other person by resorting to conversion by force, fraud or allurement cannot, in our opinion, be said to contravene Article 25(1) of the Constitution of India, as the Article guarantees religious freedom subject to public health. As such, we do not find that the provisions of sections 3, 4 and 5 of the M.P. *Dharma Swatantraya Adhiniyam*, 1968 are violative of Article 25(1) of the Constitution of India. On the other hand, it guarantees that religious freedom to one and all including those who might be amenable to conversion by force, fraud or allurement. As such, the Act, in our opinion, guarantees equality of religious freedom to all, much less can it be said to encroach upon the religious freedom of any particular individual

The Indian Supreme Court held that, while Article 25 guarantees the right to propagate one's religion, it does not give the unfettered right to convert others to one's own religion. Propagation was held to be conversion by the exposition of a religion's tenets, and not conversion by way of force, or allurement by fraudulent means, as this practice works towards a breach of the public order. There was no constitutional right to convert people by these means as it would infringe the "'freedom of conscience' guaranteed to all citizens of the country alike."[59]

A similar public law concern about conversions also occurs in Sri Lanka. The Sri Lanka Constitution is distinguishable from that of India as "[i]n Sri Lanka the Constitution does not guarantee a fundamental right to 'propagate' religion as in Article 25 (1) of the Indian Constitution. What is guaranteed here to every citizen by Article 14(1) (e) is the fundamental right to manifest, worship, observe, practice that citizen's religion or teaching."[60]

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ultra vires the powers of the State legislature, and that sections of the Madhya Pradesh Act violated Article 20(3) of the Indian Constitution.

[54] *Ramjilal Modi v State of Uttar Pradesh* (1957) S.C.R. 860.

[55] *Ramjilal Modi v State of Uttar Pradesh* (1957) S.C.R. 860, 866 (S Ranjan Das CJ).

[56] *Rev. Stainislaus v State of Madhya Pradesh & Ors*, 1977 AIR 908, 1977 SCR (2) 611.

[57] *Rev. Stainislaus v State of Madhya Pradesh & Ors*, 1977 AIR 908, 1977 SCR (2) 611, 611. (A.N. Ray CJ).

[58] Freedom of Religion Act.

[59] 2 SCR 616 (1971), 618,

[60] Supreme Court Determination No. 2/2001.

It had been claimed that some Christian groups have engaged in aggressive methods of religious conversion, which in turn provoked sometimes a violent response from some quarters. Several times, it was also attempted to enact legislation prohibiting conversions that were done through forcible methods, economic inducement or some other such unethical manner.

This matter first came to the attention of the courts when three Private Members' Bills seeking to incorporate Christian organisations were challenged in the Sri Lanka Supreme Court in 2001.[61] In the *Christian Sahanaye Doratuwa Prayer Centre (Incorporation)* case, the Supreme Court held that the articles and powers of the body to be incorporated involved economic and commercial activities and included the provision of assistance of an economic nature. In these circumstances, there was in the Court's opinion a 'likelihood' that persons attending the prayer centre would be allured by economic incentives to convert. This, the court held, was inconsistent with the *Free Exercise* of the freedom of religion guaranteed by Articles 10 and 14 (1) (e),[62] because the provision of any allurement would distort and infringe the Free Exercise of those rights.

In the *New Wine Harvest Ministries (Incorporation)* case,[63] the objects of the proposed corporation included the conduct of a broad range of activities aimed at the raising the 'socio-economic conditions of people of Sri Lanka.' In this instance, the court held that mixing religious activities with those that involved in uplifting the socio-economic conditions of the people of Sri Lanka in general would 'necessarily' infringe the Free Exercise of the rights guaranteed by Articles 10 and 14 (1) (e) of the Constitution. In a similar case the *Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka (Incorporation)* case,[64] the Supreme Court reaffirmed the decisions discussed above in respect of Article 10, and also went on to hold that the propagation of the Christian faith in the manner proposed by the incorporation bill would infringe the Buddhism clause in Article 9.[65] The Court emphasised that the freedom to worship did not include the right to propagate.[66] The petitioners in this case challenged a Private Member's Bill allowing a Christian group to "propagate a religion while taking advantage of the vulnerability of certain persons".[67]

These cases in India (and to a lesser extent Sri Lanka) are important for a number of reasons:

[61] S.C. Determination No. 2/2001.
[62] Constitution of the Democratic Socialist Republic of Sri Lanka 1978.
[63] S.C. Determination No. 2/2003.
[64] S.C. Determination No. 19/2003.
[65] On October 21, 2005, the United Nations Human Rights Committee found the Sri Lankan Supreme Court's decision in the Sisters of the Holy Cross in Menzingen to be in violation of Articles 18 and 26 of the International Covenant of Civil and Political Rights, stating that: "differential treatment in the conferral of a benefit by the State … amounts to a violation of the right in Article 26 (ICCPR) to be free from discrimination on the basis of religious belief" (CCPR /C/85/D/1249/2004 31 October 2005..
[66] *Provincial of the Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka* (S.C: 19/2003).
[67] *Menzingen*, S.C. Determination No. 19/2003, at 4.

- Whilst in most secular democracies, arguments or suspicions about 'separation of church and state', or undue influence of religion and the state upon one another are largely speculative it is not so in the subcontinent. They show clearly that unlimited religious freedom and heavy handed state treatment of religion can lead to communal conflict. Only a model like India's, which is quite compatible with Holyoake's principles, that has general acceptance serves as a means of guiding religion-state interactions.

- They are matters not arising in the West. Secularism in the subcontinent is of a different character to that in Europe, North America and Australia. Secularism in India is treated with a great deal of suspicion as a Western import and not a local solution to local issues.[68] Only a model of secularism as advocated by Holyoake, that is not particular to one religion and does not control the state, works in India.

There have been some cases in the United States on this issue but not for some years.[69] Most cases have been protected as forms of free speech protected under the First Amendment to the US Constitution. Limitations have been made only when there is a disturbance of the peace or threat to security and, distinct from the cases mentioned above, the nature of the proselytism was generally not in issue, and the subject matter was not considered and was incidental. Rather, the nature of the delivery has been at issue and cases such as *Lovell v Griffin*,[70] *Cox v New Hampshire*,[71] and *Heffron v International Society for Krishna Consciousness, Inc.* (ISKCON)[72] which involved breaches of local ordinances for public order served a legitimate government interest.

As noted earlier, the ability of the state to intervene in matters involving public proselytism depends upon local regulations. Generally the state intervenes when the message excites civil disturbance, such as in India, but in the US the message is largely irrelevant. In either case, Holyoakean thought would support the free dissemination of any message without arbitrary limitation by the state.

IV LIMITATIONS ON MINORITY RELIGIOUS SECTS BASED ON PUBLIC ORDER

A number of cases have arisen where the activities of religious groups in public have been not related to proselytism or forced conversion, but for other reasons usually

[68] See particularly the writings and views of Triloki Nath Madan, Partha Chatterjee and Ashis Nandy, such as T.N. Madan, 'Secularism in its Place' and Ashis Nandy, 'The Politics of Secularism and the Recovery of Religious Toleration', and Partha Chatterjee, 'Secularism and Tolerance' in Rajeev Bhargava (ed.) *Secularism and its Critics* (Delhi: Oxford University Press, 1998).
[69] See generally Howard O. Hunter and Polly J. Price, 'Regulation of Religious Proselytism in the United States' [2001] *Brigham Young University Law Review* 537.
[70] 303 US 444 (1938) (failure to obtain permit to distribute "circulars, handbooks, advertising, or literature of any kind").
[71] 312 US 569 (1941) (convicted for violating a state law that prohibited parades or processions on public streets without a permit and without paying a fee.).
[72] 452 US 640 (1981). (The annual Minnesota State Fair had rules that required that anyone who wanted to distribute or sell merchandise of any kind, including pamphlets, tracts, or other documents, had to do so from a designated booth. The booths were available on a non-discriminatory, first-come, first-serve basis. The Supreme Court found the rule to be a reasonable exercise of the police power to maintain public order and safety at the state fair.)

involving a lack of conformity with popular culture, perceived as a threat to the state. A number of religious groups have been considered, usually through the espousing of their particular doctrines, to be disruptive to the state and public order. Accordingly the state has sought to limit their activity.

Some states that have a commitment to ensuring that a pluralistic community has religious-ethical freedoms, and will not prevent their belief, will also often have regulations where the state requires its citizens to perform acts that may be contrary to religious beliefs, with the intent of binding the community together with sanctions against non-conformism drawing. Such compulsions, although celebrating values and achievements of the state in a positive way, may nonetheless creating conflict.[73]

Prominent among such groups have been the Christian sect of Jehovah's Witnesses, primarily because of the international spread of cases and the usually successful defences in the various national supreme courts to efforts to limit them. Most cases have related to their doctrines which have been considered to be against state interests, such as the Australian *Jehovah's Witnesses* case,[74] or their refusal to participate in the displays of patriotism or military service in certain countries.[75]

In Australia, during the early part of the twentieth century, the Jehovah's Witnesses were a fringe Christian group not understood by the mainstream and hence persecuted by many. This led in the early part of the Second World War to the sect being banned[76] because it was accused of being "involved in radio station broadcasts which were suspected of relaying information to the 'enemy'" and "of attempting to destroy national morale and the war effort by refusing to acknowledge King George VI as their King, refusing to fight for their country and, interestingly, for being 'in, but not of, the community' (*Sydney Morning Herald*, 18 January 1941)."[77] The Australian Government sought to occupy and seize their property and ban their association with each other. Following the occupation of their property the sect sought an injunction from the Australian High Court.[78]

The Witnesses argued that the regulations contravened the freedom of religion provisions contained in section 116 of the *Australian Constitution*. The Court held that the regulations were *ultra vires* the defence power of the Constitution and did not

[73] Darryn Jensen, 'Classifying church-state arrangements: beyond religious versus secular' in Nadirsyah Hosen and Richard Mohr (eds), *Law and Religion in Public Life: The Contemporary Debate* (Routledge, Oxford, 2011), 28.
[74] *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116.
[75] Decision of the German Federal Constitutional Court, BVerfG, 1 BvR 618/93 vom 2.8.2001, Absatz-Nr. (1 - 30) and in the *Case of Jehovah's Witnesses of Moscow and ors. v Russia* ((Application no. 302/02) in 2010. There are a number of cases also on their views on blood transfusion. These cases lie outside the scope of this thesis as not being constitutional matters.
[76] Under the *National Security (Subversive Organisations) Regulations* 1940, the Australian government declared the organisation to be "prejudicial to the defence of the Commonwealth" and to the "efficient prosecution of the war". Police immediately occupied premises of the organisation.
[77] Jayne Persian, 'The Banning of Jehovah's Witnesses in Australia in 1941', TASA Conference 2005, University of Tasmania, 6-8 December 2005, 2.
[78] The court unanimously held that the *National Security (Subversive Organisations) Regulations* 1940 did not infringe against section 116, but that the government had exceeded the scope of the Commonwealth's "defence power" in section 51(vi) of the Constitution.

therefore have to conclude whether they contravened the freedom of religion provisions contained in section 116 of the *Australian Constitution*.[79]

Under different circumstances, however, in India in 1985, in the state of Kerala, some of Jehovah's Witnesses' children were expelled from school under the instructions of Deputy Inspector of Schools for having refused to sing the national anthem. A parent, V J Emmanuel, appealed to the Supreme Court of India for legal remedy. On August 11, 1986, the Supreme Court overruled the Kerala High Court, and directed the respondent authorities to re-admit the children into the school.[80]

In 1993, the Supreme Court of the Philippines held that exemption may be accorded to the Jehovah's Witnesses with regard to the observance of the flag ceremony out of respect for their religious beliefs.[81]

In the USA there has been many cases involving Jehovah's Witnesses. Between 1938 and 1946 Jehovah's Witnesses brought nearly two dozen separate actions before the US Supreme Court relating to the First Amendment.[82] In a recent case, Jehovah's Witnesses refused to get government permits to solicit door-to-door in Stratton, Ohio. In 2002, the case was heard in the US Supreme Court.[83] The Court ruled in favour of the Jehovah's Witnesses, holding that making it a misdemeanour to engage in door-to-door advocacy without first registering with the mayor and receiving a permit violated the First Amendment as it applies to religious proselytizing, anonymous political speech, and the distribution of handbills.

The most important decision was in *West Virginia State Board of Education v Barnette*,[84] in which the court ruled that school children could not be forced to pledge allegiance to or salute their national flag. The *Barnette* decision overturned an earlier case, *Minersville School District v Gobitis*,[85] in which the court had held that Jehovah's Witnesses could be forced against their will to pay homage to the flag. The nature of these cases is interesting in the sense that the state has considered that a constitutionally protected First Amendment right, that of freedom of religion, could

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[79] Although Williams J did hold a violation of s116.
[80] *Bijoe Emmanuel & Ors v State Of Kerala & Ors*
[81] Republic of the Philippines Supreme Court G.R. No. 95770 March 1, 1993**.**
(http://www.lawphil.net/judjuris/juri1993/mar1993/gr_95770_1993.html). Retrieved 26 July 2011.
[82] Shawn Francis Peters, *Judging Jehovah's Witnesses: Religious Persecution and the Dawn of the Rights Revolution* (University Press of Kansas, 2002). Notable cases include:

- *Cantwell v Connecticut*, 310 US 296 (1940)
- *Minersville School District v Gobitis*, 310 US 586 (1940)
- *Cox v New Hampshire*, 312 US 569 (1941)
- *Jones v Opelika I*, 316 US 584 (1942)
- *Jones v Opelika II*, 319 US 103 (1943)
- *Douglas v City of Jeannette*, 319 US 157 (1943)
- *Murdock v Pennsylvania*, 319 US 105 (1943)
- *West Virginia State Board of Education v Barnette*, 319 US 624 (1943)
- *Follett v Town of McCormick*, 321 US 573 (1944)
- *Prince v Massachusetts*, 321 US 158 (1944)
- *Watchtower Society v Village of Stratton*, 536 US 150 (2002).

[83] *Watchtower Society v Village of Stratton*, 536 US 150 (2002).
[84] 319 US 624 (1943).
[85] 310 US 586 (1940).

be trumped or limited by the state using a higher obligation, but ultimately failed to trump religious freedom.[86]

Similarly, in *Chaplinsky v New Hampshire*,[87] a Jehovah's Witness had reportedly told a New Hampshire town marshal who was attempting to prevent him from preaching "You are a damned racketeer" and "a damned fascist" and was arrested. The court upheld the arrest, thus establishing that "'insulting' or 'fighting words', those that by their very utterance inflict injury or tend to incite an immediate breach of the peace" are among the "well-defined and narrowly limited classes of speech [which] the prevention and punishment of ... have never been thought to raise any constitutional problem." The case established the 'fighting words doctrine', which limits of the US Constitution's First Amendment's guarantee of freedom of speech.

V THE NEED FOR CONSTITUTIONAL BALANCING OF CONFLICTING INTERESTS

A pluralistically committed state may well consider that prohibiting religiously inspired activity should be secondary to legislation that provides for the peace and good government of the state.[88] While the state may not limit the right of an individual to believe what they will, this class of cases differs to those which have resulted in an incidental infringement on religious freedom by legislation furthering the aims of the state.[89]

This conflict between religious and state ideals is often inevitable. Religious practice to some can impact upon all As McLachlin CJ of the Supreme Court of Canada observed in *Alberta v Hutterian Brethren of Wilson Colony*, in the context of the state requirement for photos to be displayed on driver's licences:

> Because religion touches so many facets of daily life, and because a host of different religions with different rites and practices co-exist in our society, it is inevitable that some religious practices will come into conflict with laws and regulatory systems of general application.[90]

A *Need for balance*

This issue has been analysed for many years, considering and contrasting the concept 'balancing' in the United States with that of 'proportionality' in Europe.[91] Balancing

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[86] Jackson J in *West Virginia State Board of Education v Barnett* argued "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials. … One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly and other Fundamental Rights may not be submitted to vote: they depend on the outcome of no elections." (319 US 624 (1943), 638).

[87] 315 U.S. 568 (1942).

[88] See generally Iddo Porat, 'On the Jehovah Witnesses Cases, Balancing Tests, Indirect Infringement of Rights and Multiculturalism: A Proposed Model for Three Kinds of Multicultural Claims' (2007) 1 *Law and Ethics of Human Rights* 429.

[89] An early case applying these principles to free speech jurisprudence was *Schneider v State of New Jersey*, 308 US 147 (1939), in which a municipal ban on the distribution of handbills was attacked as unconstitutional, the Supreme Court balanced the right of free speech against the municipal interest in clean streets and held that in the circumstances of the case the ban violated the right to free speech.

[90] *Alberta v Hutterian Brethren of Wilson Colony* [2009] 2 SCR. 567

[91] Moshe Cohen-Eliya and Iddo Porat, 'American Balancing and German Proportionality: The Historical Origins' (2010) 8(2) *International Journal of Constitutional Law* 263.

involves a consideration of utilitarian principles, balancing the requirements of the state against those of the individual.

Balancing is said to be "a decision-making process, which divides any given decision into considerations for and against a course of action, and then attempts to assess the relative weight of each consideration and balance the considerations one against the other."[92]

This constitutional balancing goes back some decades in the US. The concept looks at a form of legal cost-benefit analysis.[93] Most constitutional cases in the United States involving a question of procedural regularity refer to the *Mathews* test,[94] derived from the decision in *Mathews v Eldridge*,[95] a case involving constitutional requirements for due process of law. The utilitarian approach in this case was examined at length by Jerry Mashaw where he observed that

> The Supreme Court's analysis in *Eldridge* is not informed by systematic attention to any theory of the values underlying due process review. The approach is implicitly utilitarian but incomplete, and the Court overlooks alternative theories that might have yielded fruitful inquiry. … Utility theory suggests that the purpose of decisional procedures-like that of social action generally - is to maximize social welfare. Indeed, the three-factor analysis enunciated in Eldridge appears to be a type of utilitarian, social welfare function. That function first takes into account the social value at stake in a legitimate private claim; it discounts that value by the probability that it will be preserved through the available administrative procedures, and it then subtracts from that discounted value the social cost of introducing additional procedures. When combined with the institutional posture of judicial self-restraint, utility theory can be said to yield the following plausible decision-rule: "Void procedures for lack of due process only when alternative procedures would so substantially increase social welfare that their rejection seems irrational."[96]

In conclusion, the advent of Holyoake's secularism created a public space where all including the religious were welcome. In such a space however, the religious expressions of individuals and the state need to be tempered by an appreciation that some such expressions may be disruptive to the general community and may require limitations on those freedoms for the purposes of public safety and order. Rights of all sorts seek to be expressed in the public sphere and are generally encouraged, but at times the secular state must seek constitutional solutions to balance the conflicting interests.

Holyoake made it clear that the maximum utility, the maximum happiness of society, would occur when the state, religion, and other players in the public sphere all were

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[92] Iddo Porat, 'Why All Attempts to Make Judicial Review Balancing Principled Fail?' (Paper presented at the VIIth World Congress of the International Association of Constitutional Law, Athens, 14 June 2007), 1.

[93] For a critical review of cost benefit balancing, see Henry S. Richardson, 'The Stupidity of Cost Benefit Analysis', (2000) 29 *Journal of Legal Studies* 971

[94] "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requisites would entail." (*Mathews v Eldridge*, 424 US 319 (1976), 335.)

[95] *Mathews v Eldridge*, 424 US 319 (1976).

[96] Jerry L. Mashaw, 'The Supreme Court's Due Process Calculus for Administrative Adjudication: Three Factors in Search of a Theory of Value' (1976) 44 *University of Chicago Law Review* 28, 49-51.

respected for the value that their contribution could make. Since his time the public space is now a very crowded place, with many who were previously disenfranchised (such as women) now are having a voice. Modern technology allows everyone of any age and strata of society to express a view. What Holyoake did not anticipate was that this complexity would make it much more difficult to determine what limits would be placed on each, and under what circumstances. The balancing act is now much more difficult. However, the principles remain the same. The utilitarian view that society is best off when all are allowed a voice, and Holyoake's that religion should be neither endorsed and encouraged, nor denigrated and disrespected.

Where this chapter has considered issues where the state has determinedly attempted at times to keep religion from influencing the public sphere, the next chapter looks at where the secular state has actively worked against its brief in aiding religion to apply its views through the authority of the state.

CHAPTER 6

RELIGIOUS SYMBOLISM IN THE PUBLIC SPHERE

I THE NATURE OF RELIGIOUS SYMBOLISM

Holyoake advocated a public place where religion and the state could express themselves freely. Much of the analysis in this thesis to this point has considered traditional and overt forms of public expression such as speech and writings, but a number of cases have come to the attention of the courts where individuals, formal organisations, and even the state have sought to express religious views mutely.

The cases in this chapter are particularly interesting. A number of them relate to circumstances where the symbol has been in place for some time, but changing society has found different views, that the implied social agreement for their placement is perhaps no longer share by the whole community.[1] This chapter will look at the circumstances where these cases arise, and consider whether they are compatible with Holyoake's principles of secularism.

Religious symbols in the public sphere are polarising in many secular jurisdictions and promote strong views. The symbols that have often created controversy have been overt symbols such as clothing and jewellery worn by individuals, or larger items placed in public areas that are identifiable with religious traditions.[2] Symbols by their nature have a different meaning to each person, and in a society can change over time.

> No symbol (no event, thing, representation, relationship, activity) has meaning apart from use. Correlatively, a religious symbol, like any symbol, may have one set of meanings at one time, in one place or for one group, and other sets of meanings elsewhere or for other people. Religious symbols may have other, nonreligious referents. Whether the primary meaning of a symbol is religious or not will depend on context and may shift over time. A symbol that has religious meanings in one context may have little or nothing to do with religion when used in another context; for example, the cross of the Red Cross. Similarly, a symbol with religious meanings may bear some of those meanings for some people, even if used in a nonreligious context; for example, Santa Claus in the local department store.
> Religious symbols, as such, tend almost by definition to be particularistic and sectarian. They signal identification with a group, whatever their concrete and specific message.[3]

These symbols, either worn by individuals or found in public buildings, also excite widely varying responses by government. Ioanna Tourkochoriti sees these differences based on completely different approaches by the state. With respect to France and the US for example, there is

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[1] See for example *Van Orden v Perry*, 545 US 677 (2005), regarding a display of a religious text on a monument on a courthouse in place for more than 40 years, and *Lautsi and Others v Italy* [GC] - 30814/06 Judgment 18.3.2011 [GC] (18 March 2011), where placing crucifixes on public school walls had been a long standing practice in Italy.

[2] See generally Laura Barnette, 'Freedom of religion and religious symbols in the public sphere' (Government of Canada Publications, 2004).

[3] Janet L. Dolgin, 'Religious Symbols and the Establishment of a 'National Religion', (1987-88) 39 *Mercer Law Review* 495, 497-8.

> In France, a paternalistic vision of the state, together with a conception of a secularism imposed from top-to-bottom [which] legitimizes state intervention for banning religious symbols. In the United States, a conception of secularism founded upon the need to accommodate religious differences leads to a more tolerant attitude towards religious symbols even if they seem incomprehensible to the majority of the population.[4]

Symbols are now one front in a larger cultural war,[5] part of a debate about the relationship between religion and liberal democracy. Horwitz sees that the insistence of religion to have symbols in the public sphere may be related to questions on whether God exists. On that latter thought, he reasonably observes that "we should try to arrive at a reasonable lawyerly way of addressing conflicts between law and religion, and leave the deep thoughts about God to our colleagues in religious studies departments, or to the individual conscience".[6]

Susan Mancini[7] tends to agree, and goes so far as to say that religious symbols create conflicts in the public sphere that

> do not only reflect most of the dilemmas that liberal democracies face in the attempt to reconcile constitutionalism and religion through adherence to secularism in the public place – they actually challenge the very legitimacy of the dominant conception of constitutionalism and its nexus to the principle of secularism.

These cases have often been controversial. While decisions and cases are often couched in neutral terms some such as Mancini have been critical of European decisions concerning religious symbols. In the school crucifix cases discussed later in this thesis,[8] she feels that the decisions, although couched in neutral terms, are critical of non-Christian practices while accepting of Christian practices as being culturally neutral.[9] In respect of the Italian and German crucifix cases she argues that

> [i]n both cases the courts made a choice among the various possible meanings of the crucifix and picked the one which was most congenial to their argument, i.e. the crucifix may be legitimately displayed in state schools because it does not clash with the principle of secularism. As a consequence, all other meanings – including the ones that are most central to religion – are left in the limbo of an interpretive no-man's land, devoid of constitutional protection.

Significantly, she notes that although these two cases involved a comparison between Christianity and Islam, neither of the parties challenging the school practices were Muslims. The courts had concluded that Christianity had its roots in the state's democratic values, while the second was incompatible with those values. She finds particularly that the decisions of the European Court of Human Rights (ECHR),

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[4] Ioanna Tourkochoriti, 'The Burka Ban: Divergent Approaches to Freedom of Religion in France and the USA' (2012) 20 *William & Mary Bill of Rights Journal* 791, 850.
[5] The concept of a culture war is discussed in more detail in Chapter 9.
[6] Paul Horwitz, *The Agnostic Age: Law, Religion, and the Constitution* (Oxford University Press, Oxford, 2011), xvi-xviii.
[7] Susanna Mancini, 'Religious Symbols in the Public Space: The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence' (2009) 30 *Cardozo Law Review* 2629.
[8] In Chapter 8.
[9] Susanna Mancini, 'Religious Symbols in the Public Space: The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence' (2009) 30 *Cardozo Law Review* 2629, 2632.

although required to strike a balance between the 47 nations (that have very different constitutional traditions) that constitute its jurisdiction, have almost always a construction of the dichotomy between Christianity and Islam, which is projected in Christianity as a central component of Western civilization, while Islam is cast as the "other". In short, a culturally homogeneous European society perceived as threatened by pluralism and globalisation.[10]

Issues relating to religious symbolism in some states go back more than a century. For example, in France the official secularisation of the state began with the 1905 Law.[11] On the basis of the law discrimination on the basis of religion was prohibited, and crucifixes were removed from classrooms. Religious symbols in the public sphere cause most jurisprudence in places of particular importance to most citizens – those of justice and of education. These symbols create two types of conflict. The first is that of the wearing of religious symbols, such as headscarves and crucifixes by public employees in environments owned or controlled by the state, and generally by those affiliated with minority religions. The second occurs when a religious symbol is associated with identity of the state. This latter symbolism usually represents the dominant religion in that state.[12]

In Europe (particularly France, Germany, and Italy) much of the jurisprudence has related to public educational institutions, including the wearing of religious garb by teachers of minority religions, or the open display of religious symbols in ostensibly secular public schools. In the USA the conflict has been of the second type, usually displays of religious symbols in and around courthouses, or in public buildings, and the latter particularly around religious holidays.

Arguably much of this conflict has arisen with the increasing growth of non-religious or other-religious viewpoints of citizens in recent times as people withdraw from the religion of their parents or have brought other views into a country through migration, where not so long ago the population was homogenous in its religious views.

Often states have shed their official religious positions in favour of secular constitutions to prevent religious conflicts in times of increasingly pluralistic societies, particularly in Europe. Some states, such as India, were made constitutionally secular *ab initio* in order to maintain what went before.

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[10] Susanna Mancini, 'Religious Symbols in the Public Space: The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence' (2009) 30 *Cardozo Law Review* 2629, 2631.

[11] Secularisation of France can be traced back to the revolution of 1789, before which France had had Catholicism as the state religion. However, Napoleon re-established the Catholic Church in 1801 with the Concordat of 1801. Thereafter the French state funded and built religious buildings for Roman Catholicism, Calvinism, Lutheran Protestantism and Judaism. Efforts were made in the 1870s to suppress the Concordat of 1801, after which a gradual secularisation of began with the removal of priests and nuns from roles in public hospitals in 1879-80, and the establishment of secular education with the Jules Ferry laws in 1881-82. See generally Jean Bauberot, 'The Evolution of Secularism in France: Between Two Civil Religions' in Linell E. Cady and Elizabeth Shakman Hurd (eds.), *Comparative Secularisms in a Global Age* (Palgrave Macmillan, Hampshire,2010), 57.

[12] Susanna Mancini, 'Religious Symbols in the Public Space: The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence' (2009) 30 *Cardozo Law Review* 2629. I disagree with Mancini as she feels this description relates only to public schools. I consider the analysis can be cast much wider.

Mancini[13] considers there are only two religious symbolism events that test the limits of secularism: those of religious dress; and public symbols like crucifixes. She notes that the latter are a form of 'public language' by state authorities, and generally of the majority religion. Mancini also indicates her view that "neutral character of secularism and its ability to solve religious conflicts in pluralistic societies is increasingly contested."[14]

Dieter Grimm supports this argument attributing the increasing debate to having its "source in the growing multiculturalism of European societies, caused by the immigration of members of non-Christian beliefs."[15] He considers that these changes in European society are causing stress upon existing paradigms of the role of religion in the state, noting that

> Since religious freedom means equal freedom, the state may neither privilege nor discriminate against certain religious groups. This is also true with regard to those religious communities that are traditionally supported by the native society - the state is not entitled to treat them preferentially. Yet, preferential treatment of a religion as such must be distinguished from protection of the values, traditions, and customs that, although originally rooted in a country's predominant religion, have lost their religious connotations and are no longer viewed as specific expressions of a religion but rather have become a part of the country's general culture that includes believers and non-believers.[16]

Grimm's view offers again assumptions that are Eurocentric and unsupported. The assertion that religious freedom equates with equal freedom is not supported. The principles that Holyoake derived propose an equal opportunity to contribute to the public space. This does not mean that laws must necessarily apply equally, as the issue may only apply to less than the whole religious polity. For example, a state support of all schools will apply equally to all religious schools, but it is erroneous to suggest that because a religious organisation has more schools, that the state is attempting to favour that organisation more than another.

A *Symbols of a 'civil religion'*

Often the line between religion and the state can become very blurred. Consider the outcry and case law related to flag burning, especially in the USA, where "the United States flag is treated as an almost sacred symbol."[17] In comparing the history of flag burning in the US and Germany, Ute Krüdewagen observes that "the [US] flag forms part of the American civil religion: '[C]urious liturgical forms have been devised for "saluting" the flag, for "dipping" the flag, for "lowering" the flag, and for "hoisting"

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[13] Susanna Mancini, 'Religious Symbols in the Public Space: The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence' (2009) 30 *Cardozo Law Review* 2629.
[14] Susanna Mancini, 'Religious Symbols in the Public Space: The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence' (2009) 30 *Cardozo Law Review* 2629, 2630.
[15] Dieter Grimm, 'Conflicts between general laws and religious norms', (2009) 30 *Cardozo Law Review* 2369, 2370.
[16] Dieter Grimm, 'Conflicts between general laws and religious norms' (2009) 30 *Cardozo Law Review* 2369, 2370, 2374.
[17] Ute Krüdewagen, 'Political Symbols in Two Constitutional Orders: The Flag Desecration Decisions of the United States Supreme Court and the German Federal Constitutional Court' (2002) 19(2) *Arizona Journal of International and Comparative Law* 679, 680.

the flag. Men bare their heads when the flag passes by; and in praise of the flag poets write odes and children sing hymns'"[18]

This burning of the flag in the US is generally described as flag 'desecration', a term indicating the removal of something's sacred nature. Michael Welch observed[19] that

> given the deep emotional – virtually religious – attachment of most citizens to the nation's most cherished emblem, flag burning has been known to incite a full-fledged moral panic, a phenomenon marked by a turbulent and exaggerated reaction to a putative threat. … Although moral panic over flag desecration aroused considerable anxiety among citizens, the campaign to criminalize that expression of protest triggered resistance by First Amendment advocates committed to preserving the constitutional right to free speech.

The US Supreme Court in *Texas v Johnson*[20] (reaffirmed in *US v Eichman*)[21] ruled that it was unconstitutional for a government (whether federal, state, or municipality) to prohibit the desecration of a flag, due to its status as 'symbolic speech' under the free speech provisions of the US Constitution's First Amendment. Similar cases have occurred in Germany.[22] On the different treatments of flag burning in the US and Germany, Ute Krüdewagen interestingly notes the different roles symbols play in these two countries:[23]

> The language of the statutory provisions concerned with the attack on the flag illustrates the contrast between the role that the flag occupies in the German society and the role of its American counterpart in American society. In United States law, the misdemeanour or crime of burning a flag is called 'flag desecration.' Section 90(a) StGB, on the other hand, is entitled 'Verunglimpfung des Staates und seiner Symbole.' The term 'Verunglimpfung' has no religious connotations, it simply stands for an act of defamation or denigration. As nobody has consecrated the German flag, nobody can desecrate it.

These cases in Europe and the United States show clearly that symbolism retains an important place in these societies.

It is difficult to separate a society from its symbols. They are not like trademarks with clearly defined associations. They can have no meaning, or sacred associations, to different people. Many of them have a longstanding association with communities so that it can be difficult to separate the religious representation of the symbol from the state, if the latter has appropriated it as a symbol also of the national community.[24]

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[18] Citing Carlton J. Hayes, *Essays on Nationalism* (Macmillan, New York, 1926) 107-08

[19] Michael Welch, *Flag Burning: Moral Panic and the Criminalization of Protest* (Transaction Publishers, 2000), 5.

[20] 491 US 397 (1989).

[21] 496 US 310 (1990).

[22] On March 7, 1990, three months before the US Supreme Court handed down the *Eichman* decision, the *Bundesverfassungsgericht* (German Federal Constitutional Court) reversed the conviction of the manager of a book distribution company charged with defiling the federal flag.

[23] Ute Krüdewagen, 'Political Symbols in Two Constitutional Orders: The Flag Desecration Decisions of the United States Supreme Court and the German Federal Constitutional Court' (2002) 19(2) *Arizona Journal of International and Comparative Law* 679, 687.

[24] Such as in *Lautsi and Others v Italy* [GC] - 30814/06 Judgment 18.3.2011 [GC] (18 March 2011).

II GOVERNMENT SPONSORED RELIGIOUS DISPLAYS

The issue of government displays of religiosity in the public sphere has been controversial for many years. It has been described as '[t]he debate that won't go away'.[25] Most cases in this part relate to static displays of a religious nature that are either assembled by the state on religious holidays such as Christmas, or have been erected many years ago, and only in recent times following successful litigation have some people or organisations found the confidence to dispute them. The static nature of these displays, these symbols, does not attract the attention of the public quite so much as religious speech which allows the hearer to form a judgment as to its constitutionality much more immediately.

