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TOWN OF GREECE AND *CITY OF SAGUENAY*: NON-ESTABLISHMENT PRINCIPLES WITH OR WITHOUT AN ESTABLISHMENT CLAUSE

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I. INTRODUCTION

Ever since the United States Supreme Court first considered the scope of the Establishment Clause of the First Amendment,[1] the relationship between non-establishment principles and the Free Exercise Clause has been a source of controversy. Are the clauses capable of consistent application? Are they inevitably in tension, if not in conflict? If non-establishment principles and free exercise principles come into conflict in a particular case, should one always prevail? And is it always evident in a particular case whether it presents an establishment or a free exercise issue?[2]

A survey of constitutional protection of religion in western democracies shows protection for the freedom of religion and conscience is widespread, but explicit prohibitions on government establishments of religion are rare.[3] One would expect that a constitution that expressly includes a non-establishment principle would be

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[1] Everson v. Bd. of Educ., 330 U.S. 1 (1947) is the first Supreme Court case to discuss the scope of the clause.

[2] *See* Locke v. Davey, 540 U.S. 712 (2004) (excluding students enrolled in programs preparing for ministry from Washington State Scholarship program is permissible to allow the state to pursue non-establishment values).

[3] *See* Leszek Lech Garlicki, *Perspectives or Freedom of Conscience and Religion in the Jurisprudence of Constitutional Courts*, 2001 BYU L. REV. 467, 489 (2001).

more vigilant in protecting Jefferson's "wall of separation"[4] than one with no such provision. But an examination of non-establishment cases in the United States Supreme Court and similar cases in the Supreme Court of Canada seems to contradict this logical conclusion. Canadian cases demonstrate that free exercise principles alone demand at least a degree of enforced separation between religion and government.

A pair of cases presenting quite similar situations where local government bodies opened each legislative session with a spoken prayer, one in the United States Supreme Court,[5] the other in Canada,[6] presents a striking contrast. The Canadian Court, using freedom of religion analysis, in the absence of an establishment clause, requires a greater degree of non-establishment restraint on government than placed by the United States Supreme Court applying an express Establishment Clause. Might this suggest that, paradoxically, regarding the Establishment Clause as something standing alone and apart from free exercise principles actually leads to under-enforcement of non-establishment principles?

II. LEGISLATIVE PRAYER BY LOCAL GOVERNMENT: THE CASES

A. Town of Greece v. Galloway

The town of Greece, New York is a community of 94,000 adjacent to the city of Rochester.[7] Prior to 1999, the monthly meeting of the town board, at which the board conducted business and was open to being addressed by citizens, was opened with a moment of silence.[8] In 1999, the newly elected supervisor decided to open meetings with a recitation of the Pledge of Allegiance and a prayer

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[4] The phrase originated in THOMAS JEFFERSON, LETTER TO A COMMITTEE OF THE DANBURY BAPTIST ASSOCIATION (Jan. 1, 1802). The phrase was invoked by Justice Black in *Everson*, 330 U.S. at 16.

[5] Town of Greece v. Galloway, 572 U.S. ____ (2014); 134 S. Ct. 1811.

[6] Mouvement Laïque Québécois *v.* Saguenay (City), 2015 SCC 16, [2015] 2 S.C.R. 3 (Can.).

[7] *Town of Greece*, 134 S. Ct. at 1816.

[8] *Id.*

delivered by a local clergyman who was designated as "chaplain of the month."[9]

From 1999 to 2007, all of the invited chaplains were Christian.[10] Their invocations ranged from rather generic theism to specifically Christian references.[11] In 2007, Susan Galloway and Linda Stephens, who often attended town board meetings, brought suit in federal court, claiming that the town's invocation practice was a violation of the Establishment Clause.[12] They did not seek a complete end to invocations, but rather that invocations be limited to "inclusive and ecumenical prayer."[13]

Relying on *Marsh v. Chambers*,[14] the 1983 decision of the Supreme Court permitting prayer by a legislative chaplain in the Nebraska legislature, the district court dismissed the complaint.[15] The Second Circuit Court of Appeals later reversed.[16] Applying the "non-endorsement" test forged by Justice O'Connor, which considered whether a government practice conveys a message of endorsement of a religious message, the court found that the "steady drumbeat of Christian prayer," combined with a failure to actively seek out non-Christian chaplains, "ensured a Christian viewpoint" and did violate the non-endorsement standard.[17]

While the case progressed, the town invited a Jewish layman and the chairman of a local Baha'i temple to deliver invocations, and granted a request from a Wiccan priestess to do the same.[18] The great majority of invocations, however, continued to be delivered by

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[9] *Id.*

[10] *Id.*

[11] *Id.* ("Greece neither reviewed the prayers in advance of the meetings nor provided guidance as to their tone or content.").

[12] *Id.* at 1817.

[13] *Id.*

[14] Marsh v. Chambers, 463 U.S. 783 (1983) (upholding Nebraska Legislature's practice of opening its sessions with a prayer delivered by a state-paid chaplain).

[15] Galloway v. Town of Greece, 732 F. Supp. 2d 195, 241–43 (W.D.N.Y. 2010).

[16] Galloway v. Town of Greece, 681 F.3d 20 (2d Cir. 2012).

[17] *Id.* at 30–32. The non-endorsement test was set forth and applied by Justice O'Connor in County of Allegheny v. ACLU, 492 U.S. 573, 623 (1989) (O'Connor, J., concurring).

[18] *Town of Greece*, 134 S. Ct. at 1817.

Christian clergy.[19] Although this limited outreach was intended to strengthen the town's legal position, it seems to have had little, if any, effect on the Justices of the Supreme Court.

Justice Kennedy's majority opinion relied primarily on the Court's decision in *Marsh*.[20] To Justice Kennedy, *Marsh* was significant not merely for its narrow holding concerning legislative prayer, but also for the proposition that a long historical acceptance of a practice could outweigh the conclusion that such a practice might fail any of the Court's suggested modern analytical approaches to Establishment cases.[21]

Drawing on the language of *Marsh* and the history of specifically Christian invocations in early Congressional history,[22] Justice Kennedy rejected the argument that permissible legislative prayer must be nonsectarian.[23] The only limitation that the Court would place on the prayers was that they not "denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion."[24] Although the town need not make "an effort to achieve religious balancing,"[25] the opinion at least strongly suggests that the town may not discriminate against a representative of any religion who comes forward wishing to deliver an invocation.

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[19] *Id.* at 1840 (Breyer, J., dissenting) ("[N]early all of the prayers given reflected a single denomination.").

[20] *Id.* at 1817–28 (citing *Marsh* fourteen times, with *County of Allegheny* coming in second with eight citations) (majority opinion).

[21] Justice Kennedy dismisses the non-endorsement test as dictum, *id.* at 1821, and maintains that the prayer creates no constitutional problems under a non-coercion test, since dissenters would be free to enter or leave without standing out as disrespectful, *id.* at 1828. To Justice Kennedy, this distinguishes legislative prayer from prayer at public high school graduations, which, writing for the Court, he found psychologically coercive and therefore unconstitutional. *Id.*; Lee v. Weisman, 505 U.S. 577 (1992).

[22] *Town of Greece*, 134 S. Ct. at 1820.

[23] *Id.* ("The decidedly Christian nature of these [Congressional] prayers must not be dismissed as the relic of a time when our Nation was less pluralistic than it is today.").

[24] *Id.* at 1823–24 (finding that only a "course and practice over time" of such invocations would raise constitutional problems; an occasional disparagement of religious dissenters would not be sufficient).

[25] *Id.* at 1824.

