
Is Establishment Consistent with Religious Freedom?

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Are religious freedom and religious establishment mutually exclusive? This question evokes a classic dichotomy that is at the heart of many legal systems, notably that of the United States—the separation of church and state. The prevailing view appears to be that these notions are indeed mutually exclusive and that nations that single out a specific religion and accord it a privileged position inevitably discriminate against adherents of other faiths.

The authors argue, however, that a weak form of establishment is in fact consistent with religious freedom. Examining case law and legislation in countries such as England, Canada, Australia, and South Africa, they maintain that a state that explicitly acknowledges a religion without coercing or compelling religious practice or observance is compatible with religious freedom. Moreover, the authors suggest that religious establishment is inescapable insofar as all liberal democracies have an establishment.

La liberté de culte et l'*establishment* religieux sont-ils mutuellement exclusifs ? La question évoque une dichotomie classique au cœur de nombre d'ordres juridiques, en particulier celui des États-Unis, qui consacre la séparation entre Église et État. Le point de vue dominant semble être à l'effet que ces notions sont en effet exclusives et que les nations qui isolent et accordent un statut privilégié à une religion particulière ne peuvent que discriminer contre les fidèles de confessions différentes.

Les auteurs soutiennent pour leur part qu'une forme modeste d'*establishment* est en réalité compatible avec la liberté de culte. S'appuyant sur un examen de la jurisprudence et de la législation en vigueur dans des pays comme l'Angleterre, le Canada, l'Australie et l'Afrique du Sud, ils soutiennent qu'un État peut reconnaître une foi particulière, sans pour autant y compromettre la liberté de culte, à condition que la pratique ou l'observance de cette foi ne soit ni forcée ou requise. Ils suggèrent de plus que l'*establishment* religieux est inévitable, dans la mesure où toutes les démocraties libérales en ont un.

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Introduction

Can a state have an establishment of religion *and* religious liberty? Or is freedom of religion necessarily a condition that can exist only in the absence of an established church or faith? The prevailing view appears to be the latter: a nation that singles out a church for special privileges or accords it a unique status is, broadly speaking, being unfair.¹ It is, so the argument often goes, unjustly discriminating against adherents of other faiths, including those of no religion. Those who do not belong to the established faith may feel marginalized, perhaps even demeaned.

In this article we seek to challenge the prevailing view. We argue that establishment (at least in its contemporary, milder form) is not antithetical to religious freedom. As a matter of principle, religious liberty properly understood can coexist with religious establishment. In terms of current law, it is interesting to note that the relevant international conventions and the case law of the *European Convention on Human Rights*² do not see the two as inconsistent. This reflects, we believe, the correct appreciation of the theoretical problem.

Much of the criticism of establishment today derives from the voluminous American First Amendment jurisprudence on non-establishment. This case law—which, as many United States scholars concede, is highly controversial and confused³—should not dictate the answer to the question we address.

Establishment is, in fact, consistent with religious freedom. Establishment, we shall explain, is inescapable, and thus if religious liberty is to be realized at all it is always under the auspices of a state orthodoxy on religious matters. Even if a state does not have an established church, it will have an established position on religion. A secular, liberal state is not “neutral”. It tolerates religions on its own terms. Religious liberty is always exercised in the shadow of establishments, whether conventionally religious or not.

In Part I we define the key concepts at issue, providing a thorough account of both “establishment” and “religious liberty”. In Part II we examine the incompatibility

¹ See Sebastian Poulter, *Ethnicity, Law and Human Rights: The English Experience* (Oxford: Oxford University Press, 1998) at 62; Peter W. Edge, “Religious Remnants in the Composition of the United Kingdom Parliament” in Richard O’Dair & Andrew Lewis, eds., *Law and Religion: Current Legal Issues*, vol. 4 (Oxford: Oxford University Press, 2001) 443 at 454-55 [Edge, “Religious Remnants”]; Paul Weller, “Equity, Inclusivity and Participation in a Plural Society: Challenging the Establishment of the Church of England” in Peter W. Edge & Graham Harvey, eds., *Law and Religion in Contemporary Society: Communities, Individualism and the State* (Aldershot, U.K.: Ashgate, 2000) 53.

² [European] Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 U.N.T.S. 221 (entered into force 3 September 1953) [ECHR].

³ See e.g. Michael W. McConnell, “Neutrality, Separation and Accommodation: Tensions in American First Amendment Doctrine” in Rex. J. Ahdar, ed., *Law and Religion* (Aldershot, U.K.: Ashgate, 2000) 63.

position, namely, that the concepts of religious freedom and establishment are inherently at odds with one another. The compatibility position, which sees no inherent dissonance between the two concepts, is then outlined in Part III. In Part IV we address the principal objections to the compatibility defence—the alienation and inequality charges—and explain the practical impossibility of absolute neutrality.