Public displays of religious symbols would seem on the surface to be harmless. They are signs of popular and dominant culture as much as advertising of new products and contemporary television. Is there harm in doing so by the government, to put religious displays in public areas where the only message appears to be that the government shares the same cultural and historical ties as the majority of the state? Is it possible to argue that such displays would cause the uncritical or immature mind to change religious habits, or to infer that the government favours the dominant religion only?

The view of Thomas C. Berg[26] comes to mind when he observed in the American First Amendment context:

> My first, gut reaction to Establishment Clause cases about religious displays is that they are unimportant and it is irritating to see so much effort, emotion, and paper spent on them. From the standpoint of serious religion, it is hard to imagine that any display of the Ten Commandments does anything to make this a more Christian or religious nation, more inclined to live according to biblical values, or indeed that such a display affects anyone's behaviour.

He observes that the context is important. In public schools where impressionable children may be subtly pressured into religious activity such as prayers,[27] such coercion will usually be seen as unconstitutional. He asks though whether non-coercive public religious symbolism displays by the state should be taken as seriously and be made the constant subject of litigation, often by interest groups such as the American Civil Liberties Union (ACLU). He recalls Frankfurter J's remark that "[w]e live by symbols"[28] and that although "[s]ymbols sometimes distract people from real issues and challenges … sometimes they embody those issues and challenges. In the latter cases, we ignore symbols at our peril."[29]

Berg offers a view that is consistent with Holyoake's principles:

> Official religious displays should not be invalidated on the basis that religion is a private matter and the public sphere must be secular. Displays can be invalidated in many cases on the basis of the voluntarist approach. Although religion may be highly relevant to public life,

[25] Joseph HH Weiler, 'State and Nation; Church, Mosque and Synagogue—the trailer' (2010) 8 ICON 157, 157.
[26] Thomas C. Berg, 'Religious Displays and the Voluntary Approach to Church and State' (2010) 63 *Oklahoma Law Review* 47.
[27] This will be addressed in more detail in Chapter 8 of this thesis.
[28] *Minersville School District v Gobitis*, 310 US 586 (1940), 596 quoting Oliver Wendell Holmes.
[29] Thomas C. Berg, 'Religious Displays and the Voluntary Approach to Church and State' (2010) 63 *Oklahoma Law Review* 47, 48.

> its influence should normally operate through independent, private religious institutions and through individuals who bring their values to bear on political questions—not through explicit government assertion of religious truths.

This view clearly expresses the view that religion has a place in the public sphere, and should express its views publicly and privately as do other players there. He feels however that it should draw a line at having the state extol its virtues and doctrines.[30] This is an important point. Religion can be recognised and respected for its role in the public sphere. However, where the state asserts "religious truths" with the ability to do so unable to be matched by any individual or organisation, then such activity not only detracts from the state's traditional roles in government, it makes it difficult for the state to assert neutrality in other contexts.[31]

Many religious display cases have involved education in particular. This is because this a medium by which the state can exercise some control over culture and public opinion.[32] There a number of important and recent cases to be examined on this issue in greater depth in the next chapter. The following cases relate to the state's control of other public space and cultural resources.

Many such cases have occurred in the United States and Europe in the last few decades. The first of the major cases in this area was *Lynch v Donnelly*.[33] This case was the first of many which had the state objecting not to religious speech in the streets or published polemics, but rather mute displays of religious origin with well understood connotations in public spaces by public authorities. There was no overt message attached saying that the state put its might behind an endorsement of the religion, in the same way that a footballer might endorse a sports drink. Instead, religious symbols, often associated with traditional religious (and usually state promulgated) holidays, where their presence had caused little or no offence in the past, began to have suggestions that their presence had always been unconstitutional.

Paul Horwitz reflects that the US was once widely religiously observant,[34] and the disputes in the courts were largely internecine disputes about state distributions of income to religion. He sees that the funding issues were effectively resolved in *Zelman v Simmons-Harris*[35] and *Mitchell v Helms*,[36] cases which involved funding of religious schools. In what he sees is an age of religious contestability, the skirmishes in the public sphere are not on where government spends its money, but over what the government says about religion. In the United States context religious symbolism is seen as a result of a wider issue. There, "the Supreme Court is engaged in a profound reshaping of the ground on which issues of religious establishment are

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[30] Thomas C. Berg, 'Religious Displays and the Voluntary Approach to Church and State' (2010) 63 *Oklahoma Law Review* 47, 66.
[31] See for example the activities of Alabama Chief Justice Roy Moore's installation of the Decalogue in 2001 (removed in 2003, in the form of a 2.5 ton granite block) in the Alabama State Judicial Building, removed at the insistence of the 11th Circuit Court. (Jeffrey Gettleman, 'Monument is now out of sight, but not out of mind', *The New York Times*, 28 August, 2003. <http://www.nytimes.com/2003/08/28/us/monument-is-now-out-of-sight-but-not-out-of-mind.html>.
[32] Michael McConnell et al, *Religion and the Constitution* (Aspen Law & Business, New York, 2006), 704.
[33] 465 U.S. 668 (1984).
[34] More than it is now.
[35] 536 US 639 (2002).
[36] 530 US 793 (2000).

fought. To put the matter simply, the emerging trend is away from concern over government transfers of wealth to religious institutions, and toward interdiction of religiously partisan government speech."[37] Government speech can also be mute.

In *Lynch*, an annual Christmas display in the Pawtucket, Rhode Island's shopping district, consisting of a Santa Clause house, a Christmas tree, a banner reading "Seasons Greetings" and a crèche,[38] was challenged in court. The crèche had been a part of the display since at least 1943. The plaintiffs alleged that the display violated the Establishment Clause. They ruled that the crèche was a passive representation of religion and that there was "insufficient evidence to establish that the inclusion of the crèche was a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious" view.[39]

This may well have been the case, and is the argument proffered by plaintiffs in similar case, but there is often little evidence offered in its support. There may well be some form of government advocacy of religion, but often the argument is a form of reverse logic: why would the government display the symbols if not to endorse them? The Court held that the state was celebrating a religious holiday in the way the greater Western culture had done so for some time.

Several years later after the decision in *Lynch* the Supreme Court addressed a religious holiday display issue in *County of Allegheny v ACLU*.[40] The Court considered the constitutionality of two recurring holiday displays located on public property in Pittsburgh.[41] The majority held that the County of Allegheny violated the Establishment Clause by displaying a crèche in the county courthouse, because the "principal or primary effect" of the display was to advance religion within the test parameters outlined in *Lemon v Kurtzman*[42] when viewed in its overall context. Moreover, in contrast to *Lynch v Donnelly*, nothing in the crèche's setting detracted from that message.

In more recent times, two cases, *Van Orden v Perry*[43] and *McCreary County v ACLU*,[44] although decided at the same time, appear to be contrary in their reasoning and offer

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[37] Ira C. Lupu, 'Government message and government money: *Santa Fe, Mitchell v Helms* and the Arc of the Establishment Clause' (2001) 42 *William and Mary Law Review* 771, 771.

[38] Also known as a nativity scene, has artistic representation of the birth of Jesus Christ.

[39] Interestingly, the Court also stated that the Constitution "affirmatively mandates accommodation, not merely tolerance of all religions, and forbids hostility toward any." The Court ruled that the crèche had a legitimate secular purpose within a larger holiday display to celebrate the season and the origins of Christmas which has long been a part of Western culture. The Federal "Government has long recognized - indeed it has subsidized - holidays with religious significance."

[40] 492 U.S. 573 (1989).

[41] The first, a nativity scene, was placed on the grand staircase of the Allegheny County Courthouse. The second of the holiday displays in question was an 18-foot Hanukkah menorah, which was placed just outside the City-County Building next to the city's 45-foot decorated Christmas tree. The legality of the Christmas tree display was not considered in this case.

[42] Known as the 'Lemon Test': 'Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v Allen*, 392 US 236, 243 (1968); [403 U.S. 602, 613] finally, the statute must not foster 'an excessive government entanglement with religion.' " 403 U.S. 602 (1971).

[43] 545 US 677 (2005).

[44] 545 US 844 (2005).

little in guidance on the contemporary stance of the Supreme Court on public religious displays. The Court in *Van Orden* held a six-foot monument displaying the Ten Commandments donated by a private group and placed with other monuments next to the Texas State Capitol had a secular purpose and would not lead an observer to conclude that the state endorsed the religious message, and therefore did not violate the Establishment Clause. Yet, in *McCreary County,* the Court held that two large, framed copies of the Ten Commandments in Kentucky courthouses lacked a secular purpose and were not religiously neutral, and therefore violated the Establishment Clause.[45]

So, where does American jurisprudence lie at the moment on the matter of public religious displays by government officials and institutions? Authors such as Colby[46] and Muñoz[47] are critical of the split decisions in each, resulting in a divided court and inconsistent reasoning. Colby is most critical of the reasoning of Scalia J in both cases, and to a lesser extent, that of Breyer J. Inconsistent decision making by the Supreme Court has resulted in decisions like *Lynch v Donnelly*[48] (nativity scene displayed alongside "secular" symbols of Christmas), and a Jewish Menorah next to a Christmas tree[49] in *Allegheny*, as well as the *Van Orden* and *McCreary County* cases which were decided in the same year.

Most recently, in April 2010 the case of *Salazar v Buono* was decided.[50] In 1934 members of the Veterans of Foreign Wars (VFW) placed a Latin Cross (a crucifix) on federal land in the Mojave National Preserve, a National Park. Buono, a regular visitor to the Preserve filed a suit alleging a violation of the US Constitution's First Amendment's Establishment Clause, and sought an injunction requiring the US Federal Government to remove the cross. The case ultimately reached the United States Supreme Court through an appeal from the Ninth Circuit Court of Appeals.[51]

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[45] 545 US 844 (2005) (Souter J).

[46] Thomas Colby, 'A Constitutional Hierarchy of Religions? Justice Scalia, 'The Ten Commandments, and the Future of the Establishment Clause', (2006) 100(3) *Northwestern University Law Review* 1097.

[47] Vincent Phillip Muñoz, 'The Original Meaning of the Establishment Clause and the Impossibility of its Incorporation', (2006) 8 *University of Philadelphia Journal of Constitutional Law* 591.

[48] *Lynch v Donnelly*, 465 US 668 (1984)

[49] *County of Allegheny v American Civil Liberties Union*, 492 US 573 (1989).

[50] *Salazar v Buono*, 559 U.S. 700 (2010).

[51] In the first stage, known as *Buono I (Buono v Norton*, 212 F. Supp. 2d 1202 (CD Cal. 2002)), the District Court found that Buono had standing to sue, and granted Buono's request for injunctive relief. While the Government's appeal was waiting to be heard, the US Congress passed the *Defense Appropriations Act*, 2004, §8121(a), which had within it a direction to the Secretary of the Interior to transfer the cross and surrounding land to the VFW. Subsequently the appeal was heard in the Ninth Circuit Court of Appeals (*Buono v Norton*, 371 F. 3d 543 (CA9 2004)) (*Buono II*) affirmed the District Court's judgment, but which did not address the land transfer issue raised by the Appropriations Act. The US Supreme Court reversed the decision of the lower court. The issue relating to the Establishment Clause, and to government endorsement of the religious nature of the crucifix. The Court was split between those who believed that the cross on the memorial had a broader meaning, and those who considered the religious message was clear. In an opinion by Kennedy J, joined by Roberts CJ and Alito J, the majority held that the minority decision of Stevens J, joined by Ginsburg and Sotomayor JJ (with Breyer J writing a separate dissent), argued that the land transfer ordered by Congress would perpetuate the Establishment Clause violation at issue in the 2002 injunction and that it would be "a clear Establishment Clause violation of Congress had simply directed that a solitary Latin cross be erected … to serve as a World War I memorial. Congress did not erect this cross, but it commanded that the cross remain in place, and it gave the cross the imprimatur of Government." (*Salazar v Buono*, 559 US 700 (2010), 759.

The decision in *Salazar v Buono*[52] is typical of recent decisions, with what the *New York Times* considered was "a badly fractured Supreme Court".[53] In this case Kennedy J discussed at length the secular purpose behind the cross memorial. He claimed that "the cross and the cause it commemorated [became] entwined in the public consciousness"[54] He explained further that

> [a] Latin cross is not merely a reaffirmation of Christian beliefs. It evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles, battles whose tragedies would be compounded if the fallen are forgotten.[55]

However, on this Ian Bartrum[56] makes an important point. He notes that Kennedy J in his comments regarding the cross at the centre of the *Salazar* case considered that the lower court did not appreciate the complex nature of the cross as a symbol "that has complex meaning beyond the expression of religious views".[57]

However, in an opinion that has echoes in decisions made by the European Court of Human Rights discussed in the next chapter, Bartrum asks whether Kennedy J's view that "a Latin cross is not merely a reaffirmation of Christian beliefs [but] a symbol often used to honor and respect those whose heroic acts, noble contributions and patient striving help secure an honored place in history for this Nation and its people".[58] This would mean that the association of the cross used in such public ways by the state has lost much of its original meaning by association with the state and its objectives.

What was particularly notable about this case was the following: during those hearings Scalia J had argued that Counsel for the respondent, Peter Eliasberg, in arguments heard in October 2009 had argued that many Jewish war veterans would not want to be honoured by "the predominant symbol of Christianity". During those hearings Scalia J had argued that "the cross is the most common symbol of the resting place of the dead" to which Eliasberg responded, "There is never a cross on the tombstone of a Jew".[59] This is an example of what can happen when the state identifies the majority religion with itself. Other religious viewpoints (or none) become marginalised, and views such as Scalia J's show that such identification excludes any insight on how that identification has happened.[60]

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[52] *Salazar v Buono*, 559 US 700 (2010).
[53] Adam Liptak, 'Justices' Ruling Blocks Cross Removal', *The New York Times*, April 28, 2010, <http://www.nytimes.com/2010/04/29/us/29cross.html?_r=0>.
[54] *Salazar v Buono*, 559 US 700 (2010).
[55] (Supreme Court of the United States, Oral Argument Transcript, http://www.supremecourt.gov/opinions/09pdf/08-472.pdf, 38-39).
[56] Ian Bartrum, '*Salazar v Buono*: Sacred Symbolism and the Secular State' (2010) 105 *Northwestern University Law Review Colloquy* 31, 39.
[57] *Salazar v Buono*, 559 US 700 (2010).
[58] *Salazar v Buono*, 559 US 700 (2010).
[59] (Supreme Court of the United States, Oral Argument Transcript, http://www.supremecourt.gov/opinions/09pdf/08-472.pdf, 38-39).
[60] This issue has been revisited recently in *Jewish War Veterans v City of San Diego*. (US Court of Appeals Ninth Circuit 4 January 2011 No 08-56415, 223.) McKeown J for the court stated: 'The use of such a distinctively Christian symbol to honor all veterans . . .suggests that the government is so connected to a particular religion that it treats that religion's symbolism as its own, as universal. To many non-Christian veterans, this claim of universality is alienating.'

The *New York Times* commented that "[i]t is one of the ironies of the sequence of cases dealing with religious symbols on public land that those who argue for their lawful presence must first deny them the significance that provokes the desire to put them there in the first place."[61] In the wake of *Salazar v Buono*,[62] the *New York Times* introduced the topic as "the latest chapter of this odd project of saving religion by emptying it of its content" and asked when is a cross a cross?

> … also, when is a menorah a menorah, and when is a crèche a crèche, and when are the Ten Commandments directives given to the Jews by God on Mt. Sinai? These questions, which might seem peculiar in the real world, are perfectly ordinary in the wild and wacky world of Establishment Clause jurisprudence, where in one case *(Lynch v Donnelly, 1984)*[63] the Supreme Court declared, with a straight judicial face, that a display featuring the baby Jesus, Mary, Joseph and the wise men conveyed a secular, not a religious message.[64]

John Witte, Jr and Nina-Louisa Arold recently considered the long line of religious symbolism cases in the US in the context of symbolism cases in Europe. They find a number of contemporary parallels.[65] They observed that older displays and practices fare better than newer ones, even if the older displays were much more religious in nature. The US Supreme Court's view is that such displays have become merged into American culture, society and democracy, and that therefore their time has passed to influence contemporary discourse on religious establishment. They have now lost their religious content or have become a symbol of ceremonial deism.[66] They note also how the symbol is characterised by the court.[67]

> *Stone* and *McCreary County* characterized the Decalogue as a religious symbol and struck it down; *Van Orden* and *Pleasant Grove City* characterized it as an historical marker and let it stand. *Lynch* labeled the crèche a mere holiday display with commercial value, and let it stand; *County of Allegheny* labeled the crèche a depiction of the Christmas story, and struck it down. *Pinette* called the Latin cross a form of private expression protected by the free speech clause; *Pleasant Grove City* called the Decalogue a form of government speech immune from the Free Speech Clause. *Lynch* labeled the secular decorations around the crèche an effective buffer; *McCreary County* regarded the secular documents around the Decalogue as fraudulent camouflage. For *Stone*, labeling the Decalogue as a moral code was viewed as a subterfuge belied by the very imperative tone of the Commandments. For *County of Allegheny*, labeling a forty-five-foot county Christmas tree as "A Salute to Liberty" was sufficient Constitutional cover for placement of a menorah. ... Characterization of the symbol or practice can be key to its Constitutional fate.

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[61] Stanley Fish, "When is a Cross a Cross?" *New York Times Opinionator* (May 3, 2010), http://opinionator.blogs.nytimes.com/2010/05/03/when-is-a-cross-a-cross/?_r=0 cited in Ian Bartrum, '*Salazar v Buono*: Sacred Symbolism and the Secular State', (2010) 105 *Northwestern University Law Review Colloquy* 31, 39.
[62] *Salazar v Buono*, 559 US 700 (2010).
[63] *Lynch v Donnelly*, 465 US 668 (1984).
[64] Stanley Fish, "When is a Cross a Cross?" *New York Times Opinionator* (May 3, 2010), http://opinionator.blogs.nytimes.com/2010/05/03/when-is-a-cross-a-cross/?_r=0.
[65] John Witte, Jr. and Nina-Louisa Arold, 'Lift High the Cross?: Contrasting the New European and American Cases on Religious Symbols on Government Property' (2011) 25 *Emory International Law Review* 5, 48-52.
[66] This latter concept will be explored in greater depth in Chapter 9.
[67] John Witte, Jr. and Nina-Louisa Arnold, 'Lift High the Cross?: Contrasting the New European and American Cases on Religious Symbols on Government Property' (2011) 25 *Emory International Law Review* 5, 49-50.

The above cases show that in a number of jurisdictions, and in the United States and Europe particularly, the role of symbols whether placed by the state or worn by individuals remains a strongly contested issue. As Mark Movsesian observes:

> The fact that cases like *Salazar* and *Lautsi* continue to arise reveals something important about the state of religion at the start of the 21st century. Long past the point when it was supposed to have disappeared as a public concern, religion remains a vital, even growing force. Governments continue to place religious symbols in courtrooms, classrooms, city halls and parks. And citizens continue to consider such symbols worth a fight. Even in Western Europe, perhaps the most secular place on the planet, millions of people object to removing religious symbols from public places. Other millions consider such symbols an affront to pluralism and a throwback to an unenlightened time.[68]

Religious symbols, where the symbols relate to a long standing religious community, are difficult to separate from the prevailing constitutional identity, especially in states such as Italy where the association goes back centuries. Within the national context it is understandable that it is difficult for some states to perceive of religious symbols as not being representative of the state, as was asserted by Italy in the *Lautsi v Italy*[69] case. This is particularly so where religious influences upon the state are particularly strong.[70]

However, in the context of secularism as considered by Holyoake, these symbols are not necessarily illegitimate. Italy is constitutionally secular[71] as is the United States.[72] Yet the cases of *Lautsi* and *Salazar* excite much controversy, and the decisions in each are complex, where the courts are attempting to reconcile secular principles with strong community support of religion. In their considerations of secularism, each state follows the general principle of the state being neutral with respect to religion.[73] Each has a different perspective,[74] but are the distinctions important?

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[68] Mark L. Movsesian, 'Crosses and Culture: State-Sponsored Religious Displays in the US and Europe' (2012) *Oxford Journal of Law and Religion* 1, 2. See also John Witte, Jr. and Nina-Louisa Arold, 'Religious Symbols on Government Property: Lift high the Cross?: Contrasting the New European and American Cases on Religious Symbols on Government property' (2011) 25 *Emory International Law Review* 5.

[69] *Lautsi and Others v Italy* [GC] - 30814/06 Judgment 18.3.2011 [GC] (18 March 2011).

[70] Alessandro Ferrari and Silvio Ferrari, 'Religion and the Secular State: The Italian Case' in Javier Martínez-Torrón and W C Durham Jr (eds), *Religion and the Secular State: National Reports* (ICLRS 2010) 431, 432.

[71] The Italian Constitution provides that '[t]he State and the Catholic Church are independent and sovereign, each within its own sphere' (Italian Constitution Art. 7) and that 'religious denominations are equally free before the law'. (Italian Constitution Art. 8)

[72] First Amendment to the *United States Constitution*.

[73] Michel Rosenfeld, 'Can Constitutionalism, Secularism and Religion be Reconciled in an Era of Globalization and Religious Revival Symposium: Constitutionalism and Secularism in an Age of Religious Revival: The Challenge of Global and Local Fundamentalisms: Introduction.' (2008-09) 30 *Cardozo Law Review* 2333, 2333, "from a constitutional standpoint, the modem state steeped in the normative order dictated by the Enlightenment should at once be both neutral with respect to religion, by neither favoring it nor disfavoring it within its (public) sphere of legitimate action, and also equally protective of its citizens' freedom of and from religion within the private sphere."

[74] "For the Supreme Court, neutrality means, at a minimum, that government may not proselytize, in the sense of pressuring people to join a religion. Neutrality goes beyond that narrow conception, however. The Justices have also indicated that government may not display symbols in a way that suggests preference for a particular sect. Indeed, the Court sometimes says that government may not endorse religion even generally, though the Court's decisions do not consistently support that view. For the ECtHR, in contrast, neutrality means only that the state must avoid proselytism, understood as active religious indoctrination—classroom catechism or prayers, for example. Giving 'preponderant

Holyoake sought to have a role for all, including religion, in the public sphere. Secularism also meant that religion would not directly control the policy and legislative decisions of the state. Cases such as *Lautsi* and *Salazar* have caused concerns that overt religious symbols overtly or impliedly supported by the state suggest an influence upon the deliberations of the state that are contrary the ideals of secularism, that there is control of government by religion. *Lautsi* and *Salazar* are recent examples of where there is smoke but no fire: that the courts have not accepted that there is any evidence that religious symbolism sponsored, endorsed or incidentally related to by the state has any deliberate intent to further the interests of religion, contrary to the secular ideal.

Holyoake's views would have seen these symbols as part of the plurality of the community, that they are part of the local culture. Public symbols such as flags,[75] crosses and the like are imbued with meaning, a *mythos*, of the community,[76] and have varying meaning to others, with no consistent view even within countries.[77] Removing these symbols would remove manifestations of how a community sees itself, but there is little evidence it influences its constitutional identity; that there is any real influence of these symbols upon non-believers, or intent of the state to manifest that religion has influenced it. In the spirit of Holyoake's views that all positions have a role to play in the polity, and all contribute to a state's cultural identity, then the symbols do no harm. Susanna Mancini considers that religious symbols have the capacity for harm:

> Religious symbols, however, can easily turn into catalysts of aggression because they express and generate a primitive intellectual and relational level of human development - the level of blind fixations and belongings. Religious symbols unite, but at the same time they strengthen division and support the building of barriers between one's self and the other. Majorities and minorities seek shelter in religious symbols as a reflex of the increasing difficulty they experience in finding a common core of shared civic values. [78]

However, this capacity should not be removed until the state considers that the harm to society outweighs the good. Outside of France's 'hard secularism' there are no

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visibility' to the symbols of a particular sect does not qualify, to say nothing of endorsing religion generally." (Mark L. Movsesian, 'Crosses and Culture: State-Sponsored Religious Displays in the US and Europe' (2012) 1 (2) *Oxford Journal of Law and Religion*338).

[75] Susanna Mancini makes a distinction between flags and other public symbols by arguing that "in a pluralistic society, both for majorities as well as for minorities, religious symbols play a peculiar role in identity related dynamics. Their role cannot be compared with that of official State symbols such as the national flag, which do not represent any "official truth" but rather testify to the existence of a political community that shares a (limited) set of common political values." (Susanna Mancini, 'The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence', (2008-09) 30 *Cardozo Law Review* 2629, 2630.)

[76] Susanna Mancini, 'The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence', (2008-09) 30 *Cardozo Law Review* 2629, 2629, "religious symbol, such as the crucifix, or the crèche, is used as a 'public language' of identity by State authorities."

[77] Isabelle Rorive, 'Religious Symbols in the Public Space: In Search of a European Answer' (2008-09) 30 *Cardozo Law Review* 2669, 2670. "The acceptance of religious symbols in the public sphere greatly varies from State to State. National political cultures and social histories weight heavily on the construction of concepts framing the scope of freedom of religion, such as secularism or public order."

[78] Susanna Mancini, 'The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence', (2008-09) 30 *Cardozo Law Review* 2629, 2630.

strong state views on this, and indeed France has not shown that there is harm to society from such symbols.

III STATE FEAR OF BEING IDENTIFIED WITH RELIGION - RELIGIOUSLY IDENTIFIABLE CLOTHING

This matter of religious symbols being endorsed by the state in public places is even more controversial in the public school environment where again the state attempts to associate a religious symbol with a secular purpose. The most obvious symbols are those worn by students and teachers to publicly show their affiliation with a religious viewpoint.

One of the most prominent issues in the media in the last ten to fifteen years has been the profoundly negative response of some secular states - notably France but also elsewhere in Europe - to overt personal displays of religious affiliation. Most notably, the state has found that those who are of minority religious persuasions have been asserting their rights to act as their religion has obligated them (in most cases), through the wearing of conspicuous religious garb or jewellery.

These cases cover a number of jurisdictions, and appear in most mainstream secular democracies to be anomalous to their general treatment of religious freedoms.[79] The previous section of this chapter looked at the curious treatment of some jurisdictions to religious symbols, which on their face value had been in place for some time and were not being overtly used to endorse religion. This section looks at old religious symbols in new contexts, where the state has had to consider new policy responses to the new circumstances, such as Islamic headdress in Europe, or Jewish symbols in Christian North America. Holyoake's principles would consider that all these symbols have little to do with secularism. These symbols are not proselytising by themselves, but yet are being judged for what might be implied by their presence in the public sphere. It is not clear at all what harm these symbols create in their respective jurisdictions. The cases outline potential harms of passive proselytising. If that were all that was required, then the state would have to remove all buildings and religious dress that are impliedly accepted and therefore endorsed by the state.

As for other symbols mentioned in this thesis, I would argue that passive symbols are consistent with Holyoake's principles. They do not act to remove religion from having its place in the public sphere; indeed they are in the public sphere but do not say anything. Their presence does not pressure the state into decisions that favour their religions. Each of these cases are however slightly different in their context, and are worth discussion below.

In most modern liberal secular democracies, those who are of the Christian tradition tend not to attract the enmity of the secular state for a number of reasons.[80] The first is that states with a significant Christian history are unlikely to have laws successfully

[79] As will be discussed below in the context of Canada, Switzerland and Turkey.

[80] However, recent cases have held that prohibitions against the wearing of religious symbols in the workplace, such as *Chaplin v Royal Devon & Exeter Hospital NHS Foundation Trust* [2010] ET 1702886/2009 and *Eweida v British Airways* [2010] EWCA Civ 80 (holding that prohibitions regarding wearing crucifixes were not discriminatory).

passed that identify those who are members of the majority religious grouping. Second, in Christianity the wearing of crucifixes and similar are usually small and are worn as a sign of religious conviction and tend to be unobtrusive. The state with such traditions therefore rarely has reason to consider the impact of Christian symbol worn by adherents.[81]

However, the wearing of the Islamic Hijab, the Jewish Yarmulke and the Sikh Turban are seen by wearers as a religious duty or social obligation in the countries where these obligations are long accepted. As with Christians, there is little issue with their wearing by states where these are traditional garb.[82] However, in recent years there has been a large movement of people from areas of traditional acceptance of overt religious symbols worn by individuals, to lands where traditions have been to have minimal or no symbolism, such as migration of Muslims to Europe.[83]

Many countries meeting unaccustomed religious diversity have approached the issue differently. Some like the United Kingdom have seen little difficulty in accommodating change, where for example school children wearing religiously required clothing are common and unremarkable.[84] France has banned such things unequivocally.[85] Often the proffered argument for clothing bans have been that the clothing is associated with religious behaviours deemed to contradict the values that the workplace or school promotes.

Many cases across the world have involved women wearing recognisable religious items as clothing, and usually Islamic headdress, in the public square as teachers or public employees. Whilst many of these cases have originated in Europe, it has not been unknown in other jurisdictions such as the USA or Canada.[86]

Government departments and schools in secular states commonly have within them individuals as employees or students who represent the multi-cultural and multi-religious breadth of the general population. A number of these will feel an obligation to wear items of religious garb that may challenge public policy or legislation. Such individuals may feel that public policy against religious dress in a public place may breach their right to religious expression. Often this clash of ideals ends up as litigation.

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[81] Susanna Mancini, 'Religious Symbols in the Public Space: The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence' (2009) 30 *Cardozo Law Review* 2629, 2629.

[82] Peter G. Danchin, 'Suspect Symbols: Value Pluralism as a Theory of Religious Freedom in International Law' (2008) 33(1) *Yale Journal of International Law* 1, 3.

[83] Timothy M. Savage, 27(3) *The Washington Quarterly*, Summer 2004, 25, 25. "Internally, Europe must integrate a ghettoized but rapidly growing Muslim minority that many Europeans view as encroaching upon the collective identity and public values of European society."

[84] Matthias Koenig, 'Incorporating Muslim migrants in western nation states – a comparison of the United Kingdom, France, and Germany' (2005) 6(2) *Journal of International Migration and Integration* 219, 224.

[85] See generally Carolyn Evans, 'The Islamic Scarf in the European Court of Human Rights' (2006) 7 *Melbourne Journal of International Law* 52; Christian Joppke, State Neutrality and Islamic headscarf laws in France and Germany (2007) 36(4) *Theory and Society* 313; Mohammad Mazher Idriss, 'Laïcité and the banning of the 'hijab' in France' (2005) 25(2) *Legal Studies* 260.

[86] Bloomberg Businessweek, *NY Sikh, Muslim workers allowed religious headwear*, May 30 2012, <http://www.businessweek.com/ap/2012-05/D9V3C5L80.htm>.

The United States is generally seen as more tolerant than most states with respect to religiously inspired clothing. Ioanna Tourkochoriti argues that this because in "in the United States the widespread religiosity makes the American legal order more respectful to religious differences." Accordingly, "this religiosity makes the American legal order more open to accepting manifestations of religion in the public sphere."[87]

There are few cases as a consequence in the United States relating to issues between the state and wearers of distinctive religious dress. The leading case in this area is *Goldman v Weinberger*.[88] In *Goldman* the US Supreme Court rejected a Free Exercise Clause challenge to a US Air Force regulation which required Air Force officers not wear headgear whilst indoors.

The Supreme Court was required to determine whether the Free Exercise Clause of the First Amendment to the United States Constitution required the military to accommodate religion by providing an exemption to military regulations regarding authorised clothing while on duty. Captain Goldman was a doctor in the US Air Force, serving as a clinical psychologist. He was also an orthodox Jew and an ordained Rabbi. Contrary to military regulations he wore his yarmulke (skullcap) whilst on duty.

Following an obligation to attend a court martial as a defence witness in 1981, the prosecution attorney complained that Goldman had breached Air Force regulations. When requested to cease breaching regulations by wearing the yarmulke, Captain Goldman sued - arguing that the state should permit an accommodation to him under the Free Exercise Clause of the First Amendment. The U.S. Supreme Court held that no such accommodation was required. Goldman argued in the Supreme Court that the defence had to pass the *Sherbert*[89] test by demonstrating a "compelling interest" for the violation, which he argued could not be made out as wearing a yarmulke did not threaten military discipline. The Court did not accept this, holding that the *Sherbert* test did not apply to the military as there was a need to "foster instinctive obedience, unity, commitment, and esprit de corps."[90] Congress later permitted the wearing of religious dress by the military.[91]

Goldman is concerned with a religious symbol in the form of clothing, in particular clothing that makes identifiable a religion that is not mainstream and is a symbol of difference.[92] The Air Force regulation in question[93] actually permitted military

[87] Ioanna Tourkochoriti, 'The Burka Ban: Divergent Approaches to Freedom of Religion in France and the USA', (2012) 20 *William & Mary Bill of Rights Journal* 791, 851-2.
[88] *Goldman v Weinberger*, 475 U.S. 503 (1986).
[89] The *Sherbert* test is a test used by the courts in the United States when considering cases involving unemployment compensation. The government is required to show a compelling state interest when such compensation is denied to a person who in some way was dismissed from employment due to the conditions of that employment not agreeing with the observed tenets of the employee's religion. The test derives from the case of *Sherbert v Verner*, 374 US 398 (1963), and requires the demonstration of the state's compelling interest in denying the compensation.
[90] *Goldman v Weinberger*, 475 US 503 (1986), 507.
[91] Proposals in Congress to amend the regulations finally succeeded in 1988 in the annual *National Defense Authorization Act*, providing for a general rule that "a member of the armed forces may wear an item of religious apparel while wearing the uniform of the member's armed force."
[92] Janet L. Dolgin, 'Religious Symbols and the Establishment of a 'National Religion', (1987-88) 39 *Mercer Law Review* 495, 506.
[93] Department of Defense Directive 1300.17 (June 18, 1985).

personnel to wear religious clothing.[94] Brennan J in his dissent in that case observed that the Air Force Standard *"only* individuals whose outer garments and grooming are indistinguishable from those of mainstream Christians to fulfil their religious duties."[95]

Brennan J therefore highlighted the possible problems of the state identifying itself with religion. By having partisan policies favouring religion, it encouraged unbalanced treatment of other religious positions. As Dolgin noted regarding the *Lynch* and *Goldman* decisions:

> *Lynch* establishes a national 'Christian' religion that combines the power of the state with the power of the insider. *Goldman* suggests the consequences for those who continue to display particularity. In the end, the civil religion supported in *Lynch* and reaffirmed in *Goldman* is neither civil nor a religion. Rather, it is a state ideology grounded in Christian forms but not in Christian theology. These cases combine the myths of the nation with Christian symbolic forms, unite the collective interests of the 'insider' with those of the state, and preclude all who disagree.[96]

There have since been no comparable religious clothing cases in the US. These cases do, however, make clear the reasonable concerns of the state in supporting, even for solidarity reasons, religion publicly through symbols. To be consistent with Holyoakean secularism, the state need not overtly support religion or be limited in what it may do. Rather it should not distinguish between religions and give a balanced treatment.[97]

A case involving religious clothing in the form headscarves first occurred in Canada in an immigration case. In *Kaya v Canada (Minister of Citizenship and Immigration)*,[98] Nurcan Kaya[99] sought to remain in Canada as a refugee. She lost her job in Turkey because she would not remove her Hijab whilst she taught in a public school. The material before the initial Board of enquiry indicated that the European Human Rights Commission supported the decision of the Turkish Constitutional Court to the extent that it maintained the right of a secular state to restrict religious practice in line with the rights of citizens to equal treatment and religious freedoms. The

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[94] Brennan J in that case, in dissent observed that "the Air Force cannot logically defend the content of its rule by insisting that discipline depends upon absolute adherence to whatever rule is established. If, as General Usher admitted at trial, App. 52, the dress code codified religious exemptions from the "no-headgear-indoors" regulation, then the wearing of a yarmulke would be sanctioned by the code, and could not be considered an unauthorized deviation from the rules" (*Goldman v Weinberger*, 475 US 503 (1986), 517)

[95] *Goldman v Weinberger*, 475 US 503 (1986), 520.