The dissenting Justices did not challenge *Marsh* itself, nor did they call for an outright ban on prayer by local legislative bodies. Justice Kagan distinguished *Marsh* by pointing to the fact that the local town board meetings included ordinary citizens as participants as well as observers.[26] When dealing with citizen requests, the town board is acting more like a court vis-à-vis the request, and just as it would be improper to begin a court session with a sectarian prayer, so also here a citizen whose religious (or non-religious) convictions are inconsistent with those reflected in the invocation will legitimately feel alienated from her government.[27]

This difference, Justice Kagan and her dissenting colleagues concluded, requires that local legislative prayer be permitted only where the town has taken steps not only to include representatives of non-majority views in the roster of "chaplain of the month," but also to see that the invocations themselves are nonsectarian and inclusive.[28]

B. Movement Laique Quebecóis v. Saguenay (City)

The city of Saguenay, Quebec, was founded in 2002 by the consolidation of seven smaller municipalities.[29] The regular meetings of the Saguenay municipal council, open to the public, are held in the borough hall of three of the seven communities that comprise Saguenay.[30] At the start of each public council meeting, the mayor would deliver a prayer. The short body of the prayer made no specific denominational references, but the prayer began and ended with the mayor reciting (in French), "In the name of the Father, the Son and the Holy Spirit," while making the sign of the cross.[31]

Alain Simoneau, an atheist Saguenay resident who regularly attended council meetings, asked the mayor to stop the practice of

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[26] *Id.* at 1842 (Kagan, J., dissenting).

[27] *Id.* at 1844–45.

[28] *Id.* at 1850 ("[T]he government must take especial care to ensure that the prayers [citizens] hear will seek to include, rather than serve to divide.").

[29] Mouvement Laïque Québécois v. City of Saguenay, 2015 SCC 16, [2015] 2 S.C.R. 3, para. 5 (Can.).

[30] *Id.* at para. 6.

[31] *Id.* at para. 6–7.

the invocation.[32] The mayor refused, and Simoneau brought his complaint to the Quebec Human Rights Tribunal, which found that the City's by-law calling for prayer was inconsistent with the Quebec Charter of Rights, as it protected Simoneau's freedom of conscience and religion.[33] The purpose of the by-law was, in the Tribunal's view, entirely religious and inconsistent with the government's duty of religious neutrality.[34]

The City successfully appealed to the Quebec Court of Appeal.[35] The court found that the prayer, as an invocation of universal values, did not violate the duty of neutrality, and in addition, Simoneau's injury, if any, was trivial and insubstantial.[36] The Supreme Court of Canada allowed Simoneau's appeal, and invalidated the City's prayer practices.[37] In an opinion sharply in contrast to the United States Supreme Court decision in *Town of Greece*, Justice Gascon, writing for a unanimous Court, held that "consciously adhering to certain religious beliefs to the exclusion of all others . . . [breaches] the state's duty of neutrality" and interferes with Simoneau's freedom of conscience and religion.[38]

Both the Quebec Charter[39] and the Canadian Charter of Rights and Freedoms[40] contain provisions that guarantee freedom of conscience and freedom of religion. In contrast to the United States Constitution, neither of these Charters contains an express equivalent of the First Amendment Establishment Clause. Although Justice Gascon noted that neither the Quebec nor the Canadian Charter contains an express requirement of government neutrality on matters of religion, such a "duty results from an evolving interpretation of freedom of conscience and religion."[41] This interpretation leads to the

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[32] *Id.* at para. 8.
[33] *Id.* at para.14–17.
[34] *Id.* at para. 16.
[35] *Id.* at para. 18–22.
[36] *Id.* at para. 21.
[37] *Id.* at para. 150.
[38] *Id.* at para. 4.
[39] Quebec Charter of Human Rights and Freedoms, C.Q.L.R. C-12 § 3 (Can.).
[40] Constitution Act, 1982, *being* Schedule B to the Canada Act 1982 (UK), 1982, c. 11, s. 2 http://canlii.ca/t/ldsx#sec2.
[41] *Saguenay*, 2015 SCC 16, [2015] 2 S.C.R. 3, para. 71.

conclusion that the state must maintain a neutrality that "requires that the state neither favour nor hinder any particular belief, and the same holds true for non-belief."[42]

In its resolution calling for the maintenance of the public prayer, the Saguenay Council members had asserted their own rights of religious expression. But Justice Gascon declared that "[w]hen the state adheres to a belief, it is not merely expressing an opinion on the subject. It is creating a hierarchy of beliefs and casting doubt on the value of those it does not share. It is also ranking the individuals who hold such beliefs."[43]

The Court of Appeal had found the prayer practice consistent with what it termed "benevolent neutrality," which was sufficient because the neutrality requirement should not be interpreted to require "complete secularity" by government.[44] Justice Gascon denied that complete secularity was at issue, but rather maintained that true neutrality required that the state "neither encourage nor discourage" religion, and that such encouragement violates Charter principles regardless of whether the religious practice is done "under the guise of cultural or historical reality or heritage."[45]

In analyzing the City's prayer practices under this requirement of neutrality, Justice Gascon began with a two-part test, which closely resembles the first two parts of the *Lemon* test used by the United States Supreme Court in Establishment Clause cases.[46] First, "[a] provision of a statute, of regulations or of a by-law will be inoperative if its purpose is religious."[47] The second step is to examine

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[42] *Id.* at para. 72.

[43] *Id.* at para. 73 (quoting R. Moon, *Freedom of Religion Under the Charter of Rights: The Limits of State Neutrality*, 45 U.B.C. L. REV. 497, 507 (2012) ("If religion is an aspect of an individual's identity, then when the state treats his or her religious practices or beliefs as less important or less true than the practices of others, or when it marginalizes his or her religious community in some way, it is not simply rejecting the individual's views and values, it is denying his or her equal worth.").

[44] *Id.* at para. 77.

[45] *Id.* at para. 78.

[46] Lemon v. Kurtzman, 403 U.S. 602 (1971) (finding that Establishment Clause is violated if government practice lacks secular purpose, has primarily religious effect, or entangles government with religion).

[47] *Saguenay*, 2015 SCC 16, [2015] 2 S.C.R. 44, para. 81.

the effect of the practice. Here, the analysis diverges from *Lemon* to some extent. The second prong of the *Lemon* test asks whether the "primary effect" of the government action is religious or secular.[48] With the neutrality requirement of the Quebec and Canadian Charters being grounded in the rights of the individual, the question is whether the state practice has "the effect of interfering with the individual's freedom of conscience and religion, that is, impeding the individual's ability to act in accordance with his or her beliefs" in a non-trivial way.[49]

Both the Quebec and the Canadian Charters provide that a provision of a statute or regulation that interferes with a range of individual rights, including the right to freedom of conscience or religion, may be justified under a proportionality test. Section 1 of the Canadian Charter states that an infringement may be allowed if the state can show that it is a reasonable limit in a free and democratic society.[50] Although the language of the analogous provision of the Quebec Charter is not precisely the same, the Supreme Court of Canada has held that the analysis of each of these provisions is the same.[51]

The analysis for determining whether a limit on freedom of conscience or religion can be justified consists of the following steps:

> (1) that the legislative objective is of sufficient importance, in the sense that it relates to pressing and substantial concerns, and (2) that the means chosen to achieve the objective are proportional. The second requirement has three components: (i) the means chosen must be rationally connected to the objective; (ii) they must impair the right in question as little as possible; and (iii) they must not so severely

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[48] *Lemon*, 403 U.S. at 612.

[49] *Saguenay*, 2015 SCC 16, [2015] 2 S.C.R. 45 para. 85.

[50] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.), section 1.

[51] Quebec Charter of Rights and Freedoms, C.Q.L.R. C-12 § 9.1 provides: "In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Quebec."