I. Clarifying the Critical Concepts

A. “Establishment”

“Establishment” is an ambiguous term, “a word of no certain meaning”,⁴ never “a legal term of art”;⁵ a concept that is “vague, imprecise and ever-changing”.⁶ There are several overlapping meanings. In a judgment discussing section 116 of the *Commonwealth of Australia Constitution Act 1900*,⁷ Gibbs J. identified four distinct senses in which a religion could be established by law:

The widest of these meanings is simply to protect by law ... Secondly, and this is the most usual modern sense, the word means to confer on a religion or a religious body the position of a state religion or a state church ... Thirdly, when used in relation to the establishment principle ... the word means to support a church in the observance of its ordinances and doctrines ... [T]he establishment principle can be held by churches that are unconnected with the state, and are supported by voluntary contributions alone. ... A fourth possible meaning of the word “establish” is simply to found or set up a new church or religion, but that is obviously not the meaning used in s. 116.⁸

This section will consider the first three senses of establishment in detail, beginning with a familiar exemplar of an established church—the Church of England (“the Church”)—before moving further afield.

In England the legal incidents of establishment are often thought of primarily with reference to the interpenetration of state and religious institutions, reflected in three aspects.⁹ First is the position of the sovereign as head of state and Supreme Governor of the Church of England.¹⁰ Second, there is state involvement in church procedures,

⁴ Julian Rivers, “Irretrievable Breakdown? Disestablishment and the Church of England” (1994) 3 Cambridge Papers 1.

⁵ M.H. Ogilvie, “What is a Church by Law Established?” (1990) 28 Osgoode Hall L.J. 179 at 195.

⁶ *Ibid.* at 196.

⁷ (Cth) [*Australian Constitution*].

⁸ A.G. (Vict.); *Ex rel. Black v. The Commonwealth* (1981), 146 C.L.R. 559 at 595-97 (H.C.A.) [*Black v. The Commonwealth*].

⁹ See Vernon Bogdanor, *The Monarchy and the Constitution* (Oxford: Clarendon, 1995) c. 7; Frank Cranmer, “Church-State Relations in the United Kingdom: A Westminster View” (2001) 6 Ecc. L.J. 111; Richard Davies, “Church and State” (1976) 7 Cambrian L.R. 11-12.

¹⁰ See Ian Bradley, *God Save the Queen: The Spiritual Dimension of Monarchy* (London: Darton, Longman & Todd, 2002).

be it the requirement of parliamentary approval for church legislation,¹¹ or the Crown's role in senior ecclesiastical appointments.¹² Third, there is church involvement in state processes, such as the coronation of a new monarch¹³ and the representation of senior bishops in the House of Lords.¹⁴ To these constitutional dimensions should be added the status of ecclesiastical law as part of Britain's common law, and the position of church courts.

Judges have been careful, however, to distinguish the Church of England from the state.¹⁵ Recently, in *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v. Wallbank*,¹⁶ the House of Lords held that the Parochial Church Council of the Church of England was not a "public authority" under the *Human Rights Act 1998*.¹⁷ Lord Hope of Craighead stated that the Church of England

plainly has nothing whatever to do with the process of either central or local government. It is not accountable to the general public for what it does. It receives no public funding, apart from occasional grants from English Heritage

¹¹ Ecclesiastical measures are made under the *Church of England Assembly (Powers) Act, 1919*, 9 & 10 Geo. V., c. 76, as am. by the *Synodical Government Measure 1969* (U.K.), 1969 No. 2. To become law a measure must first be passed by the General Synod of the Church of England, be approved by parliamentary resolution (where it is scrutinized by a special ecclesiastical committee), and then receive royal assent. See Norman Doe, *The Legal Framework of the Church of England: A Critical Study in a Comparative Context* (Oxford: Clarendon, 1996) c. 3.

¹² Bishops are appointed by the Queen, as Supreme Governor, on the recommendation of the Prime Minister. The Prime Minister chooses from two names that are proposed in a ranked order by the Crown Appointments Commission, a church body. Prime Ministers are not obliged to follow the order in which the Commission ranks candidates and may ask for alternative names. See Prime Minister James Callaghan's description when introducing the procedure: U.K., H.C., vol. 912, col. 612-14 (8 June 1976); Bernard Palmer, *High and Mitred: A Study of Prime Ministers as Bishop-Makers, 1837-1977* (London: Cromwell, 1992).

¹³ See Bradley, *supra* note 10 at c. 8-9 (the Coronation Oath includes a promise to defend the Church of England).

¹⁴ Twenty-six bishops are entitled to sit—the Archbishops of Canterbury and York, the Bishops of London, Durham, and Winchester, and twenty-one other diocesan bishops according to seniority, amounting to approximately four per cent of the membership of the interim House of Lords. Due to the failure to reach political consensus on further reform of the House of Lords, following the removal of most hereditary peers, the government has proposed that the bishops remain entitled to sit for the foreseeable future. See U.K., Department for Constitutional Affairs, *Next Steps for the House of Lords* (London: Her Majesty's Stationery Office, 2003); Charlotte Smith, "The Place of Representatives of Religion in the Reformed Second Chamber" (2003) P.L. 674 (for discussion of earlier proposals).

¹⁵ See Phillimore J. in *Marshall v. Graham*, [1907] 2 K.B. 112 at 126: "A Church which is established is not thereby made a department of the State. The process of establishment means that the State has accepted the Church as the religious body in its opinion truly teaching the Christian faith, and given to it a certain legal position, and to its decrees, if rendered under certain legal conditions, certain civil sanctions."