[96] Janet L. Dolgin, 'Religious Symbols and the Establishment of a 'National Religion', (1987-88) 39 *Mercer Law Review* 495, 516.

[97] This does not mean placing symbols of every religion in public spaces, which would be unworkable.

[98] 2004 FC 45

[99] Her status in Canada is determined under the *Immigration and Refugee Protection Act*, S.C. 2001 c27 as a person who by reason of a well-founded fear of persecution for reason of race, religion, nationality, membership in a particular social group or political opinion is unwilling or unable to avail himself or herself of the protection of the country of nationality. A person may also be given refugee status in Canada if in need of protection because removal to the country of nationality could lead to subjection to torture, a risk to life or to a risk of cruel and unusual treatment or punishment. Mrs Kaya was found in the first instance not to be a refugee or a person in need of protection, on the grounds that the banning of the wearing of head scarves in public places reflected a government policy designed to protect the secular state, and was not discriminatory or persecutory.

Federal Court agreed. Accordingly her removal to Turkey would not put her in danger of any form of maltreatment by the Turkish state.

Mrs Kaya cited the 1984 Canadian case of *Rajuden v Canada (Minister of Employment and Immigration)*[100] where it was held that there was persecution in Turkey in the form of punishment due to particular opinions or adherence to a particular creed or mode of worship. This was not applied, as Mrs Kaya advised that her own Imam never encouraged women to wear the Hijab in the workplace, and she was not being harassed because of her adherence to any form of Islam or indeed any religion.

The case was also distinguished from the 1994 case of *Fosu v Canada (Minister of Employment and Immigration),*[101] where Jehovah's Witnesses in Ghana had their public practice of religion prohibited. In Turkey Mrs Kaya was permitted to practise her religion, and wear her Hijab in public. Two other 1994 cases were also cited *Namitabar v Canada (Minister of Employment and Immigration)*[102] and *Fathi-Rad v Canada (Secretary of State*).[103] These cases both dealt with Iranian women who were required by law to wear a Chador. These cases were also distinguished, as there was no legal compulsion for Mrs Kaya to wear the Hijab in Turkey. Canada, like the United States, continues to have debates on whether its constitution continues to reflect the views of the majority in supporting their religious rights.[104]

Most of the cases involving religious dress in Canada have involved Sikh practices.[105] More recently, a religious dress in Canada related to a school student's wearing of a kirpan, a knife-like weapon worn as a religious obligation by Sikhs. In 2006 the Canadian Supreme Court held in *Multani v Commission scolaire Marguerite-Bourgeoys*[106] that involved a 12 year old Sikh boy wearing one to school. The Court held that the banning of the kirpan in a school environment went against the freedom of religion principles within Canada's *Charter of Rights and Freedoms*, and was not considered to fall within the limitations clause of the *Charter* that allows reasonable limitations on rights and freedoms through legislation if it can be "demonstrably justified in a free and democratic society." [107] The banning of kirpans in schools as a public safety reason for limitation of a constitutional rights was not a proportional response to the perceived threat.[108]

[100] (1984), 55 N.R. 129 (F.C.A.)
[101] (1994), 90 FTR 182
[102] [1994] 2 FC 42, 78 FTR.
[103] (1994) 77 FTR 41
[104] "Just When you thought the Church and the State were Separated ..." Centre for Constitutional Studies < http://www.law.ualberta.ca/centres/ccs/news/?id=146>.
[105] *Bhinder v CN* [1985 2 S.C.R. 561] (railway employee required to wear a hard hat), *Peel Board of Education v Ontario Human Rights Commission*, Court File #1170/89 (Supreme Court of Ontario - Divisional Court) (Sikh teacher in a school with a weapon).
[106] [2006] 1 S.C.R. 256, 2006 SCC 6
[107] "1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."
[108] Anthony Gray, 'Comparative Religious Freedom: The Right to Wear Religious Dress" in Meg Wilkes Karraker, *The Other People: Interdisciplinary Perspectives on Migration* (Palgrave Macmillan, Basingstoke, 2013), 175

In Canada, religion does not have its rights protected absolutely, and must be prioritised against other public interests.[109] However, religious rights limitations are not applied readily and "the narrow conception of any limiting measures taken to protect safety and security is essential."[110] The cases in Canada have mainly involved, not altogether unreasonably, the obligation of the state to ensure public safety through concern about weapons in public spaces for which they have responsibility. This has clashed with the wish of Sikhs to have their inflexible obligation[111] to wear the kirpan acknowledged and respected.

Again, there has been little evidence that there has been an identifiable threat to the state by a religious practice. In the Holyoakean ideal, there is room for a practice that has no threat to the state, either through its nature as a religious symbol, or as an object that has the perceived capacity for harm.[112] The 2006 case of *Multani v Commission scolaire Marguerite-Bourgeoys*[113] has caused Canadians to review their national identity and forced them to reconcile religious traditions outside mainstream values. Non-Sikhs have had to re-evaluate the purpose of secularism in relation to national identity.[114] Where the state has failed to make a case for a threat to its constitutional and secular identity, a new perception of national identity is forming, accepting in the Holyoakean mode that religious practices can have a place in the public sphere.

Some have found it curious that there has been on balance less concern about religious weapons in Canada than there has been regarding religious headdress in France.[115]

France has a long history on this issue. Similarly to Canada, the cases examined in the supreme courts involved Islamic dress. However, the emphasis there has been on school students. In 1989 France was focused upon three girls who insisted on having their heads covered up in public.[116] The girls were expelled from their school for wearing sign of their religion that treated as an attack on the public secularism of France, *Laïcité*. The refusing by the headmasters to admit these girls to school created a great deal of media attention, which had to be addressed by the Ministry of Education. They referred the matter to the *Conseil d'Etat*, the French Court of Final Instance on administrative matters, which held that the wearing of clothing that indicated a religious affiliation was not of itself incompatible with secularism.[117]

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[109] See for example *Children's Aid Society* [1995] 1 SCR. 315, where the Canadian Supreme Court held that the interest in administering a life-saving blood transfusion to a child to outweigh the rights of the child's parents to prevent the transfusion on religious grounds.
[110] Michael Baker, 'Security and the Sacred: Examining Canada's Legal Response to the Clash of Public Safety and Religious Freedom' (2010) 13 *Touro International Law Review* 1, 58.
[111] See 'Understanding the Kirpan', *World Sikh Organization of Canada* <http://worldsikh.ca/page/understanding-kirpan >.
[112] See 'Understanding the Kirpan', *World Sikh Organization of Canada* <http://worldsikh.ca/page/understanding-kirpan >. "The idea of a Sikh attacking someone with a kirpan is far more frightening, horrifying, and repugnant to those of our faith than to anyone outside it."
[113] *Multani v Commission scolaire Marguerite-Bourgeoys* [2006] 1 S.C.R. 256, 2006 SCC 6
[114] See generally Valerie Stoker, 'Zero Tolerance? Sikh Swords, School Safety, and Secularism in Québec' (2007) 75 (4) *Journal of the American Academy of Religion* 814.
[115] Sarah V. Wayland, 'Religious expression in public schools: *Kirpans* in Canada, *hijab* in France' (1997) 20(3) *Ethnic and Racial Studies* 545.
[116] John R. Bowen, "Muslims and Citizens", *Boston Review*, February/March 2004.
[117] However, it qualified that with three limitations, that:

In 1996,[118] the *Conseil d'Etat* determined three cases involving the expulsion of girls wearing headscarves. These cases were notable in that by this time references to the principle of secularism were missing, and replaced with a view that the freedom to express a religious view cannot be limited by reference to secularism. The 1996 decisions meant that the headscarves by themselves could not be used to argue an act of pressure or proselytism. Dealing with this issue became less subjective, limiting freedom of religious expression in this way to the protection of public order, or the continuity of the public service provided by the school, and the regular attendance at classes. Pupils could not use the more pragmatic decisions of this sort to wear distinctive religious signs in order to avoid course attendance or to avoid sport or technical classes.[119]

The French Senate approved by a significant margin the bill put to it to ban the Hijab and other religious insignia in state schools on 3 March 2004. The French Prime Minister Jean-Pierre Raffarin insisted before the vote that the law was not intended to discriminate between religions, but to "send a powerful and quick signal", and that the law was needed to contain the spread of "Muslim fundamentalism", and by doing so ensure the integrity of the French principle of secularism.

This interpretation of the 'hard' secularism exemplified in France is clearly not consistent with Holyoake's principles. There is no appeal to inclusive views compatible with Holyoakean ideals, or indeed to any philosophical view. The legislation appeals politically to the French Republic's long history of enmity with religion, and a wish not to return to the times before the 1789 Revolution.[120]

At the same time as the introduction of the ban on religious dress, three Sikh boys[121] were expelled from French schools for wearing turbans. Jasvir Singh had appealed to the European Court of Human Rights (ECHR), which had held that the ban on turbans was a proportionate response to the aims of protection of the rights and freedoms of others and the protection of public order. However Bikramjit Singh went further. Only recently, in 2013 he succeeded in *Bikramjit Singh v France*,[122] when the United Nations Human Rights Committee found that France's restrictions on the wearing of overt religious symbols breached a student's religious freedoms under the International Covenant on Civil and Political Rights.[123]

- the pupil cannot refuse attendance in a course on the basis that the course would be against the student's religious convictions;
- the wearing of those signs would acts of pressure, provocation, propaganda or proselytism, and must not be ostentatious; and
- the wearing of religious signs must not interfere with the aims or mission of the public service or utility.

[118] Conseil d'Etat, 27 novembre 1996, Ligue islamique du Nord et autres; M. et mme Wissaadane et autres; M. et mme Jeouit.

[119] Claire Saas, "Muslim Headscarf and Secularism in France" (2001) 3 *European Journal of Migration and Law* 453, 455.

[120] See generally Tony Meacham, Master's dissertation: *Secularism and the Right to Freedom of Religion: The Banning of Headscarves in France* (University of New England, 2005).

[121] Jasvir Singh, Bikramjit Singh and Ranjit Singh.

[122] UN Doc CCPR/C/106/D/1852/2008.

[123] The French legislation (Act No. 2004-228) that was the subject of the complaint relates to the wearing of religious symbols or clothing within the state school system. France's Education Code provided that "[i]n public primary schools, secondary schools and lycées, the wearing of symbols or

The complainant, Bikramjit Singh, was in 2004 an Indian national attending a lycée in France. He had attended school at the beginning of the school year wearing a *keski*, which is a light piece of dark material worn by adult Sikhs men to cover and protect their hair as a religious obligation. The school asked Mr Singh to remove the *keski*, a request with which he did not comply. The school initially suspended the student, and then later restricted his learning activities. He appealed to an administrative tribunal which had him expelled, forcing him to study by correspondence. He had no difficulties on this issue when he entered university. On appeal to the Committee, which handed down its decision in February 2013, he succeeded on the grounds of religious discrimination under Article 18[124] of the ICCPR.[125] The headscarf and similar head covering issues remains a conflict between wearers and the French state.[126]

Some ten years after the introduction of the French law banning conspicuous religious symbols in schools was introduced,[127] the debate remains based on a perspective of the state being paternalistic. The French state is seen as having a normative ideal of the French Republic as promoting individual autonomy, in the sense of Isaiah Berlin's ideal of 'positive liberty'. Policies relating to the banning of the hijab are therefore not intended to prevent harm in the sense that the Utilitarians posited, but rather have been for the purpose individual emancipation, a continuation of policies that go back to the 1789 Revolution and its reaction against the Catholic Church.[128]

In such a 'hard secularist' environment, the French state is being paternalistic, and is denying views contrary to that of the state having a contribution to the public sphere. This may even be understandably the response of *Laïcité* to public symbols, as the

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clothing by which pupils manifest their religious affiliation in a conspicuous manner is forbidden. Under the rules of procedure, disciplinary procedures shall be preceded by a dialogue with the pupil."

[124] *International Covenant on Civil and Political Rights* (ICCPR).

[125] The Committee considered that there was no evidence that the wearing of the *keski* posed any actual threat to the rights and interests of others, or to public order, and went on to say that "[t]he Committee is also of the view that the penalty of the pupil's permanent expulsion from the public school as disproportionate and led to serious effects on the education to which the author, like any person of his age, was entitled in the State party. The Committee is not convinced that expulsion was necessary and that the dialogues between the school authorities and the author truly took into consideration his particular interests and circumstances. Moreover, the State party imposed this harmful sanction on the author, not because his personal conduct created any concrete risk, but solely because of his inclusion in a broad category of persons defined by their religious conduct."

[126] Sydney Morning Herald, *Sikhs fight to wear turban to school*, 24 September 2013 <http://www.smh.com.au/world/sikhs-fight-to-wear-turban-to-school-20130924-2ubkb.html>; BBC News, *France imposes first niqab fines*, 22 September 2011 < http://www.bbc.co.uk/news/world-europe-15013383>.

[127] *loi n° 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics*" ("Law #2004-228 of March 15, 2004 concerning, as an application of the principle of the separation of church and state, the wearing of symbols or garb which show religious affiliation in public primary and secondary schools"). The author goes on to argue that the subsequent 'burqa ban' in France in 2010 continues such state paternalism to adult women instead of just school children (Article 1 declaring that "it is forbidden to wear in public places any garment designed to hide the face" (*Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public (1)* [Law 2010-1192 of October 11, 2010 banning face covering in public spaces (1)]).

[128] Cécile Laborde, 'State paternalism and religious dress code' (2011) 10(2) *International Journal of Constitutional Law* 398, 399

prevailing political context has been closer to antipathy rather than sympathy.[129] Such paternalism is antithetical to Holyoake's wish for all viewpoints to be treated equally in the public sphere, not tolerated and treated as a threat to the status quo.

However, the treatment of Islamic headdress has not been limited in Europe to France. Other secular states, such as Germany, have been adjudicating on this issue in their constitutional court on matters originating in the *Länder*. The German cases have addressed more clearly their concerns on these issues. These cases, similar to a number of religious symbol cases mentioned above, show that the state argues that the religious dress cases somehow infringe the religious neutrality of the state. How it does so is not made very clear, but can generally be categorised with cases identified in the previous section relating to religious symbols as matters where the threat to the state is not made very clear by the symbol. The nature of these symbols, as with others, appears to involve context as well as time.[130]

Islamic headscarf at the federal level in Germany has been seen in two cases at the Federal Constitutional Court in recent times. The first case, the "teacher-headscarf" decision[131] in 2003, involved a Muslim woman who had applied for a teaching position at a German school. She was a German citizen, born in Afghanistan. A condition of that employment was that she was qualified for the position, as a civil servant of one of the *Länder*. The question arose as to whether a woman applying for a teaching position in a German school who is otherwise qualified for the position, is failing to meet that qualification if she is not prepared to remove that headscarf. The woman argued that the headscarf was integral to her religious identity, and that a requirement to remove it would infringe[132] the German Basic Law.[133]

It would follow naturally from that that it would be permissible to wear a headscarf at work. However, if the wearing of that headscarf is related to a requirement of religious faith, the question arises as to whether the headscarf becomes a form of religious indoctrination and militates against any right of students not to be so indoctrinated, and not to believe in the faith being displayed.[134] By displaying her faith, such a

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[129] See generally T. Jeremy Gunn, 'Religious Freedom and Laïcité: A Comparison of the United States and France', 2004 *Brigham Young University Law Review* 419, 456-457 ("the headscarf is increasingly seen as the symbol of a foreign people--with a foreign religion--who have come to France, but who do not wish to integrate themselves fully into French life or accept French values," and that "just before the events in 2003 that raised the headscarf to a sensational media issue, some leading French legal scholars suggested the possibility that the real concern regarding the Islamic headscarf may not be related to high principles of a neutral republican education in public schools, but a deeper unease about Islam."); Adrien Katherine Wing and Monica Nigh Smith, 'Critical Race Feminism Lifts the Veil: Muslim Women, France, and the Headscarf Ban' (2005-2006) 39 *University of California Davis Law Review* 743, 745 ("While this law affected Jewish yarmulkes, Sikh turbans, and large Christian crosses, its main effect was to ban the wearing of headscarves, or *hijabs*, by young Muslim girls.").

[130] There have been few of these cases relating to Islamic dress in North American or European jurisdictions since the immediate period after late 2001.

[131] BVerfG, 2 BvR 1436/02.

[132] Articles 4(1) and 4(2), and 33(3).

[133] Christine Langenfeld and Sarah Mohsen, "Germany: The teacher head scarf case" (2005) 3 *International Journal of Constitutional Law* 86. Such cases involve a number of issues that have been raised in German courts. Articles 4.1 and 4.2 of the Basic law provide for freedom of religion. Article 33.3 of the Basic Law provides for equal access to public access irrespective of religion.

[134] Article 6.2 Sentence 1 provides for the right of a parent to determine the principles of their child's education. Article 7.1 provides for the responsibility of the state to supervise public education.

teacher may be infringing upon such a right. The question was whether the teacher, by wearing the scarf infringed the religious neutrality of the state.[135]

That Federal Constitutional Court to which she appealed acknowledged that the matter did touch upon freedom of religion rights, and that the appointment had to be considered irrespective of religion.[136] The preservation of the neutrality of the state was considered a core limit to constitutional rights.

The Court felt[137] that the principle of neutrality in the public sphere had gained more importance due to the increased plurality of modern society. Whilst looking at the rights to religious freedom of the applicant, the court balanced them against the infringement of the freedom of religion of the children whom she might teach, and the rights of the parents to determine the quality of that teaching. The Court rejected the argument that, as a private statement, a headscarf did not infringe against the state's neutrality. Rather, the Court held the headscarf is a powerful symbol of religious affiliation.

Whilst presently few in number, these cases suggest that the issue of religious freedom will soon enter public debate in Germany,[138] including associated matters of state neutrality and the nature of a pluralistic state.[139]

In Germany, Muslims have fought to have Mosques built, with arguments made that traditionally shaped mosques would disrupt the Berlin skyline, or that calls to prayer would disturb the peace. Arguments have been made that the call to prayer is analogous to the sounds made by church bells. Efforts have also been made to accommodate the special needs of students to adhere to the frequent requirements for prayer. However, Muslims have been testing the limits of secular institutions, by challenging universal laws on polygamy or compulsory school attendance on religious grounds.[140]

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[135] Matthias Mahlmann, "Religious Tolerance, Pluralist Society and the Neutrality of the State: The Federal Constitutional Court's Decision in the Headscarf Case" (2003) 4(11) *German Law Journal*, para 4. More contentiously, the argument was also raised whether, if the scarf were a sign of a patriarchal society which is said by some to subjugate women, the condoning of the wearing of the scarf was also irreconcilable with the principle of equal treatment in Articles 3.2 and 3.3.

[136] The Court however did argue that her appointment was subject to limits to constitutional rights under Article 33.5 of the Basic Law, which enables the functioning of public administration.

[137] at 255.

[138] Whilst the headscarf has been arguably the initiator in a number of jurisdictions of laws designed to prevent overt signs of religious affiliation in the public sphere, there are some signs that the provisions are being applied more even-handedly. An amended school law was adopted in Niedersachsen on April 29, 2004, which stipulated that a teacher's outward appearance should leave no doubt as to his or her fitness to convey the state's educational values. State regulations continue to be considered to ban ostentatious displays of religious affiliation across Germany, particularly in Hesse and the Saarland, as well as Bavaria and Baden-Württemburg. In general, the state regulations in place or presently being considered generally interpret headscarves as political statements that directly contradict values considered fundamental in the German constitution. However, more disturbingly, overt Christian displays are considered by some commentators as unlikely to contravene the rule of neutrality, and indeed perhaps even conform to equality clauses of the Basic Law. (see also Christine Langenfeld and Sarah Mohsen, "Germany: The teacher head scarf case" (2005) 3 *International Journal of Constitutional Law* 86, 92.)

[139] Matthias Mahlmann, op cit.

[140] Katherine Pratt Ewing, 'Legislation Religious Freedom: Muslim Challenges to the Relationship between "Church" and "State" in Germany and France' (2000) 129(4) *Daedalus* 31.

Gerstenberg[141] has recently noted on this point that

> While a distinctive feature of the German approach is the emphasis on freedom of conscience as a principle, another feature of the German approach is the assumption that Christian culture occupies a privileged place in German public life and is, indeed, a postulate of German political identity and social cohesion. Consequently its explicit affirmation in the public schools is a compelling state interest.

The problem of religious garb being restricted by the state is not limited to France and Germany, but is a constitutional issue in many European countries. Nine million Muslims live in Western Europe, which therefore has them constituting significantly large religious minorities in most of the countries in which they reside.[142] The very name of the concept of "church-state relations" indicates that traditionally the issues have been Christianity-centric and applying current thinking on separating religious issues from the state have not until recently involved significant issues involving Muslims, who only in recent years have achieved significant numbers and proportions in a number of countries - including France. Accommodating Islamic religious practices and philosophies into the strict separation of religion and state has varied in many countries.

The headscarf in Turkey is also a complex issue. The issue of women covering their heads is not seen just as a personal statement of religious affiliation. Women are banned from wearing headscarves when working in state institutions, or attending school or university. This is because the wearing of a headscarf is seen not so much as a personal choice or religious obligation, but rather as a political statement that clashes directly with the secular (or Kemalist) foundations of the state.[143]

One such case taken to the European Court of Human Rights was *Şahin v Turkey*,[144] decided in 2004. Mrs Şahin was a fifth-year medical student at Istanbul University. On 23 February 1998 the Istanbul University authorities issued a circular stating that students wearing a beard of an Islamic headscarf would not be admitted to classes, training or tutorials. The next month the Higher Education Council published an information note on regulation dress in higher education establishments, stating that it was a disciplinary and criminal offence for students to wear Islamic headscarves in such establishments. That month because of her headdress, Mrs Sahin was denied access to an examination, and subsequently impeded from attending lectures or enrolling in other courses. She appealed to the European Court of Human Rights.

The Court noted that Islamic headdresses were worn as a religious duty, and that her decision to wear hers was as a result of a religious belief. Accordingly the regulations that forced her to remove her scarf constituted a restriction on her ability to manifest her religion. The Court noted that regulations relating to wearing of headscarves were well posted prior to Miss Şahin's enrolment at university, and that she could have been

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[141] Oliver Gerstenberg, "Germany: Freedom of Conscience in public schools" (2005) 3 *International Journal of Constitutional Law* 94, 96.
[142] J. Christopher Soper and Joel S. Fetzer, "Explaining the Accommodation of Muslim Religious Practices in France, Britain, and Germany" (2003) 1 *French Politics* 39.
[143] Gareth Jenkins, "Muslim Democrats in Turkey?" (2003) 45(1) *Survival* 45, 48.
[144] 44774/98 [2005] ECHR 819 (10 November 2005).

expected to be well aware of those prohibitions, and that the wearing of the headscarf at university was incompatible with the fundamental principles of the republic.

The Court found that the measure which restricted the wearing of the headscarf was legitimate in meeting the objective of protecting the rights and freedoms of others and of protecting public order. As to whether it was necessary, the Court found that the interference with her rights was based on the principles of secularism and equality which reinforced and complemented each other. The Court went on to note that

> Secularism in Turkey was, among other things, the guarantor of: democratic values; the principle that freedom of religion was inviolable, to the extent that it stemmed from individual conscience; and, the principle that citizens were equal before the law. Restrictions could be placed on freedom to manifest one's religion in order to defend those values and principles.[145]

The Court went on to say that the concept of secularism was consistent with the European Convention on Human Rights and noted that upholding that principle could be regarded as necessary for the protection of the democratic system in Turkey. It noted that the in the Turkish context it had to be borne in mind the impact that wearing such an overt religious symbol could have on the remainder of the community which chose not to wear it.

Unusually Switzerland too had a case involving Islamic headdress which was ultimately settled in the European Court of Human Rights. In Switzerland in 2001, in the canton of Geneva, a school teacher was disqualified three years after commencing service for wearing a headscarf to class. Geneva is considered to have a secular tradition comparable to that of France. Despite no complaints being made regarding such wearing, the teacher wore it in contravention of school rules prohibiting its wearing in 1997. That prohibition was based on a threat to the state's neutrality. The Swiss Federal Court rejected the complaint, as did the ECHR in *Dahlab v Switzerland*,[146] which argued that the prohibition did not contravene Article 9 of the ECHR, and was proportionate.[147]

The above cases show the diversity of cases and jurisdictions where the state, in attempting not to be seen to be identifying with religion, has created results not proportionate to the issues. The state has in a number of cases endeavoured to maintain a public perception of neutrality in the public sphere. That neutrality has been argued to be threatened by a belief on behalf of the state that should individuals employed by them, such as teachers, or under their responsibility, such as students, who openly wear religious symbols must be doing so in the full knowledge of the state, and by extension, must be being favoured to do so.

There is, however, little evidence in such states that the disregarding of overt religious symbols in clothing in state controlled environments has had the effect of state endorsement or favouring of the religion in question relative to all others. Accordingly, the actions to quell the religious clothing in public areas appear to be an

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[145] European Court of Human Rights, "Chamber judgments in the cases of *Leyla Şahin v Turkey* and *Zeynep Tekin v Turkey"*. <http://press.coe.int/cp/2004/330a(2004).htm.>
[146] *Dahlab v Switzerland*, February 15, 2001 – Application No. 42393/98.
[147] Christine Langenfeld and Sarah Mohsen, "Germany: The teacher head scarf case", (2005) 3 *International Journal of Constitutional Law* 86, 92.

attempt to maintain a neutral stance to religion where no overt threat to it appears. Accordingly, state action as noted above has often created litigation and community disharmony where none need have been.

Carolyn Evans is critical of the approach taken by the International Court of Human Rights in these matters, particularly in the Swiss case of *Dahlab*, and the Turkish case of *Şahin*:

> The Court sided with the state against a student who was denied access to education and forced out of university. Such judgments, justified on the basis of equality, tolerance and human rights, do harm to the very notion of neutrality that the Court claims to be central to proper adjudication in these areas. When those who are not Christians but whose rights have been violated can gain no relief from the Court because the Court employs stereotypes and refuses to engage with the complexity of modern religious pluralism, then religious freedom and pluralism are undermined and the notion of human rights degraded.[148]

As I have mentioned early in this chapter, the issue of religious symbols, and particularly religious dress in the public sphere brings up many inconsistent treatments with little by way of rationale for their treatment by the various states, or clear explanation of what danger these passive objects pose to the state.[149]

IV IS THERE A LEGITIMATE BASIS FOR LIMITATIONS TO THE MANIFESTING OF RELIGIOUS SYMBOLS BY INDIVIDUALS OR THE STATE?

The original views of Holyoake regarding Secularism did not insist that religion be removed from the public space, only that it not be perceived to be driving public policy. Yet, in the case of overt religious symbolism in the public arena, religion, or the fear of being associated with it, has resulted in the state being driven by religious matters. The opportunity for religion in the secular ideal advocated by Holyoake to have a place in the public sphere without driving it is lost.

On the surface the response by the state on occasion to manifest religious symbols in the public sphere can seem to be disproportionate,[150] and the solutions meted out by higher courts can sometimes be unhelpful and confusing as a guide to constitutional interpretation.[151] However, as noted earlier in this thesis, the state may restrict freedoms in general and religious freedoms in particular in order to protect the rights

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[148] Carolyn Evans, 'The "Islamic Scarf" in the European Court of Human Rights' (2006) 7(1) *Melbourne Journal of International Law* 52, 73.

[149] I expect a deeper analysis of this is outside the scope of this thesis.

[150] Such as recently, where the United Nations Human Rights Committee has found that France's restrictions on the wearing of religious symbols or clothing in state schools breached a student's right to religious freedom under the International Covenant on Civil and Political Rights. The Committee held that "The Committee accepted that the promotion and protection of secularism within the state education sector was a legitimate aim and one which served to protect the rights of others, particularly public order and safety. However, bearing in mind the particular circumstances of this case, the Committee ruled that France's response had been unnecessary and disproportionate, as there was no evidence that Mr Singh's wearing of the *keski* posed any actual threat to the rights and interests of others, or to public order."

[151] Such as in 2005, where in the US, in *McCreary County v ACLU of Kentucky*, 545 US 844 (2005) the US Supreme Court found that the Christian Ten Commandments displayed inside a court house were held to be unconstitutional, yet in *Van Orden v Perry*, 545 U.S. 677 (2005), decided by the same court at the same time, the Ten Commandments displayed outside a court house on a monument on public grounds violated the Establishment Clause of the First Amendment to the US Constitution.

of the general community through reasons such as the protection of public order. Can there be any legitimate reasons for limiting religious symbolism?

States may wish to regulate religious symbols in order to control public institutions such as the military, prisons and similar where the maintenance of order is essential to the cohesion and administration of the public body. Additionally the state's interest in public health or safety may be impaired in the absence of such control such as in the insistence of public health authorities for motorcycle riders to wear helmets, or for women not to wear burqas in drivers licence pictures.

A third interest of the state occurs when religious symbols in public settings may be symbolic of the state.[152] While limitations on the first two grounds of behaviours permitted under Article 18 of the ICCPR have been arguably reasonably legitimate, a case for the last has been much more problematical as there is no clear public interest doctrine, no clear explanation of what it is that the state fears when symbols of religion share space in the public domain with symbols of the state.

It is difficult to understand, at least when referencing against Holyoake's principles, how passive symbols in schools can be inconsistent with secularism. It has been suggested in some of the cases above that passive symbols may influence young minds to question their religious upbringing (or lack of it). There is some case for religious doctrine introduced into public schools to be inconsistent with secular principles unless as part of a voluntary program run from outside, but these cases have largely been teased out, and decided some time ago to be inconsistent with secular principles when the doctrine is imparted by agents of the state directly.

In conclusion, while Holyoake sought a public space that respected religious contributions, what he may have not anticipated was the wish of some to make symbolic gestures through displays and clothing that, in a neutral public environment, make a statement identifying them as members of a religious community. Such displays have at times been contentious, especially in areas such as schools and courthouses where in some states such as France and the USA, where these displays make impermissible suggestions that the state supports such displays contrary to the state model of secularism.

This and the previous chapter considered where the state has shied away from association with religion in the public sphere, or has actively championed it. The next chapter looks at the grey area in between where the state has not endorsed religion, but has arguably used it to shape society with a secular purpose.

[152] Peter G. Danchin, 'Suspect symbols: Value Pluralism as a Theory of Religious Freedom in International Law', (2008) 33(1) *Yale Journal of International Law* 1, 5-6.

CHAPTER 7

SECULARISM AND RELIGIOUS EDUCATION

Holyoake had clear views on education. Consistent with his view of religion having a role in the public sphere, he felt also that there was a role for religion within education. Education did not have to include religion, nor did it have to discount it. Secularism did not advocate the removal of religion from education; it simply did not mandate it.[1]

The issues in this chapter involve the presence in some way of religion in the government owned, public school system in various countries. Any involvement by the state in the public school system is subject to the inference that such involvement must not be at the behest of, or for the direct benefit of, religion. However, a relationship with religion in the school system, as is the case in the general public sphere, can often simply arise incidentally. Just the same, often the state will seek to distance itself to remove any such suggestion, or just dismiss any such linkage. These cases have involved the funding of schools by the state, the presence of religious symbols in state schools, and the direction of students to comply with religious activity such as prayer, or to learn religious doctrine.

The cases examined in this chapter have a relation to the previous two chapters in that they address the treatment of the state to circumstances in the public sphere that come within their purview. Every secular liberal democratic state has responsibility for education overall. None completely disregard education, and at minimum will regulate it in some way, if not actively fund it and establish standards that are consistent nationally.

However, in some jurisdictions, the administration of education creates issues for the state when it is suggested that the intersection of law and religion in the public sphere means that the state in some way endorses the religious message of the schools within its responsibility. The most common cases involve school funding and traditional religious displays in schools, neither of which are new concepts, but in recent years have come under scrutiny as being somehow inconsistent with secular principles.

I SCHOOL FUNDING CASES

Although some of the cases discussed subsequently in this chapter relate to issues resolved in the courts many years ago, the concern that the state may be imposing religious values beyond its secular charter remains today. In California recently, some parents expressed concern that a uniform program for Yoga in infants' schools is a form of covert religious instruction by the state.[2]

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[1] GJ Holyoake, *The Principles of Secularism* (Austin & Company, London, 3rd Ed., 1870), 27.
[2] Sydney Morning Herald, *Parents sue schools over yoga program*, 4 March 2013. <http://www.smh.com.au/world/parents-sue-schools-over-yoga-program-20130303-2feps.html >.

This has always been a difficult area of jurisprudence. Laura Underkuffler[3] highlighted the difficulties when she observed that

> [i]n any society in which religious diversity and consequent hostilities exist, the balance that is struck among religious freedom, parental rights, and state educational objectives will necessarily be an uneasy one. The elevation of any one of these to absolutely protected status will threaten the others, and will jeopardise the complex and delicate social fabric of which all are a part.