> trench on individual or group rights that the objective is outweighed by the seriousness of the intrusion.[52]

Although some of the language of this test, particularly that of (2)(ii), seems to resemble the United States Supreme Court's strict scrutiny test,[53] its application has been somewhat more deferential to government than strict scrutiny, at least in its classic form, has been.[54] Justice Gascon's opinion focused on the religious nature of the prayer practice, dismissing the City's arguments that these were secular justifications.[55] In the absence of an important legislative objective, little attention would need to be paid to the rest of the proportionality test.

The City argued that a non-denominational prayer did not qualify as an improper religious practice.[56] Although the Court noted that the prayer was quite distinctly Roman Catholic, even assuming that it was non-denominational would not change its religious nature.[57] By excluding agnostics and atheists, the practice interfered with liberty of conscience.[58]

The City claimed that it was merely honoring tradition,[59] Justice Gascon dismissed this claim, however, noting that the practice dated only from 2002.[60] Further, the Court noted that while the state has legitimate ability to celebrate and preserve its religious heritage, this does not justify the use of public power to actually profess a municipality's "own faith."[61]

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[52] *Saguenay*, 2015 SCC 16, [2015] 2 S.C.R. 47 para. 90.

[53] Under strict scrutiny, a law will be upheld only if it is necessary to achieve a compelling government purpose. *See, e.g.*, Adarand v. Pena, 515 U.S. 200 (1995); Sherbert v. Verner, 374 U.S. 398 (1963).

[54] *See generally* ROBERT J. SHARPE & KENT ROACH, THE CHARTER OF RIGHTS AND FREEDOMS 68–87 (4th ed. 2009).

[55] *Saguenay*, 2015 SCC 16, [2015] 2 S.C.R. 49–51 paras. 96–102.

[56] *Id.* at para. 95. The City argued that objecting to non-denominational prayer would "give atheism and agnosticism precedence over religion." *Id.*

[57] *Id.* at para. 135–140.

[58] *Id.* at para. 92.

[59] *Id.* at para. 98.

[60] *Id.*

[61] *Id.* at para. 116.

Just as the town of Greece analogized its practice to the invocations delivered by Senate and House of Representatives chaplains, and sanctioned by the United States Supreme Court in *Marsh*,[62] Saguenay pointed to the practice of an opening prayer by the Speaker of the Canadian House of Commons.[63] But unlike the United States Supreme Court in *Town of Greece*, Justice Gascon did not find the analogy persuasive.

The context of the two prayers, Justice Gascon notes, are different.[64] Although he did not elaborate on this point, this may be the difference noted by the dissenters in *Town of Greece* between local and state or congressional legislative prayer.[65] At the local event, citizens are at least potential, if not actual, participants, rather than passive observers.[66] This makes religious messages that send a message of non-inclusion to non-members of the legislative body more significant. Additionally, Justice Gascon noted that the House of Commons prayer may be protected from judicial interference by parliamentary privilege, making it *sui generis* and not comparable to local government bodies.[67]

Finally, Saguenay pointed to the preamble of the Canadian Charter, which declares that "Canada is founded upon principles that recognize the supremacy of God and the rule of law,"[68] to argue that a theistic prayer requiring the same supremacy could not violate the Charter.[69] But the Court held that the general statement of the "political theory" underlying the provisions of the Charter could not serve to limit the express individual rights protections of the Charter.[70] Thus, Justice Gascon concluded that the original tribunal's findings were justified, and that the Court of Appeal erred in overturning them: "The prayer creates a distinction, exclusion and preference

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[62] Everson v. Bd. of Educ., 330 U.S. 1 (1947).
[63] *Saguenay*, 2015 SCC 16, [2015] 2 S.C.R. 65–66, paras. 141–143.
[64] *Id.* at para. 142.
[65] *See* Town of Greece v. Galloway, 572 U.S. ____ (2014); 134 S. Ct. 1811, 1842–45 (Kagan, J., dissenting).
[66] *See id.* at 1824, 1842 (Kagan, J., dissenting.).
[67] *Saguenay*, 2015 SCC 16, [2015] 2 S.C.R. 66, para. 142.
[68] *Id.* at para. 145.
[69] *Id.* at para. 144.
[70] *Id.* at para. 147.

based on religion that has the effect of impairing Mr. Simoneau's right to full and equal exercise of his freedom of conscience and religion."[71]

III. NON-ESTABLISHMENT PRINCIPLES: WITH OR WITHOUT AN ESTABLISHMENT CLAUSE

Town of Greece and *City of Saguenay* present a paradox. Faced with very similar cases challenging prayer at the outset of official business meetings of local legislative bodies, the United States Supreme Court, interpreting a Constitution containing an express prohibition on establishment of religion, found the practice unobjectionable, while the Supreme Court of Canada, in the absence of any such provision in either the Quebec or Canadian Charters, found the practice unconstitutional as a violation of the freedom of conscience or religion of non-believers.

To what extent is the neutrality principle at the heart of non-establishment dependent on an express separationist provision in a state's constitutional documents? Might it be better to conceive of the neutrality/non-establishment principle as a corollary of individual freedom of religion rather than an independent limit on government? Does the presence of an express non-establishment clause require limits on government beyond the neutrality implicit in the provisions protecting freedom of religion?

The twentieth century gave rise to widespread recognition of the obligation of governments to respect religious freedom. After World War I, the Covenant of the League of Nations required states that had been granted mandates to govern territories and prepare them for self-governance guarantee freedom of conscience and religion.[72] After World War II, the United Nations adopted the Universal Declaration of Human Rights, including Article 18:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to

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[71] *Id.* at para. 150.

[72] *See generally* NATHAN LERNER, *Religious Human Rights Under the United Nations*, in 2 RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 79–84 (Johan D. van der Vyver & John Witte eds. 1996).

> 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 teaching, practice, worship and observance.[73]

In 1981, the General Assembly adopted the United Nations Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief.[74] The Declaration begins with these provisions:

> Article I
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> 1. Everyone shall have the right to freedom of thought, conscience, and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice, and teaching.
>
> 2. No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice.
>
> 3. Freedom to manifest one's religion or belief 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.
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> Article 2
>
> 1. No one shall be subject to discrimination by any State, institution, or group of persons, or person on the grounds of religion or other belief.[75]

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[73] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. GAOR, at 71, U.N. Doc. A/811 (1948), Art. 18.

[74] Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, G.A. Res. 36/55, U.N. GAOR, 36th Session (1981).

[75] *Id.* at arts. 1–2.

Of course, not all nations have adhered to these principles, but for our purposes, a focus on those that do will be sufficient. The European Convention on Human Rights adopts, almost word for word, the conscience and religious provisions of the Universal Declaration of Human Rights, and also provides a mechanism for citizens to bring claims of violation of those rights before the European Court of Human Rights.[76] In *Kokkinakis v. Greece*,[77] the European Court held that a criminal conviction of a Jehovah's Witness for illegal proselytizing was a violation of the Convention.[78] Additionally, in *Darby v. Sweden*,[79] the Court held that a non-member of the established Swedish Lutheran Church was entitled to an exemption from a tax that supported that Church, at least to the extent that the tax supported specifically religious rather than broadly charitable activity.[80]

Notably, however, the European Court has never suggested that a government may never privilege an established faith. None of the international conventions noted above expressly prohibit establishment or insist upon strict neutrality on religious questions. Although the constitutions of some European nations expressly declare the separation of church and state,[81] or at least government neutrality as between religions,[82] other states have formally established

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[76] *See* T. JEREMY GUNN, *Adjudicating Rights of Conscience Under the European Convention on Human Rights*, in 2 RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES, at 305–360 (1996).

[77] Kokkinakis v. Greece, 260 Eur. Ct. H.R. (Ser. A) (1993).

[78] Darby v. Sweden, 187 Eur. Ct. H.R. (Ser. A) (1990); GUNN, *supra* note 76, at 316–25.