¹⁶ [2003] 3 All E.R. 1213, [2003] UKHL 37 [*Wallbank*].

¹⁷ *Human Rights Act 1998* (U.K.), 1998, c. 42, s. 6(3) [*Human Rights Act 1998*].

for the preservation of its historic buildings. In that respect it is in a position which is no different from that of any private individual. ...

... The state has not surrendered or delegated any of its functions or powers to the Church. None of the functions that the Church of England performs would have to be performed in its place by the state if the Church were to abdicate its responsibility ... The relationship which the state has with the Church of England is one of recognition, not of the devolution to it of any of the powers or functions of government.¹⁸

Lord Rodger of Earlsferry stated that

The mission of the Church is a *religious* mission, distinct from the secular mission of government, whether central or local ... This is true even though the Church of England has certain important links with the state. Those links, which do not include any funding of the Church by the government, give the Church a unique position but they do not mean that it is a department of state ... In so far as the ties are intended to assist the Church, it is to accomplish the Church's own mission, not the aims and objectives of the government of the United Kingdom.¹⁹

Nevertheless, by virtue of its role as a national church, citizens have a number of legal entitlements *against* the Church of England that they do not have against other religious bodies. The Church of England is the only religious body legally bound to provide ministry to the whole population (anyone living within parish boundaries), and not just to its own members, as evidenced by the duties in canon law to baptize, marry, and bury parishioners.²⁰

The chaplaincy responsibility of the Anglican Church is also reflected in a small number of technical provisions affording it preferential treatment in order to pursue its national ministry in education and prisons.²¹ These duties are cited by some modern defenders of establishment in response to the claim that the Anglican Church's status should be diminished, notwithstanding declining attendance at services and the increasing pluralism and secularism of British society. Its supporters argue that the Church of England has a distinctive status because it is a *national* church, and that this depends on its societal role rather than on strength of numbers. The geographical reach of the parish system, together with chaplaincy responsibilities and heavy involvement in church schools are all evidence of a national role. Some distinguish

¹⁸ *Supra* note 16 at paras. 59-61.

¹⁹ *Ibid.* at para. 156 [emphasis in original].

²⁰ See Augur Pearce, "Religious Denomination or Public Religion? The Legal Status of the Church of England" in Richard O'Dair & Andrew Lewis, eds., *Law and Religion: Current Legal Issues*, vol. 4 (Oxford: Oxford University Press, 2001) 457 at 462-63; Mark Hill, *Ecclesiastical Law*, 2d ed. (Oxford: Oxford University Press, 2001) c. 5; Doe, *supra* note 11 at 226-28, 317-18, 358 ff., 386-88. In *Wallbank*, Lord Nicholls of Birkenhead characterized the rights of parishioners to attend services and in respect of marriage and burial as "public" in nature under the *Human Rights Act 1998* (*ibid.* at para. 16); see also Lord Scott of Foscote, *ibid.* at para. 130, and Lord Rodger of Earlsferry, *ibid.* at para. 170.

²¹ See text accompanying notes 50-51.

between “earthed” or “low” establishment, by which they mean the daily on-the-ground presence of the Church of England in community life, and “high” establishment, referring to the church’s constitutional status.²² It is argued that “earthed” establishment *justifies* the elements of “high” establishment.²³

Establishment is not uniquely English and need not take the form modelled in that country. Among other European states, Denmark,²⁴ Finland,²⁵ Norway,²⁶ and Greece²⁷ all have established churches. By contrast, in several European countries commonly thought of as traditionally Catholic, the trend has been to clearly separate church and state; constitutional references to a separation of church and state can be found in Spain,²⁸ Portugal,²⁹ and Ireland.³⁰ Rather than looking for a uniform pattern among established churches, it is probably safer to look instead for characteristics that may be present to a greater or lesser degree across different contexts. This approach is geographically inclusive³¹ and has received a measure of judicial backing.³²

²² See Wesley Carr, “A Developing Establishment” (1999) 102 *Theology* 2; David McClean, “The Changing Legal Framework of Establishment” (2004) 7 *Ecc. L.J.* 292.

²³ In contrast, a recent report from a left wing think-tank suggests that partial disestablishment (severing the connection between the monarch and the Church of England) need not affect the Church’s national role. See Fabian Society, *The Future of the Monarchy: The Fabian Commission on the Future of the Monarchy* (London: Fabian Society, 2003) at 64-79; this point is also discussed in Ian Leigh, “By Law Established?: The Church of England and Constitutional Reform?” [2004] *P.L.* 266 [Leigh, “By Law Established?”].

²⁴ “The Evangelical Lutheran Church shall be the Established Church of Denmark, and, as such, it shall be supported by the State” (*Constitution, 1953* (Denmark), s. 4); “The King shall be a member of the Evangelical Lutheran Church” (*ibid.*, s. 6).

²⁵ *Constitution Act of Finland, 1999* (731/1999), s. 76.

²⁶ The Evangelical-Lutheran religion is the “official religion” of Norway (*The Constitution of the Kingdom of Norway, 1814*, s. 2(2)); the King of Norway must belong to the Church and “uphold and protect the same” (*ibid.*, s. 4).

²⁷ *Constitution of Greece, 1975*, s. 3.1.