Holyoake was quite clear on this issue. In the *Principles of Secularism*[4] he stated that

> [t]he distinction between Secular instruction and Secularism is explained, in these words:—'Secular education is by some confounded with Secularism, whereas the distinction between them is very wide. Secular education simply means imparting Secular knowledge separately—by itself, without admixture of Theology with it. The advocate of Secular education may be, and generally is, also an advocate of religion; but he would teach religion at another time and treat it as a distinct subject, too sacred for coercive admixture into the hard and vexatious routine of a school. He would confine the inculcation of religion to fitting seasons and chosen instruments. He holds also that one subject at a time is mental economy in learning. Secular education is the policy of a school—Secularism is the policy of life to those who do not accept Theology.

The two issues he articulates are therefore clear. The secular nature of the state is the means by which members of the state are governed through the nature of their constitution. Secular education is the absence of religious elements in formal education. If a government supports a school system for secular reasons - such as the provision of benefits available to all schools and students - then, if the religious mission of school is also supported by these means, it is purely incidental.

The state often does not control entirely the education sector. It is often more cost effective to have non-government providers set up schools and universities and subsidise them than to set up and pay for a school itself and duplicate the service.[5] When attempting to support the general school system to facilitate access to education, such as bus fares, it may be argued that such incidental support to a school and its students is a support of the underlying education provider, which is often a religious institution.[6]

This of course becomes a difficult argument. If the state were to withdraw general services to the community which are incidentally supportive of religious bodies, would that not, for example, be the same as withdrawing emergency services from the same groups? Where can the line be drawn between direct support of religious institutions, and indirect support which saves the institution expending the same monies for the same purpose? In providing indirect support for religion, the state is often accused of favouring religion, and thereby establishing it.

In Australia, the issue of state support of religious schools has also been examined by the Australian High Court. This was considered in *Attorney-General (Victoria); Ex*

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[3] Laura S. Underkuffler, 'Public Funding for Religious Schools: Difficulties and Dangers in a Pluralistic Society' (2001) 27(4) *Oxford Review of Education* 577, 588.
[4] GJ Holyoake, *The Principles of Secularism* (Austin & Company, London, 3rd Ed., 1870), 27.
[5] OECD, *Education at a Glance 2011 OECD Indicators: OECD Indicators*, Chapter D, D5.
[6] For example school funding: *McCollum v Board of Education, School District 71,* 333 US 203 (1948).

rel Black v Commonwealth,[7] known as the 'Defence of Government Schools' or 'DOGS Case'. Federal legislation providing for financial grants for state religious schools was challenged as breaching the provisions of section 116[8] of the *Australian Constitution*. The financial assistance legislation was provided to the states on the understanding that the funds were to be made available to state government and non-government schools. Most of the non-government providers in Australia are religiously based.

It was held that the Acts were valid laws under ss 96 and 116 of the *Australian Constitution*. Section 96 permits grants of Commonwealth funding through a State to third parties for a purpose beyond commonwealth power. A law providing incidental support to a religious body and its schools was therefore not a law establishing a religion.

The treatment of religion in Australia's public sphere is generally uncontroversial. This is because of the generally weak guarantees within section 116 for religious freedoms.[9] However, while some may see this provision as not providing for a strong separation of state and religious analogous to the religion clauses of the First Amendment to the US Constitution, this provision actually is quite consistent with Holyoake's views. Section 116 makes clear what the Australian government may not do; what is left is quite a deal of room for religion to contribute in the public sphere. Also, issues relating to this provision apply only to the Australian territories, and not to the several states.[10] Although section 116 is relatively weak in preventing the Australian government from striking down legislation that would likely not pass muster in the United States Supreme Court, organised religion is also not as strong in Australia in its desire to direct the Australian Government agenda. While often comparisons will be drawn with the *Australian Constitution* and its American counterpart, the Australian treatment of public religion is much closer to that of the United Kingdom. The latter, although not being constitutionally secular, does not have a strong religious establishment driving through the national government legislation and policies that could further its ideals were it to be aggressively pursued - as has sometimes been the case in the United States.

In the United States, *Everson v Board of Education*[11] was the first case there to examine school funding, involving a New Jersey law authorising school boards to reimburse bus fares for children to attend either public or catholic schools. Here the court had to deal with the conflict between two groups. The first were those who wished to introduce religious teachings into public school curricula and also those who wished to have public tax dollars fund private religious schools. The others were those who considered that the Establishment Clause had a strict "wall of separation" between church and state. A divided court upheld funding for buses to parochial schools. *Everson* was decided in 1947 upholding the funding because the assistance

[7] (1981) 146 CLR 559.
[8] "The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth."
[9] Luke Beck, 'Clear and Emphatic: The Separation of Church and State under the Australian Constitution' (2008) 27(2) *University of Tasmania Law Review* 161, 162.
[10] Luke Beck, 'Clear and Emphatic: The Separation of Church and State under the Australian Constitution' (2008) 27(2) *University of Tasmania Law Review* 161, 195.
[11] 330 US 1 (1947).

went to the child, not the church.[12] The Court, without dissent on this point, declared that the Establishment Clause forbids not only practices that "aid one religion" or "prefer one religion over another," but as well those that "aid all religions." Whether the funding went to the parent or the student is largely immaterial. A secular state in the Holyoakean mould would find these questions irrelevant. Where a state supports education through bus subsidies and the like, then the issue is clearly overthought. In ensuring that students could attend school their education was being facilitated. The legislation bringing the program into effect would have no overt support of religion stated. In a modern, complex and interconnected world, it is impossible not to act in the area of education and not have an incidental benefit for private education.

The issues considered in *Everson* are seen as the first expression in modern American jurisprudence of the doctrine of the separation of religion and the state. A number of commentators view the cases that followed *Everson* with some degree of disappointment. Noah Feldman[13] for example suggests that from the time of *Everson*, the Supreme Court had erred in transforming the Establishment Clause from a protector of religious freedom to a guarantor of equality for all religious practitioners. Conversely Gabriël Moens[14] argues that government indifference and absence of aid to religion actually impedes the Free Exerciseof religion and that government assistance would address a perceived tension in the Religion Clauses created by *Everson*.

In the Holyoakean perspective, there are private and public schools, each are valued for their contribution to childrens' education, and students have been able to attend following the subsidy. There has never been any proof in the US or any other liberal democracy that such programs and their analogues have ever been intended directly to benefit religion. To do so overtly would breach the secular principles of the state.

Some decades later *Lemon v Kurtzman*[15] was decided, arguably the beginning of the contemporary Neutrality Principle[16] and the source of the controversial 'Lemon Test'. The US Supreme Court struck down a Pennsylvania law reimbursing religious schools for textbooks and teacher salaries. The Court ruled that Pennsylvania's *Non-Public Elementary and Secondary Education Act* 1968, which allowed the state Superintendent of Public Instruction to reimburse non-public schools for teachers' salaries, textbooks and instructional materials, violated the Establishment Clause of the First Amendment. The Court held that for a law to be considered constitutional under the Establishment Clause of the First Amendment, the law must have a legitimate secular purpose, must not have the primary effect of either advancing or inhibiting religion, and must not result in an excessive entanglement of government and religion. These three principles became known as the *Lemon Test.*[17]

[12] This case also applied the Establishment Clause to the actions of state governments via the Fourteenth Amendment.
[13] Noah Feldman, 'From Liberty to Equality: The Transformation of the Establishment Clause', (2002) 90(3) *California Law Review* 673, 730.
[14] Gabriël Moens, 'The Menace of Neutrality in Religion' (2004) 2 *Brigham Young University Law Review* 535, 540.
[15] 403 U.S. 602 (1971).
[16] Gabriël Moens, 540.
[17] at 612-613.

Again *Lemon* is a case which is very similar to *Everson*. To be consistent with Holyoakean principles, the Pennsylvania law would have the clear intent to ensure that students had textbooks. It is impossible to ensure that a top down program designed to benefit *all* students does not incidentally benefit religion. One might also try to see if children from various counties received more funding than another, or whether more girls were aided than boys. Looking for incidental impacts of legislation, and then striking it down because such impacts were found, will find all legislation failing. Government programs are too diverse and complex to try to purge all unwanted implications from legislation meant to benefit a large part of society. Again, any overt support of religion through legislation would be struck down readily. In the US and Canadian contexts such transparent efforts have been found unconstitutional.[18]

A number of decisions since *Lemon* have been overruled so that the leading case in this area in the USA is now *Zelman v Simmons-Harris*[19] - which upheld that vouchers which draw on government funds could be used to pay for tuition at any school, public or private. The Court has held that the vouchers are issued to be used at the school of choice, and that the school cannot be held responsible for any incidental benefit to religion.

In *Zelman v Simmons-Harris*,[20] the Supreme Court defined neutrality as even-handedness in terms of who may receive aid. The Court considered whether Ohio's school voucher program under which parents may use government funds to pay for parochial school tuition violated the First Amendment's Establishment Clause. The Court upheld the constitutionality of an Ohio school voucher program, ruling for the first time that the government may give financial aid to parents so they can send their children to religious or private schools. The Court considered although some of the money went to Catholic schools, because parents could decide how to use the vouchers, there was no establishment of religion.[21]

A majority of the Court continues to find direct aid to religious institutions for use in religious activities unconstitutional following *Zelman*, but indirect aid to a religious group appears constitutional, as long as it is part of a neutrally applied program that directs the money through a parent or other third party that ultimately controls the destination of the funds.[22] Such programs have included school tuition organisations (STOs) which provide scholarships to students attending private schools, including religious schools.[23] Nicole Stelle Garnett has argued that in this area "much of the

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[18] See for example efforts by religious communities to introduce compulsory 'days of rest' along religious lines, such as *R. v Big M Drug Mart Ltd.*, [1985] 1 SCR 295 in Canada. This will be examined in detail in Chapter 8.

[19] 536 US 639 (2002).

[20] 536 US 639 (2002).

[21] 536 US 639, 654-55 (2002).

[22] First Amendment Centre <www.firstamendmentcentre.org/rel_liberty/establishment/index.aspx> on 11 October 2004>.

[23] *Arizona Christian School Tuition Organization v Winn*, 131 *S. Ct.* 1436 (2011) [n.b. there is not yet, at the time of writing, a final and official opinion in this case. It will be in the form '563 U. S. ____ (2011). See http://www.supremecourt.gov/opinions/boundvolumes.aspx]. In this case Arizona Revised Statute Section 43-1089 allowed tax credits for contributions to school tuition organizations (STOs). The taxpayers claimed that the STO tax credit violated the Establishment Clause. The Supreme Court held that the taxpayers lacked standing under *Flast v Cohen*, (1969) 392 US 83 (exception to the no-taxpayer-standing rule.). The general rule against taxpayer standing applied, and the taxpayers failed to establish that they fell within the exception to the rule for claims of extraction

Supreme Court's Establishment Clause canon was developed in the context of - and was animated by anxiety about - programs extending public resources to religious schools, especially Catholic schools".[24] She observed that scholarship tax credits have emerged in recent years as an alternative to controversial school voucher programs as they would be both more politically palatable than vouchers and more likely to survive constitutional challenge.[25]

She notes that the decision in *Flast v Cohen*[26] which was the case on point relating to the standing of taxpayers in such cases up until *Winn* had a clear anti-Catholic sentiment, citing by way of example Douglas J's concurring opinion in *Flast* warning that "[t]he mounting federal aid to sectarian schools is notorious, and the subterfuges numerous," and cited as support an explicitly anti-Catholic editorial describing how "clerics" and "priests" hoped to divert funds from facially neutral student aid programs for "sectarian" purposes.[27]

Indeed, the contradictions in this area of public policy in the USA have confused for more than six decades. Sarah Isgur[28] on this has explained that the US Supreme Court

> has stated that "the common purpose of the Religion Clauses is 'is to secure religious liberty.'[29] In 1952, the Court stated that when "[w]hen the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions … [by] respect[ing] the religious nature of our people and accommodate[ing] the public service to their spiritual needs."[30] At the same time, however, the "vast majority of Establishment Clause cases have either cited or relied upon Jefferson's 'wall of separation' metaphor. This contradiction has led to a Court that is "unwilling or unable to take a unified stand on what the Constitution really means when it comes to the relation between religion and government."[31]

This issue has also been addressed in Canada. In *Adler v Ontario,*[32] in the Canadian Supreme Court, the question was whether there was a constitutional obligation to fund private religious education. The case concerned whether, by not funding Jewish and certain Christian day schools, Ontario violated the *Charter*'s guarantees of freedom of conscience and religion (Section 2) and of equality without discrimination based on religion (Section 15). It was held that government funding of Catholic schools but not of other religious schools does not infringe the constitution. The Court found that

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and spending of tax money in violation of the Establishment Clause. The tax credit under § 43-1089 was not a governmental expenditure; contributors to STOs spent their own money, not money collected by the state from taxpayers. The tax credit was not tantamount to a religious tax or a tithe.

[24] Nicole Stelle Garnett, 'A Winn for Educational Pluralism' (2011) 121 *Yale Law Journal Online* 31, 35-36.

[25] Nicole Stelle Garnett, 'A Winn for Educational Pluralism' (2011) 121 *Yale Law Journal Online* 31, 37. See also Bruce R. Van Baren, 'Tuition Tax Credits and Winn: A Constitutional Blueprint for School Choice' (2011-12) 24(2) *Regent University Law Review* 515.

[26] 392 US 83 (1968). In this case the plaintiffs challenged, on Establishment Clause grounds, the *Elementary and Secondary Education Act* of 1965 - a federal statute that funds educational services and materials for low-income children, including those enrolled in religious schools.

[27] Nicole Stelle Garnett, 'A Winn for Educational Pluralism' (2011) 121 *Yale Law Journal Online* 31.

[28] Sarah M. Isgur, ' "Play in the joints": the struggle to define permissive accommodation under the First Amendment' (2008) 31(1) *Harvard Journal of Law & Public Policy* 371, 373-4.

[29] Citing *McCreary County v ACLU of Kentucky*, 545 US 844, 879 (2005).

[30] Citing *Zorach v Clauson* 343 US 306, 313-14 (1952).

[31] Citing Noah Feldman, 'A Church-State Solution', *NY Times Magazine*, July 3, 2005, at 28.

[32] [1996] 3 S.C.R. 609.

Ontario's *Education Act* did not violate sections 2(a) or 15(1) of the *Canadian Charter of Rights and Freedoms* or section 93 of the *Constitution Act, 1867*.

In India the support of public funding of religious institutions was addressed in 2002 in *Ms. Aruna Roy and Ors vs Union of India and Ors*[33] in the Supreme Court of India. Dharmadhikari J observed that

> Secularism is the basic structure of the Constitution. Clause (1) of Article 28 prohibits imparting of 'religious instructions' in educational institutions fully maintained out of State funds. … The words "religious instructions" have been held as not prohibiting education of religions dissociated from "tenets, the rituals, observances, ceremonies and modes of worship of a particular sect or denomination". The academic study of the teaching and the philosophy of any great Saint such as Kabir, Gurunanak and Mahabir was held to be not prohibited by Article 28 (1) of the Constitution.
>
> A distinction, thus, has been made between imparting "religious instructions" that is teaching of rituals, observances, customs and traditions and other non-essential observances or modes of worship in religions and teaching of philosophies of religions with more emphasis on study of essential moral and spiritual thoughts contained in various religions. There is a very thin dividing line between imparting of 'religious instructions' and 'study of religions.' Special care has to be taken of avoiding possibility of imparting 'religious instructions' in the name of 'religious education' or 'Study of Religions'.[34]

He held that the study of religions in *National Education Policy 2002* did not run counter to the concept of secularism in the Indian Constitution.

II RELIGIOUS DISPLAYS IN STATE SCHOOLS

The display of religious symbols in public schools in secular democracies has been a subject of much debate in a number of jurisdictions across the world in recent years. Most of these cases have involved challenges that have been made as challenges to the dominant religious paradigm of the country, such as the *Lautsi* case in strongly Catholic Italy[35] discussed below.[36]

The display of Christian symbols in state schools has been challenged in federal courts in a number of jurisdictions, including the USA and Europe, the majority only in recent years. The cases in Germany and Italy, for example, relating to the display of crucifixes in school rooms have had remarkable similarities in their decisions, particularly the conclusions that the crucifix does not contradict the state principle of secularism. Modern Europe is increasingly having to address how a modern secular

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[33] Supreme Court of India, Writ Petition (civil) 98 of 2002.

[34] Dharmadhikari J observed interestingly here that "The English word 'religion' does not fully convey the Indian concept of religion. Hindus believe in Vedas. The word 'Dharma' has a very wide meaning. One meaning of it is the 'moral values or ethics' on which the life is naturally regulated. Dharma or righteousness is elemental and fundamental in all nations, periods and times. For example truth, love, compassion are human virtues. This is what Hindu call Sanatan Dharma meaning religion which is immutable, constant, living, permanent and ever in existence. Religion, in wide sense, therefore, is those fundamental principles which sustain life and without which the life will not survive."

[35] *Lautsi v Italy*, European Court of Human Rights (Application No. 30814/06).

[36] The Court in that case argued that the pervasive crucifix in the country's public institutions and schools is simply a cultural symbol devoid of religious meaning is not religious in its context. This view is reminiscent of the view in the USA in *Salazar v Buono* 559 US 700 (2010) mentioned in the previous chapter, where the religious symbol was argued to have a secular purpose.

state should address "different viewpoints about the role of religion in a pluralistic society".[37]

A *Italy*

Italy's place in the European debate on the place of religion in the public space is complicated by the state's long association with the Catholic Church. That this debate remains unresolved in modern Europe can be seen in the list of contributors as *Amicus Curiae* in the *Lautsi* case.[38]

The Italian Constitution does not explicitly acknowledge secularism, which may be compared to the French Constitution which does. In Italy, secularism does not mean

> that the State should be indifferent to religions but that it should guarantee the protection of the freedom of religion in a context of confessional and cultural pluralism … an open and inclusive attitude, closer to equidistance, which respects the distinction and autonomy of spiritual and temporal areas, without privatising religion or excluding it from the public area.[39]

However, the Italian Constitutional Court has declared that secularism must be regarded as a fundamental principle of the Italian legal system. The Court has held[40] that the principle of secularism (*laicità*) is derived from a number of provisions within the Italian Constitution.[41] The Court emphasised that this principle does not mean an indifference to religion by the state, but rather indifference and impartiality between different religions in order to permit freedom of religion within the state.[42]

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[37] Andrea Pin, 'Public Schools, the Italian Crucifix, and the European Court of Human Rights: The Italian Separation of Church and State' (2011) 25 *Emory International Law Review* 95, 99-100.

[38] At the inception of the case, 10 countries entered the *Lautsi* case as "third party *Amicus Curiae*". Each of these countries, Armenia, Bulgaria, Cyprus, Greece, Lithuania, Malta, Monaco, Romania, the Russia Federation, and San Marino, submitted a brief to the Court inviting it to overturn its first decision. Later, additional countries joined Italy. The Governments of Albania, Austria, Croatia, Hungary, Moldova, Poland, Serbia, Slovakia, and Ukraine petitioned that the Court remember that it must respect the national identities and religious traditions of each of the 47 member States. Altogether almost half of the Council of Europe. See also 'An alliance against secularism', *L'Osservatore Romano* (Vatican City), July 22, 2010.

[39] Presentation of the Italian Government before the Grand Chamber (GC) of the ECtHR in the Lautsi Case , 30 June 2010, § 7

[40] Corte Costituzionale, Decision n. 203/1989.

[41] Article 2, which protects 'the inviolable rights of man, both as an individual and as a member of the social groups in which his personality finds expression'; Article 3, which guarantees equality before the law; Article 7, according to which the 'State and the Catholic Church are, each within their own sphere, independent and sovereign'; Article 8, according to which 'All religious denominations are equally free'10 and Article 19, which protects the freedom to profess and promote religious beliefs, individually or collectively. (Susanna Mancini, 'The Crucifix Rage: Supranational Constitutionalism Bumps Against the Counter-Majoritarian Difficulty', (2010) 6 *European Constitutional Law Review* 6, 8.

[42] Corte Costituzionale, Decisions n. 203/1989; n. 259/1990; n. 13/1991; n. 195/1993; n. 421/ 1993; n. 334/1996; n. 329/1997; n. 508/2000; n. 327/2002.

1. Lautsi v Italy

In 2002 Mrs Soile Lautsi argued that the presence of crucifixes[43] in the classrooms of the public school that her children attended infringed the principle of secularism according to which she sought to educate her children. Following her complaint the school's governors decided to keep crucifixes in the classrooms, so she instituted proceedings in the Administrative Court.

In 2004 the court granted her request and in 2005, the Italian Administrative Court in Veneto denied her request concluding, in a judgment that was confirmed by the Italian Supreme Administrative Court in 2006,[44] in a frankly startling decision, that

> The crucifix may be legitimately displayed in the public schools because it does not clash with the principle of secularism, but, on the contrary, it actually affirms it.

Mrs Lautsi took her case to the European Court of Human Rights (ECtHR), where the Administrative Court decision was overturned in an appeal to a single judge in 2009, who decided that the display of crucifixes in a public school both violated the right of parents to educate their children and their religious freedom.[45] One would have been forgiven for thinking that was the end of the matter. However, somewhat unusually, Italy together with a number of other countries in the role of *amicus curiae* in support sought to have that decision reversed. They succeeded in 2011, where the Full Court held that the crucifix displayed in public schools in Italy did not breach the European Convention on Human Rights.

It was decided at the final appeal to the Grand Chamber[46] of the ECtHR that the decision whether crucifixes should be present in state school classrooms was a matter falling within the margin of appreciation of the respondent State. The margin of appreciation is a doctrine developed by the ECtHR when considering whether a member state of the European Convention on Human Rights has breached the convention. The margin of appreciation doctrine allows the court to take into effect the fact that the Convention will be interpreted differently in different member states. Judges are obliged to take into account the cultural, historical and philosophical differences between the ECtHR and the appellant nation.[47]

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[43] The custom of displaying a crucifix in classrooms is a long standing tradition. The present civil obligation allegedly dates back to royal decree no. 4336 of 15 September 1860 of the Kingdom of Piedmont-Sardinia, which provided: "Each school must without fail be equipped with ... a crucifix". See generally Grégor Puppinck, 'The case of *Lautsi v Italy*: a synthesis', Article presented at the Eighteenth Annual International Law and Religion Symposium, "Religious Freedom in a Pluralistic Age: Trends, Challenges, and Practices," 2-4 October 2011, International Center for Law and Religion Studies, J. Reuben Clark Law School, BYU University.

[44] TAR, Mar.17, 2005, n. 1110, para 16.1.

[45] ECtHR 2 Nov. 2009, Case No. 30814/06, *Lautsi* v *Italy*.

[46] The Grand Chamber is made up of 17 judges: the Court's President and Vice-Presidents, the Section Presidents and the national judge, together with other judges selected by drawing of lots.

[47] See generally Dean Spielmann, 'Allowing the Right Margin: The European Court of Human Rights and The National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' (2011-2012) 14 *Cambridge Yearbook of European Legal Studies* 381; Giulio Itzcovich, 'One, None and One Hundred Thousand Margins of Appreciations: The Lautsi Case' (2013) 13(2) *Human Rights Law Review* 287.

The Grand Chamber did not agree with the approach of the Chamber, the previous level of appeal, which had found that the display of crucifixes in classrooms would have a significant impact on Ms Lautsi's children. It held that[48]

> [t]he effects of the greater visibility which the presence of the crucifix gave to Christianity in schools needed to be placed in perspective. Firstly, the presence of crucifixes was not associated with compulsory teaching about Christianity. Secondly, Italy opened up the school environment to other religions in parallel. In addition, the applicants had not asserted that the presence of the crucifix in classrooms had encouraged the development of teaching practices with a proselytising tendency; neither had they claimed that [children] had experienced a tendentious reference to that presence by a teacher in the exercise of his or her functions. Lastly, [Ms Lautsi] had retained in full her right as a parent to enlighten and advise her children, to exercise in their regard her natural functions as educator and to guide them on a path in line with her own philosophical convictions.

The ECtHR considered in their reasoning that there was no European consensus on the question of the presence of religious symbols in State schools, and that prescribing the presence of crucifixes in State schools was not in itself sufficient, however, to indicate a process of indoctrination on the state's part. The Court further considered that a crucifix on a wall was an essentially passive symbol that could not be deemed to have an influence on pupils comparable to that of didactic speech or participation in religious activities. Specifically the decision of the ECtHR Grand Chamber[49] concluded that the Christian crucifix had become simply a cultural symbol devoid of religious meaning, and

> Moreover, with the benefit of hindsight, it is easy to identify in the constant central core of Christian faith … the principles of human dignity, tolerance and freedom, including religious freedom, and therefore, in the last analysis, the foundations of the secular State.
>
> By studying history carefully, from a suitable distance, not from up close, we can clearly perceive an affinity between (but not the identity of) the "hard core" of Christianity, which, placing charity above everything else, including faith, emphasises the acceptance of difference, and the "hard core" of the republican Constitution, which, in a spirit of solidarity, attaches value to the freedom of all, and therefore constitutes the legal guarantee of respect for others. …
>
> It can therefore be contended that in the present-day social reality the crucifix should be regarded not only as a symbol of a historical and cultural development, and therefore of the identity of our people, but also as a symbol of a value system: liberty, equality, human dignity and religious toleration, and accordingly also of the secular nature of the State – principles which underpin our Constitution.

2 *Germany*

Germany has had cases similar to Italy's dealing with crucifixes in public schools. It has no established religion.[50] Germany is only now beginning to show some of the

[48] *Lautsi and Others v. Italy* [GC] - 30814/06 Judgment 18.3.2011 [GC] (18 March 2011).
[49] *Lautsi v Italy* (Eur. Ct. H.R. 2012) E.H.R.R.
[50] According to Article 140 of the Basic Law, Article 137 of the *Weimar* Constitution is an integral part of the Basic Law and provides that there shall be no state church. Article 140 of the Basic Law incorporates Articles 136, 137, 138, 139 and 141 of the Weimar Constitution. These articles of the Basic law and the Weimar Constitution loosely collected form the "free exercise of religion" and "no

internal stresses that the headscarf issue has been creating in France and some other parts of Europe. Whilst there has been little involvement at the federal government level by the government, some issues have been addressed by the states and the Federal Constitutional Court.

A number of German courts have addressed the headscarf issue in a similar manner. They have discussed the headscarf issue as a problem of balancing religious freedom, against the rights and freedoms of employers and public schools, and have not addressed the prohibition of the hijab as part of a dress code.[51]

In Germany the freedom of religion principle is known as the 'Freedom of Faith and Conscience' (*Glaubens- und Gewissensfreiheit*). This right,[52] and the Freedom of Religious and Ideological Belief, are unrestricted.[53] The State is required to exercise *Weltanschaulich-religiöse Neutralität*, a neutral position with respect to religion and ideological belief. The constitution provides for a separation of church and state in its modern form.[54] The constitution of modern Germany is known as the *Grundgesetz*, or 'Basic Law'.[55]

Under Germany Article 70 of the Basic Law, the constitutional responsibility for schools lies with the German states (*Länder*). The Bavarian Supreme Court in 1991 held[56] that

> … with the representation of the cross as the icon of the suffering and Lordship of Jesus Christ … the plaintiffs who reject such a representation are confronted with a religious worldview in which the formative power of Christian beliefs is affirmed. However, they are not thereby brought into a constitutionally unacceptable religious-philosophical conflict. Representations of the cross confronted in this fashion … are …not the expression of a conviction of a belief bound to a specific confession. They are an essential object of the general Christian-occidental tradition and common property of the Christian-occidental cultural circle.

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establishment of official religion" provisions, reflecting broadly those provisions of the United States Constitution First Amendment to its constitution.

[51] Dagmar Schiek and Carl von Ossietzky, 'European Developments – Just a Piece of Cloth? German Courts and Employees with Headscarves', (2004) 33(1) *Industrial Law Journal* 68.

[52] *einheitliches Grundrecht* (uniform basic right).

[53] Historically religious intolerance has been the norm in Germany until relatively recently. The principle of *cuius regis, cuius religio* dictated religious life in Germany from the peace of Augsberg in 1555 until the Napoleonic wars. Intolerance peaked during the German enlightenment and on until the late nineteenth century. The end of this period coincided with the end of Bismarck's *Kulturkampf* against the Catholic Church. For most of the nineteenth century and up until the Weimar Constitution of 1919, there were close ties between the church and state and there was significant religious discrimination. Catholics as a religious minority, relative to the predominant Lutherans, were generally excluded from most *Reich* appointments, and Jews were barred from the public service and the military. The church-state provisions of the German Constitution as they presently stand derive from a compromise between the inability of the framers of the constitution to agree on new proposals regarding that relationship.

[54] Anke Freckmann and Thomas Wegerich, *The German Legal System* (Sweet and Maxwell, Hebden Bridge, 1999), 92.

[55] The term does not actually mean "constitution" (*Verfassung*) as the original document, first drafted in August 1948, was so named to emphasise that it was only of a temporary nature, reflecting the intended nature of the German state occupied by the United States the United Kingdom and France after the defeat of Germany in May, 1945. Articles 1 to 19 of the Basic Law contain the main basic rights of the German constitution.

[56] *Bayerischer Verwaltungsgerichthof* [BayVBI] [Bavarian Higher Administrative Court] 751 (751-54) (F.R.G.)

These decisions then argue that the placing of a crucifix or other religious symbol in the classrooms of state schools may be interpreted as a cultural symbol that may be held to be symbolic of the nation and greater than the numbers of citizens who identify with it purely religiously, helping to build a national identity.[57] This argument is analogous to the Italian case in that this decision went to great pains to separate the religious from the cultural significance of the crucifix. However, this argument causes its own problems in that

> Europeans are not sure whether European civilization is to be defined by the particular historical legacy of Western 'civilization', of which cultural Christianity, to be sure in an increasingly secularised form, remains a central component. Or, alternatively, whether European civilisation ought to be defined by the cosmopolitan 'civilization' of secular modernity, which Europe itself claims to have produced.[58]

Contrarily, these arguments by the state to protect religion have been found by some to actually be counterproductive. In a 1995 case the German Federal Constitutional Court struck down a Bavarian law holding that the pressure to learn in a classroom under the cross was in conflict with the state in religious matters. The Court considered that if the crucifix was not directly linked to a specific religion then the state doing so actually is less respectful of the religious symbol. [59] Susanna Mancini argues that in Italy and Bavaria, the religious and cultural significance of the crucifix are linked and cannot be uncoupled. To insist that the crucifix in the public sphere is merely a cultural and historical symbol then weakens its religious significance.[60]

Indeed this confusion is not limited to Europe. Even in the USA these cases raise "troubling questions about the Court's increasing desire to strip sacred symbols of their religious meaning and significance"[61] leading to the loss of protection of religion by the state.

III DIRECTED BEHAVIOUR IN SCHOOLS – PRAYER

In these cases, particularly in the USA, the public expression of religious affiliation in schools has often been problematic. As noted in the previous chapter, the state may often fear that such expressions imply that the state has endorsed such actions by not controlling them in some way. However, in the following line of cases, the state has actually made it public policy for acknowledgement of religion.

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[57] Susanna Mancini, 'Religious Symbols in the Public Space: The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence', (2009) 30 *Cardozo Law Review* 2629, 2635.
[58] Jose Casanova, 'The Long, Difficult, and Tortuous Journey of Turkey into Europe and the Dilemmas of European Civilization' (2006) 13 *Constellations* 234, 235-36.
[59] Bundesverfassungsgericht [BVerfG] May 16, 1995 (Kruzifix-Urteil), 93 Entschiedungen des Bundesverfassungsgerichts [BVerfG] 1 (F.R.G.).
[60] Susanna Mancini, 'Religious Symbols in the Public Space: The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence' (2009) 30 *Cardozo Law Review* 2629, 2634.
[61] Ian Bartrum, '*Salazar v Buono*: Sacred Symbolism and the Secular State' (2010) 105 *Northwestern University Law Review Colloquy* 31, 33.

A *United States of America*

The US Supreme Court's decision in *Engel v Vitale*[62] was the first of a number of landmark cases that determined that it is unconstitutional for state officials to compose an official school prayer and require its recitation in public schools. The case was brought by the parents of public school students in New Hyde Park, New York who complained the prayer to "Almighty God" contradicted their religious beliefs. The plaintiffs argued that opening the school day with a prayer (even if students are not required to recite it) violates the Establishment Clause.

Stewart J in his dissent[63] in *Engel v Vitale* argued that the issue is whether the Board of Regents for the State of New York will prohibit those who want to begin their day at school with prayer from doing so. Also, he argued that phrases like "the wall of separation" are nowhere in the Constitution and Black J used them uncritically. Stewart J then listed the religious references present at the top of all three branches of the federal government and on American coins, in the National Anthem, in the Pledge of Allegiance, and in one of the court's recent decisions in *Zorach v Clauson*.[64] He argued that neither these examples, nor the voluntary prayer in New York, established a religion. On the Pledge of Allegiance, Steven Shiffrin[65] comments that "I am sure that a pledge identifying the United States as subject to divine authority is asserting the existence and authority of the divine." And he adds that "pretending [that this and similar expressions] are not religious is simply insulting."

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[62] 370 US 421 (1962).

[63] 370 US 421, 444 (1962).

[64] "At the opening of each day's Session of this Court we stand, while one of our officials invokes the protection of God. Since the days of John Marshall, our Crier has said, "God save the United States and this Honorable Court." Both the Senate and the House of Representatives open their daily Sessions with prayer. Each of our Presidents, from George Washington to John F. Kennedy, has, upon assuming his Office, asked the protection and help of God.

The Court today says that the state and federal governments are without constitutional power to prescribe any particular form of words to be recited by any group of the American people on any subject touching religion. One of the stanzas of "The Star-Spangled Banner " made our National Anthem by Act of Congress in 1931, contains these verses:

> Blest with victory and peace, may the heav'n rescued land
> Praise the Pow'r that hath made and preserved us a nation,
> Then conquer we must, when our cause it is just.

And this be our motto "In God is our Trust."

In 1954, Congress added a phrase to the Pledge of Allegiance to the Flag so that it now contains the words "one Nation *under* God, indivisible, with liberty and justice for all." In 1952, Congress enacted legislation calling upon the President each year to proclaim a National Day of Prayer. Since 1865, the words "IN GOD WE TRUST" have been impressed on our coins.