[79] The European Commission, the body that initially evaluates complaints under the European Convention on Human Rights, found that Article 9 was violated by the requirement that a dissenter pay a tax earmarked for a specifically religious activity. Upon review, the Court agreed that the tax on Dr. Darby was improper, but based its ruling on the fact that he was denied an exemption from the tax because he was only a part-time resident of Sweden, while full-time residents were entitled to claim exemption as dissenters. *See* GUNN, *supra* note 76, at 316–18.

[80] *Id.*

[81] *See, e.g.*, CONSTITUCICAO DA REPUBLICA PORTEGUESA 1982, art. 41(4) (Port.); LA CONSTITUTION, 1958, ar. 1 (Fr.).

[82] *See, e.g.*, CONSTITUTION OF IRELAND, 1957, Art. 44.722.

churches, or at least recognize one religion as having a unique place in the nation's history and culture.[83]

The European Court has not challenged government financial support to religion. In *Darby*, the Court did not criticize Sweden's system insofar as it taxed members of the established church for that church's support.[84] Some have noted that the European Court and Commission grant more deference not only to established churches, but also to members of "mainstream" religions, as opposed to new or non-traditional faiths.[85]

Thus, in the view of the European Court, individual rights of religious freedom do not necessarily imply government neutrality among religions, or government neutrality between religion and irreligion. When the dissenting Evangelical Lutheran Church in Sweden challenged mandatory religious education in Swedish public schools conducted under the auspices of the established Swedish Lutheran Church, the European Commission negotiated a settlement granting Evangelical Lutherans an exemption.[86] When an atheist sought a similar exemption from the same law, the Commission dismissed the claim as "manifestly ill-founded."[87]

This cautious application of religious freedom principles, affirming individual freedom claims while not objecting to unequal state treatment of religions, is likely a consequence of an international body exerting restraint in framing rules that will bind different

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[83] *See, e.g.*, KATAETATIKO [CONSTITUTION], 1975, art. 3 (Greece) (establishing the Eastern Orthodox Church); NORGES GRUNDLOV [CONSTITUTION], 1814, art. 16 (Nor.) (establishing the Evangelical Lutheran Church); Act of Supremacy 1 Eliz., c. 1 (1558) (establishing the Church of England).

[84] GUNN, *supra* note 76, at 312 (quoting Darby v. Sweden, 187 Eur. Ct. H.R. (Sec. A) (1990)) ("[A] State Church system cannot in itself be considered to violate Article 9 of the Convention. In fact, such a system exists in several Contracting States and existed there already when the Convention was drafted and when they became parties to it.").

[85] Gunn found that, with only two exceptions, "the European Commission always denied applications from religions that could be called 'new', 'minority', or 'nontraditional.'" GUNN, *supra* note 76, at 311.

[86] Karnell v. Sweden, 1971 Y.B. Eur. Conv. On H.R. 676 (Eur. Comm'n H.R.).

[87] Angelini v. Sweden, App. No. 10941/883, 51 Eur. Comm. H.R. Dec. & Rep. 41, 49 (1987). *Karnell, Angelini* and other cases rejecting claims made by adherents to minority religions are discussed by GUNN, *supra* note 76 at 311–12.

societies with different histories concerning the relationship of church and state. This is consistent with the general principle that the European Court will respect a "margin of appreciation" for particular national history and culture in adjudicating rights claims.[88] But some western democracies, with or without specific constitutional provisions mandating separation or neutrality, have been more sensitive to the relationship between non-establishment principles and individual rights. Canada provides a clear example.

As a British colony, Canada was familiar with the formal religious establishment practiced in the United Kingdom. But the religious diversity caused by the Francophile and largely Roman Catholic Quebec, a single denomination establishment was not a practical option.[89] Instead, Canadian constitutionalism from the Constitution Act of 1867 through the middle of the twentieth century was largely devoted to negotiating the degree to which dominant religious majorities—Catholics in Quebec or Protestants in other provinces—needed to respect minority religious rights in matters such as education and marriage.[90] Although some respect was given to Protestant or Catholic minorities, rights of non-Christian minorities received much less attention.[91]

Canada inherited the British doctrine of parliamentary supremacy, and the original Canadian constitutional documents did not empower courts to overturn legislative decisions as violative of individual rights.[92] Thus, when the widespread movement among west-

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[88] *See generally* PETER G. DANCHIN & LISA FORMAN, *The Evolving Jurisprudence of the European Court of Human Rights and the Protection of Religious Minorities, in* PROTECTING THE HUMAN RIGHTS OF RELIGIOUS MINORITIES IN EASTERN EUROPE 192–99 (Peter G. Danchin & Elizabeth A. Cole, eds.)(2002).

[89] *See generally* JANET EPP BUCKINGHAM, FIGHTING OVER GOD: A LEGAL AND POLITICAL HISTORY OF RELIGIOUS FREEDOM IN CANADA, 7–18 (2014).

[90] *Id.* at 32–69 (education issues); *id.* at 151–64 (marriage and divorce).

[91] *Id.* at 13 ("[T]he dominance of Roman Catholic-Protestant conflict overshadowed consideration of the rights of religious minorities."). After the cultural changes in Quebec during the post-World War II era, that led to far less influence by the Catholic Church in government and social norms, referred to as the "Quiet Revolution," self-definition by Canadians became less focused on the Catholic-Protestant divide and more on English-French language differences. *Id.* at 18–19.

[92] *See* SHARPE & ROACH, *supra* note 54, at 4–5.

ern democracies toward recognition of individual rights following World War II came to Canada, it initially resulted in legislation at both the national and provincial levels recognizing rights, including the right of religious freedom.[93] Finally, after years of pressure for the adoption of a bill of rights with constitutional status, the incorporation of a charter of rights became a priority when the government of Prime Minister Trudeau embarked on the task of constitutional revision in 1980.[94]

Thus, the first thirty-four sections of the Constitution Act of 1982 comprise the Charter of Rights and Freedoms, [95] Canada's first constitutionally entrenched individual rights protections. The list of protected rights is largely, but not entirely, similar to those protected by the United States Constitution.[96] Section 1 of the Charter expressly provides for a form of judicial balancing in interpreting the scope of the enumerated rights, making it clear that rights are not absolute.[97] This section provides that Charter rights are guaranteed, "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[98]

Section 2 of the Charter deals with the same subject matter as the First Amendment of the United States, but with some textual differences:

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[93] *Id.* at 12–18.

[94] *See* DAVID MILNE, THE NEW CANADIAN CONSTITUTION 23–46 (1982).

[95] Canadian Charter of Rights and Freedoms, Canada Act, Part I of the Constitution Act, *being* Schedule B to the Canada Act, 1982 c. 11 (U.K.). As a consequence of its history as a British colony, until the 1982 changes to the Canadian Constitution (the Canada Act), constitutional changes needed to be approved by the former colonial power. *See* JEREMY WEBBER, THE CONSTITUTION OF CANADA: A CONTEXTUAL ANALYSIS 26–29 (2015).

[96] For example, the Charter contains no equivalent of the Second Amendment right to bear arms, nor does it contain a "Takings Clause." Section 7 of the Charter, which comes closest to the Due Process Clause of the United States Constitution, "provides that life, liberty and security of the person" (omitting "property") may not be taken away "except in accordance with the principles of fundamental justice." Canada Act, 1982, § 7. But Section 26, in language reminiscent of the Ninth Amendment, states that "[t]he guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada." *Id.* at § 26.

[97] *Id.* at § 1.

[98] *Id.*

> Everyone has the following freedoms:
> (a) freedom of conscience and religion;
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
> (c) freedom of peaceful assembly; and
> (d) freedom of association.[99]

Subsections (b), (c) and (d) deal, in somewhat more detail, with the same freedoms as the speech and press clauses of the First Amendment. The treatment of religion in subsection (a), however, has significant differences from the First Amendment religion clauses. In keeping with national and international documents from the post-World War II era, a protection is extended to "conscience" as well as "religion." This would seem to greatly reduce, if not eliminate, the need for courts to determine when a belief system qualifies as a religion,[100] and would presumably bring non-theists and atheists within the scope of its protection.