²⁸ *Constitution, 1978* (Spain), s. 16(3).

²⁹ *Constitution of the Portuguese Republic, 1976*, s. 41(4).

³⁰ *Constitution of Ireland, 1937*, s. 44(2.2) [*Constitution of Ireland*]. This follows an amendment in 1972, which removed reference to the “special position of the Holy Catholic Apostolic and Roman Church as the guardian of the Faith professed by the great majority of the citizens”; other provisions (also repealed) “recognized” several of the other denominations (David Feldman, *Civil Liberties and Human Rights in England and Wales*, 2d ed. (Oxford: Oxford University Press, 2002) at 909). On the state of the constitution prior to the amendment, see *Quinn’s Supermarket v. Attorney-General*, [1972] *I.R.* 1 at 23-4, Walsh J.

³¹ See e.g. Gerhard Robbers, ed., *State and Church in the European Union* (Baden-Baden: Nomos, 1996); Gerhard Robbers, ed., *Church Autonomy: A Comparative Survey* (Frankfurt: Peter Lang, 2001).

³² Comparing the position of the Church of England to section 116 of the *Australian Constitution*, Stephen J. stated: “It may be accepted that there is no single characteristic of that Church which of itself constitutes the touchstone of its establishment. Over the centuries the rights enjoyed by the Church of England, as the established church, have greatly changed, as has that subjection to

The potential forms of establishment vary.³³ There can be formal, de jure establishments or informal, de facto establishments. These establishments may be symbolic or substantive in nature, and may render official a generic religion, a collection of faiths (or denominations), or just one faith.

A formal establishment of a symbolic kind is illustrated by nations whose constitutions invoke dependence upon a deity.³⁴ Several examples can be given. The preamble to Canada's *Constitution Act, 1982* commences: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law ..."³⁵ The Australian constitution recites that the people of its various states were "humbly relying on the blessing of Almighty God" in resolving to form a federal Commonwealth.³⁶ Ireland's constitution commences: "In the name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred, We, the people of Ireland, humbly acknowledging all our obligations to our Divine Lord, Jesus Christ ..."³⁷ The preamble to the Polish constitution of 1997 refers to "those who believe in God as the source of truth, justice, good and beauty, As well as those not sharing such faith, ... our culture rooted in the Christian heritage of the Nation" and "recognizing our responsibility before God ..."³⁸ Religious establishment may end at the point of symbolic acknowledgement, with no further translation of religious doctrine into public policy and institutions.

Even a symbolic reference may, however, be divisive, as shown by the negotiations over the new Constitution for the European Union. Proposals to include reference to Europe's Christian heritage or Judaeo-Christian inheritance were supported by several Catholic countries but were opposed by other states, France especially, which saw even a historical reference of this kind as compromising the secular nature of the union. The eventual compromise, reached by the Inter-Governmental Conference in June 2004, was the inclusion in the text of a bland

temporal authority which is the concomitant of establishment" (*Black v. The Commonwealth*, *supra* note 8 at 606).

³³ See Stephen V. Monsma & J. Christopher Soper, *The Challenge of Pluralism: Church and State in Five Democracies* (Lanham, Md.: Rowan & Littlefield, 1997) at 11; Rivers, *supra* note 4. Rivers cautions: "Every establishment must be looked at in detail first" (*ibid.* at 4).

³⁴ See Rivers, *ibid.* at 3; George Winterton, "A New Constitutional Preamble" (1997) 8 *Pub. L. Rev.* 186 at 186.

³⁵ Being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. The Ontario Court of Appeal has held that the reference to the "supremacy of God" does not limit the meaning to be given to freedom of religion under section 2 of the Charter: *Zylberberg v. Sudbury Board of Education (Director)* (1988), O.R. (2d) 641 at 657, 52 D.L.R. (4th) 577 [*Zylberberg*].

³⁶ *Australian Constitution*, *supra* note 7, Preamble.

³⁷ *Constitution of Ireland*, *supra* note 30, Preamble.

³⁸ *Constitution, 1997* (Poland), Preamble.

statement referring to the signatories' "inspiration from the cultural, religious and humanist inheritance of Europe".³⁹

A formal, de jure establishment may be substantive when a specific religion is identified and promoted. Contemporary examples include the Church of England, the Church of Scotland, and the Lutheran Church in Scandinavian countries (i.e., Denmark, Norway, Finland, and Iceland). More than one religion may be favoured above others in this way. In Germany, for example, a diluted form of state supported, quasi-establishment persists in that the three main historical religious communities—Evangelical, Catholic, and Jewish—are public corporations and qualify for support pursuant to the church tax.⁴⁰ In addition, clergy and church officials have the right to take part in rendering public services. Compared to Islam or other religions, these religions could be said to be established in a formal de jure sense.⁴¹

Finally, there may exist an informal, de facto establishment of religion. One particular faith may be favoured by the state in practice due to its "overwhelming numerical or cultural strength in that country."⁴² Alternatively, the state may promote a generic form of religion by passing laws and implementing public policies that reflect the broad tenets and ideals of one religion in particular—for example, laws that broadly concur with Judaeo-Christian principles.⁴³ This approach might entail the enactment of legislation recognizing religious holidays or festivals,⁴⁴ the adoption of blasphemy laws that refer to only one religion,⁴⁵ or the preference of a given religion in legislative provisions governing collective worship in schools.⁴⁶

³⁹ *Provisional Consolidated Version of the Draft Treaty Establishing a Constitution for Europe* (25 June 2004) CIG 86/04, online: Conference of the Representatives of the Governments of the Member States <http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/misc/81243.pdf>.