Countless similar examples could be listed, but there is no need to belabor the obvious. It was all summed up by this Court just ten years ago in a single sentence: "We are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson,* 343 US. 306, 313." (internal references removed)

[65] Steven H. Shiffrin, 'The Pluralistic Foundations of the Religion Clauses' (2004) 90 *Cornell Law Review* 9, 70-71

These cases appeared from time to time over the years. In *Lee v Weisman*[66] in similar circumstances, a school had invited a local clergyman to offer a benediction at a school graduation. Students were not obligated to stand or participate in the prayer. The prayer was said by the school district to be "non-sectarian".[67] Weisman, a student, had unsuccessfully sought an injunction before the invocation. Following the graduation the litigation was taken ultimately to the US Supreme Court.

The Court held that the prayers were unconstitutional. On the argument that Weisman's attendance was voluntary, Kennedy J for the court argued[68] a position now known as the 'coercion test' that

> [a]s we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools. Our decisions in [Engel] and [Abington] recognize, among other things, that prayer exercises in public schools carry a particular risk of indirect coercion. The concern may not be limited to the context of schools, but it is most pronounced there. What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.

The decision endorsed the court's position in cases as *Engel v Vitale*[69] and *Abington v Schempp*[70] and which has more recently been endorsed in *Santa Fe Independent School District v Doe*.[71]

The ultimate impact of the American prayer cases, Steven Smith has noted, is[72]

> not that they invalidated school prayer or even that they acted on a secularist conception of American government. The majority of public schools probably did not conduct prayer exercises anyway, and some state courts had ruled against school prayer almost a century earlier. Moreover, a secularist interpretation of America has been present in one form or another from the Republic's beginnings. The crucial, or perhaps fateful, achievement of the school prayer decisions is that they formally constitutionalized this interpretation. It is not an exaggeration to say that the decisions "established" political secularism as the nation's constitutional orthodoxy.

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[66] 505 US 577 (1992).

[67] Whilst this was stated in mitigation by the school, it was still religious in nature. Non-sectarian does not mean not religious. Kennedy J who wrote the majority decision stated the nonsectarian nature of the prayer was no defence as the Establishment Clause forbade coerced prayers in public schools, not just those representing a specific religious tradition. On the issue of voluntariness, Kennedy J remarked that "To say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme. True, Deborah could elect not to attend commencement without renouncing her diploma; but we shall not allow the case to turn on this point. Everyone knows that, in our society and in our culture, high school graduation is one of life's most significant occasions. A school rule which excuses attendance is beside the point. Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself from the graduation exercise in any real sense of the term "voluntary," for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years."

[68] 505 U.S. 577, 592 (citations omitted).

[69] 370 US 421 (1962)

[70] 324 US 203 (1963).

[71] 530 US 290 (2000).

[72] Steven D. Smith, 'Constitutional Divide: The Transformative Significance of the School Prayer Decisions', (2011) 38 *Pepperdine Law Review* 945.

Not all public endorsement of religion by the state has been in the form of directed behaviour or public statement. Sometimes such overt endorsement of religion may be muter but no less contrary to secular neutrality.

In Canada, the first significant case was heard in 1988 in *Zylberberg v Sudbury Board of Education (Director)*[73] by the Court of Appeal. In *Zylberberg*, parents of children in elementary school[74] challenged a regulation enacted under the *Education Act*, RSO 1980, which provided that:

> 28(1) A public school shall be opened or closed each school day with religious exercises consisting of the reading of the Scriptures or other suitable readings and the repeating of the Lord's Prayer or other suitable prayers.

The Board of Education indicated that the daily opening exercises in its schools included the singing of the national anthem *O Canada* and the saying of the Lord's Prayer. Parents could be consulted in how a child could be excused from such exercises such as by leaving the classroom, or not participating. The Court[75] acknowledged that the regulations did remove any element of compulsion to participate in religious exercises, but argued

> From the majoritarian standpoint, the respondent's argument is understandable but, in our opinion, it does not reflect the reality of the situation faced by members of religious minorities. Whether or not there is pressure or compulsion must be assessed from their standpoint and, in particular, from the standpoint of pupils in the sensitive setting of a public school. ...
>
> While the majoritarian view may be that s.28 confers freedom of choice on the minority, the reality is that it imposes on religious minorities a compulsion to conform to the religious practices of the majority.[76]

Whilst the parents of the children concerned chose not to seek exemptions from the regulation, they felt that such an exemption would differentiate their children from others, and peer pressure would force their children to conform to the regulation. The Court found this pressure to conform, despite the exemption to comply, to be "real and pervasive" and to "operate to compel members of religious minorities to conform with majority religious practices".[77] They held therefore that the right to be excused from class did not overcome the infringement of s2(a) of the Charter freedom of conscience and religion.

The next of these cases in 1990, known as the *Elgin County case*,[78] also looked at the same subject area of school religious exercises and the need for exemption as *Zylberberg*. *Elgin County* was a challenge to the validity of the "religious instruction" provisions of the regulation[79] which remained in force after *Zylberberg*. The Court held that "State-authorized religious indoctrination amounts to the imposition of majoritarian religious beliefs on minorities". The Court went on to say that "state-authorised religious indoctrination amounts to the imposition of majoritarian religious

[73] (1988) 52 DLR (4th) 577; 65 OR (2 641 (CA).
[74] Comparable to primary school in Australia.
[75] Brooke, Blair, Goodman, and Robins JJA; (Lacoucière dissenting).
[76] (1988) 52 DLR (4th) 577, 654.
[77] (1988) 52 DLR (4th) 577, 655.
[78] *Canadian Civil Liberties v. Ontario (Minister of Education),* (1990) 71 O.R. (2d) 341.
[79] (ss. 28(4) – (16)).

beliefs on minorities."[80] It held therefore that there had been an infringement of s.2 (a) of the Charter.

B *Germany*

In a 1979 case reminiscent of the US case noted above of *Engel v Vitale*, the Federal Constitutional Court[81] in the 'School prayer in state schools case' heard two similar cases at the same time. In the first case,[82] the parents of pupils attending a rural primary school in Kirschhausen in the *Land* of Hesse objected to school prayer and sought to have it prohibited. The prayer was usually conducted prior to the commencement of lessons. Following application to the school,[83] the prayer was temporarily suspended. The complainants in this case (Complainant I) were parents of other children in the school who objected to this suspension. They submitted an appeal to the Administrative District which rejected their complaint. They appealed, and the decision on this case was suspended until the second case was heard in the Federal Constitutional Court.[84]

In the second[85] case the father (Complainant II) of a child attending an Evangelical primary school in Aachen asked for the cessation of school prayers in his daughter's class. As it was a religious private school the educational authorities did not accede to his request, as school prayer was an essential element of the school curriculum. The complainant was unsuccessful so the matter was taken to the Administrative Court.[86] The Court upheld most of the complaint noting the negative freedom to profess a belief, the right to remain silent. The respondent was ordered not to give religious instruction outside the times set aside for it.

The Higher Administrative Court rejected the appeal. Its basis for decision was that although the Christian schools of North-Rhine/Westphalia were said to have children brought up and taught on the basis of Christian cultural values which were bound and described in the *Land* constitution[87] by the words "respect for God", this did not mean that it was permissible to hold school prayers in lessons outside the times stipulated for religious instruction. The school authority appealed to the Federal Administrative Court[88] which held that it cannot be deduced from the Basic Law that school prayer outside religious instruction, or religious instruction outside the express permission of the student or parents, is unconstitutional in religious schools.

The Court argued that the *Länder* were granted broad scope in ideological or religious matters by Article 7[89] of the Basic Law and could see to it that religious instruction

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[80] *Canadian Civil Liberties v. Ontario (Minister of Education),* (1990) 71 O.R. (2d) 341, 363.
[81] *Bundesverfassungsgericht,* or BVerfG.
[82] 1 BvR 647/70.
[83] One of sixteen federated states constituting Germany (plural: *Länder*).
[84] Under the special circumstances of the case, the preconditions of the Federal Constitutional Court were met for a ruling prior to the exhaustion of the appeals.
[85] 1 BvR 7/74.
[86] *Verwaltungsgericht.*
[87] *Landesverfassung.*
[88] *Entscheidungen des Bundesverwaltungsgerichts*.
[89] Article 7 [School system]
(1) The entire school system shall be under the supervision of the state.

and school prayer was conducted with the permission of the parents. However, school prayer may not encroach upon the fundamental right of freedom of religion to profess a belief or to reject school prayer. This right could not be said to be violated if alternative arrangements were available to students not to participate. The Federal Constitutional Court held that Complainant I was successful in overturning the administrative acts, and Complainant II was unsuccessful.

IV DIRECTED RELIGIOUS CURRICULUM IN PUBLIC SCHOOLS

A *Creationism and 'intelligent design'*

The issue of the teaching of creationism[90] as an alternative to evolution in the school curriculum is almost exclusively an American phenomenon. Cases of this nature have been common there for many years, despite an almost complete lack of success in the US Supreme Court. Those who advocate the teaching of creationism in schools generally do not wish the state to allow the concurrent teaching of the theory of evolution in the science curriculum.

These cases raised a number of complex social issues at the time such as whether the absence of prayers was a deliberate government secularising of students, or whether allowing such prayers was any less objectionable than permitting a pro-religious government message,[91] as well as the symbolism of a direct challenge to Christian orthodoxy. Accordingly some states passed laws against teaching evolution in public schools, such as Tennessee's 1925 *Anti-Evolution Act*, which was upheld by the Tennessee Supreme Court in *Scopes v State*.[92] The teaching of evolution remained an uncomfortable and contentious issue in science education until the late 1950s.[93] It was then brought to the fore in *Epperson v Arkansas*[94] in 1968.

In *Epperson,* the United States Supreme Court invalidated an Arkansas statute[95] adopted in 1928 that prohibited the teaching of evolution; namely, that humans evolved from other species. Susan Epperson was unable to teach the required science content at her local school because it was unclear whether such teaching would be hostile to religion, where being hostile to or advocating religion in a public school

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(2) Parents and guardians shall have the right to decide whether children shall receive religious instruction.
(3) Religious instruction shall form part of the regular curriculum in state schools, with the exception of non-denominational schools. Without prejudice to the state's right of supervision, religious instruction shall be given in accordance with the tenets of the religious community concerned. Teachers may not be obliged against their will to give religious instruction.

…

[90] This is a religious view that the Earth and the rest of the universe were created by a deity, often involving a literal interpretation of a religious text.

[91] Michael W. McConnell, John H. Garvey, Thomas C. Berg, *Religion and the Constitution* (Aspen Law, New York, 2002), 656.

[92] *Scopes v State*, 154 Tenn. 105 (1927).

[93] Spurred on by the *National Defense Education Act* (1958) and the National Science Foundation's Biological Science Curriculum Study (1959).

[94] (1968) 393 US 97.

[95] Tennessee Butler Act, Tennessee Code Annotated Title 49 (Education) Section 1922.

setting was understood to be contrary to the Religion Clauses of the US Constitution's First Amendment.[96]

Black J, in concurring with the opinion of the court delivered by Fortas J, explained that:

> The Court, not content to strike down this Arkansas Act on the unchallengeable ground of its plain vagueness, chooses rather to invalidate it as a violation of the Establishment of Religion Clause of the First Amendment. I would not decide this case on such a sweeping ground for the following reasons, among others.
>
> 1. In the first place I find it difficult to agree with the Court's statement that "there can be no doubt that Arkansas has sought to prevent its teachers from discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man." …
>
> 2. A second question that arises for me is whether this Court's decision forbidding a State to exclude the subject of evolution from its schools infringes the religious freedom of those who consider evolution an anti-religious doctrine.
>
> 3. I am also not ready to hold that a person hired to teach school children takes with him into the classroom a constitutional right to teach sociological, economic, political, or religious subjects that the school's managers do not want discussed. … I question whether it is absolutely certain, as the Court's opinion indicates, that "academic freedom" permits a teacher to breach his contractual agreement to teach only the subjects designated by the school authorities who hired him.

In a 1982 case, *McLean v Arkansas Board of Education*,[97] - also from the same state as *Epperson* - legislation that required public schools to give "balanced treatment" to "creation science" and "evolution science" as competing science theories in the science curriculum was held to violate the Establishment Clause of the US Constitution's First Amendment. The Court held that the law did not have a secular purpose, and that "creation science" was not a science. It was also held that the teaching of "creation science" created an excessive entanglement with religion because the teachers in the public schools were public officials.

In 1987 in *Edwards v Aguillard*[98] in circumstances similar to *McLean v Arkansas Board of Education*, Louisiana's "Creationism Act"[99] was held to be unconstitutional by the US Supreme Court. The Court explored whether creationism could be taught as an alternative theory to evolution, rather than instead of it. The legislation prohibited the teaching of evolution in public schools, except when it was accompanied by instruction in "creation science".
Brennan J, who delivered the court's opinion, described the legislation by noting[100] that

> [t]he Creationism Act forbids the teaching of the theory of evolution in public schools unless accompanied by instruction in "creation science." No school is required to teach evolution or

[96] This test of not aiding or opposing religion was stated five years earlier where Justice Clark held that the state must be "neutral" toward religion, saying, "The test may be stated as follows: "what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution." (*Abington School District v Schempp* 374 US 203(1963), 222).
[97] *McLean v Arkansas Board of Education*, (1982) 529 F. Supp. 1255.
[98] (1987) 482 US 578.
[99] *Balanced Treatment for Creation-Science and Evolution-Science Act* (Act 590) (Arkansas).
[100] at 581.

> creation science. If either is taught, however, the other must also be taught. The theories of evolution and creation science are statutorily defined as "the scientific evidences for [creation or evolution] and inferences from those scientific evidences."

Louisiana argued that the purpose of the statute was secular, to protect academic freedom. The Court held that the law was invalid, as an impermissible establishment of religion.

The court used the three-pronged test developed in *Lemon v Kurtzman*[101] in 1971 to consider possible breaches of the Establishment Clause, on which Brennan J argued that Louisiana's law failed on all three. The law was not enacted to further a clear secular purpose, the primary effect of the law was to advance the viewpoint that a "supernatural being created humankind," and the law significantly entangled the interests of church and state by seeking "the symbolic and financial support of government to achieve a religious purpose."

Following the failure by creationists to succeed in establishing the concept of "creation science" as a viable alternate theory for the science curriculum in *Edwards*, some proponents of this view recognised that creationism was too directly linked to religion to be considered a science, and commenced with the concept of "intelligent design",[102] a theory that offered an alternate view to evolution, to circumvent decisions such as *Edwards*, by removing direct reference to religion.

The most recent significant case on this matter in the US has been *Kitzmiller v Dover.*[103] In *Kitzmiller* in 2005 US District Court Judge John E. Jones III ordered the Dover Area School Board to refrain from maintaining an Intelligent Design (ID) curriculum within the district. The offending policy included a statement "students will be made aware of gaps/problems in Darwin's Theory and other theories of evolution including, but not limited to, intelligent design."[104] In his ruling, Jones J wrote it was "abundantly clear that the Board's ID Policy violates the Establishment Clause" and that "ID cannot uncouple itself from its creationist, and thus religious, antecedents".[105]

Creationism remains in the US education system, as the constitutional issues apply only to public schools, leaving the private sector to teach as and what it wishes.[106] This has however led to students who have studied science with a strongly creationist element of the biology curriculum being refused entry into state institutions of higher education.[107] The debate however remains.[108]

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[101] *Lemon v Kurtzman*, 403 US 602 (1971), 612-613.

[102] Washington, D.C.: Center for Inquiry, Office of Public Policy. 'Understanding the Intelligent Design Creationist Movement: Its True Nature and Goals' (May 2007) <http://www.centerforinquiry.net/uploads/attachments/intelligent-design.pdf >.

[103] *Tammy Kitzmiller, et al. v Dover Area School District, et al*. (400 F. Supp. 2d 707 (M.D. Pa. 2005).

[104] *Kitzmiller v Dover Area School District,* Memorandum Opinion, December 20, 2005, 117.

[105] *Kitzmiller v Dover Area School District,* Memorandum Opinion, December 20, 2005, Conclusion, 136.

[106] Where there is no state action there is no constitutional violation: *Adickes v. S.H. Kress & C*, 398 US 144, 152 (1970).

[107] *Association of Christian Schools International v Roman Stearns*, 679 F. Supp. 2d 1083, 1090.

[108] See generally Robert J. D'Agostino, 'Selman and Kitzmiller and the Imposition of Darwinian Orthodoxy' (2010) *Brigham Young University Education and Law Journal* 1; Charles Cowan,

In conclusion, the intersection of religion and public education has been replete with decisions of higher courts, often the United States Supreme Court or the European Court of Human Rights considering the meaning of religious symbols or religiously influenced curricula in schools generally considered secular. The meaning of secular in these contexts has been hotly debated, particularly in Europe, where religious symbols are closely associated with, and difficult to separate from, the dominant cultural paradigm. These practices would no doubt have been contrary to Holyoake's ideals as efforts to remove religion from a public space where its contribution is welcomed and the harm suggested by the state for its presence is largely unproven.

The next chapter follows on from this theme, examining the impact of the use or maintenance of religion by secular states to effect cultural change using secular arguments for their purpose, or to maintain long standing but increasingly controversial practices on the basis of tradition.

'Creationism's Public and Private Fronts: The Protection and Restriction of Religious Freedom' (2013) 82 *Mississippi Law Journal* 223.

CHAPTER 8

EFFORTS TO MOULD A PUBLIC CULTURE BASED ON RELIGION

I INTRODUCTION

In 1846 Holyoake stated in *English Secularism* that "Secularism is a code of duty pertaining to this life founded on considerations purely human."[1] Constitutions based on this principle for the governing of society have generally removed religion as a dictating force from public policy. Yet in a number of jurisdictions, states avowedly secular have sought to impose religious values[2] or severely limit or abolish religious practices in the view that society is better for it,[3] contrary to Holyoake's original principles. To round out this second part of the thesis this chapter will examine these and a number of related issues.

The efforts of some states to attempt to impose religious principles through legislation has always been a contentious area of religious freedom. The issues related to a state imposing the religious values of the majority often have a dubious constitutional authority, and controversy often arise suggesting that religion has had an unreasonable influence upon government. Some cases in this chapter also consider whether religion may be excessively limited (relative to non-religious players in the public space) due to over-regulation of its activities. Some changes or interferences may not always be beneficial and well-received by the affected community or the community in general.

II CONSTITUTIONAL PROVISIONS TO BENEFIT RELIGIOUS COMMUNITIES

A *Abolition of 'untouchability' – Temple entry cases*

Holyoakean principles advocate that secular principles are open to critique and debate in the public sphere.[4] This is generally understood to mean that religion should not seek to influence or coerce government.[5] While a number of cases have involved the suggestion that religion has influenced government - such as through religious

[1] George Jacob Holyoake, *English Secularism: A Confession of Belief* (The Open Court Publishing Company, Chicago, 1896), 34.
[2] *R v Big M Drug Mart*, [1985] 1 SCR 295, 18 DLR (4th) 321; *McGowan v Maryland*, 366 US 420 (1961).
[3] Such as in India through the *Muslim Women (Protection of Rights on Divorce) Act, 1986*.
[4] "The universal fair and open discussion of opinion is the highest guarantee of public truth—only that theory which is submitted to that ordeal is to be regarded, since only that which endures it can be trusted. Secularism encourages men to trust reason throughout, and to trust nothing that reason does not establish". (*The Principles of Secularism Illustrated* (Austin & Co., London, 1871), 15).
[5] See generally David E. Campbell and Robert D. Putnam, 'God and Caesar in America: Why Mixing Religion and Politics is Bad for Both' (2012) 91(2) *Foreign Affairs* 34; Robert Audi, 'Religion, Politics and the Secular State', (2014) 64 (1) *The Philosopher's Magazine* 73.

displays,[6] or through school prayers[7] and directed curriculum[8] - there are also cases of government working directly against Holyoakean principles by not only limiting religious activity[9] but actively prohibiting religious institutions from undertaking long-standing practices.

The policy of the British Government in India in the nineteenth century was not to interfere with religion, and in particular long-standing religious practices. Lord William Bentick, between 1833 and 1835 made some exceptions and abolished religious practices such *sati*[10] and *thuggee*,[11] although they had a long history. This interference in religious practices however was done with the declared intent of redefining public culture and religious practice along definitions set by the state. Such interference is consistent with a long held view, back to the time of Locke, that groups whose beliefs could potentially undermine the maintenance of civil society are not to be tolerated.[12] In more recent times, India has sought to abolish other long standing practices, a process which began in 1947.[13]

The *Temple Entry* cases are examples of government imposing a 'secular' vision upon religion, bolstered by constitutional provisions designed to achieve social change, such as the abolition of untouchability in Article 17 of the Indian Constitution.[14] The *Temple Entry* cases arose from the abolition of the concept of untouchability in the new constitution, and the enforcement of public religious acceptance of Dalits[15] within the greater Hindu community.[16]

The contentious issue of temple entry is a uniquely subcontinent matter, with most cases occurring in India.[17] These resulted from the Indian state's wish to remove

[6] See for example *Lynch v Donnelly*, 465 US 668 (1984).
[7] See for example BVerfGE 52, 223 in Germany.
[8] See for example *Abington School District v Schempp*, 374 US 203(1963).
[9] As examined in Chapter 5 of this thesis.
[10] Also known as suttee. A woman devoted to her husband in life who, upon his death, immolated herself on his funeral pyre. Considered to date back to 400 BCE the practice came to acquire the approval of most devout Hindus.
[11] Also known as Thuggee; practised by 'thugs'. In the nineteenth century these were a class of professional thieves and assassins who were Hindus or Muslims claiming the support of the goddess Kali, Durga or Bhabani who allegedly consecrated their weapons.
[12] John Locke, *A Letter Concerning Toleration* (trans. William Popple, Merchant Books, USA, 2011), 78. See also Chapter 2 of this thesis.
[13] One such was the institution of dedicating young girls to temple deities (which was abolished by the *Madras Devadasis (Prevention of Dedication) Act*, 1947, another the limiting of temple entry (removed by the *Madras Temple Entry Authorization Act 1947)*. Devadasis were those women 'married' to the deity, dedicated for their lifetime to service in the temple. Initially these women had wealthy patrons and were held in high regard for skills such as dancing. Colonial times saw these women left without support and reformists sought to abolish the practice that they saw as a form of prostitution.
[14] 17. Abolition of Untouchability.—"Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law.
[15] also known as "untouchables" or Harijans, but now more commonly known as Dalits.
[16] Marc Galanter, 'Hinduism, Secularism, and the Indian Judiciary' (1971) 21(4) *Philosophy East & West* 466, 469.
[17] Some cases also occurred in Sri Lanka. See generally Bryan Pfaffenberger, 'The Political Construction of Defensive Nationalism: The 1968 Temple-Entry Crisis in Northern Sri Lanka' (1990) 49 *The Journal of Asian Studies* 78.

discrimination imposed upon those of a low caste,[18] together with a rise in political consciousness among Dalits in the middle of the last century.[19] Shabnum Tejani argues that Indian secularism relates more to considerations of caste, than to traditional religion. Accordingly secularism in the Indian context is not

> a separation of political from religious institutions or creating a particularly Indian ethics of tolerance. Rather, it represented a formulation of nationalism that involved dovetailing liberal discourses around individual representation with definitions of majority and minority populations that were defined communally. Secularism in the Indian context thus took on quite specific historical meanings: it was not distinct from caste, communalism and democracy but a relational category that emerged at their nexus. … Indian secularism emerged in the transition from nationalism to independence at the fault lines of where minority communities, Muslims and Sikhs, as well as the Untouchables, asserted their right to be recognized in the new state.[20]

New laws following independence regarding temple entry were perceived by religious institutions as an imposition upon their right to determine their own internal policies.[21]

Temples have been a vexed problem for a number of reasons. The public control over temples has been perceived to be a flaw in Indian secularism as it either violates the integrity of religious premises or interferes with the internal affairs of religious bodies.[22] As the abolition of the practice of Devadasis,[23] another long standing religious practice, could be said to be made for secular reasons - for the protection of the women concerned - it was argued that another Hindu practice, that of preventing access to temples on the grounds of untouchability[24] was also unlawful and inequitable.[25] A number of cases reached the Indian Supreme Court contesting these provisions, arguing that the freedom of religion provisions of the constitution should prevail over the temple entry laws.

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[18] Imposed by those of higher castes.

[19] Shabnum Tejani, 'Untouchable Demands for Justice or the Problem of Religious "Non-Interference": The case of temple entry movements in late-colonial India' (2013) 14(3) *Journal of Colonialism and Colonial History*. *Project MUSE*. Web. 8 Feb. 2014. <http://muse.jhu.edu/>. The concept of temple entry was inclusive of access to public space - tanks, temples and bathing *ghats*. A *ghat* is series of steps leading down to a body of water, often a holy river, or a lesser body of water.

[20] Shabnum Tejani, 'Untouchable Demands for Justice or the Problem of Religious "Non-Interference": The case of temple entry movements in late-colonial India' (2013) 14(3) *Journal of Colonialism and Colonial History*. Project MUSE. Web. 8 Feb. 2014. <http://muse.jhu.edu/>.

[21] Marc Galanter, 'Hinduism, Secularism, and the Indian Judiciary' (1971) 21(4) *Philosophy East and West* 467, 469.

[22] Donald.E. Smith, *India as a Secular State* (Oxford University Press, London, 1963), 241-243.

[23] The institution of dedicating young girls to temple deities (which was abolished by the *Madras Devadasis (Prevention of Dedication) Act*, 1947. Devadasis were women 'married' to the deity, dedicated for their lifetime to service in the temple. Initially these women had wealthy patrons and were held in high regard for skills such as dancing. Colonial times saw these women left without support and reformists sought to abolish the practice that they saw as a form of prostitution.

[24] Untouchability was made illegal under Article 17 of the 1950 Constitution which abolishes the practice. The *Untouchability Offences Act* of 1955 (renamed to *Protection of Civil Rights Act* in 1976) made it illegal to prevent a person from entering a place of worship or from taking water from a tank or well. See generally Hillary Mayell, "India's "Untouchables" Face Violence, Discrimination", *National Geographic News*, 2 June 2003. <http://news.nationalgeographic.com/news/2003/06/0602_030602_untouchables.html>.

[25] Partha Chatterjee, 'Secularism and tolerance' in Rajeev Bhargava (ed), *Secularism and its Critics* (Delhi: Oxford University Press, 1998), 353.

The Indian constitution provides for the access to all of Hindu religious institutions of a public character to all classes of Hindus.[26] Notable in this area was the decision in 1958 in *Sri Venkataramana Devaru v State of Mysore*,[27] known as the *Temple Entry case*. The trustees of the Temple of Sri Venkataramana Devaru at Mulki challenged the *Madras Temple Entry Authorisation Act, 1947*.[28] This Act provided for the removal of the disability of Harijans from entering Hindu temples otherwise accessible to Hindus generally. The temple trustees argued that they were private, which was rejected by the High Court of Mysore, but the Court allowed that they had the right to prevent entry to the general public on certain ceremonial occasions.

In a democracy the state naturally is inclined to pass laws and regulations that support the views of the majority. This proposition is not inconsistent with the published views of Holyoake. However, when the state is inclined to enforce religious precepts upon the general population, such as in the "day of rest" cases, then religion begins to cease being an objective presence in the public sphere, and begins to direct public policy, moving away from Holyoake's paradigm. The "temple entry" cases however show that the state can interfere with matters that are religious in nature, not so much as to impose religious doctrine, but rather to apply limits for the betterment of the whole community under the general precepts of peace, order and good government.

These cases, and many like it[29] in the early years post-Independence, chronicled a struggle between established tradition and new constitutional principles. Those new principles took some time to be adapted, and even some decades later were still not well understood.[30] Indian secularism remains unlike most Western concepts. Rajeev Bhargava has observed, it "is different from, and provides an alternative to, both the idealized American and French conceptions of secularism."[31] Yet, it retains the essential elements of Holyoake's principles of not permitting dominance of religion over the state, and allowing religion a place in the public sphere. Indeed, religion

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[26] Article 25(2)(b):

[27] AIR 1958 SC 895.

[28] This was an appeal by the trustees of the temple of Sri Venkataramana of Moolky Petta, who were managing the temple on behalf of the Gowda Saraswath Brahmins in accordance with a Scheme framed in a suit under s. 92 of the *Code of Civil Procedure*.

[29] Such as *Raja Bira Kishore v State of Orissa*, AIR 1964 SC 1501; *Shastri Yagnapurushdasji v Muldas* AIR 1966 SC 1119; and *Durgah Committee, Ajmer v Syed Hussain Ali* AIR 1962 SC 1402.

[30] "There is disagreement about what this secular state implies - whether it implies a severe aloofness from religion, a benign impartiality toward religion, a corrective oversight of it, or a fond and equal indulgence of all religions": Marc Galanter, 'Hinduism, Secularism, and the Indian Judiciary' (1971) 21(4) *Philosophy East and West 467, 467.*

[31] Rajeev Bhargava, 'The "Secular Ideal" before Secularism" in Linell E. Cady and Elizabeth Shakman Hurd (eds.), *Comparative Secularisms in a Global Age* (Palgrave Macmillan, Hampshire, 2010), 161. Bhargava goes on to argue that: "Both these conceptions separate the state from religion for the sake of individualistically conceived moral and ethical values. The idealized American model interprets separation to mean mutual exclusion (wall of separation). The state has no neither a positive relationship with religion, for example, there is no policy of granting aid to religious institutions, nor a negative relationship with it; it is not within the scope of state activity to interfere in religious matters even when the values professed by the state are violated within the religious domain. … In contrast, the idealized French model interprets disconnection to mean one-sided exclusion. Here the state may interfere in the affairs of religion, but religion must not interfere in the affairs of the state. … Such states exclude religion to control or regulate them and sometimes even to destroy them. They encourage an active disrespect for religion and are concerned solely with the prevention of the religious order dominating the secular."

plays more of a part in the public sphere in India than does the familiar European or North American experience.

It is different, but it remains consistent with Holyoake's principles. The limitations of religion's ability to preclude individuals from accessing temples and other places held to be holy to them, together with the outlawing of untouchability, are laws that are reasonable restrictions aimed at maintaining the public order. These traditions can also be reasonably limited for the purposes of public order and safety.[32] In Holyoakean terms, the limitation upon the temple administrators to remove restrictions on public access, facilitates a balancing of conflicting interests, permitting the utilitarian principle of the greatest good to the greatest number in society to prevail.

III ENCOURAGEMENT OF PATRIOTISM

An encouragement of patriotism would seem to most on the surface to be an agreeable thing, a value for the common good. Such encouragement, manifested almost as a civil religion the values of which are almost universally shared within a state, has a narrative of society that most can share. Such values can be symbolised in a manner all can understand in the form of statues, flags and other mute symbols. The meaning of these of course will often differ between observers.

The quasi-religious aspect can be seen clearly when others of the community sometimes react when a non-conformist fails to observe its rituals, such as singing a national anthem or saluting a flag. A profession of a civil religion is not uncommon. In the United States, in the context of the case of *Lynch v Donnelly*[33] where religious symbols were placed by government authorities in a public place, it was observed that

> Every nation-state develops a set of myths about the meaning of the nation, its history, and its people, and a corresponding set of rituals. Although such myths and rituals may be recited and acted out at important, historic, or commemorative moments, they are not saved exclusively for these significant events. People appropriate and transform these myths and rituals into an integral part of everyday life that informs people about what it means to be an 'American' (or a member of any other national group) and about who is marginal to that definition of self. [34]

An encouragement to profess patriotism, even if it must be compelled, is almost an insistence on a civil religion.[35] The state in a number of countries has compelled such forced profession on a number of groups who feel that it is a breach of their religious freedoms to do so.[36]

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[32] In Chapter 5 limits to express freedoms were examined.
[33] *Lynch v Donnelly*, 465 US 668 (1984).
[34] Janet L. Dolgin, 'Religious Symbols and the Establishment of a 'National Religion', (1987-88) 39 *Mercer Law Review* 495, 502.
[35] Janet L. Dolgin, 'Religious Symbols and the Establishment of a 'National Religion', (1987-88) 39 *Mercer Law Review* 495, 505. "Those who refuse to applaud or appropriate the crèche in its public display risk being marked as pariahs or as refusing the American way of life. The real, almost unspeakable, danger of *Lynch* is that "being Christian,"- whether through birth or through the proper "code for conduct," including publicly accepting the crèche - can become synonymous with, or an essential aspect of, being American."
[36] This includes the non-observance of civic rituals like saluting the flag in the US (*Board of Education v Barnette*, 319 US 624 (1943), singing the national anthem in India (*Bijoe Emmanuel v State of Kerala* (1986) 3 SCC 615) or contributing financially to the dominant religion (*Premalal Perera v Weerasooriya* (1985 (2) Sri LR, 177)).

Such an example is the *Jehovah's Witnesses Case*[37] in India, where three members of the Christian sect of Jehovah's Witnesses refused to sing the National Anthem. The schools in Kerala had issued a directive that all students must do so. On the basis that such an act breached the tenets of their sect the students refused - citing that such insistence breached their religious freedoms under the Constitution. As a result of their refusal, the children were expelled from the school. An appeal against their expulsion to the High Court of Kerala failed. An appeal to the Supreme Court succeeded, the Court setting aside the expulsion order of the Director of Public Instruction, Kerala.

It was accepted that the appellants were not permitted to observe any ritual proscribed by their sect, and this included singing a national anthem or saluting a national flag. The Supreme Court held that their refusal was not in contravention of Section 3 of the *Prevention of Insults to National Honour Act, 1971*, and that the students' refusal and subsequent expulsion was a violation of their rights under Article 25. Chinnappa Reddy J and Dutt J noted the freedoms provided by Article 26 and observed

> We do endorse the view suggested by Davar J's observation[38] that the question is not whether a particular religious belief or practice appeals to our reason or sentiment but whether the belief is genuinely and conscientiously held as part of the profession or practice of religion. Our personal views and reactions are irrelevant. If belief is genuinely and conscientiously held it attracts the protection of Art. 25 but subject, of course, to the inhibitions contained therein.