A difference of perhaps greater significance is the absence of any express provision barring government establishment of religion. How significant is this omission in differentiating the scope of religious freedom in the United States and Canada? A reasonable hypothesis might posit that Canadian courts would be more tolerant of government practices that promote religion. Yet, from the first significant Canadian decisions interpreting Section 2(a), concerns that American lawyers would label as "Establishment Clause matters" were evident and dealt with in a way that demonstrated a commitment to non-establishment values at least as strong as their United States counterparts.

The first significant decision of the Supreme Court of Canada interpreting the Charter's guarantee of freedom of conscience and religion was *R v. Big M Drug Mart.*[101] Big M, charged with selling goods on Sunday in violation of the Lord's Day Act, challenged that

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[99] *Id.* at § 2.

[100] United States courts frequently must address the definition of "religion." *See* Donald L. Beschle, *Does a Broad Free Exercise Right Require a Narrow Definition of "Religion"?*, 39 HASTINGS CONST. L.Q. 357 (2012).

[101] [1985] 1 S.C.R. 295 (Can.).

Act as a violation of Section 2(a).[102] Chief Justice Dickson analyzed the case in terms that would fit into an Establishment Clause case in the United States. Initially, the Chief Justice found it significant that the Lord's Day Act had the purpose of promoting Sunday worship, rather than the secular purpose of simply providing a uniform day of rest.[103]

In focusing on the effect of the Act, Chief Justice Dickson discussed the meaning of "freedom of religion" under the Charter. He saw both equal treatment and non-coercion as essential aspects of the guarantee:

> Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free . . . . Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others.[104]

The presence or absence of coercion has been decisive in United States Establishment Clause cases, at least in the opinion of several Justices.[105] Those who use the term do not necessarily agree on its meaning, however. To Justice Scalia, coercion is present only when the state imposes a tangible punishment on those who fail to con-

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[102] R.S.C. 1970 c. L-13. With some exceptions, the Act prohibited commercial activity on Sunday. *See Big M Drug Mart*, [1985] 1 S.C.R. at 301–02.

[103] "Its religious purpose, in compelling sabbatical observance, has been long-established and consistently maintained . . . ." *Big M Drug Mart*, [1985] 1 S.C.R. at 331.

[104] *Big M Drug Mart*, [1985] 1 S.C.R. at 336–37.

[105] *See, e.g.*, Lee v. Weisman, 505 U.S. 577 (1992), discussed *infra* at notes 106–107. *See also* Allegheny County v. ACLU, 492 U.S. 573, 655 (1989). Justice Kennedy, concurring in part and dissenting in part, contends that religious holiday displays are noncoercive and therefore constitutional. *Id.* at 659–67.

form.[106] Justice Kennedy, in contrast, recognizes the possibility that psychological pressure can also qualify as coercion.[107] Chief Justice Dickson's view of coercion clearly adopts Justice Kennedy's view. In finding the Lord's Day Act to be coercive, the Chief Justice described its effect in terms that seem less concerned with coercion and more with results that are reminiscent of the endorsement of religion found to be a First Amendment violation under the "non-endorsement" test first enunciated by Justice O'Connor[108] in United States cases:

> To the extent that it binds all to a sectarian Christian ideal, the Lord's Day Act works a form of coercion inimical to the spirit of the *Charter* and the dignity of all non-Christians. In proclaiming the standards of the Christian faith, the Act creates a climate hostile to, and gives the appearance of discrimination against, non-Christian Canadians .... The theological content of the legislation remains as a subtle and constant reminder to religious minorities within the country of their differences with, and alienation from, the dominant religious culture.[109]

The Attorney General of Alberta, defending the Lord's Day Act, stressed the absence of any establishment clause in the Charter, and contended that this omission meant that no statute that did not actually impede an individual's religious exercise could violate Section 2(a).[110] Chief Justice Dickson rejected this argument, noting that "es-

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[106] *See Lee*, 505 U.S. at 640 (Scalia, J., dissenting) ("The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*.").

[107] *Lee*, 505 U.S. at 588 (majority opinion) (noting that the Establishment Clause may protect against "subtle coercive pressure.").

[108] *See* Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) ("[The] more direct important infringement [of the Establishment Clause] is government endorsement or disapproval of religion. Endorsement sends a message to ... adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.").

[109] *Big M Drug Mart*, [1985] 1 S.C.R. at 337.

[110] *Id.* at 339.

tablishment" and "free exercise" "are not two totally separate and distinct categories."[111] Dickson continued, "[N]either 'free exercise' nor 'anti-establishment' is a homogeneous category; each contains a broad spectrum of heterogeneous principles."[112]

Big M did not require the invalidation of all Sunday closing laws. This became evident shortly after the *Big M* decision, when the Supreme Court of Canada refused to invalidate the Ontario Retail Business Holidays Act.[113] The Act prohibited retail business on "holidays," defined as including Sundays and a number of additional holidays, some but not all of which were of religious significance.[114] The Act also contained an exemption from the prohibition on Sunday business for small retailers who were closed on the preceding Saturday.[115]

Applying the analysis of religious purpose and discriminatory effect enunciated in *Big M*, the Court found these statutory differences significant.[116] The more broad definition of "holidays" established a fundamentally secular purpose, and the exemptions minimized any negative effect on the religious freedom of those who recognized a day other than Sunday as a day of rest.[117] The lasting effect of the decision was minimal, however. In 1993, the Ontario legislature amended the Act to permit retailing on Sunday, while retaining the mandate of closing on a list of specific holidays, some but not all with religious significance.[118]

School closings for holiday observance have been challenged in both Canadian and American courts,[119] with mixed results. The

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111 *Id.* at 339–40.

112 *Id.* at 340.

113 R. v. Edwards Books and Arts, Ltd., [1986] 2 S.C.R. 713 (Can.) (upholding the Retail Business Holidays Act, R.S.O. 1980, c. 453 (Can.)).

114 *Edwards Books*, [1986] 2 S.C.R. at 716–17.

115 *Id.*

116 *Id.* at 741–44.

117 *Id.*

118 *See* BUCKINGHAM, *supra* note 89, at 139.

119 *See e.g.*, Islamic School Federation v. Ottawa School Board, [1997] 99 O.A.C. 127, 145 D.L.R. 4th 659 (Can., Ont. Div. Ct.) (holding that it was not a violation of the Charter to close schools for Christmas and Easter, but not for Islamic holidays); Metzl v. Leininger, 57 F.3d 618 (7th Cir. 1995) (finding statewide closings in Illinois of public schools on Good Friday unconstitutional); Commack v.

Ontario Divisional Court upheld school closings for Christmas and Easter holidays, on the grounds that the holidays have become "secular holidays or common pause days"[120] rather than simply religious observations. Applying the First Amendment to a similar challenge concerning the closure of public schools in Hawaii for a long Easter weekend, the district court found that the long history of such a closure has turned observance into a "spring [weekend]," one with secular overtones.[121]

No question involving church-state relations in the United States has caused more controversy than the issue of prayer in public schools.[122] Unsurprisingly, this issue has arisen in Canada as well. Section 28(1) of Regulation 262, issued under Ontario's Education Act, provided that the public elementary school day would begin with the recitation of the Lord's Prayer and a Scripture reading.[123] Although parents could request exemptions from the recitation for their children, the parents of children attending Sudbury public schools sought a ruling that the regulation was invalid as a violation of Section 2(a).[124] The parents maintained that the peer pressure on their children not to exempt themselves made the right to seek exemptions largely illusory.[125]

Despite the absence of a non-establishment principle in the Charter, the Ontario Court of Appeal sustained the challenge, in an analysis largely similar to that used by the United States courts in Establishment Clause cases involving school prayer:

> The three appellants chose not to seek an exemption from religious exercises because of

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Waibee, 932 F.2d 765 (9th Cir. 1991) (holding that public school closings on Good Friday are not a violation of the Establishment Clause).