⁴⁰ See Monsma & Soper, *supra* note 33 at 172-92.

⁴¹ See Peter W. Edge, "Reorienting the Establishment Debate: From the Illusory Norm to Equality of Respect" (1998) 27 *Anglo-Am. L. Rev.* 265 at 269. If the essence of establishment is special legal treatment then there may be more than one established religion or church. Edge's own definition is: "A religious organization is established where there are laws which apply to that particular religious organization ... which do not apply to the majority of other religious organizations" (*ibid.* at 271).

⁴² Monsma & Soper, *supra* note 33 at 11.

⁴³ See Rex J. Ahdar, "A Christian State?" (1998-1999) 13 *J. L. & Religion* 453.

⁴⁴ See *infra* discussion of *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321 [*Big M Drug Mart* cited to S.C.R.] and *S. v. Lawrence*, [1997] 4 S. Afr. L.R. 1176 [*Lawrence*].

⁴⁵ Or in the United Kingdom, to the established church: "A person may, without being liable to prosecution for it, attack Judaism, or Mahomedanism, or even any sect of the Christian Religion (save the established religion of the country); and the only reason why the latter is in a different situation from the others is, because it is the form established by law, and is therefore a part of the constitution of the country" (Alderson B. in *Gathercole's Case* (1838), 168 E.R. 1140 at 1145). See *R. v. Chief Metropolitan Stipendiary Magistrate, Ex parte Choudhury*, [1991] 1 Q.B. 429, confirming that the common law offence of blasphemy does not apply in the case of an attack on Islam (the case concerned an abortive prosecution for publication of Salman Rusldie's *The Satanic Verses*).

⁴⁶ The legal requirement is for a collective act of worship "wholly or mainly of a broadly Christian character," but not reflecting a particular denominational tradition (*Schools Standards and*

It is the second of these types—the legal promotion of a particular religion—that is most commonly referred to as establishment (and which the remainder of this section will consider), but the other two should be borne in mind, and we will return to them. The extent of the connection between a religious body and the state can be measured in two distinct ways: by legal privileges granted to the body that other religions do not enjoy and by powers that the state has over the body in question (e.g., to appoint or dismiss clergy and other staff and to approve or veto certain decisions). Privileges raise questions of religious liberty for other, less favoured religious bodies. State controls, on the other hand, raise questions of liberty for the established religion itself.

Religious privilege and state control are both matters of degree. Under some constitutional arrangements the established church enjoys considerable advantages, both symbolic and practical, over other religions. For instance, where it is legally declared to represent the state religion,⁴⁷ the state may collect taxes on a church's behalf,⁴⁸ membership may be a precondition for access to public education or participation in public life,⁴⁹ or public recruitment by non-established religions may be prohibited or controlled. A few examples of privileges afforded to Christian churches along these lines can still be found in some European states, but the clearest examples, from the contemporary Islamic world, are beyond the scope of this article.

In other cases establishment amounts to a weak preference—for example, minor relaxation of the formalities that apply to other religious bodies in conducting

Framework Act 1998 (U.K.), 1998, c. 31, s. 70 and Sch. 20). Legal protection is given to children and teachers who do not wish to participate (*ibid.*, ss. 71 and 59, respectively).

⁴⁷ See e.g. *Constitution of Greece, 1975, supra note 27; Constitution of the Kingdom of Norway, 1814, supra note 26.*

⁴⁸ As in Germany and Scandinavia.

⁴⁹ As in Britain prior to *An Act for the Relief of His Majesty's Roman Catholic Subjects, 1829* (U.K.), 10 Geo. IV., c. 7 [*Roman Catholic Relief Act*]. Until 1974, the Lord Chancellor could not be a Roman Catholic since he was "keeper of the Queen's conscience" and had certain ceremonial roles—for example, the appointment of a bishop. The *Lord Chancellor (Tenure of Office and Discharge of Ecclesiastical Functions) Act 1974* (U.K.), 1974, c. 25, ss. 1-2 now enables the office to be held by a Roman Catholic, in which case some functions are transferred to another minister.