A similar case occurred in the USA in *Board of Education v Barnette*,[39] known as the "flag salute" case. The West Virginia Board of Education in 1942 adopted a resolution ordering that the salute to the flag be a regular part of public school programs, and that pupils "shall be required to participate in the salute honouring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an Act of insubordination, and shall be dealt with accordingly."[40] The appellants asked for an injunction in a federal court restraining enforcement of the laws which ran counter to the teaching of the Jehovah's Witnesses of which the appellants were members. The Court agreed, and the state appealed.

In considering the appeal the US Supreme Court in *Barnette* reviewed *Minersville School District v Gobitis*,[41] decided three years before, also involving Jehovah's Witness school children. There the Court had reasoned that "National unity is the basis of national security", and that authorities would have "the right to select appropriate means for its attainment".[42] Such measures were therefore constitutional. In *Minersville* the Court considered whether national unity by compulsion was

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[37] *Bijoe Emmanuel v State of Kerala* (1986) 3 SCC 615.
[38] "If this is the belief of the community – and it is proved undoubtedly to be the belief of the Zoroastrian community – a secular Judge is bound to accept that belief – it is not for him to sit in judgment on that belief – he has no right to interfere with the conscience of a donor who makes a gift in favour of what he believes to be the advancement of his religion and for the welfare of his community or of mankind …" *Jamshedji v Soonabai* (1909) (Davar J) 33 Bom. 122
[39] 319 US 624 (1943).
[40] 319 US 624 (1943), 627.
[41] 310 US 586 (1940).
[42] 310 US 586 (1940), 595.

constitutional. It reviewed examples in history of futile examples to compel unity through compulsion and in *Barnette* reflected that[43]

> Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard. It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. … Authority here is to be controlled by public opinion, not public opinion by authority ….

Accordingly the Court held that *Minersville* was overruled, and that the judgment enjoining the West Virginia regulation was affirmed.

A slightly different case occurred in Sri Lanka in *Premalal Perera v Weerasooriya*.[44] The petitioner was an employee of the Railways Department, who complained that an administrative circular infringed his rights under Articles 10[45] and 14 (1) (e)[46] of the Sri Lanka constitution. The circular directed that a day's salary for the month of January 1985 would be deducted from all railway employees as a contribution to the National Security Fund, except for those who requested an exemption. The petitioner stated that as a Buddhist, he could not consent to the contribution, as the money would be used for purchasing weapons to be used for the destruction of human life. He claimed that informing the railway authorities of this fact as required by the circular would expose him to harassment. The Supreme Court agreed with the petitioner that his freedom of thought, conscience and religion was guaranteed and protected by the constitution, but nonetheless held that the circular did not expose him to the harassment he feared. As stated by Ranasinghe J in that case

> Beliefs rooted in religion are protected. A religious belief need not be logical, acceptable, consistent or comprehensible in order to be protected. Unless the claim is bizarre and clearly non-religious in motivation, it is not within the judicial functions and judicial competence to inquire whether the person seeking protection has correctly perceived the commands of his particular faith. The Courts are not arbiters of scriptural interpretation and should not undertake to dissect religious beliefs.

These cases of compliance with civic ritual does not make the whole of society stronger, but rather it is counterproductive, defeating the original intent of achieving a good for society. As Jackson J in *Barnette*[47] observed, "compulsory unification of opinion achieves only the unanimity of the graveyard." Compulsorily enforced uniformity does society no good, and there is no true evidence that non-conformity does society harm. It is consistent with Holyoake's principles that civic religion, like all other religion, can have its dissenters with no harm to the rest of society.

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[43] *West Virginia State Board of Education v Barnette*, 319 US 624 (1943), 641. (Jackson J).
[44] *Premalal Perera v Weerasooriya* (1985 (2) Sri LR, 177).
[45] Freedom of thought, conscience and religion
[46] (1) Every citizen is entitled to –
(e) the freedom, either by himself or in association with others, and either in public or in private, to manifest his religion or belief in worship, observance, practice or teaching;
[47] *West Virginia State Board of Education v Barnette*, 319 US 624 (1943), 641. (Jackson J).

IV THE CULTURAL HISTORY ARGUMENT

In order to avoid political repercussions regarding state support of religious symbols, the courts recently in the United States,[48] Germany,[49] and Italy,[50] have often made recourse to the 'cultural history argument'. These cases have been interesting in that they posit a legal history and identity retrospectively where jurisprudence had not sensed its presence before.

The US cases for example, when explaining religious symbols and statements in public buildings, have been argued by plaintiffs that such symbols are clearly religious, and seem to send a message that the state endorses religion contrary the US Constitution's First Amendment Religion Clauses. Breyer J in one of these cases, *Van Orden v Perry*,[51] observed that many of these cases were not that simple to decide, involving variables such as the specific facts of the case.[52] In that case the fact that the monument in question had not been queried as being unconstitutional for the forty year it had been in place in front of the court house, was a deciding factor.[53] Scalia J, in the minority in *McCreary County v ACLU*[54] put the primary argument that the majority of the people are religious, and always have been, so the religious nature, especially Christian nature of the people should prevail over minority views, that the cultural history of the people is not be distinguished from the history of the state:

> The three most popular religions in the United States, Christianity, Judaism, and Islam–which combined account for 97.7% of all believers–are monotheistic . . .. All of them, moreover (Islam included), believe that the Ten Commandments were given by God to Moses, and are divine prescriptions for a virtuous life . . .. Publicly honoring the Ten Commandments is thus indistinguishable, insofar as discriminating against other religions is concerned, from publicly honoring God. Both practices are recognized across such a broad and diverse range of the population–from Christians to Muslims–that they cannot be reasonably understood as a government endorsement of a particular religious viewpoint.

The cases considered in this section examine whether religious symbols and statements in the public sphere by the state are contrary to secular principles, or are simply part of the cultural history of the state, and as Breyer J noted, cannot be reasonably seen as an endorsement of a religious message.

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[48] *Marsh v Chambers*, 463 US 783 (1983).
[49] BVerfGE 52, 223
[50] *Lautsi v Italy*, European Court of Human Rights (Application No. 30814/06).
[51] *Van Orden v Perry*, 545 US 677 (2005).
[52] "The case before us is a borderline case. It concerns a large granite monument bearing the text of the Ten Commandments located on the grounds of the Texas State Capitol. On the one hand, the Commandments' text undeniably has a religious message, invoking, indeed emphasizing, the Deity. On the other hand, focusing on the text of the Commandments alone cannot conclusively resolve this case. Rather, to determine the message that the text here conveys, we must examine how the text is used. And that inquiry requires us to consider the context of the display." *Van Orden v Perry*, 545 US 677, 700-701 (2005). (Breyer J)
[53] Kathryn Page Camp, *In God We Trust: How the Supreme Court's First Amendment Decisions Affect Organized Religion* (FaithWalk Publishing, Lima, USA, 2006), 91-2.
[54] *McCreary County v ACLU of Kentucky*, 545 US 844 (2005).

A *Ceremonial deism*

The use of cultural history to support the imposition of religion by the state into the public sphere includes terms such as 'ceremonial deism'. These terms have been suggested by their users to imply that their official use by the state over a long period, rather than being long-standing support by the state for religion in contravention of secular constitutional provisions to the contrary, are written off in contemporary usage as not being religious at all. To those who do not subscribe to the majority religion, their usage is overtly religious.[55]

The phrase 'ceremonial deism' was first used in 1962 by Eugene Rostow, who explained it to be "a class of public activity which . . . c[ould] be accepted as so conventional and uncontroversial as to be constitutional."[56] The concept has been considered in a number of US cases, including one which involved a nativity scene, and another which challenged the inclusion of "under God" in the US Pledge of Allegiance. [57]

Andrew Koppelman[58] shares his confusion on this issue:

> Some kinds of official religion are clearly impermissible, such as official prayers and Bible reading in public schools. Laws such as a ban on the teaching of evolution are struck down because they lack a secular purpose. Yet at the same time, 'In God We Trust' appears on the currency, legislative sessions begin with prayers, judicial proceedings begin with 'God save the United States and this Honourable Court', Christmas is an official holiday, and of course, the words 'under God' appear in the Pledge of Allegiance. Old manifestations of official religion are tolerated, while new ones are enjoined by the courts: the Supreme Court held in 2005 that an official Ten Commandments display is unconstitutional if it was erected recently, but not if it has been around for decades.

Koppelman's position on this confusion is that there must be a middle path between the extremes of "the complete eradication of religion from public life" and the traditional practice of "frank endorsement of religious propositions." [59] Holyoake's principles fit in this space that Koppelman envisages. He has identified that 'secular' positions that advocate the complete removal or acceptance of religion in the public sphere are impossible to maintain. As noted in earlier chapters of this thesis, religion is seen by many of its proponents as manifesting in all of society, both public and private. At the same time, as noted in Chapter 5, the state has an interest in limiting religion in part, but not entirely. The middle ground does not need defining or kept to an extreme, it needs only balance.

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[55] See for example *Elk Grove Unified School District v Newdow*, 542 US 1 (2004).
[56] Steven B. Epstein, '*Rethinking the Constitutionality of Ceremonial Deism'*, (1996) 96(8) *Columbia Law Review* 2083, 2091.
[57] *Lynch v Donnelly*, 465 US 668 (1984) and *Elk Grove Unified School District v Newdow*, 542 US 1 (2004).
[58] Andrew Koppelman, 'And I Don't Care What It Is: Religious Neutrality in American Law' (2013) 39 *Pepperdine Law Review* 1115, 1116-7.
[59] Chad Flanders, 'Can We Please Stop Talking About Neutrality? Koppelman between Scalia and Rawls' (2013) 39 *Pepperdine Law Review* 1139, 1140.

Yet such overt displays by government of religious association, contrary to professed neutrality continue to cause controversy where and when they appear.[60] Many have been, like the symbols mentioned in Chapter 6, in the public domain for some time without query as to their purpose. In the United States this long standing use and practice of ceremonial deism or displays of official religion was first seen in *Marsh v Chambers*.[61]

In Nebraska the legislature was opened by a chaplain selected by legislators and paid out of public funds. Chambers, one of the legislators, challenged the practice as an establishment of religion, but the practice was upheld by the Supreme Court. The Court held[62] that

> The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom. In the very courtrooms in which the United States District Judge and later three Circuit Judges heard and decided this case, the proceedings opened with an announcement that concluded, "God save the United States and this Honorable Court." The same invocation occurs at all sessions of this Court.

The Court cited in support the first Congress approving funds for house and senate chaplains in 1789. Brennan J however dissented, arguing "I have no doubt that, if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice unconstitutional."[63] He went on to say that it was "self-evident" that the purpose of such prayer was "pre-eminently religious", and that its effect was religious by "explicitly link[ing] religious beliefs and observance to the power and prestige of the state".[64] Consequently such practices "involve[ed] precisely the sort of [entangling] supervision that agencies of government should if at all possible avoid." The next year in Brennan J's dissenting opinion in *Lynch v Donnelly*[65] he argued

> … I would suggest that such practices as the designation of 'In God We Trust' as our national motto, or the references to God contained in the Pledge of Allegiance to the flag can best be understood, in Dean Rostow's apt phrase, as a form of 'ceremonial deism'[66] protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content.

The amendment to the American Pledge of Allegiance nearly 60 years ago was a particularly overt effort to change public culture. A bill was introduced into Congress in 1954 calling for the addition of the words "under God" to be added to the Pledge.

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[60] These issues are articulated on a regular basis in various jurisdictions. For example, recently in Australia, there have been calls for the Australian Parliament to cease opening with a Christian prayer that has occurred since the creation of the Australian state in 1901: Judith Ireland, 'Greens to move motion to remove Lord's Prayer in favour of "silent reflection"', *The Sydney Morning Herald*, February 13, 2014. <http://www.smh.com.au/federal-politics/political-news/greens-to-move-motion-to-remove-lords-prayer-in-favour-of-silent-reflection-20140213-32j55.html.>

[61] *Marsh v Chambers*, 463 US 783 (1983).

[62] *Marsh v. Chambers*, 463 US 783, 786 (1983).

[63] *Marsh v Chambers*, 463 US 783, 800 (1983).

[64] *Marsh v Chambers*, 463 US 783, 798 (1983).

[65] 465 US 668 (1984).

[66] A term created by the Dean of the Yale Law School, Eugene Rostow, in 1962, cited in Davison M. Douglas, 'Ceremonial Deism', in Paul Finkelman ed., *Encyclopedia of American Civil Liberties* 259 (Taylor & Francis, Abingdon, 2006).

In June 1954, it was passed into law. Although largely unchallenged until recently, some cases have begun since 2002. The US Court of Appeals for the Ninth Circuit in *Newdow v US Congress*[67] held that the 1954 statute was unconstitutional. Newdow had complained about the policy of a California School district for his child and indeed all public school children in their district to do so. Following political controversy the Ninth Circuit amended its decision.[68]

O'Connor J in the appeal to the Supreme Court by the school district case in *Elk Grove School District v Newdow*[69] used the ceremonial deism argument to dismiss Newdow's appeal that the inclusion of the phrase "under God" in the American pledge of allegiance was 'ceremonial deism' and hence not innately religious.[70] In a form of the cultural history viewpoint, Rehnquist CJ in the same case considered the same phrase was constitutionally permissible because the pledge had a 'patriotic purpose' (thereby invoking a common good to society argument).[71] This view does not deny the religiosity of these issues, but simply considers that if the purpose was good, the content is irrelevant, and hence does not address the constitutionality of the matter at all.

These arguments are innately circular and self-serving. The long-standing usage of such phrases with religious content has been used by a population essentially religiously homogenous until late in the last century.

It is only in recent times that society through secularisation and immigration has changed the demographics of a number of jurisdictions such as Australia, the UK, France and the USA which have welcomed and encouraged this change.[72] This has created an environment where some now feel comfortable in questioning the assumptions underlying their state's underlying constitutional identity, relating to the role of religion in the public sphere.[73]

This cultural history argument for the dismissal of religious intent on the part of the state by associating it with traditional religious symbols and statements has analogues with decisions in Europe relating to similar displays in schools.[74] There are some

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[67] *Newdow v US Congress*, 292 F. 3d 597.(9th Circuit, 2002). Known as *Newdow I.*

[68] William Trunk, 'The Scourge of Contextualism: Ceremonial Deism and the Establishment Clause', (2008) 49 *Boston College Law Review* 571.

[69] *Elk Grove School District v Newdow*, 542 US 1 (2004), known as *Newdow II.*

[70] 542 US 1, 36-37. "There are no de minimis violations of the Constitution – no constitutional harms so slight that the courts are obliged to ignore them. Given the values that the Establishment Clause was meant to serve, however, I believe that government can, in a discrete category of cases, acknowledge or refer to the divine without offending the Constitution. This category of "ceremonial deism" most clearly encompasses such things as the national motto ("In God We Trust"), religious references in traditional patriotic songs such as "The Star-Spangled Banner", and the words with which the Marshal of this Court opens each of its sessions ("God save the United States and this honorable Court"). These references are not minor trespasses upon the Establishment Clause to which I turn a blind eye. Instead, their history, character, and context prevent them from being constitutional violations at all."

[71] at 31.

[72] See generally Barry Kosmin, *One Nation Under God: Religion in Contemporary American Society* (Random House, New York, 2011); Peter L. Berger, Grace Davie, and Effie Fokas, *Religious America, Secular Europe?: A Theme and Variation* (Ashgate Publishing, Farnham, 2008).

[73] Such as in *Elk Grove Unified School District v Newdow*, 542 US 1 (2004).

[74] *Lautsi v Italy*, European Court of Human Rights (Application No. 30814/06); *Bayerischer Verwaltungsgerichthof* [BayVBI] [Bavarian Higher Administrative Court] 751 (751-54) (F.R.G.).

differences between the classes of cases however. The arguments of the plaintiffs in the school decisions in Europe were basically that overt religious symbols in schools would have a compelling religious message, a proselytising that would have the power of the state behind the message, influencing the mind of the student who did not subscribe to the dominant religious view.

The cases in the US are more technical. Religious statements such as 'In God We Trust' in courts and legislatures are unlikely to affect a formative mind in that they would not attend these places much, if at all. Such messages on currency are even more removed. As few people pay much attention to what is written on a coin or note.

As in Chapter 6, there is no demonstrable harm to society from these messages if there is little evidence that these messages and symbols cause the social harm anticipated. Then they are likely to be difficult to remove from the underlying culture, and unlikely to be associated with religion in any proselytising sense. Here, the element of coercion is missing, distinguishable from the flag salute cases of the previous section, and the 'day of rest' cases in the next. Accordingly such matters would not be inconsistent with Holyoakean principles.

V THE 'DAY OF REST' PROPOSITION

Since the 1850s laws passed by some jurisdictions to limit activity by people, particularly businesses, in public have been a controversial reform issue, limiting their ability to lawfully work or trade on the day. The constitutional authority for such laws is generally drawn from the state's powers for health and safety. The controversies arose because the limitations applied arbitrarily to all citizens on one day of the week. As a recognised and enforced day of rest, these laws applied whether the rest was wanted on that day, or at all.[75]

In England secularists sought to draw attention to petty examples of Sunday trading laws, such as the example of a Peter Kay of Preston in England who was a disabled seller of nettle beer on Sundays. He was prosecuted under an old law from the times of Charles II, which limited the opening of inns on Sundays.[76] Holyoake himself came across the case of a widow prosecuted for selling hot mutton pies a few minutes after midnight on a Saturday night.[77] In July 1855 there were riots in London against Lord Robert Grosvenor's *Sunday Trading Bill*, which was subsequently withdrawn.[78] Holyoake held that the bill was "a mere Church monopoly act, for the protection of religion from competition".[79]

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[75] See generally Neil J. Dilloff, 'Never on Sunday: the Blue Laws Controversy', (1980) 39(4) *Maryland Law Review* 679.
[76] 29 Charles II, c. 7 (1677).
[77] Edward Royle, *Victorian Infidels* (Manchester University Press, 1974), 260.
[78] "Mob Legislation", *The Spectator*, 7 July 1855, 13. The article noted that "The bill would not have enforced the observance of the Sabbath, "bitter" or otherwise; and it was supported by many who did not themselves sympathize with Sabbatical observance as a religious institution. The practice of trading on the Sunday in particular districts of London first attracted attention as a violation of public decency on religious grounds; and the Committee of the House of Commons that sat in 1832 obtained evidence which proved the wide extent of Sunday trading, and at the same time a very general desire on the part of traders to give up their business on the seventh day if they could be protected against the competition of each other."
[79] *The Reasoner*, 8 July 1855.

A number of jurisdictions have attempted to pass legislation under the rationale of a universal worker's day of rest with a secular purpose. These have generally been found by supreme courts to be thinly veiled attempts by the state to impose religious values upon the community, including those which did not subscribe to the majority view. Many of the cases brought involved those who had 'days of rest' other than the Christian Sunday.

The first case that involved this area was *R v Big M Drug Mart*,[80] a challenge to the *Lord's Day Act*.[81] That Act prohibited retail sales on Sundays in Canada, unless otherwise provided for in provincial law. Canada's current freedom of religion principles currently lie in subsection 2(a)[82] of the Canadian *Charter of Rights and Freedoms*.[83]

In order for the Supreme Court to have jurisdiction to invalidate it, the Act had to be characterised as religious in nature. However, this would then attract the protection of subsection 2(a) of the Canadian constitution if the freedom of religion provisions were read narrowly.[84] However, Dickson J considered that a narrow reading would protect freedom of religious belief, but would also compel respect for the religion of others. He stated:

> The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest belief by worship and practice or by teaching and dissemination.[85]

This freedom then included the freedom not to have to practise or adhere to another's religion. This protection from coercion:

> ... means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in any way contrary to his beliefs or his conscience.[86]

The Court struck down the *Lord's Day Act* for violating Section 2 of the Canadian *Charter of Rights and Freedoms*.

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[80] *R v Big M Drug Mart*, [1985] 1 SCR 295, 18 DLR (4th) 321.
[81] *Lord's Day Act*, 1906 (Can.), c. 27.; *Lord's Day Act*, R.S.C. 1970, c. L-13, s. 4.; *Lord's Day (Ontario) Act*, R.S.O. 1980, c. 253.; *Lord's Day (Saskatchewan) Act*, R.S.S. 1978, c. L-34.
[82] 2. Everyone has the following fundamental freedoms:
(a) freedom of conscience and religion;
[83] The *Charter* is a bill of rights contained within the Canadian Constitution, forming the first part of the *Constitution Act, 1982*.
[84] Prior to 1982, religious freedom of expression rights in Canada were contained within three constitutional documents. First, there was a clear mention of religion in section 93 of the *Constitution Act*, 1867. Second, the criminal law power in section 91(27) permitted the federal government to legislate with respect to religious observance and to prevent profanation of the Christian Sabbath. Cases involving these provisions were of little value in religious freedom rights as they tended to be characterised in terms of a distribution of powers, rather than involving religious freedom rights. Third, the *Canadian Bill of Rights* contained a guarantee of freedom of religion but was of little value in upholding those rights, such as in *R v Robertson* in 1963, which upheld the *Lords Day Act*.
[85] *R v Big M Drug Mart*, [1985] 1 SCR 295, 353.
[86] *R v Big M Drug Mart*, [1985] 1 SCR, 354.

In the United States, a similar issue[87] was addressed in *McGowan v Maryland*.[88] The outcome was different, however. The Supreme Court acknowledged that the origins of these laws were to encourage church attendance, and hence were religious in nature. However, the decision here focused on contemporary secular reasons for maintaining the tradition. Although the laws coincided in part with religious provisions, the modern impact was to provide a common day of rest and "health, safety, recreation, and general well-being".[89]

Additionally, writing for the Court, Warren CJ noted that the plaintiffs had argued only economic loss for being forced to close on such a day, rather than an infringement of religious freedom, concluding

> [The] appellants allege only economic injury to themselves; they do not allege any infringement of their own religious freedoms due to Sunday closing. In fact, the record is silent as to what appellants' religious beliefs are. Since the general rule is that "a litigant may only assert his own constitutional rights or immunities," (*United States v Raines*, 362 U.S. 17, 22) we hold that appellants have no standing to raise this contention.[90]

The Court also held that the law did not violate the Fourteenth Amendment. Chief Justice Warren again stated:

> ...the Court has [previously] held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power [even when], in practice, their laws result in some inequality.[91]

The element that again applies in this group of cases is that of coercion. Legislation by the state forcing all of a community to comply with religiously based obligations as with other compulsory state activities to advance religious doctrine does not achieve a uniform desired outcome.

If, as Holyoake insisted, that secular principles are open to critique and debate in the public sphere,[92] then all parties in the public sphere may contribute to public policy. Such enacted legislation, if it is indeed for the safety, health and welfare of the society or other rationale, must have its true objective made transparent. Religion may seek to influence the state to apply its values universally, or the state to regulate religion's public activity, but each must seek to have in the public sphere "fair and open discussion of opinion", without coercion. Public culture based on religious ideals, no matter how well intended, cannot be imposed

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[87] Three other cases, of a similar type also occurred in 1961, *Gallagher v Crown Kosher Super Market of Mass., Inc.*, 366 US 617 (1961); *Braunfeld v Brown*, 366 US 599 (1961); *Two Guys from Harrison v McGinley*, 366 US 582 (1961).
[88] *McGowan v Maryland*, 366 US 420 (1961).
[89] *McGowan v Maryland*, 366 US 420 (1961), 444.
[90] *McGowan v Maryland*, 366 US 420, 429 (1961).
[91] *McGowan v Maryland*, 366 US 420, 425 (1961).
[92] "The universal fair and open discussion of opinion is the highest guarantee of public truth—only that theory which is submitted to that ordeal is to be regarded, since only that which endures it can be trusted. Secularism encourages men to trust reason throughout, and to trust nothing that reason does not establish". (*The Principles of Secularism Illustrated* (Austin & Co., London, 1871), 15).

In conclusion, this chapter considered the efforts of the state to maintain a presence of the majority religion in the public space not so much by way of establishment, or by an expounding of their principles, but rather by way of the state's maintenance of religion's link with the community. This has often been done, not as an overt endorsement of religious practices, but rather as maintenance of long standing religious practices endorsed by the state rebadged as patriotism or cultural history which, it is argued, has long since lost its religious origins but binds citizens of all persuasions equally because of their common appeal as such. These practices, however, in their more coercive forms such as enforced days of rest have been held by supreme courts as contrary to secular principles.

The development of the theories of secularism developed by Holyoake were examined in Part I, through to an analysis of the contemporary secular state and its current relationship with religion in the public sphere, including its effectiveness in accommodating religion in the public sphere as Holyoake envisaged in Part II. The next part of this thesis moves through to a consideration of the future viability of Holyoakean secular principles, and the proposition of a way forward through a general theory of constitutional secularism.

PART III

MODERN SECULARISM: THE REMOVAL OF THE WALL IN FAVOUR OF A NEIGHBOURHOOD FENCE

CHAPTER 9

HOLYOAKE'S VISION OF SECULARISM: THEN, NOW AND THE FUTURE

The first Part of this thesis looked at where modern secularism originated, and how George Holyoake formulated his principles regarding secularism. The second examined how a number of secular states interpreted the ideals of secularism and incorporated them into their own constitutional and political systems. Cases were considered where issues examined by supreme courts were assessed in light of these principles, and their conformity with Holyoake's principles formed more than a century ago.

Part III of this thesis commences with this chapter. The modern understanding of secularism will be outlined, especially those consistent with Holyoake's principles. Particularly over the last half century, supreme courts have examined what their secular paradigms have meant in practice when examining the state's treatment of intersections between the state and religion in the public square. That period has given scholars an opportunity to look back and consider what trends have come out of those court decisions, and what public policy should be from now and reflect on what has been learned.

This chapter will consider four issues. The first will examine the views of those who, with the benefit of hindsight, have analysed states that have been secular for a significant period and consider that the purpose for which the state has been made secular has failed, and a revised model is needed. The second will consider the views that secular constitutions and liberal democracies have evolved to adapt to modern challenges, and remains as a result an effective model of governance. The third part of this chapter will look at how secularism may be improved, and perhaps be changed to address the critics' perceptions of irrelevancy. The last will look at issues that arise when the state becomes overzealous in its perception of how secular the state ought to be, particularly when the perceived paradigm is a strict separation of religion and state.

I THE OFT CITED CRISIS OF SECULARISM: DID HOLYOAKE'S VISION FAIL?

There are often statements in academic writings and even newspapers suggesting that secularism has failed,[1] religiosity is on the ascendant,[2] and that we should all acknowledge that secularism had a good try at changing the world but must now accept that that model must now be discarded.[3]

[1] Bruce Ledewitz, *Church, State and the Crisis in American Secularism* (Indiana University Press, Bloomington, 2011), 171.

[2] "The world we contemplate at the dawning of the twentieth-first century remains vibrantly, energetically, even at times maniacally religious, in ways large and small, good and bad, superficial and profound, now as much as ever". (Wilfred M. McClay, 'Two Concepts of Secularism', (2001) 13(1) *Journal of Policy History* 47, 48.

[3] See generally H. Baker, *The End of Secularism* (Crossway, USA, 2009).

One such critic, William Connolly, has stated that "[t]he historical modus vivendi called secularism is coming apart at the seams."[4] Lorenzo Zucca agrees and says that "[t]he secular state is in a difficult position. It barely copes with diversity and the fact of pluralism."[5] He sees the role of the secular state as the management of diversity, ergo the more diverse it becomes the more unmanageable it is. Accordingly, he sees "the impossibility of satisfying [the demands of religion] only increases the gap between different segments of society, which is thus more and more polarised." [6]

Recently Tariq Modood[7] cited publications in this vein in the context of European secularism such as those by Olivier Roy, "The Crisis of the Secular State,"[8] and Rajeev Bhargava writing on the "crisis of secular states in Europe."[9] Modood felt that the stream of such articles intimating such a crisis in Secularism is misleading. He notes that in Europe that it is more a challenge for political secularism or multiculturalism to adjust to post-immigration multiculturalism, to adjust to significant numbers of migrants who challenge the status quo of residual privilege to the majority religion, such as tax concessions and grants, or simply a voice recognised and respected in the public sphere. His view of secularism is that it comes in two forms: the first is that exemplified by French *Laïcité*, and the other what he terms "organized religion as a potential public good or national resource (not just a private benefit)".[10]

Rajeev Bhargava, in his response article to Modood, tended to agree, arguing that "we need not an alternative to but an alternative conception of secularism, one that is different from mainstream conceptions shaped by French *Laïcité* and the American wall of separation variant." [11] He sees that contemporary secularism is inflexible, as are the politics and law associated with it. Moderate, or accommodative, secularism in his view is not succeeding. Bhargava sees a future for secularism in Europe only "[o]nce we have shifted away from these and start to focus on the normative, informal practices of a broader range of Western and non-Western states, we shall see that better forms of secular states and much more defensible versions of secularisms are available." [12]

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[4] William E. Connolly, *Why I am not a Secularist* (University of Minnesota Press, Minneapolis, 1999), 19.
[5] Lorenzo Zucca, *A Secular Europe: Law and Religion in the European Constitutional Landscape* (Oxford University Press, Oxford, 2012), 30.
[6] Lorenzo Zucca, *A Secular Europe: Law and Religion in the European Constitutional Landscape* (Oxford University Press, Oxford, 2012), 30.
[7] Tariq Modood, 'Is there a crisis of secularism in Western Europe?', *The Immanent Frame: Secularism, Religion and the Public Sphere*, 24 August 2011. <http://blogs.ssrc.org/tif/2011/08/24/is-there-a-crisis-of-secularism-in-western-europe/ >.
[8] In Olivier Roy, *Secularism confronts Islam*, Columbia University Press, New York (2007).
[9] In Rajeev Bhargava, 'States, Religious Diversity, and the Crisis of Secularism', (2010) 12(3) *The Hedgehog Review* 8.
[10] Tariq Modood, 'Is there a crisis of secularism in Western Europe?', *The Immanent Frame: Secularism, Religion and the Public Sphere*, 24 August 2011. <http://blogs.ssrc.org/tif/2011/08/24/is-there-a-crisis-of-secularism-in-western-europe/ >.
[11] Rajeev Bhargava, "Beyond moderate secularism", *The Immanent Frame: Secularism, Religion and the Public Sphere*, 16 September 2011. <http://blogs.ssrc.org/tif/2011/09/16/beyond-moderate-secularism/.>
[12] Rajeev Bhargava, "Beyond moderate secularism", *The Immanent Frame: Secularism, Religion and the Public Sphere*, 16 September 2011. <http://blogs.ssrc.org/tif/2011/09/16/beyond-moderate-secularism/.>

Adding to the distrust of secularism by some, on occasions there has been a conflation of the term "secularization" with "secularism".[13] The arguments made by such individuals have therefore muddied the waters of discourse in this area and inflamed the views of those who see the first and create antipathy for the second. One such is Jean Bethke Elshtain who argues that the "secularization hypothesis has failed, and failed spectacularly. We must now find a new paradigm that will help us to understand the complexities of the relationship between religion and democracy."[14] Another is T.N. Madan, whose writings are very assertively against secularism as a model of democratic government and sees secularism as a Western concept imposing colonial values inappropriate for the Indian context.[15] He does however admit that he is "bedevilled by terminological confusion, ethnographic diversity and ideological dissension."[16]

Madan illustrates his position with the views of the sociologist David Martin. He notes Martin's dissatisfaction with secularization in general, with what is believed to have a "counter religious impulse".[17] Madan argues that

> conservatives see secularization as a threat to their conceptions of the good, moral, life, robbing it of its ideas of sacredness and ultimate value, the secularists look upon it as an anti-religious emancipator process. The latter consider urbanization, industrialization and modernization as the causes and symptoms of the 'secularizing fever' that grips our societies today.

Arguments such as Madan's are typical of commentators[18] who tend to see the process of secularization as an active process promoted and propelled by 'secularists' characterised as 'the other' to be opposed and countered by those who disagree with it. He does not define 'secularists' as any particular group, but they appear to be personified and identified with the secularization process. They and secularism are therefore seen as being aligned as a counter societal process without respect for local and traditional processes and practices.

Madan's conflation is articulated in a discussion on George Jacob Holyoake who "inherited from the Owenite and Utilitarian movements of England a naturalistic, ethical and social utopian rationalism. From the French Revolution he derived republicanism, anticlericalism and an aversion to theology."[19] From this reasoning, Madan considers secularism to be "an anti-religious ideology" and indeed almost conflates it with the notion of a civil religion when he argues that

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[13] A popular anti-secular stance is propounded by Jean Bethke Elshtain who, associating secularism with anti-religious views, explains: "During the past few years, we have been treated to a spate of work blaming religion for every evil under the sun while conveniently ignoring that the greatest horrors of the twentieth century—the bloodiest of all centuries—were fueled by two antireligious totalitarian regimes, Nazi Germany and the officially atheistic Soviet empire." (Jean Bethke Elshtain, 'Religion and Democracy', (2009) 20(2) *Journal of Democracy* 5, 8.)

[14] Jean Bethke Elshtain, 'Religion and Democracy', (2009) 20(2) *Journal of Democracy* 5, 8.

[15] T.N. Madan, 'Whither Indian Secularism?' (1993) 27(3) *Modern Asian Studies* 667, 668-9.

[16] T.N. Madan, 'Whither Indian Secularism?' (1993) 27(3) *Modern Asian Studies* 667, 668.

[17] Citing David Martin, 'Towards Eliminating the Concept of Secularization' in J. Gould (ed.), *Penguin Survey of the Social Sciences* (Penguin, London, 1965).

[18] Such as Partha Chatterjee and Ashis Nandy.

[19] T.N. Madan, 'Whither Indian Secularism?' (1993) 27(3) *Modern Asian Studies* 667, 670.

> Secularism as the state ideology of India seeks to provide the moral basis of public life just as Islam supposedly does in Pakistan; the state in India is expected to protect and promote secularism in more or less the same manner in which the Sri Lankan state is expected to protect and promote Buddhism …

This promotion of secularism as a state religion that must be pushed and defended by the state as if it were a religious establishment is a concerning argument. It appeals to those who think in terms of formal religion and its 'opponents' and couches the argument in terms of an ideology that must be displaced as soon as those who advocate it may be identified and removed. Secularism as advocated by Holyoake was no such thing. His secularism did not offer an alternative moral fabric for society nor did Holyoake seek to replace religious traditions with another as some form of established 'religion'. However, such arguments by such as Madan and Nandy, couched in those terms, allow secularism to be perceived as the enemy of tradition and religion, to be a modernity to be denied.