[120] *Islamic School Federation*, 145 D.L.R. 4th at 661.

[121] *Commack*, 932 F.2d at 778. *But see Metzl*, 57 F.3d 618 (employing a contrary analysis of a similar Illinois requirement).

[122] *See, e.g.*, Abington Township v. Schempp, 374 U.S. 203 (1963) (invalidating state mandated Bible recitation in public schools); Engel v. Vitale, 370 U.S. 421 (1962) (invalidating the practice of beginning the public school day with organized prayer).

[123] Education Act, R.S.O. 1980 c. 129 (Can); R.R.O. Req. 262 s. 78(1) (Can.).

[124] Zylberberg v. Sudbury Bd. Of Education, [1988] 52 D.L.R. 4th 577 (Can. Ont. C.A.).

[125] *Id.* at 591.

> their concern about differentiating their children from other pupils. The peer pressure and the classroom norms to which children are acutely sensitive, in our opinion, are real and pervasive and operate to compel members of religious minorities to conform with majority religious practices.[126]

Dissenting Judge Lacourciere argued that the right to seek exemption eliminated the coercive element of the program and distinguished the case from *Big M*.[127] In addition, Judge Lacourciere objected to the court's application of an analysis similar to earlier United States cases, specifically calling attention to the absence of an establishment clause in the Canadian Constitution.[128] The majority was not convinced, however, that the Canadian Constitution calls for "a bridge between church and state rather than a wall of separation."[129]

Similarly, in 1990, the Ontario Court of Appeal invalidated a program of religious education in Ontario public schools.[130] The program originally focused entirely on Christianity, but in recent years had added references to other religions. [131]As was the case with school prayer, parents could seek exemptions for their children.[132] Ontario defended the program as a way of promoting character, eth-

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[126] *Id.*

[127] Judge Lacourciere wrote:

> In contrast to the legislation impugned in *Big M*, it is clear that s. 28 does not seek to compel participation in exercise with a religious component by all public school children. I agree that indirect forms of coercion may result in a Charter violation, but whatever may be the indirect effect of the regulation, it cannot reasonably be suggested that its purpose is to compel participation in these exercises when the exemption is cast in such broad terms.

Id. at 604 (Lacourciere, J., dissenting).

[128] *Id.* at 608 (Lacouriere, J., dissenting).

[129] *Id.* at 609 (Lacourciere, J., dissenting).

[130] Canadian Civil Liberties Ass'n. v. Ontario (Minister of Education), [1990] 65 D.L.R. 4th 1 (Can. Ont. C.A.).

[131] *Id.* at 7–8.

[132] *Id.* at 6–8.

ics, and moral values, but the court concluded that the purpose and effect of the program was to promote Christian beliefs as normative.[133]

Although the public school cases could easily fit into the mainstream of United States Establishment Clause jurisprudence, one aspect of Canadian church-state law involving schools is clearly distinct from the American model. This is the question of direct public funding of religious schools. The close connection between religion, language and culture that has been so much a part of Canada's attempt to unite English and French speaking communities, while allowing them to retain their own identities has led to some specific constitutional choices that require less of a separationist position on aid to religious schools.[134] Section 93 of Canada's original constitutional document, the Constitution Act of 1867, grants exclusive control of education to the provincial governments, and also preserves the rights and privileges of denominational schools existing by virtue of statutes in effect at that time.[135] In 1928, it was held that Section 93 gave the provinces broad authority to determine the degree of public funding of religious schools.[136] In 1984, however, after enactment of the Charter, when the government of Ontario sought to expand public funding for Catholic schools beyond grade 10 to include all secondary school grades, the enactment was challenged as a violation of both Section 2(a) and the principle of equal treatment found in Section 15(1).[137]

The Canadian Supreme Court did not disagree that standing alone, the Charter provisions would seem to prohibit provincial aid to religious schools, but went on to hold that the Charter was not in-

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[133] *Id.* at 28–39. The program was still heavily weighted toward Christianity. In addition, material on non-Christian religions was primarily historical and descriptive, while discussion of Christianity included much more on theory and belief. *Id.*

[134] *See generally*, BUCKINGHAM, *supra* note 89, at 3–31.

[135] Constitution Act, 1867, 30 & 31 Vict., c. 3, § 93 (U.K.).

[136] For a discussion of the history of disputes concerning § 93, see BUCKINGHAM, *supra* note 89, at 38–45.

[137] In re An Act to Amend the Education Act, [1987] 1 S.C.R. 1148 (Can. Ont.).

tended to override Section 93 of the Constitution Act of 1867.[138] The express provisions of Section 93 create a clear contrast on this issue between Canadian and American church-state jurisprudence.[139] In this instance, as we might expect, the constitutional system that expressly provides for non-establishment is more restrictive on government aid. The implication of the Canadian Supreme Court's reasoning, however, is clear that without the express authority given to the provinces by Section 93, the aid to Catholic schools would be constitutionally problematic.

The most factually similar precedent in Canadian appellate courts to *City of Saguenay* was decided in 1999 by the Ontario Court of Appeal.[140] The mayor and council of the town of Penetanguishene opened each council meeting with a recitation of the Lord's Prayer.[141] Foreshadowing the decision in *City of Saguenay*, the court held that the practice infringed the religious freedom of non-Christian residents who wanted to attend the open meeting.[142]

The court found it "clear that the purpose of the recitation of the Lord's Prayer at the opening of council meetings is to impose a Christian moral tone on the deliberations of council."[143] The town argued that this was quite different than the school prayer at issue in *Zylberberg*, in that adults would feel no more than a trivial degree of coercive peer pressure.[144] The court responded that while children may be more vulnerable, the adults, "[j]ust as children[,] are entitled to attend public schools and be free of coercion or pressure to conform to the religious practices of the majority, so everyone is entitled

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138 *Id.* at 1196 ("The *Charter* cannot be applied so as to abrogate or derogate from rights or privileges guaranteed by or under the Constitution.").

139 *See generally* Ira C. Lupu, *Government Messages and Government Money:* Santa Fe, Mitchell v. Helms, *and the Arc of the Establishment Clause*, 42 WM & MARY L. REV. 771 (2001) (providing an overview of the United States Supreme Court's history dealing with government aid to religious schools).

140 Freitag v. Town of Penetanguishene, [1999] 179 D.L.R. 4th 150 (Can. Ont. C.A.).

141 *Id.* at 157.

142 *Id.* at 162.

143 *Id.* at 157.

144 *Id.* at 162.

to attend public local council meetings and to enjoy the same freedom."[145]

The court was unimpressed with the argument that longstanding tradition should insulate the prayer from constitutional scrutiny. Justice Brennan's dissenting opinion in the United States Supreme Court decision in *Marsh*[146] was cited to emphasize that changing times and attitudes can transform a practice once offensive to no one, but later "highly offensive to many persons, the deeply devout and the nonbelievers alike."[147] The court, however, did suggest that a brief non-sectarian prayer might be a constitutionally acceptable alternative to the identifiably Christian Lord's Prayer.

When we review the Canadian cases under the Charter that most closely resemble disputes that the United States would analyze as Establishment Clause cases, we can see an interesting pattern. Putting aside the question of government aid to religious schools, an issue specifically dealt with by the Constitution Act of 1867 in a way untouched by the Charter, the Supreme Court of Canada has reached decisions that are at least as respectful of what Americans would classify as non-establishment principles as United States decisions. And in the specific case of legislative prayer at the level of local government, the Canadian Supreme Court has been more sensitive to these principles. And this is so despite the absence of any analog of the First Amendment Establishment Clause in the Charter or any other provision of Canada's constitution. What can we learn from the Canadian Supreme Court's focus on the threat to individual religious freedom posed by government support for religion that might be helpful in clarifying United States First Amendment jurisprudence?