The remaining elements of official Anglican establishment affect the sovereign personally. The sovereign is required to join in communion with the Church of England and to make a declaration on accession to the throne that he or she is a faithful Protestant and will uphold the enactments securing the Protestant succession to the throne: *An act for establishing the coronation oath, 1688* (U.K.), 1 Will. & Mar., c. 6, s. 3; *An act for declaring the rights and liberties of the subject, and settling the succession of the Crown, 1688* (U.K.), 1 Will. & Mar. sess. 2, c. 2, s. 1 [*U.K. Bill of Rights, 1688*]; *Act of Settlement 1700* (U.K.), 12 & 13 Will., c. 2, s. 2 [*Act of Settlement*]; *Accession Declaration Act, 1910* (U.K.), 10 Edw. 7 & 1 Geo. 5, c. 29, Sch. 1. The *Act of Settlement (ibid.)* also prevents the sovereign or the heir to the throne from marrying a Roman Catholic (it does not, however, forbid marriage to someone of any other non-Anglican religion, or of no religion). The Fabian Commission report regarded these provisions as a form of outmoded religious discrimination and called for their repeal. See Fabian Society, *supra note 23* at 49.

marriages or in the entitlements of prison chaplains.⁵⁰ Another example would be an automatic right to representation in public bodies, whether it is the House of Lords or a local education committee,⁵¹ which other religious groups do not have. Even these examples, drawn from the UK, are ambiguous since the purpose of these advantages is to enable the church to carry out a national ministry and pastoral duties that are supposedly wider than those of other religious organizations.

State control also comes in varying degrees. In its strongest form, government and the relevant religious organization may be inseparable. One thinks, for example, of the Ministry for Suppression of Vice and Promotion of Virtue under the Taleban in Afghanistan. A government minister may be the ultimate authority for important decisions about church property, appointments, and finance. Significantly weaker are arrangements where legal authority is vested in the state but a degree of practical autonomy is granted to the church, as with arrangements in the UK for church legislation and the appointment of bishops.

Legal recognition does not always result in state control over church affairs. In Belgium⁵² and Luxembourg⁵³ legal recognition is given to several churches, but without state interference. This approach stresses the value of religion to the state, without prescribing a single, official religion or diminishing church autonomy (for example, by control of ecclesiastical appointments).

It can be argued that the Church of Scotland is established in the sense of being recognized and protected by statute.⁵⁴ But the state is, nevertheless, jealous of its independence. The sovereign swears an oath to protect the Church of Scotland, but (unlike with the Church of England) does not make ecclesiastical appointments.⁵⁵

⁵⁰ See *Marriage Act, 1949* (U.K.), 12-13-14 Geo. VI., c. 76; the *Prison Act, 1952* (U.K.), 15 & 16 Geo. VI & 1 Eliz. II, c. 52, s. 7(1) requires the appointment of an Anglican chaplain to every prison. The rights (and duties) of these chaplains are broader than those of other “Prison Ministers”. See Peter W. Edge, *Legal Responses to Religious Difference* (The Hague: Kluwer Law, 2002) at 220-21.

⁵¹ Under the *Education Act 1996* (U.K.), 1996, c. 56, ss. 390-93 and Sch. 31, ss. 2, 4(2), revision of religious education syllabuses is in the hands of local Standing Advisory Committees on Religious Education—one of which is reserved for the Church of England, while other Christian denominations and other religions are grouped together. The result is to give an effective veto to the Church of England.

⁵² *Constitution, 1970* (Belgium). Note the following provisions: s. 20 (forbids forced religion); s. 21 (freedom of religious groups to appoint ministers); s. 181 (establishes state remuneration of religious and moral leaders).

⁵³ *Constitution, 1868* (Luxembourg), s. 22 (imposes limits on state intervention in religious appointments).

⁵⁴ *Church of Scotland Act, 1921* (U.K.), 11 & 12 Geo. V., c. 29, s. 1. The Church of Wales was disestablished by the *Welsh Church Act, 1914* (U.K.), 4 & 5 Geo. V., c. 91, s. 1 (which took effect in 1920 by virtue of the *Welsh Church (Temporalities) Act 1919*, 9 & 10 Geo. V., c. 65, s. 2); similarly, the Church of Ireland was disestablished in 1869 by the *Irish Church Act, 1869* (U.K.), 32 & 33 Vict., c. 42, s. 2.

⁵⁵ See Francis Lyall, *Of Presbyters and Kings: Church and State in the Law of Scotland* (Aberdeen: Aberdeen University Press, 1980) c. 2-5; T.M. Taylor, “Church and State in Scotland” (1957) 2 *Jurid.*

Since the *Treaty of Union*⁵⁶ the Church of Scotland has enjoyed constitutional guarantees for its status against adverse legislation.⁵⁷ The Appendix to the *Church of Scotland Act, 1921*⁵⁸ contains Declaratory Articles affirming the church's long-standing claim to self-government and reflecting its "two kingdom" theology,⁵⁹ which the Scottish courts have used as a reason for non-intervention in the church's affairs.⁶⁰

We have seen that establishment of religion is a question of the degree of connection, state influence, and support. This, however, has a radical implication: it suggests that other religious bodies not normally regarded as established may enjoy some, though not as many, of the privileges of the established church. We return in Part IV to the inevitability of establishment in this broader sense.