Secularism is more often now being widely seen as being in strife. Samuel F. Huntington said in 1998 that[20]

> The increasing political power of religious fundamentalists is not confined to the Middle East. Rather, it is a virtually worldwide phenomenon. … Throughout the World, religious identities are increasing. The power and salience of religion has increased. There is more questioning of the secular state. This could be called secularism or the revenge of God.
>
> … Since the collapse of communism and the end of the Cold War, the identities of many nations have been increasingly based on religion, with governments using faith to define their legitimacy. … The rise of religious consciousness has generated an increase of conflict based on religion and on persecution.

Historically, moderate secular thought as proposed by Holyoake has been consistently criticised as being associated with atheism, or those who are anti-religious. This has naturally engendered a feeling of persecution by those who therefore see secularism as harmful to the religious institutions to which they hold allegiance. Holyoake has been tarred with the same brush as Bradlaugh, who did not hide his anti-religious views. Contrary to Bradlaugh, Holyoake was not interested in removing or replacing religion, and offered a place in the public sphere respecting religion's right to do so.

Like the squeaky wheel that makes the most noise, the 'hard' secular paradigms of the US and France have been those that have received the greatest attention, and have been seen as the face of modern secularism. A cursory look at the breadth of scholarship on secularism will show that most of the writings on this topic have related to controversies in respect of these two states. Those states which have secular principles consistent with Holyoake, such as Australia, Canada and much of Europe, have had few debates on this issue. Without the hard edges to rub against, there have been few sparks.

Those who feel that secularism is a faulty paradigm have been saying so for some time, and most not recently. It will be instructive to consider the current state of secular government in liberal democracies.

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[20] Samuel F Huntington, "The Revenge of God: Secularism Retreats", *The Washington Report on Middle East Affairs*, May-June1998, 68.

II CONTEMPORARY SECULARISM: DID HOLYOAKE'S VISION SIMPLY EVOLVE INTO A NEW FORM?

The meaning of secularism has almost as many meanings as those one might ask for it. Jawaharlal Nehru, the first Prime Minister of India,[21] once became particularly frustrated with the use and abuse of the term "Secularism"[22]

> Another word is thrown up a good deal, this secular state business. May I beg with all humility those gentlemen who use this word often to consult some dictionary before they use it?

Not much has changed since. Indeed, as the concept has travelled, its meaning has varied. As Bankim Chandra Chatterji noted in the nineteenth century, "You can translate a word by a word, but behind the word is an idea, the thing which the word denotes, and this idea you cannot translate if it does not exist among the people in whose language you are translating."[23]

So, where does the understanding of secularism currently stand, and is it still consistent with Holyoake's principles? In considering where secularism fits in the modern world, Robert Audi observed recently that "[t]he history of the Western world has progressed from a time when the state was taken to represent the church to an age in which most governments are committed to at least some degree of secularity."[24]

Trying to determine what secularism means to the world today is like Segal's law.[25] Look to one jurisdiction for definition, there is usually some consensus. Look at others and the answers are all different. Maclure and Taylor see it in broad terms as the management of moral and religious diversity in contemporary society. That diversity they note includes issues such as *Sharia* in family law and polygamous marriages in Canada, headscarves in France and Hindu nationalists in India. They see however that secularism is an essential part of any liberal democracy that adheres "to a plurality of conceptions of the world and of the good …"[26] Graeme Smith sees contemporary secularism as "the latest expression of the Christian religion. … Secularism is Christian ethics shorn of its doctrine. It is the ongoing commitment to do good, understood in traditional Christian terms, without a concern for the technicalities of the teachings of the Church."[27]

Secularism, however, has also touched the Eastern world, but has been adapted for local use. Priya Kumar explains that, in the Indian context, secularism has "expanded from its traditional concern with emancipation from religion or the privatization of religion to a far more wide-ranging and heterogeneous agenda in postcolonial India. It has been called upon to resolve a number of thorny social and political issues,

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[21] 15 August 1947 – 27 May 1964.
[22] Report 1967:401 *Constituent assembly debates official reports*, Vol. II.
[23] Quoted in T. N. Madan, 'Secularism in its Place', in Rajeev Bhargava (ed), *Secularism and its Critics* (Delhi: Oxford University Press, 1998), 308.
[24] Robert Audi, 'Religion, Politics and the Secular State' (2014) 64 (1) *The Philosopher's Magazine* 73, 73.
[25] An old saying that states: "A man with a watch knows what time it is. A man with two watches is never sure." (Arthur Bloch, *Murphy's Law* (Perigee, New York, 2003).
[26] Jocelyn Maclure and Charles Taylor (trans. Jane Marie Todd) *Secularism and Freedom of Conscience* (Harvard University Press, Cambridge, USA, 2011), 1.
[27] Graeme Smith, *Short History of Secularism* (I.B.Taurus, London, 2007), 2.

including primarily (but not only) the possibility of multireligious and multicultural coexistence within the nation and the complex question of the place of religious minorities in a liberal democratic state."[28]

Many jurisdictions indeed have some degree of secularity, but more importantly, usually a different secularity, different often from their neighbours or their colonial predecessors. On this Madhu Purnima Kishwar asked recently,[29] "Do we want to create a world in which everyone thinks alike? A world in which there is no space for divergence of views or foolish people?" Kishwar wrote in the context of a Hindu Temple insisting on the religious freedom to determine who may enter a temple. She observes that translating an originally European concept into one that jurisdictions elsewhere can take on board as their own has proven to be difficult, but not impossible. However, the point she makes is that an overzealous 'secularism' carries with it intolerance for the unconventional and often an element of hypocrisy.[30] On this latter point I expand further in part IV of this chapter.

Holyoake did not envision secularism to be a tool to be used by individuals, organisations or the state bluntly against those who dissent against orthodoxy. Rather, it was intended as a means for all participants in the public sphere to have their place. In particular it was not intended to be a political panacea for all ills nor an alternative orthodoxy used to supplant another.

Holyoake spent much of his time related to Secularism defending it against accusations of hostility to religion in the public sphere, and in general. Accordingly most of his speeches and writings are less polemical on his thoughts and more efforts to get across the idea that secularism is not anti-religious, or indeed seeking to limit religion. The thrust of his views is that secularism gives equal access to all players in the public sphere, but not all need equal access and some may play a greater role in contributing to public policy, or none.

Much of Holyoake's moderate viewpoint was eclipsed in the later nineteenth century by the positions taken by a contemporary and erstwhile colleague, Charles Bradlaugh. As stated earlier in this thesis Bradlaugh's view of secularism was strongly anti-religion and anti-establishment of religion, and so he and Holyoake's paths diverged. Holyoake considered that secularism and secular ethics should take no position on religion and its validity or truth. Bradlaugh's views however were in favour of strong freethought and atheism as a counter to religious thought, which split the movement they had supported. Bradlaugh's controversial views being so forcefully against conventional wisdom in a country where Anglicanism was established took on the public face of secularism, leaving Holyoake's more moderate statements in their shadow.

Accordingly, since then the common understanding of secularism as a constitutional and social policy philosophy has tended to err in favour of the more confronting views of Bradlaugh and his supporters. Many academics have begun articles and books with

[28] Priya Kumar, *Limiting Secularism* (University of Minnesota Press, Minneapolis, 2008), 1.
[29] "Don't like this temple? Choose another." *The Hindu*, January 17, 2013. <http://www.thehindu.com/opinion/op-ed/dont-like-this-temple-choose-another/article4313507.ece ≥.
[30] "Don't like this temple? Choose another." *The Hindu*, January 17, 2013. <http://www.thehindu.com/opinion/op-ed/dont-like-this-temple-choose-another/article4313507.ece ≥.

unquestioned statements about the nature of secularism, as if it were stating the obvious as a common knowledge between reader and author.[31] Such statements lead the reader to believe the statement to be unquestioned and promote the same perspective. Some examples include Iain Benson who advised that "'secularism' describes an ideology that is, and has been since its inception, anti-religious. As such, the ideology of secularism cannot be one of the principles upon which Canada, as a free and democratic country, is based." This statement forms the basis for his article and yet the assertion is unreferenced.[32]

Some have spoken of secularism in terms of 'strong' or 'weak' secularism.[33] These views tend to align with the anti-religious positions that do not permit a religious perspective in the public sphere, and those that accept it and do not seek to control it, respectively. Current secular discourse explores the black and white perceptions of the US and France which brook little concession to religion, and the 'softer' Indian perspective which seeks to bind a multi-religious state with a populace which sees the role of secularism as a model of keeping the peace. Today's secular discussion looks at their constitutional identity anew, and considers the symbols around them and the communities in which they were raised or just joined, and sees them with new eyes. Supreme courts have considered headscarf cases in Europe, the 'blue laws' of North America and the temple entry cases in India. These and others reviewed in this thesis have all caused the dominant groups in those societies to recognise that the last six decades have wrought social change through economic prosperity, education, and mass migration.

A constitution is a mirror of a society and its values, and many such as those in this thesis are looking to see if the values stand, or perhaps need tweaking. More than ever, when they discuss secularism, as seen in the views of the commentators considered, they go back to where their secular values originated, and many acknowledge the work and thoughts of George Holyoake as a man who could offer an alternative to the state or religion wresting control of the public space.

III FUTURE SECULARISM: A NEED FOR MORE THAN TOLERANCE

A modern definition of secularism cannot be made in terms of what secularism is not. Rather, we should move forward. Some such as Simone Chambers see that we are already doing so.[34]

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[31] See generally Winifred Fallers Sullivan, 'Varieties of Legal Secularism' in Linelle E. Cady and Elizabeth Shakman Hurd (eds.), *Comparative Secularisms in a Global Age* (Palgrave Macmillan, Hampshire, 2010, 107). Sullivan, while promising 'varieties' speaks almost exclusively about the US, and speaks of religion in opposition to secularism, rather than religion being an acknowledged part of the public sphere.

[32] Iain T. Benson, 'Considering Secularism' in Douglas Farrow (ed.), *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy* (McGill Queens Press, Montreal, 2004), 83.

[33] Andras Sajo, 'Constitutionalism and Secularism: The Need for Public Reason' (2009) 30 *Cardozo Law Review* 2401, 2403-2404.

[34] "I see a growing number of open secularists and liberal theists converging on a center position. The core ... is an invitation to all religious citizens, indeed all citizens, complete with their deepest convictions, to participate in public life and debate within certain liberal/moral constraints governing appropriateness of public justifications." (Simone Chambers, 'Secularism Minus Exclusion: Developing a Religious –Friendly Idea of Public Reason' (2010) 19(2) *The Good Society* 16, 16.

Much of the jurisprudence that I have discussed in this thesis has accepted a domestic norm of mainstream conceptions such as that found in France or the United States, and has not explored what secularism could be, and is slow to consider alternatives. Secularism in the modern world is now a much more complicated concept. Most liberal democracies have a secular state peculiarly their own. In times past Secularism in Europe was a simple distinction between the state and a religion, the latter common to most if not all of the citizens of the state. Now, the religion that attempts to share the public sphere with the state is not one but many, so now religion is now also seeking identity, to have its unique voice heard and respected distinct from the others. The public sphere is now much more complex, an increasingly pluralistic polity, shared now not only with the religious, but now also with the actively non-religious and even the anti-religious. It may or may not be in crisis, but it needs a review.

There are views varying from secularism being the only solution to a divided modern world, to secularism being liberalism gone amok and likely to tear modern society apart. The philosopher John Rawls[35] in his book *Political Liberalism* expounded his ideal of public reason in which "citizens are to conduct their fundamental discussions within the framework of what each regards as a political conception of justice based on values that others can reasonably be expected to endorse".

These latter views have caused some controversy,[36] together with the similar views of others such as Kent Greenawalt and Robert Audi. Greenawalt[37] for example considers that religious arguments are acceptable in supporting political positions whenever secular arguments cannot resolve issues, such as abortion and animal rights issues. Audi[38] argues that religious convictions should largely or completely be excluded from politics. Jürgen Habermas has asked in respect of Rawls views regarding public reason

> How does the constitutional separation of state and church influence the role which religious traditions, communities and organizations are allowed to play in civil society and the political public sphere, above all in the political opinion and will formation of citizens themselves? Where should the dividing line be in the opinion of the revisionists? Are the opponents who are currently out on the warpath against the liberal standard version of an ethics of citizenship actually only championing the pro-religious meaning of a secular state held to be neutral, versus a narrow secularist notion of a pluralist society? Or are they more or less inconspicuously changing the liberal agenda from the bottom up—and thus already arguing from the background of a different self-understanding of Modernity?

Habermas explains Rawls' public reason argument as "'natural' reason, in other words solely on public arguments to which supposedly all persons have equal access. The assumption of a common human reason forms the basis of justification for a secular state that no longer depends on religious legitimation. And this in turn makes the

[35] James P. Sterba, 'Rawls and Religion' in Victoria Davion and Clark Wolf (Eds.), *The Idea of Political Liberalism: Essays on Rawls* (2000), 34.
[36] Jürgen Habermas, "Religion in the Public Sphere", (2006) 14(1) *European Journal of Philosophy* 1, 3.
[37] Kent Greenawalt, 'Religious Convictions and Political Choice: Some Further Thoughts' (1990) 38 *DePaul Law Review* 1019, 1022.
[38] Robert Audi, 'The Place of Religious Argument in a Free and Democratic Society' (1993) 30 *San Diego Law Review* 677.

separation of state and church possible at the institutional level in the first place." He feels that constitutional religious freedom is the solution to religious pluralism.[39]

So, what must be done with secularism to make it less contentious and palatable to as many as possible?

William Connolly argues that "I certainly do not suggest that a common religion needs to be reinstated in public life or that separation of church and state in some sense of that phrase needs to be reversed. Such attempts would intensify cultural wars already in motion. Secularism needs refashioning, not elimination".[40] Michael Rosenfeld feels that the public sphere must be shrunk to a minimum so as best to "achieve objectives over which there is unanimous consensus throughout the polity."[41] The difficulty with Rosenfeld's view is that in order to find a public square small enough to find a space where all players agree, that space is likely to be miniscule or non-existent. It is impossible to find a space where so many diverse interests may contribute, and still make those contributions meaningful. The answer is likely to be that the public square is no smaller, and accessible to all, but that all players must accept that they must make concessions, find common ground and work with what they have. Also, he discusses variants within each broad model such as France and Turkey, but does not consider any concept of secularism that may have taken seed elsewhere, particularly in jurisdictions where the constitution is secular but the majority of the population is non-European.[42]

Regarding models outlining the relations between the state and religion, Charles Taylor[43] considers that

> [o]ne of our basic difficulties in dealing with these problems is that we have the wrong model, which has a continuing hold on our minds. We think that secularism (or *laïcité*) has to do with the relation of the state and religion, whereas in fact it has to do with the (correct) response of the democratic state to diversity. … There is no reason to single out religious (as against nonreligious), "secular" (in another widely used sense), or atheist viewpoints. Indeed, the point of state neutrality is precisely to avoid favoring or disfavoring not just religious positions, but any basic position, religious or nonreligious. We can't favor Christianity over Islam, but also we can't favor religion over against nonbelief in religion, or vice versa.
>
> The late-Rawlsian formulation for a secular state cleaves very strongly to certain political principles: human rights, equality, the rule of law, democracy. These are the very basis of the state, which must support them. But this political ethic can be and is shared by people of very different basic outlooks (what Rawls calls "comprehensive views of the good"). A Kantian will justify the rights to life and freedom by pointing to the dignity of rational agency; a Utilitarian will speak of the necessity to treat beings who can experience joy and suffering in such a way as to maximize the first and minimize the second …

[39] Jürgen Habermas, "Religion in the Public Sphere" (2006) 14(1) *European Journal of Philosophy* 1, 4.
[40] William E. Connolly, *Why I am not a Secularist* (University of Minnesota Press, Minneapolis, 1999), 19.
[41] Michael Rosenfeld, *Law, Justice, Democracy and the Clash of Cultures: A Pluralist Account* (Cambridge University Press, Cambridge, 2011), 158.
[42] Michael Rosenfeld, *Law, Justice, Democracy and the Clash of Cultures: A Pluralist Account* (Cambridge University Press, Cambridge, 2011), 155.
[43] Charles Taylor, 'The Meaning of Secularism', *The Hedgehog Review* (Vol. 12 no. 3, 2010) 23, 25.

In a case relating to same-sex marriage, the South African Constitutional Court in their judgment, made a clear statement of the place for all non-majoritarian positions in the public sphere. Views need not be merely tolerated, but rather should be valued as equal parts of the polity:

> As was said by this Court in *Christian Education*[44] there are a number of constitutional provisions that underline the constitutional value of acknowledging diversity and pluralism in our society. … Taken together, they affirm the right of people to self-expression without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called the "right to be different". In each case, space has been found for members of communities to depart from a majoritarian norm. The point was made in *Christian Education* that these provisions collectively and separately acknowledge the rich tapestry constituted by civil society, indicating in particular that language, culture and religion constitute a strong weave in the overall pattern. … The strength of the nation envisaged by the Constitution comes from its capacity to embrace all its members with dignity and respect.[45]

Similarly the Supreme Court of Canada has held in *Chamberlain v Surrey School District No. 36*[46] that:

> In my view, Saunders J. [the trial judge] below erred in her assumption that "secular" effectively meant "non-religious". This is incorrect since nothing in the *Charter*, political or democratic theory, or a proper understanding of pluralism demands that atheistically based moral positions trump religiously based moral positions on matters of public policy. … To construe the "secular" as the realm of the "unbelief" is therefore erroneous. Given this, why, then, should the religiously informed conscience be placed at a public disadvantage or disqualification? To do so would be to distort liberal principles in an illiberal fashion and would provide only a feeble notion of pluralism. The key is that people will disagree about important issues, and such disagreement, where it does not imperil community living, must be capable of being accommodated at the core of a modern pluralism.[47]

The Court in *Chamberlain v Surrey* made clear that the public sphere in a secular democracy must not be deemed to exclude religion, and must include opinions based in religion as well as those based in other considerations.[48]

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[44] *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC); 2000 (10) 1051 (CC), [24].

[45] *Minister of Home Affairs v Fourie*; *Lesbian & Gay Equality Project & Others v Minister for Home Affairs* 2006(1) SA 524 (CC) (South Africa Constitutional Court) Case CCT 60/04 (2005), [61-2] (Sachs J).

[46] [2002] 4 S.C.R. 710, 2002 SCC 86.

[47] [2002] 4 S.C.R. 710, 2002 SCC 86 [137] (Gonthier J for himself and Bastarache J (who would have upheld the British Columbia Court of Appeal's decision on all points, and therefore wrote in dissent on part of the decision).

[48] It is notable that Iain T. Benson has said on this case, based on a mischaracterisation of Holyoake's principles (drawing a definition of secularism from the *Encyclopedia Britannica*) , that "While it was necessary to examine the term "secular," it was not necessary to discuss "secularism," and the definition of the latter was not argued before the court. … In equating "secular" with "secularism" the majority judges overlooked the fact that, at its historic origins, the intention of secularism was precisely to exclude religion from all public aspects of society - the very thing the court itself refused to do. Simply put: the Supreme Court of Canada failed to recognize that the term "secularism" describes an ideology that is, and has been since its inception, anti-religious. As such, the ideology of secularism cannot be one of the principles upon which Canada, as a free and democratic country, is based." (Iain T. Benson, 'Considering Secularism' in Douglas Farrow (ed.), *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy* (McGill Queens Press, Montreal, 2004), 85)

Considering the issue from an opposing perspective, the Indian anti-secularist Ashis Nandy said that

> It is time to recognize that, instead of trying to build religious tolerance on the good faith or the conscience of a small group of de-ethnicized, middle-class politicians, bureaucrats, and intellectuals, a far more serious venture would be to explore the philosophy, the symbolism, and the theology of tolerance in the faiths of the citizens and hope that the state systems in South Asia may learn something about religious tolerance from everyday Hinduism, Islam, Buddhism, or Sikhism rather than wish that ordinary Hindus, Muslims, Buddhists and Sikhs will learn tolerance from the various fashionable secular theories of statecraft.

John Gray, the author of *The Two Faces of Liberalism*, contends that

> the liberal view of toleration contains an internal contradiction: on the one hand, liberalism tries to reach a rational consensus on the best way of life; yet on the other hand, liberalism believes that human beings can flourish through many different ways of life.[49]

Gray considers that the current view of toleration is internally contradictory as it tries to achieve a consensus on the best way to live, yet believes that people will flourish through many ways of life. He contends that the homogeneity of contemporary society means that a consensus on values impossible.

In the US in recent years the efforts of secular governments no longer to accommodate strong religious positions in public policy is being seen not as a neutral position of government, but rather a battle between religion and secular government for the public sphere, sometimes titled a 'culture war'. US Supreme Court Justice Antonin Scalia said that the Court "has taken sides in the culture war", the *Kulturkampf* as the Germans have styled it. The debate, the culture war, continues nonetheless in contemporary US society.

Michael Hernandez maintains that contemporary law and government in the US are currently still affected by religious principles in the form of "civil religion", which while he argues is "not grounded in the tenets of any particular faith" is then not sectarian, but is clearly Christian in nature. He cites Alexis de Toqueville in 1835 saying "[t]here is no country in the whole world in which the Christian religion retains a greater influence over the souls of men than in America …", and notes how far the court in is removed from the early Christian era in rejecting Judeo-Christian principles in its interpretations, but is himself of the view that Christianity is losing its influence on the development of contemporary American law. [50]

Then again, Jeremy Rabkin is more pragmatic, commenting on the so-called culture war:

> Having agitated and distracted our politics for more than a quarter of a century ... it still shows no signs of slackening. It continues to rattle, like some Victorian ghost, haunting most of all those robed judicial worthies who are most intent on laying it to rest.[51]

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[49] David M. Brown, 'Reconciling Equality and Other Rights: Paradigm Lost?' (2004) 15 *National Journal of Constitutional Law* 1, 3.
[50] Michael V. Hernandez, "A Flawed Foundation: Christianity's Loss of Pre-eminent Influence on American Law" (2004) 56 *Rutgers Law Review* 625, 626.
[51] Jeremy Rabkin, "The Supreme Court in the culture wars" (1996) 125 *Public Interest* 3, 25.

The reasons for so many perceptions on modern secular governance and secularism's future have many bases. Maclure and Taylor[52] put it down to "the relationship between religious and nonreligious people [being] often characterized by incomprehension, distrust, and sometimes even mutual intolerance." They see that modern atheists and agnostics have difficulty in understanding individuals whose truth cannot be evaluated with the scientific approach. The religious cannot understand why the non-religious cannot move beyond the material. Their solution is that "contemporary societies must develop the ethical and political knowledge that will allow them to fairly and consistently manage the moral, spiritual, and cultural diversity at their heart."[53]

IV THE DOWNSIDE WHEN A STATE IS TOO SECULAR: NON-NEUTRAL NEUTRALITY

If one considers that secularism is a neutrality of the state towards religion, can the wish of the state to appear neutral actually be counterproductive to secular ideals? There are some strong views on how secular a state need be in order to effectively meet the obligations of the state to the people and of religion to contribute to public discourse in matters that are of importance to it. Veit Bader[54] has observed in the US context that

> Most American liberal philosophers, among them Dworkin, Ackerman, Galston, Rawls, Macedo, and Audi, "believe that ... values of freedom, equality and toleration are best preserved if religion is removed from public affairs." They are virtually unanimous in their staunch advocacy of the "wall of separation." They believe that "both religious practice and pluralistic democracy are best preserved" by precluding religious argumentation within the public realm and by putting "the moral ideals that divide us off the conversational agenda of the liberal state

This interpretation of secularism, according to some interpretations, is the complete absence of religion in the public sphere, in what is termed in the US 'strict secularism'. In chapter 3 of this thesis these states were characterised as 'militant secularist'. The presumption, as has been explored earlier, is that if the state is not seen through actions of its institutions, policies or agents to be favouring religion in any way, then the general population will not believe that they are acting contrary to the constitutional paradigm that supports this model. Examples of such were school funding of parochial schools or the employment by the state of those people who wear overt religious symbols. Such were exemplified by the USA and France.

Often such activities can be counterproductive. The sacking of women who wear Islamic headscarves, for fear of their employment being seen as a tacit acceptance of a view that headscarves are worn only by women who are oppressed by their religion, does them no service. The state's hands are clean for not supporting a practice that is anathema to public policy, yet is overly simplistic because that person is now out of a job. How is the state's arguably additional pressure on such people advancing society as a whole?

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[52] Jocelyn Maclure and Charles Taylor (trans. Jane Marie Todd) *Secularism and Freedom of Conscience* (Harvard University Press, Cambridge, USA, 2011), 106.
[53] Jocelyn Maclure and Charles Taylor (trans. Jane Marie Todd) Secularism and Freedom of Conscience (Harvard University Press, Cambridge, USA, 2011), 110.
[54] Veit Bader, 'Religious Pluralism: Secularism or Priority for Democracy?' (1999) 27(5) *Political Theory* 597, 598.

Unintended consequences of a strict neutrality in court decisions have been recognised in the US in recent years. Take for example *Santa Fe Independent School District v Doe*[55] where the US Supreme Court observed that

> Even if the plain language of the [school invocation] policy were facially neutral, "the Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions." (citing *Capital Square Review and Advisory Bd. v Pinette*, 515 US, at 777 (1995).[56]

In a more recent case the same court held that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise."[57] Some US courts have considered that such adherence to strict neutrality can be seen as a bias, or hostility, to religion,[58] or indeed even that "we do not apply an absolute rule of neutrality because doing so would evince hostility toward religion that the Establishment Clause forbids."[59]

In Chapter 2 it was noted that the Utilitarian thoughts of such as Jeremy Bentham and John Stuart Mill advocated social change and the removal of harm such that society altogether gained. George Holyoake, building on their work, had advocated that secularism intended that society should find a role for both religion and the state in the public sphere. Is the above an isolated example and are such state behaviours limited to the 'militant secularist' states?

Patrick Parkinson highlighted some interesting cases outside this model from the United Kingdom in 2010.[60] Two of these involved strongly religious individuals employed by government authorities who provided counselling to gay and lesbian couples.

In the first, *Islington London Borough Council v Ladele*,[61] Lord Neuberger MR held that the Council's refusal to accommodate a marriage registrar's religious objections to officiating at same-sex civil partnership ceremonies did not constitute religious discrimination. Ladele claimed that her refusal to perform ceremonies for same-sex ceremonies caused her to suffer discrimination on the grounds of religion or belief, after she was disciplined and threatened with dismissal for her refusal. The Council

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[55] *Santa Fe Independent School District v Doe*, 530 US 290 (2000).
[56] (O'Connor, J., concurring in part and concurring in judgment); see also *Church of Lukumi Babalu Aye, Inc.* v *Hialeah,* 508 US 520, 534-535 (1993) (making the same point in the Free Exercise context).
[57] *Gonzales v O Centro Espirita Beneficente Uniao do Vegetal,* 546 US 418, 439 (2006).
[58] *Trunk v City of San Diego*, 629 F. 3d 1099, 1105.
[59] Ibid, making reference to *School District of Abington Township, Pennsylvania v Schempp,* 374 US 203, 206 (1963), where Goldberg J, with Harlan J concurring, noted that "the attitude of government toward religion must be one of neutrality. But untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it."
[60] Patrick Parkinson, 'Accommodating Religious Belief in a Secular Age: The Issue of Conscientious Objection in the Workplace' (2010) 34(1) *University of New South Wales Law Journal* 281.
[61] [2010] 1 WLR 955.

denied this claiming Ladele had not worked as directed, and was not disciplined for her beliefs. Notably, Elias P for the Employment Appeals Tribunal observed that

> The claimant's complaint on this score is not that she was treated differently when she ought to have been. The council refused to make an exception of her because of her religious convictions. *That is a complaint about a failure to accommodate her difference, rather than a complaint that she is being discriminated against because of that difference. The council has been blind to her religion, and she submits that that they ought not to have been.*[62]

The Court of Appeal found in favour of the Council, upholding the Employment Appeal Tribunal's decision. Ladele subsequently appealed to the European Court of Human Rights on freedom of religion grounds. However the Court rejected her complaint in January, 2013.[63]

Similarly in *McFarlane v Relate Avon Ltd*[64] the appellant[65] was employed by a charity to provide relationship counselling services to singles, couples, families and young people. The terms of his contract required him to affirm that he would comply with his employer's equal opportunity policy "that no person... [receive] less favourable treatment on the basis of characteristics, such as... sexual orientation...".[66]

On the concept of a specific accommodation for deeply held religious views Laws LJ was quite clear that "the conferment of any legal protection or preference upon a particular substantive moral position on the ground only that it is espoused by the adherents of a particular faith, however long its tradition, however rich its culture, is deeply unprincipled." He went on to note that the observers of such views would require the general community to follow a compulsory law which is not for the objective advancement of society generally, but rather to give effect to a subjective opinion. The objective truth of the obligation cannot be ascertained, and it is only the believer who is alone bound by the obligation. He went on to state:[67]

> The promulgation of law for the protection of a position held purely on religious grounds cannot therefore be justified. It is irrational, as preferring the subjective over the objective. But it is also divisive, capricious and arbitrary. We do not live in a society where all the people share uniform religious beliefs. The precepts of any one religion – any belief system – cannot, by force of their religious origins, sound any louder in the general law than the precepts of any other. If they did, those out in the cold would be less than citizens; and our constitution would be on the way to a theocracy, which is of necessity autocratic. The law of a theocracy is dictated without option to the people, not made by their judges and governments. The individual conscience is free to accept such dictated law; but the State, if its people are to be free, has the burdensome duty of thinking for itself.

The application was refused, and upon appeal to the European Court of Human Rights, again refused.[68]

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[62] [2009] ICR 387, 401 [51-52]. (my italics).
[63] ECtHR Chamber judgment in cases nos. 48420/10, 59842/10, 51671/10 and 36516/10.
[64] [2010] IRLR 872.
[65] MacFarlane's application had been supported by a witness statement from Lord Carey of Clifton, a former Archbishop of Canterbury.
[66] Cases Update <found at http://www.employmentcasesupdate.co.uk/site.aspx?i=ed5719 on 22 June 2013.>.
[67] [2010] IRLR 872, [23-24].
[68] ECtHR Chamber judgment in cases nos. 48420/10, 59842/10, 51671/10 and 36516/10.

The difficulties inherent in cases such as the two cases above were outlined by Lord Neuberger MR. He agreed with the tribunal that it would have been easy enough to reassign staff who had religious objections to certain duties. The Council's aim however had been to ensure that none of its staff acted in a way that discriminated against others, and the means to do so had been ensuring that all registrars celebrated civil partnerships. He observed that Ms Ladele's employment did not interfere with her religious beliefs and indeed "she remained free to hold those beliefs, and free to worship as she wished"[69] and that "Islington's requirement in no way prevented her from worshipping as she wished."[70]

Laws LJ summarised the contribution of Lord Carey to *MacFarlane* to be that "the courts ought to be more sympathetic to the substance of the Christian beliefs referred to than appears to be the case, and should be readier than they are to uphold and defend them".[71] Laws LJ acknowledged his view, but emphasised that the role of the law was to protect the right to manifest religion, and not to protecting the substance of the beliefs. On this he explained[72] that

> In a free constitution such as ours there is an important distinction to be drawn between the law's protection of the right to hold and express a belief and the law's protection of that belief's substance or content. The common law and ECHR Article 9 offer vigorous protection of the Christian's right (and every other person's right) to hold and express his or her beliefs. And so they should. By contrast they do not, and should not, offer any protection whatever of the substance or content of those beliefs on the ground only that they are based on religious precepts. These are twin conditions of a free society.

On this Laws LJ made the important point that the general law may protect a particular social or moral position that is advocated by religion. However, this is not because of a religious imprimatur, but because it commends itself on its own merits.[73] Appeals to the European Court of Human Rights have been consistent on the treatment of these types of cases. In *R (SB) v Governors of Denbigh High School*,[74] a case involving refusal of a school to change its school uniform rules to accommodate an Islamic headdress, Lord Bingham stated that on appeal

> The Strasbourg institutions have not been at all ready to find an interference with the right to manifest religious belief in practice or observance where a person has voluntarily accepted an employment or role which does not accommodate that practice or observance and there are other means open to the person to practise or observe his or her religion without undue hardship or inconvenience.

Russell Sandberg has characterised such cases in the UK as a tension between the old and the new. The old laws are those that give Christianity and Christians a special degree of protection whilst tolerating other religions, where the legislature and judiciary had a stance of passive accommodation rather than proscriptive regulation. The new are laws that consider individual rights of religious freedom need be balanced against other rights.[75]

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[69] [2010] 1 WLR 955, 970 [51].
[70] [2010] 1 WLR 955, 970 [52].
[71] [2010] IRLR 872, [21].
[72] [2010] IRLR 872, [22].
[73] [2010] IRLR 872, [23].
[74] [2007] 1 AC 100, 112 [22].
[75] Russell Sandberg, *Law and Religion* (Cambridge University Press, Cambridge, 2011), 36, 202.

In the United States, it has been suggested that the apparent strict neutrality of the Supreme Court is actually working contrary to the best interests of religious minorities. Shivakumar[76] asks the question of whether the strict neutrality practice adds to the power and influence of mainstream religions, whilst minimising the rights of religious minorities because of their lesser political influence. He cites the examples of *Oregon v Smith,*[77] where the Free Exercise Clause does not provide religious adherents exemptions from neutral laws that impair their religious practice, and *Rosenberger v Rector of the University of Virginia*[78] where in relation to religious neutrality a public institution of higher learning was required to subsidise evangelical religious speech.

In the nearly quarter century since *Oregon v Smith,* the impact of the case on the privileged treatment of religion in the public sphere remains profound. Academic commentators such as Frederick Gedicks[79] have since argued that religious exemptions cannot be supported because they violate legal commitments to equality. Eisgruber and Sager[80] have noted that the only the Free Speech element of the First Amendment to the US Constitution should remain privileged; religion like race should be protected only from discrimination.

Ultimately, it may be impossible to maintain an objectively neutral stance in such cases. Michael McConnell, recently a circuit judge on the US Court of Appeals for the Tenth Circuit,[81] that in some contexts "departures from religious neutrality are either permissible or constitutionally required." McConnell goes on to note that no genuinely neutral governmental approach may be available.[82] Gedicks has made the interesting observation that "[r]eligious neutrality presupposes that the purpose of the Free Exercise Clause is to prevent religious discrimination, rather than to protect freedom of action in a domain of religious liberty."