IV. NON-ESTABLISHMENT: A SEPARATE PRINCIPLE OR A NECESSARY ASPECT OF RELIGIOUS FREEDOM?

Some would dismiss an inquiry into what insights foreign court interpretations of their own constitutional provisions might

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[145] *Id.*

[146] Marsh v. Chambers, 463 U.S. 783, 795–822 (Brennan, J., dissenting).

[147] *Freitag*, [1999] 179 D.L.R. 4th at 165 (quoting *Marsh*, 463 U.S. at 817 (Brennan, J., dissenting)).

provide for American courts as they interpret United States constitutional law.[148] Although courts of other common law nations frequently draw on American cases for persuasive authority in cases involving individual rights, it has been extremely rare to find the United States Supreme Court citing foreign law.[149] While occasional separate opinions from a Justice might suggest that other nations' experiences might "cast an empirical light on the consequences of different solutions to a common legal problem,"[150] the Court's prevailing position, as most clearly articulated by Justice Scalia, has been that comparative constitutional analysis is helpful only when drafting, rather than interpreting, a constitution.[151]

Certainly, where a foreign constitution reflects a basic choice of values inconsistent with the United States Constitution, comparative analysis makes little sense. Where foreign law is equally committed to common values, a different picture emerges. A commitment to religious freedom has become a widely accepted international norm, one embraced by all western democracies. The scope of this freedom has evolved, both in the United States, where nineteenth century mere toleration of religious minorities has grown to, at least, equal treatment of all faiths, and in other nations, even those where a formal establishment still exists.[152] This would suggest that the scope of religious freedom, and its relationship to non-

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[148] This position is most closely associated with Justice Scalia. *See* Printz v. United States, 521 U.S. 898, 921 n.11 (maintaining that a comparative analysis with other countries may be relevant in writing a constitution, but not in interpreting one).

[149] *See, e.g.*, R. v. Rahey, [1987] 1 S.C.R. 588, 639 ("[I]t is natural and even desirable for Canadian courts to refer to American constitutional jurisprudence in seeking to elucidate the meaning of *Charter* guarantees that have counterparts in the United States Constitution"). But at the same time, courts "[s]hould be wary of drawing too ready a parallel between constitutions born to different countries, in different ages." *Id.*

[150] *See Printz*, 521 U.S. at 976 (Breyer, J., dissenting).

[151] *See* In re An Act to Amend the Education Act, [1987] 1 S.C.R. 1148 (Can. Ont.).

[152] *See supra* notes 72–88 and accompanying text. For the evolution of church-state law in nineteenth century United States at the state level, prior to the application of the First Amendment to the states, see STEVEN K. GREEN, THE SECOND DISESTABLISHMENT: CHURCH AND STATE IN NINETEENTH-CENTURY AMERICA (2010).

establishment principles, is a subject on which foreign law may provide helpful insight.

The presence of two separate First Amendment clauses dealing with religion has led to significant difficulty in interpretation. On the surface, there seems to be a degree of conflict between the Establishment Clause, which suggests that government disregard religion in its decisions, and the Free Exercise Clause, which suggests that sensitivity to religion is sometimes required. For judges and others analyzing constitutional claims involving religion, the presence of two clauses would seem to require an initial decision of whether a case essentially presents an establishment or a free exercise issue. While different tests have emerged for analysis of problems arising under each clause, it should be obvious that any case involving government and religion presents concerns touching the values behind each clause.

In some cases, the coexistence of non-establishment and free exercise values is obvious and discussed explicitly by courts. In *Locke v. Davey*,[153] for example, the Supreme Court faced a challenge to the State of Washington's rule disallowing participation in a state program of merit scholarships by those pursuing a college-level program preparing the student for the ministry.[154] The majority of the Court permitted Washington to pursue non-establishment values by refusing to fund preparation for ministry,[155] while the dissenters saw this as state discrimination against religion, essentially the type of state action infringing free exercise values.[156] From the earliest days of Establishment Clause cases, defenders of state practices, such as government aid to religiously affiliated schools, or the presence of prayer in public schools, have defended the programs as no more than attempts to eliminate discrimination against religious institutions,[157] or recognition of believers' free exercise rights within a pub-

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[153] 540 U.S. 712 (2004).

[154] *Id.* at 715.

[155] *Id.* at 719–25.

[156] *Id.* at 726–34 (Scalia, J., dissenting).

[157] *See, e.g.*, Everson v. Board of Education, 330 U.S. 1, 16 (1947) ("[W]e must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from ex-

lic forum.[158] Similarly, opponents of religiously based exemptions from legal obligations have characterized them as improper government favoritism, implicating non-establishment values.[159]

The overlap of Establishment Clause and free exercise values may explain recent trends in the Supreme Court's application of each clause. Establishment Clause cases have moved in a more accommodationist direction, both in contexts involving government financial aid to religious institutions,[160] and government symbolic support of religion.[161] At the same time, the Court's application of the Free Exercise Clause has been limited to instances of government hostility to religion[162]—a development that, implicitly at least, recognizes non-establishment values. While the two clauses seem to converge somewhat at the level of First Amendment analysis, the Court has made it clear that at the state level, governments may extend free exercise protection under their own constitutions beyond the First Amendment limits without creating non-establishment problems,[163]

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tending its general state law benefits to all its citizens without regard to their religious belief.").

[158] *See, e.g.*, Santa Fe Indep. School Dist. v. Doe, 530 U.S. 290, 323 (2000) (Rehnquist, C.J., dissenting) (arguing in favor of permitting student-led invocations at high school football games, suggesting that the Court's decision impinges on the students' free exercise rights).

[159] In *United States v. Seeger*, 380 U.S. 163 (1965), and *Welsh v. United States*, 398 U.S. 333 (1970), the Court significantly expanded the definition of "religion" in the Selective Service Act to include belief systems beyond those professing traditional theistic beliefs. Justice Harlan concurred, despite his view that this was clearly contrary to legislative intent, on the ground that an exemption from the military draft available only to members of traditionally defined religions would create a serious Establishment Clause problem. *Welsh*, 398 U.S. at 356–61 (Harlan, J. concurring).

[160] *See, e.g.*, William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991).

[161] *See* Lupu, *supra* note 139, at 791–72.

[162] *See generally* Erwin Chemerinsky, *Why Justice Breyer Was Wrong in* Van Orden v. Perry, 14 WM. & MARY BILL OF RTS. J. 1, 7 (2005).

[163] *Compare* Emp't Div. Dep't. of Human Res. of Oregon v. Smith, 494 U.S. 872 (1990) (finding no free exercise exemption required from neutral statute of general applicability), *with* Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) (requiring free exercise exemption where religion is singled out for hostile treatment).

or, as in *Locke*, enforce non-establishment principles of their state constitutions beyond the requirements of the First Amendment.[164]

The presence of non-establishment principles and free exercise principles in any case involving government and religion means that a court must decide which set of principles dominates in a particular case. That decision will likely lead a court to classify a case as an Establishment Clause or a Free Exercise Clause case, but the label will be less significant than the degree of deference given to each principle in the court's analysis. This allows us to see how Canadian courts have come to interpret religious freedom as including some degree of non-establishment, despite the absence of an establishment clause in the Canadian Charter.

If any case involving government and religion calls for some degree of balancing principles, how much weight should be given to each? We would expect constitutional text to be of at least some assistance here. Before discussing the significance of the existence or absence of an express non-establishment clause, we might note a possible significant textual difference between the scope of the religious freedom principle in the United States and Canadian Constitutions.