We conclude this section with a brief account of why establishment is thought to be worthwhile. Anyone defending establishment today must remind its numerous critics that establishment does have certain virtues, unquantifiable as they may be. Nevertheless, two significant caveats should be entered. First, the question itself is misleading, as no country with an established religion now has a clean slate on which to debate the merits of introducing such an arrangement. In practice the debate is about the merits of *disestablishment* (or incremental changes in that direction). Paul Avis paraphrases T.S. Eliot's argument in the *Idea of a Christian Society*:

[W]e are not being asked whether we want to invent an establishment, but what would be the consequences of dismantling the establishment we have ... the very act of disestablishing a church separates it more definitely and irrevocably from the life of the nation than if it had never been established in the first place.⁶¹

Second, the notion of a cost-benefit analysis presupposes a utilitarian world view. Part of the classical argument was, however, that establishment was the working out of transcendent reality—a recognition of the impossibility of separating the spiritual from the secular. It is hard to understand or reclaim this perspective in a society whose dominant world view assumes the privatization of religion. Classical exponents of

Rev. 121; R. King Murray, "The Constitutional Position of the Church of Scotland" [1958] P.L. 155; C.R. Munro, "Does Scotland Have an Established Church?" (1997) 4 Ecc. L.J. 639.

⁵⁶ *Union with Scotland Act 1706*, 6 Anne, c. 11.

⁵⁷ *Ibid.*, s. 2. Although the efficacy of these provisions is a matter of debate among constitutional lawyers. See Lyall, *supra* note 55, c. 3; Colin R. Munro, *Studies in Constitutional Law*, 2d ed. (London: Butterworths, 1999) at 137-42; Michael Upton, "Marriage Vows of the Elephant: The Constitution of 1707" (1989) 105 Law Q. Rev. 79.

⁵⁸ *Church of Scotland Act, 1921*, *supra* note 54, Sch., s. 4.

⁵⁹ The conundrum of self-government free from parliamentary control yet legally recognized by Parliament itself was resolved by a formula under which the Appendix became operative only after approval by the church's General Assembly.

⁶⁰ See e.g. *Ballantyne v. Presbytery of Wigtown* (1936), S.C. 625; *Logan v. Presbytery of Dumfries*, [1995] S.L.T. 1228; *Percy v. Church of Scotland Board of National Mission*, [2001] S.L.T. 497.

⁶¹ Paul Avis, *Church, State and Establishment* (London: Society for Promoting Christian Knowledge, 2001) at 35.

establishment based it on a theology of the state. They saw establishment as the natural and proper relationship between two divinely ordained institutions—the Church *and* the State.⁶²

With those qualifications in mind, what claims do exponents of establishment make? Historical champions of establishment such as Hooker, Burke, Coleridge, Gladstone, and Arnold based their defence of the concept on several overlapping ideas about the state and society.⁶³ These were the moral purpose and personhood of the state, the divine calling and purpose for different nations, the “dual citizenship” (i.e., of the state and of the church) of individual Christians, and the unification and identification of these two spheres in the dual authority of the sovereign (in England, the Supreme Governor of the Church).⁶⁴ Modern arguments emphasize that establishment is a reminder that God, rather than the state, is the ultimate source of authority and, conversely, that “secular” institutions such as monarchies draw legitimacy and strength from religious underpinnings. A pluralist version of the same argument is that the spiritual sphere cannot simply be ignored; hence, it is appropriate for religious representatives to take part in the legislative process alongside many other groups.⁶⁵

A further aspect of the classical argument was the assumption that the state had a responsibility for the spiritual welfare of its citizens. The established church discharged this by providing religious *services* to the population (christening, marriage, and funerals) rather than to members alone. In some places (in Scandinavia, for example) this responsibility was reflected in the absence of formal criteria for membership in the established church; the entire population were deemed to be members. Responsibility for spiritual welfare may find expression also in an official chaplaincy role—for example, to prisons, the armed forces, hospitals, and educational bodies. In many cases, the church was the sole provider of education or health care long before the state assumed these roles. The territorial responsibility of the church is a further aspect of the provision of services. In rural England, for example, although many community facilities such as village shops, post offices, banks, and even public houses have closed on economic grounds, the parish system ensures that the Church of England continues to offer ministry throughout the entire country.

What does an established church gain from such arrangements? Certainly establishment constitutes official recognition of a church’s theological position. Professor Ogilvie claims that when a state establishes a church, it confers upon it

⁶² *Ibid.* at 35-36, c. 6.

⁶³ See *ibid.* at c. 6; Jeremy Morris, “The Future of Church and State”, in Duncan Dormor, Jack McDonald & Jeremy Caddick, eds., *Anglicanism: The Answer to Modernity* (London: Continuum, 2003) 161.

⁶⁴ Arguably, however, it has never been fully possible to identify nation with church in England because there have always been religious minorities—Jews and Roman Catholics especially. See Avis, *supra* note 61 at 19.

⁶⁵ In the case of the UK, by membership in the House of Lords.

recognition as the “truest expression of ... faith.”⁶⁶ In that sense it is necessarily considered officially superior to other religions, even if adherents of other religions suffer no formal legal disadvantage as a consequence. There is a degree of endorsement, even where this does not amount to the grant of a monopoly by the state. In the mild form of establishment, however, the state’s commendation amounts to little more than, say, the public recognition given to a national sports team.

The institutional trappings of establishment may be seen as symbolizing the now controversial idea of “Christian nationhood”. Proponents of establishment are probably not so naive, however, as to ignore statistics on religious diversity and unbelief in contemporary societies. Rather, they probably advocate recognition of one of two things: the place of Christianity as the *dominant* religion numerically, culturally, and historically within the state; and/or that the state is *not* a secular one in which religion is legally privatized. The second of these arguments attracts wider support for the symbolism of establishment from writers of non-Christian religions on the basis that it is a reminder of the spiritual sphere of life.⁶⁷ In this second symbolic sense, establishment is more *anti-secularist* than it is religious.