There can be a place for reasonable accommodation of religion in the public sphere where such accommodation aids in public discourse and does not detract from the state's ideals of maintaining communal harmony and community safety and security. So, what is 'reasonable'? A series of apt questions was put by Robert Thiemann some years ago regarding accommodation of religious precepts in the public sphere:[83]

> What are the appropriate limits of governmental accommodation of majority religious belief and practice within a pluralistic democracy? At what point does proper accommodation of

[76] Dhananjai Shivakumar, "Neutrality and the Religion Clauses", 33 *Harvard Civil Rights-Civil Liberties Law Review* 505, 507.
[77] 494 U.S. 872 (1990).
[78] 515 U.S. 819 (1995).
[79] Frederick Mark Gedicks, 'An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions' (1998) 20 *University of Arkansas at Little Rock Law Review* 555, 560-66 cited in Angela C. Carmella, 'Exemptions and the Establishment Clause' (2011) 32 *Cardozo Law Review* 1731.
[80] Christopher L. Eisgruber & Lawrence G. Sager, 'The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct' (1997) 61 *University of Chicago Law Review* 1245, 1251-52, 1282 cited in Angela C. Carmella, 'Exemptions and the Establishment Clause', (2011) 32 *Cardozo Law Review* 1731.
[81] 2002-2009.
[82] Michael W. McConnell, 'Neutrality under the Religion Clauses' (1986) 81 *Northwestern University Law Review* 146, 149, 151, 164.
[83] R.F. Thiemann, *Religion in public life* (Georgetown University Press, Washington, 1996), 53.

> religion become improper aid or assistance to religion? When does accommodation of the majority religion become discriminatory toward religious minorities?

Robert Thiemann concluded after a consideration of the US cases since *Everson* that the US separation metaphor should be "abandoned for four reasons: (1) it deflects attention from more fundamental principles (e.g., liberty, equality, tolerance) that undergird the two clauses, (2) it conceptualizes church-state relations in singular and monolithic terms, (3) it conceals the variety of ways in which they interact, and (4) it constrains our ability to imagine new possibilities for their relation."[84]

Dickson CJ in the Canadian case *R v Big M Drug Mart* observed that "[t]he equality necessary to support religious freedom does not require identical treatment of all religions. In fact, the interests of true equality may well require differentiation in treatment."[85] This suggests a differential treatment based on the context. Such a case, also Canadian, would be the much more recent *Syndicat Northcrest v Anselem*.

In *Anselem* the appellants were Orthodox Jews who owned buildings in Montreal, attempting to meet religious obligations to reside in temporary huts during a 9-day religious festival of *Succot.* They challenged by-laws which prohibited decorations, alterations and constructions on the balconies. The Supreme Court held that the by-laws imposed a trivial imposition and infringed their rights to observe the requirements of the religious festival. This is one of many instances where, in order not to be seen endorsing religious practices and impliedly supporting them, the state is often cracking a walnut with a hammer, imposing inconveniences on the religious practitioner out of all proportion to the (often unproven) perception of bias by the state to religion.

The scope of religious freedom in *Anselem* was held to be a

> Freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials.[86]

The Court has therefore established in *Anselem* the principle that a religious belief need not be reasonable, but if sincerely believed, should only have a non-trivial interference by the state applied in limitation if it would cause harm or interference with the rights of others in that particular context.

This position was supported two years later in *Multani*[87] where the administrators of a public school sought to prevent Multani from carrying a concealed kirpan[88] in his clothing to school. Following the principle established in *Anselem* the Court held that the burden of prevention upon Multani was non-trivial as his religious belief was sincerely held and hence his freedom of religion was unreasonably infringed. In Canada at least the Court appears to be moving towards a more accommodating position and tolerance, with no evidence that the stance taken by the state is being

[84] R.F. Thiemann, *Religion in public life* (Georgetown University Press, Washington, 1996), 43.
[85] *R. v Big M Drug Mart*, [1985] 1 SCR 295, para 362.
[86] *Anselem*, [46].
[87] *Multani v Commission scolaire Marguerite-Bourgeoys*, [2006] 1 SCR 256, 264 DLR (4th) 577.
[88] A Sikh ceremonial dagger.

perceived negatively by any parties. The decisions in *Anselem* and *Multani* have demonstrated a trend in Canadian jurisprudence away from an areligious secularism. Indeed, Gonthier J in *Chamberlain* argued that

> Nothing in the Charter, political or democratic theory, or a proper understanding of pluralism demands that atheistically based moral positions trump religiously based moral positions on matters of public policy. … the key is that people will disagree about important issues, and such disagreement, where it does not imperil community living, must be capable of being accommodated at the core of modern pluralism.[89]

Societies have become more pluralistic over the last half century or more. States are now accepting of those who bring different views and values, but those values need to be added to the pool of experience of existing populations in order to create new constitutional identities that are inclusive, rather than the old being tolerant of the new. Holyoake's principles continue to serve. Ideals such as the accepting all viewpoints in the public sphere, including the religious, and to not seek to replace those views with another remain the most popular model for liberal democracies in increasingly pluralistic societies. What we can derive as most effective from the cases supreme courts have struggled with in recent years will be the subject of the next and last chapter.

In conclusion, it can be seen that secularism has been given accountability and characteristics quite unlike the principles Holyoake envisaged a century and a half ago. The common understanding of a secular state has become one where, rather than the state not being controlled or strongly influenced by religion, it is seen as one that has no tolerance of association with religion. In some cases secularism is seen as responsible for keeping pluralistic communities together. This then results in the state acting not in a neutral fashion as advocated by Holyoake, but instead acting to meet those perceptions. When secularism does not perform as expected it is considered to have either failed, or to be in a crisis. While this chapter has explored these perceptions and expectations, these outliers that have been examined are not those practices advocated by Holyoake's principles of secularism. Rather, they represent a misunderstanding of those principles.

The next and final chapter will examine how Holyoake's principles still remain relevant in the modern world, and while various models of secular constitutional principles remain extant, a general theory of constitutional secularism based on Holyoake's principles will be proposed.

[89] *Chamberlain v Surrey School District No. 36* (2002) SCC 86, [137].

CHAPTER 10

CONCLUSION: 200 YEARS OF AN AGITATOR'S INFLUENCE

The purpose of this thesis has been, in part, to explore the contemporary relevance of the thoughts of George Jacob Holyoake, particularly as they pertain to his principles of secularism. This thesis has examined the influences of Holyoake's thought in modern times. After his life, Holyoake's thoughts influenced some who sought to create constitutions in pluralistic societies.

In his seventies, Holyoake reflected on his life and work in *Sixty Years of an Agitator's Life*.[1] He acknowledged there that he was a man of his times, having lived and worked through most of the nineteenth century. His writing in the books from which I have drawn the material for this thesis have indeed depicted the manner and practice of his time, for which his apology is unwarranted.[2] Holyoake wrote on many things that caught his attention and intersected with his life, but his thoughts on secularism remain his enduring legacy.

Edward Royle, who wrote at length on the life on Holyoake, remarked that "he managed to "thrust himself into the centre of contemporary debates about religion, politics and economics, as he uneasily straddled the social and intellectual gulf between the 'common people' and their masters." He concluded with the observation that "History has dealt harshly with Holyoake. He was too typical of his age to leave remarked upon, save for the occasional reference to his autobiography, *Sixty Years of an Agitator's Life.*" The remarks on his work in this thesis bring Holyoake back just a little into the public view.

Holyoake was a freethinker, a chartist, and a man who was attuned to the thoughts and ideals of the working class. While some such as he would pursue advocacy of workers' rights in opposition to those who employed them,[3] Holyoake observed also that workers felt that established religion affected their ability to progress.[4] Not surprisingly his first thoughts and actions were to argue for religion's removal in the public sphere, which he did in his younger years. Colleagues he met along this path such as Charles Bradlaugh supported his endeavours and echoed his frustrations with the perceived collusion of religion with the state.

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[1] Edward Royle, *Selected Pamphlets by G.J. Holyoake*, 1841-1904, Microform Academic Publishers <http://www.microform.co.uk/guides/R97234.pdf>, 1.

[2] George Jacob Holyoake, *Sixty Years of an Agitators Life, Vol II* (London, T. Fisher Unwin, 1892), Chap. CXII, *APOLOGY TO THE READER.* 'Many books at their close need this: and he who has perused these chapters has probably thought some apology was due long ago. The story of many persons and many events remain untold in them; should I ever tell them, as in those I have related, one characteristic will be found—that of depicting the manners, prejudices, and progress of my time, so far as, judging from my own experience, may be of use to others'.

[3] See generally Sidney Pollard, *Labour history and the labour movement in Britain* (Vol. 652). (Ashgate Publishing, Farnham, 1999).

[4] Noah Feldman, *Divided by God: America's Church-State Problem - and What We Should Do About It* (Macmillan, Hampshire, 2007), 114.

Mature reflection and years resulted in Holyoake adjusting his actions and thoughts into a more conciliatory mode. The beliefs that he developed in his thirties on how society could best include all views - rather than banishing some - caused him to part from those with whom he had previously associated. They, such as Bradlaugh, followed a different path,[5] finding supporters for their own hard-line stance of a strict removal of religion from the public sphere. Holyoake's more moderate views on secularism have played a stronger role in modern constitutional discourse.

Holyoake first explained secularism to "express the extension of freethought to ethics"[6] and to be "the study of promoting human welfare by material means; measuring human welfare by the utilitarian rule, and making the service of others a duty of life ".[7] He expanded on this by explaining that:

> Secularism is that … which selects as its methods of procedure the promotion of human improvement by material means, and proposes these positive agreements as the common bond of union, to all who would regulate life by reason and ennoble it by service.

These thoughts make clear that Holyoake wished to provide a benefit to society in the utilitarian mode, but not at the detriment of religion in any form. While Bradlaugh wished to remove religion as illogical and outdated, Holyoake considered testing and arguing the validity of religious 'truths' as being irrelevant to creating an open public sphere. Holyoake expressed four rights:[8]

1. The right to Think for one's self, which most Christians now admit, at least in theory.
2. The right to Differ, without which the right to think is nothing worth.
3. The right to Assert difference of opinion, without which the right to differ is of no practical use.
4. The right to Debate all vital opinion, without which there is no intellectual equality—no defence against the errors of the state or the pulpit.

These rights can be claimed by anyone at any time in a secular democracy. They do not permit the censure or criticism of the state, nor that of religion, or indeed anyone who wishes to express a view in the public sphere. These principles of secularism might readily apply to disputes regarding the best football code as much as they might apply to religious and state opinions about what is best for society. In this sense Holyoake saw secularism apart from religion, not against it.

In modern times secularism has taken on many shades of meaning, often creating confusion where the term is invoked. The meaning is infused with its common application to politics rather than constitutional law, to religion as a synonym for

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[5] Bradlaugh went further than Holyoake. While Holyoake accepted that all points of view were valuable and valid, Bradlaugh was more hard-line: "Although at present it may be perfectly true that all men who are Secularists are not Atheists, I put it that in my opinion the logical consequence of the acceptance of Secularism must be that the man gets to Atheism if he has brains enough to comprehend." (Alex J. Harrison and Charles Bradlaugh, *Secularism: Report of a public discussion between Alexander J. Harrison and Charles Bradlaugh, held in the New Town Hall, Newcastle-upon-Tyne, on the evenings of Sept. 13 & 14, 1870* (Austin & Co., London, 1870)).

[6] George Jacob Holyoake, *English Secularism: A Confession of Belief* (The Open Court Publishing Company, Chicago, 1896), 34.

[7] George Jacob Holyoake, *English Secularism: A Confession of Belief* (The Open Court Publishing Company, Chicago, 1896), 60.

[8] GJ Holyoake, *The Principles of Secularism* (3rd Ed., Austin & Co. London, 1870), Chapter XIII.

atheism, and in the East as a solution to communal violence and a perceived remainder of colonial times incorrectly applied to new nations with new ideas.

Modern constitutional law over a wide range of liberal democratic jurisdictions is trending towards the inclusion of secular principles in the administration of religious freedom in their constitutions consistent with Holyoake's principles. Some have gone so far as including the word 'secular' in the constitution's text to make the intent clear.

Yet, more than a century and a half after Holyoake offered his views on how politics and religion could work together in the public sphere to ensure that their mutual interests were addressed to the benefit of all, like a 'Chinese whisper' Holyoake's message travelled the world and likely lost its original meaning even before it left Britain's shores.

The message that has come back, like in the childhood game, is a garbled and completely different one. From most points of the world the inclusive view of Holyoake seems to have been re-developed into either the more strident and anti-religious one of Charles Bradlaugh in England, or that of strict separation attributed to Thomas Jefferson in the USA. While the latter predated Holyoake, serious consideration of what freedom of religion and secularism means did not begin to be considered there until the middle of the last century.

Religion in the form of organised institutions and well-meaning public officials has attempted to occupy the public sphere with its symbols in order to remind the public of its relevance and message, and to keep it there through the imprimatur and support of the state. This thesis has shown that these battles, such as in France to deny symbols worn by individuals, or in the USA to remove symbols endorsed by the state, eventually demean the efforts of the state to control the narrative of the place of religion in national discourse. Efforts to control the narrative by the state often give these issues a status they do not warrant, and a message the state does not understand and control.

In attempting to control the perspective held of the state in its dealings with organised religion by controlling its image, the state comes across as overbearing rather than disaffected. In places such as the England and Scotland, the Netherlands and Denmark, where religion has some form of formal establishment, the state is not seen as a tool of organised religion. There was a fear and discontent in England during the times of Holyoake of religion controlling the state, but in these states the influence of organised religion upon the state is well understood and is known to have a voice, but by no means a controlling interest.

I WORKING TOWARDS A WORKING AND PRACTICAL SECULARISM IN THE HOLYOAKE TRADITION

The question I have sought an answer to in this thesis has been, as I put in Chapter 1, "how religion in a secular liberal democracy may be accommodated without impacting upon broader state public policy objectives, yet allowing a role for religious and non-religious members of the community to make a contribution in the public space with minimal friction". In short, is it possible for religion and the state to co-exist amicably?

If that is possible, in what form would it be? Amartya Sen[9] described secularism as being broadly grouped into two predominant forms. The first is that secularism requires that the state be equidistant from all religions, not supporting any religion, and being neutral with respect to all, the other requires that the state have no relationship with any religion, and be equally distanced from all religions.

Sen explains that both interpretations do not give religion a privileged position in the activities of the state. The first view is distinguished from the other because there is no requirement that the state stay clear of *any* association from religion. What is needed he says is "a basic symmetry of treatment" rather than a "demand that the state must stay clear of any association with any religious matter whatsoever." [10] The question that remains is what form that symmetry may take.

This argument is, however, rather simplistic. If religion could be identified organisationally, then its activities would perhaps be obvious, and its influences clear. In times past, the sovereign as a temporal authority would know of his religious counterpart. Those days are gone. Religions such as Hinduism do not have a centralised authority which seeks to influence government. Some, such as Scientology struggle to be recognised as such.[11] Religion and state interactions are now not so clear, as many of the cases cited in this thesis attest. Religion is often involved in public charitable works and other public beneficial activity such as education,[12] helping disaffected youth[13] and helping people find employment.[14]

So, how can the state seriously be expected to separate itself entirely from people and organisations which operate in a spectrum from the purely religiously motivated, through to the formally religious? Modern secularism cannot be reasonably characterised with the popular model of a separation of religious matters from the state. [15] Since around the time of the US case of *Everson v Board of Education*[16] in the late 1940s, cases trying to make clear where the state starts and religion finishes has been extremely difficult. The word 'secular' once had the meaning of 'living in the world, not belonging to a religious order' having a context of being outside a monastic environment.[17] The 'spiritual' and 'temporal' worlds are no longer distinct, and the modern world has seen that the former no longer lives and operates separately from the latter.

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[9] Amartya Sen, *The Argumentative Indian* (Penguin UK, 2006), 296.
[10] Amartya Sen, *The Argumentative Indian* (Penguin UK, 2006), 296.
[11] Cases include *Church of Scientology Moscow v Russia* [2007] ECHR 258; see also 'Parliament passes new rules on official recognition of religions', *Poltics.hu*, 27 June, 2013 <http://www.politics.hu/20130627/parliament-passes-new-rules-on-official-recognition-of-religions/>.
[12] E.g. the Australian Catholic University.
[13] E.g. Youth off the Streets (http://www.youthoffthestreets.com.au/).
[14] E.g. Christian Jobs Australia (www.christianjobs.com.au).
[15] "The State and the Church are not like two distinct objects, which can be seen at a glance and estimated in a moment. They are distinct enough it is true – they have an overwhelming palpableness when they are once discerned – but being entities of the mind, only those who think comprehend them." (George Jacob Holyoake, *The Reasoner*, Vol. 30 July, 1872, 276.)
[16] 330 US 1 (1947).
[17] secular. (n.d.). *Online Etymology Dictionary*. Retrieved February 20, 2014, from Dictionary.com website: http://dictionary.reference.com/browse/secular.

This thesis has examined cases such as a cross in the desert in the US,[18] which to some is a religious symbol, and to others a representation honouring those who have died in wars. Priests of minority religions in India,[19] and schoolboys in Canada[20] are seen as a danger to the state. Stones in front of court houses[21] and religious symbols on school walls,[22] in place for decades, become controversial. These and similar cases across the jurisdictions must separate issues which are multifaceted and complex into matters which supreme courts must tease out the constitutional issue from the merely pedestrian.

The anthropologist Deepa Das Acevedo recently considered secularism from the perspective of India, but it has an application and perspective beyond India.[23] While secularism in India is not necessarily different from another, her paper collates a number of different perspectives on secularism that fit well with the tradition of Holyoake, such as the views of Bhargava and Yildirim. Rajeev Bhargava considers that secularism in India takes a "principled distance" that includes both nonestablishment but not strict separation of religion and state. Seval Yildirim sees Indian secularism to be "a discourse to reconstruct the political space so that religion and the state can co-exist" and Pratap Bhanu Mehta together with others such as Rajeev Dhavan consider that in India secularism can have multiple meanings, and in practice has different forms according to local conditions. Acedevo considers that secularism may only be understood if both "the nonestablishment of a state religion and the desire to keep religion and state separate" are referenced together.[24]

Acedevo argues that India increasingly does not meet these definitions. She is arguably incorrect in this regard. Here the distinction is the concept of separation of religion and state. It is difficult to see that any definition has been met if it is not well defined in the first instance. This is not her fault, as those she cites are broad in their characterisation themselves. She notes this vagueness when she observes that Yildirim considers the United States and Turkey are successful secular states.

While the above formed the basis for a discussion on contemporary secularism in India, the distinction may serve equally well for consideration on the nature of secularism in secular democracies in general. Much has been made of secular models that vary from the Holyoakean ideal, where the paradigm has been a strict separation of religion and state. This is because this has been an ideal difficult to administer and impossible to police, and a jurisprudence unable to be applied consistently and equitably without the state arriving at outcomes that the media has delighted to often point out as absurd.

On the question of the contemporary state of religious freedom in secular constitutional jurisdictions, in some secular states like India, the question of religious freedom is not on any recent agenda. India has a relatively recent constitution, and

[18] *Salazar v Buono*, 559 US 700 (2010) (Chapter 6).
[19] *Rev. Stainislaus v State of Madhya Pradesh & Ors*, 1977 AIR 908, 1977 SCR (2) 611 (Chapter 5).
[20] *Multani v Commission scolaire Marguerite-Bourgeoys* [2006] 1 SCR. 256, 2006 SCC 6 (Chap 6).
[21] *Van Orden v Perry*, 545 US 677 (2005).
[22] *Lautsi and Others v. Italy* [GC] - 30814/06 Judgment 18.3.2011 [GC] (18 March 2011).
[23] Deepa Das Acevedo, 'Secularism in the Indian Context' (2013) 38(1) *Law and Social Enquiry* 138, 140.
[24] Deepa Das Acevedo, 'Secularism in the Indian Context' (2013) 38(1) *Law and Social Enquiry* 138, 140.

yet the provisions of its Constitution in this regard have received comparatively little debate in the Indian Supreme Court compared with some jurisdictions like the United States. It is not that the issue of religion is of little importance in India, but rather that the religious freedom provisions of its Constitution appear, through the lack of recent significant issues on the matter, to be accepted by society and found satisfactory.

However, in some jurisdictions like Canada and particularly the United States, the question of religious freedom continues to be tested in their highest courts without a firm position either being articulated by the court, or being accepted by large parts of the community. Often the cases seem to arise to take advantage of conservative supreme courts that may be perceived to be sympathetic to religious views. Rather than the supremacy of their highest court being accepted as final, the topic is constantly re-adjudicated.

Secularism in liberal democracies is indeed being tested and often wavering. It is being tested and eroded in less spectacular and slower means in other places, particularly in the United States and in Germany. Some have suggested that the popular rhetoric of various countries may explain their views about religious freedom in terms of what might be called "founding myths". These myths exemplify the values they have articulated regarding freedom, neutrality and equality upon which they state they were founded. However, it is the practice of those countries in modern times that determines how they put their founding myths into practice, to project their constitutional identity.[25]

Secularism as a constitutional model continues to be a popular and agreed means to bring diverse interests and religions together so that all interests might be acknowledged, but have none prevail. The recent religious symbol debates in France, and to a lesser extent Europe and beyond, have brought into focus for many jurisdictions the nature of their constitutional identity, and how it projects that identity when considering novel constitutional questions not considered when those constitutions were first drafted. Many were drafted as solutions to address entirely different religious freedom issues to those currently presented to them. Some jurisdictions continue at this time to review their legal traditions in this area. Is it possible though to improve and make a one-size-fits-all model that would be able to adopt all that is consistent with what has been learned from Holyoake's principles?

II A GENERAL THEORY OF CONSTITUTIONAL SECULARISM

Additionally, as well as considering anew Holyoake's principles of secularism, it is also appropriate to reflect upon whether his principles remain in currency in constitutional law, and whether the experiences of those jurisdictions which have adopted secular principles remain consistent with those principles some century and half distant from when they were first articulated by him.

As I have demonstrated, at the present time there is not a strong normative theory of constitutional secularism. Many of the cases examined in this thesis have sought to ensure that the basic principles of secularism are maintained, that is, that organised

[25] T. Jeremy Gunn, 'Under God but Not the Scarf: The Founding Myths of Religious Freedom in the United States and *Laïcité* in France' 46(1) *Journal of Church and State* 1, 9.

religion does not dictate directly the policies and actions of government. In doing so, many actions have been brought through concerns of the state impeding the practices of religion, or at the extreme through fear of the state working actively to marginalise religion so that its public presence is meaningless. These thoughts were particularly uppermost in Holyoake's time when he sought to differentiate his principles from those who saw a possibility in the immediate post Enlightenment period to remove religion through ridicule of its tenets by way of reason, or its place in influencing public policy. Those efforts by extreme 'secularists' remain as the view of many as the true ideals of secularism.

While the principles of anti-religious 'secularism' of Bradlaugh and his successors remain as the more public face of secularism, the quieter and more measured views expressed by George Holyoake have to some extent faded over time, as less sensational things do, so that his intentions to some extent have been forgotten. Although caught up in the enthusiasm of his contemporaries in his early years to convince his fellow members of society of the illogic of religion and its undue influence upon government, Holyoake's later mature years were applied not to replace religion in society but rather to accept its place.

What is not well remembered are his views that religion in the public sphere should not be actively sidelined, marginalised or disregarded. While the fears of religion's power and influence remain in France's current polity centuries after the 1789 Revolution, Holyoake did not see that such extreme responses were required. His new paradigm of Secularism sought not to abolish religion, nor to embrace it, but rather to accept that it had a place in the public sphere, along with others who wish to have their views heard in public policy deliberation.

Holyoake's principles have effectively been incorporated into the constitutions of most modern liberal democracies or their practices. Although most modern constitutions of this type remain consistent with Holyoake's principles, some remain resolutely in battle with it. Many of the cases cited above have involved issues that have arisen since Holyoake's death. As religion has ceased to have a less dominant place in politics and society through the twentieth century until now, public policy originating in its precepts have been progressively questioned. Issues such as the right of the religious to proselytise in public, for children to learn under religious symbols and curricula in public schools, and for government to regulate religion's activities have been considered in supreme courts to see whether they conform to a state's modern constitutional and social identity.

While many of these issues have been resolved and rarely resurrected in the courts, some jurisdictions continue to grapple with the competing obligations to meet both the aspirations of religion and the state in the public sphere and finding the limits that may apply to them so that both may co-exist. Matters such as the meaning and purpose of religious symbols in public places in Europe and the United States, or paternalistic public policies in France and India to address state-religion interactions continue to cause friction in the communities concerned and litigation in the courts. A number of jurisdictions share the same issues but have addressed them differently, or the problems have not arisen. This thesis has also identified these. Can those jurisdictions with ongoing issues with religion in the public sphere learn from those which have

addressed them successfully, or can those jurisdictions approach the conflicts in a different way?

I suggest a new paradigm that draws from those jurisdictions I have addressed in this thesis that have succeeded to work effectively with religion in the post-Holyoake secular state:

1. *Secularism must be seen as a modern and effective paradigm that will not have the baggage associated with only one place or colonial power. It needs to be seen as Holyoake first thought it, as of universal applicability.*

   Rajeev Bhargava has argued that we must "start to focus on the normative, informal practices of a broader range of Western and non-Western states, we shall see that better forms of secular states and much more defensible versions of secularisms are available." [26]

   Bhargava's views of a more 'defensible' secularism come close to the mark of a long term solution. However, secularism as Holyoake envisaged it should be commonly accepted as a viable and effective constitutional model that works across all jurisdictions without need for local variation. More importantly, it should be *a priori* accepted, not needing further argument and 'defence'. This will come from incremental acceptance as it is seen as beneficial, and not counter to the interests of other views in the public space. It will be seen as being of contemporary constitutional relevance in all jurisdictions.

2. *Where it is proposed that a limit be applied to religion or the state, there should be a clearly identifiable and supportable public utility for that limit. Limits must be seen to serve a practical need recognised by all.*

   This is not the same proposition as the *Lemon Test* in the US suggesting that legislation must prove that it has a secular purpose. Legislation should not need to demonstrate its secular or religious purpose. Rather, the test should be "Who is demonstrably harmed?" The level of harm should be at a level higher than merely inconvenienced. All of us are inconvenienced at some level by the choices we make in interacting with the state. We must slow our journeys because of road works, buy homes only in zoned areas fit to live in, or drive at posted speed limits. If in such interactions of state with religion, where there is a clash, are there alternatives? Is the objection merely philosophical? Is the objection to pre-empt a future harm which may not arise, and is there any likelihood that it will arise? Interactions between religion and the state need not be a battle of wills, or a culture war, each not giving ground until a supreme court is reached. Is the common good, the maximum happiness of us all, served by a secular state that loses its way in the details rather than addressing the realities?

[26] Rajeev Bhargava, "Beyond moderate secularism", *The Immanent Frame: Secularism, Religion and the Public Sphere*, 16 September 2011. <http://blogs.ssrc.org/tif/2011/09/16/beyond-moderate-secularism/.>

One of the main criticisms of secularism is that it seeks to sideline or impair the ability of religion to operate publicly. Not unsurprisingly this is often perceived to be an attempt to negate the message that religion wishes to promulgate in the public space, and that limitations on religion by the secular state must be in some way an attempt to criticise or replace the religious message. Few people or organisations see that their free expressions of speech, activity or passage may at times impair the ability of others to do the same. Yet, as Thomas Jefferson put it, "Of liberty I would say that, in the whole plenitude of its extent, it is unobstructed action according to our will. But rightful liberty is unobstructed action according to our will within limits drawn around us by the equal rights of others."[27] A limitation by the secular state upon the activities of the religious is not likely to be a denial of religious freedom, but rather a means to preserve the rights of others who have an equal right to a presence in the public arena. In that sense, it must be abundantly clear that there is a demonstrable public utility to that limitation.

3. *Leave the state to pass laws, and individuals and organisations to act in the public space, without seeking to search all who enter it for dangerous intent to society. The harm to society of actors in the public space needs to be tangible.*

Charles Taylor[28] argued that the role of secularism as a principle is not to be interpreted in the light of 'founding myths' or to single out religious (as against nonreligious), "secular", or atheist viewpoints to inform the response of the democratic state to diversity. There are few or no proofs in the jurisprudence in this area that society truly sees the hand of religion controlling the state when it gives transport subsidies to school children and incidentally supports it financially, or uplifts the social standing of disadvantaged citizens who also happen to identify with a religious group.

In the contemporary world, it is impractical to sift through legislative activity of the modern secular state for possible critiques or limitations upon religion. Consequently it must be accepted as a principle of a secular constitutionalism that legislation will be drafted that will have the purpose intended and will not intentionally impair religious freedom and activity. The harm perceived to organised religion would need to be obvious and tangible to religion, not inferred. Secular jurisdictions would not pass such legislation as it would clearly be unconstitutional. Accordingly legislation passed by the secular state must be accepted as passed for the common good.

The larger picture is that legislation drawn from constitutional principles, allowing the state to make such laws, permits the state to make laws to do so. Unless there is an overt provision that makes clear that the legislation is designed to abolish or meddle with religion for no good reason, then it should be accepted on its face. There are always going to be those who are affected or inconvenienced by legislation. Not everything that impacts on religion has its harm in mind. Legislatures and appellate courts in modern times know that no action that has the harm of religion in mind would pass muster. Those who

[27] Thomas Jefferson to Isaac H. Tiffany, Monticello, 4 April 1819 <http://founders.archives.gov/documents/Jefferson/98-01-02-0303>.
[28] Charles Taylor, 'The Meaning of Secularism', (2010) 12(3) *The Hedgehog Review* 23, 25.

wish to claim otherwise should look to the overt purpose of laws. Laws will always bother someone, but laws cannot be drafted to meet the ideals of everyone. Holyoake's secularism allows for all views. Once acknowledged, and if reasonable, accommodated, government must govern.

4. *In the absence of any harm to society, accommodation is reasonable. Where there is no strict separation of religion and state, no accommodation is necessary. Give religion respect, but no special status.*

   Religion plays a role in many states for its charitable and social works. However, so do many secular organisations. Some states give religion benefits for its status as religion alone, the charitable aspect being presumed, leaving the secular to have to argue its compliance with beneficial legislation. Let religion prove its charitable and social worth. In doing so, provisions that required definitions of religion to gain tax exemption status or for landlords not to be subject to ant-discrimination laws when they cite religious reasons for precluding tenants, for example, would fall by the wayside. Religious individuals and organisations have long sought to be excluded from laws of general application when they clashed with religious scruples.

   Andrew Koppelman asked in recent times if it was fair to give religion special treatment.[29] His conclusion is that:

   > The decision whether to treat religion specially in any particular case requires the decision maker, whether it is a legislature or a court, to balance the good of religion against whatever good the generally applicable law seeks to pursue. That balancing is a matter of context-specific judgement. It is not reducible to any legal formula.

   Courts have spent many years trying to be proscriptive. One rule, such as the US *Lemon* test, will not fit all circumstances. Making accommodations for religion, as religion, when these traditions began made sense in the context extant at that time. Religion was clearly understood, and often the state was expected to support religion in some way, if not overtly, then through concessional treatment. However, in more modern times, such traditions have less support among the general population, overt support has become more difficult to justify, and the plurality of current citizens makes even the definition of the religion to be so favoured hard to define.

   Koppelman has asked, 'Is it fair to give religion special treatment?" Religion no longer holds the dominant position in modern secular democracies that it once held. Favours once given to religion are now questioned relative to other priorities of the state. Therefore the Holyoakean tradition would suggest that religion be respected as should all public players. Fairness would then not be in question if all are treated equitably.

In summary, what Holyoake set out to have others understand was that the public space could be populated, but it did not have to be adversarial. Currently in many jurisdictions Secularism is seen by the religious as antithesis to religion, and

[29] Andrew Koppelman, 'Is it fair to give religion special treatment?' (2006) 2006 *University of Illinois Law Review* 571, 602.

therefore to be spurned if religion is to have a place in the public arena. It is this view that prevents it from having universal acceptance. As has been examined in previous chapters, secularism is seen in each country through a local lens. In the East it is seen as a colonial imposition, a carry-over from the days before independence. In the West it has the perception of the intent to impose non-religious values through the constitution leaving no place in the public space for religion, or at worst, a plan to remove it entirely.

What is required hereafter is a model of secularism that has the above elements. Secularism that has a forward focus, that respects religion in all its understood forms (and those that are not) equally, that gives due credit and hearing to religion as a traditional and continuing contributor to public discourse, and one that is seen as a constitutional model for all, not the new displacing the old.

In closing I note a quote from Francoise Guizot who said "In order to become acquainted with an age or a people we must also know something of its second-rate and obscure men. It is in the beliefs, sentiments, and lot of unimportant individuals and unknown families, that the lot, the sentiments, and the beliefs of the country are to be found."". *The Spectator* in London observed[30] at the time of Holyoake's publication of *Sixty Years of an Agitator's Life* that:

> We feel that all interested in social progress should make the acquaintance of these volumes. They are not literature, though some striking thoughts are embedded in the book of one who has been a nervous and fertile writer, speaker, and organiser. They are not—as we have hinted before—to be read without particular allowances for the class, constitution, character, and general opportunities of an energetic, able, thoughtful, but almost self-taught man.

Holyoake aimed to serve his society, and in particular the general society, and not just the subset of it that he belonged to. He began by seeking to help the working class into which he was born by aiding and joining causes such as the chartists, but over time included society of all classes and states in the considered thoughts of his later years on a practical secularism. He sought to gain the ear of society through speeches, brochures, books and debates. Holyoake left a number of publications he contributed to or wrote entirely, from those he edited and contributed to, through some on diverse topics as co-operatives, biographies and guidebooks of America and Canada.[31]

Holyoake also wrote a number of books where he was clearly seeking a way to allow society both religious and not to co-exist. Although a man of England and the nineteenth century, he was also a quiet and thoughtful man who wanted society to be harmonious, but not through the removal of its social and philosophical makeup as some would do. This accommodative and adaptive stance is why Holyoake's views remain influential, and his principles of secularism remain persuasive nearly 200 years after his birth.

[30] *The Spectator*, 26 November 1892, 24.
[31] For a selection available online see: http://onlinebooks.library.upenn.edu/webbin/book/lookupname?key=Holyoake%2C%20George%20Jacob%2C%201817-1906.

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