The Free Exercise Clause of the First Amendment expressly protects only "religion."[165] The Canadian Charter, in contrast, but in keeping with the most common formulation in post-World War II national and international documents, protects rights of both "religion" and "conscience."[166] At first glance, this suggests a broader, if not a stronger, application of the right, under the Canadian formulation. In addition, the broader formulation eliminates the need, not uncommon in First Amendment cases, to determine when a belief system qualifies for protection as a religion.

In practice, however, there may be less significance to this distinction than might appear likely. In cases interpreting the scope of the statutory exemption of religiously-based conscientious objectors from the military draft during the Vietnam War era, the Su-

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[164] *See generally* Angela C. Carmella, *State Constitutional Protection of Religious Exercise: An Amazing Post-*Smith *Jurisprudence*, 1993 BYU L. REV. 275 (1993).
[165] *See* Locke v. Davey, 540 U.S. 712 (2004).
[166] U.S. CONST. amend. I.

preme Court broadened the scope of the concept of religion far beyond traditional boundaries.[167] A "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying"[168] as religious would suffice. Clearly, the line between the religious and the conscientious was, if not eliminated, certainly blurred. Of interest for our purposes of examining the relationship between freedom of religion and non-establishment principles, Justice Harlan concurred in these decisions despite skepticism on legislative intent, on the grounds that limiting the definition to traditional forms of religion would pose a serious Establishment Clause problem.[169]

Although the draft exemption cases were matters of statutory interpretation,[170] courts in subsequent years applied similarly broad notions of religion in a wide range of cases seeking free exercise exemptions. While the Supreme Court has noted that purely "personal reasons" might not qualify, and also allowed courts to examine the sincerity of the claimant's belief, in the absence of evidence of insincerity, or a belief system so outlandish as to suggest that the claimant is merely seeking personal gain, courts have been hesitant to reject claims of religious belief.[171] Although Canadian courts do not seem to have dealt with the scope of "conscience," it would not be surprising if that concept were also subject to some limits, such as sincerity. The Charter language more clearly protects agnostic or atheistic belief systems, but it would seem that in practice the absence of a reference to conscience in the First Amendment does not lead to a significant difference in the breadth of the First Amendment Free Exercise Clause and the religious freedom provision of the Canadian Charter.

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[167] Canadian Charter of Rights and Freedoms § 2(a).

[168] United States v. Seeger, 380 U.S. 163, 176 (1965); *see also* Welsh v. United States, 398 U.S. 333, 339 (1970).

[169] *Seeger*, 380 U.S. at 176.

[170] *Welsh*, 398 U.S. at 356–61 (Harlan, J., dissenting).

[171] *See, e.g.*, Malnak v. Yogi, 592 F.2d 197 (3d Cir. 1979) (finding transcendental meditation as religion); Petersen v. Wilmer Commcn's, Inc., 205 F. Supp. 2d 1014 (2002) (finding "Creativity," a philosophy of white supremacy, as religion); Howard v. United States, 864 F. Supp. 1019 (D. Colo. 1994) (finding Satanism as religion).

Justice Harlan's insight that a narrow definition of religion in the draft exemption cases would raise serious Establishment Clause questions points to one way in which the Establishment Clause serves to limit government not in merely abstract ways, but in service of freedom of conscience. How does a government practice that does not coerce an individual (in Justice Scalia's narrow definition of coercion)[172] create a concrete, individualized injury sufficient to grant standing to those objecting to the program? The Supreme Court addressed this question in *Flast v. Cohen*,[173] holding that the Establishment Clause created a right to be free of government actions rising to the level of establishment.[174] The Court recognized that denial of standing would essentially immunize from challenge government financial aid to religion, the most classic type of establishment activity.[175] In doing so, the Court brought within the protection of the First Amendment religious dissenters, not merely those of different faiths, but also the nonreligious. Although subsequent Supreme Court decisions have chipped away at the holding of *Flast*,[176] it remains as a reminder that the religion clauses are meant to do more than assure equal treatment of traditional religions.

The recognition that the Establishment Clause does not merely limit government in pursuit of some abstract principles, but rather in the service of individual rights, can go a long way to explain the presence of a non-establishment principle in a constitutional system without an express establishment clause, particularly one which, like Canada's, respects freedom of conscience as well as religion. At the same time, when Canadian courts decide cases presenting what

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[172] The most prominent of the cases in which courts refuse to recognize individual beliefs are those in which is seems clear that the religious claim was meant to protect illegal drug use. *See, e.g.*, United States v. Meyers, 95 F.3d 1475 (10th Cir. 1996); State v. Pederson, 679 N.W.2d 368 (Minn. Ct. App. 2004).

[173] 392 U.S. 83 (1968).

[174] *Id.* at 103–04 ("The concern of Madison and his supporters was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another and to aid religion in general.").

[175] *Id.*

[176] Valley Forge Christian College v. Americans United for the Separation of Church & State, 454 U.S. 464 (1982) (finding no taxpayer standing to challenge the transfer of government property to a religious college).

United States courts would recognize as Establishment Clause cases as religious freedom cases, and deciding them in ways that are no less protective of non-establishment values (and, in the case of local legislative prayer, more protective), it should suggest that recent Establishment Clause claims in the United States Supreme Court have leaned too far in the direction of accommodation.

The existence of two separate religion clauses in the First Amendment may serve to mask the degree in which they are each grounded in the protection of individual conscience. Standing alone, the Establishment Clause can seem to be a restraint on government, but one disconnected from any individual right. Only when a severe instance of coercion is challenged will the function of the Clause in protecting individual rights be recognized.

Canadian decisions, starting with *Big M* and including *City of Saguenay*, serve to highlight the connection between religious freedom and non-establishment principles.[177] By itself, the principle of free exercise prohibits state coercion in matters of religion, and as a corollary, insists on non-discrimination based on religion. The presence of the Establishment Clause in the First Amendment, then, should be seen as serving to emphasize the connection between non-establishment values and individual religious freedom, rather than the introduction of a separate principle that stands in tension with the Free Exercise Clause.

At the very least, the contrast between *City of Saguenay* and *Town of Greece* should suggest that non-establishment values are being under-enforced by the United States Supreme Court. To interpret the Establishment Clause as requiring only neutrality among religions ignores the growing number of Americans who do not regard themselves as belonging to a particular denomination, including but not limited to atheists and agnostics.[178] To see no Establishment Clause problem in the absence of government coercion, in the narrow definition put forward by Justice Scalia, ignores the significance of government endorsement of religion. The United States Supreme Court is unlikely to begin citing foreign decisions to any significant

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[177] *See* R v. Big M Drug Mart, [1985] 1 S.C.R. at 301–02; Mouvement Laïque Québécois v. City of Saguenay, 2015 SCC 16, [2015] 2 S.C.R. 3, para. 5 (Can.).

[178] *See supra* notes 100–116 and accompanying text.

extent in the near future. But where a constitutional system that, in the absence of an express Establishment Clause leads to court decisions that seem more deferential to non-establishment values than recent decisions of the United States Supreme Court, it certainly provides food for thought.[179] Is it possible, however paradoxical, that a separate Establishment Clause, by disguising the connection between non-establishment principles and free exercise rights, might lead to less respect for non-establishment principles than would be the case if the clause were not there?

[179] *See America's Changing Religious Landscape*, PEW RESEARCH CENTER (May 12, 2015), http://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/. The survey finds 22.8% of America's "unaffiliated" with any particular religion. Interestingly, Pew finds a similar trend in Canada, *Canada's Changing Religious Landscape*, PEW RESEARCH CENTER (June 27, 2013), http://www.pewforum.org/2013/06/27/canadas-changing-religious-landscape/.