Of course, there are critics of establishment within the church itself who argue that even the mild form, found in England, for example, compromises the church’s integrity and autonomy, because the state has a say in approval of church legislation and appointments.⁶⁸ We have seen earlier that state control is a matter of degree. In England, at least, establishment does not leave the church financially beholden to the state and the church has a large measure of independence over doctrinal matters under its system of synodical government.

B. “Religious Freedom”

Article 18 of the United Nations *Universal Declaration of Human Rights*⁶⁹ contains a definition echoed in many subsequent international and domestic instruments.⁷⁰ It states:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either

⁶⁶ Ogilvie, *supra* note 5 at 235.

⁶⁷ See *infra* note 200 and accompanying text.

⁶⁸ See e.g. Colin Buchanan, *Cut the Connection: Disestablishment and the Church of England* (London: Darton, Longman and Todd, 1994).

⁶⁹ GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71.

⁷⁰ See e.g. the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976) [ICCPR]; *ECHR*, *supra* note 2, art. 9(1); *New Zealand Bill of Rights Act 1990* (N.Z.), 1990/109 [N.Z. *Bill of Rights*].

alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.⁷¹

Religious freedom is a malleable concept.⁷² A helpful judicial attempt to define it is that made by the Supreme Court of Canada in *Big M Drug Mart*:

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. But the concept means more than that. 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.⁷³

Coercion, in the Supreme Court of Canada's view, "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 courses of conduct available to others."⁷⁴

Religious freedom is not absolute and is limited by public order considerations of the sort found in article 18(3) of the *International Covenant on Civil and Political Rights*: "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."⁷⁵

Most definitions of religious liberty do not expressly mention the right to abstain from religious belief and practice, but it is not doubted that freedom *from* religion

⁷¹ *Supra* note 69, art. 18.

⁷² See e.g. M. Searle Bates, *Religious Liberty: An Inquiry* (New York: International Missionary Council, 1945). Searle Bates writes: "The term 'religious liberty' is used in a wide range of meanings, often ill-determined. Part of this vagueness in usage derives from the complex relationships in issues of religious liberty, involving the individual, the religious body, the community, and the state" (*ibid.* at 295). We shall use the terms "religious freedom", "freedom of religion", and "religious liberty" interchangeably.

⁷³ *Supra* note 44 at 336, Dickson J. (as he then was). The South African Constitutional Court judge, Chaskalson P., enthused: "I cannot offer a better definition than this of the main attributes of freedom of religion" (*Lawrence, supra* note 44 at para. 92). For a similar definition see Vatican II, *Declaration on Religious Freedom (Dignitatis Humanae)* (7 December 1965) c. 1 at para. 2, in Walter Abbott, ed., *The Documents of Vatican II* (London: Geoffrey Chapman, 1966) 679 [*Dignitatis Humanae*]:

This freedom means that all men are to be immune from coercion on the part of individuals or of social groups and of any human power, in such ways that in matters religious no one is to be forced to act in a manner contrary to his own beliefs. Nor is anyone to be restrained from acting in accordance with his own beliefs, whether privately or publicly, whether alone or in association with others, within due limits.

⁷⁴ *Ibid.*

⁷⁵ *Supra* note 70. See also art. 9(2) of the *ECHR, supra* note 2.

must inhere in the concept of religious freedom as well.⁷⁶ If, as the Supreme Court of Canada has suggested, the underlying philosophic premise is that every individual be free to hold and manifest whatever beliefs and opinions his or her conscience dictates, then freedom to disbelieve must also be included: "Equally protected, and for the same reasons, are expressions and manifestations of religious non-belief and refusals to participate in religious practice."⁷⁷

The particular facets of this compendious concept of religious freedom are as varied as religion itself. First, religious liberty has internal and external dimensions. Internal religious freedom, as a purely internal freedom to believe, has sometimes been described as an "absolute"⁷⁸ religious freedom. There appears to be no way a state could breach this inner right, the so-called *forum internum*,⁷⁹ even if it wished.⁸⁰

The external dimension can be divided into positive religious liberty and negative religious liberty. Positive religious liberty is the freedom to actively manifest one's religion or belief in various spheres (public, private, etc.) and in a variety of ways (worship, teaching, and so on). Positive religious liberty, being a social freedom, is subject to certain limitations to preserve social order and the rights of other citizens.

Negative religious liberty is the freedom from coercion or discrimination on the ground of religious (or nonreligious) belief. Article 1(2) of the United Nations *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, for example, states that: "No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice."⁸¹ Immunity from coercion implies that people not be subjected to penalties or disadvantageous treatment on account of their religious beliefs: "Religious discrimination by officials or by Courts is unacceptable in a free society."⁸² It would

⁷⁶ See e.g. James E. Wood, Jr., "An Apologia for Religious Human Rights" in John Witte, Jr. & Johan D. van der Vyver, eds., *Religious Human Rights in Global Perspective: Religious Perspectives* (The Hague: Martinus Nijhoff, 1996) 455 at 469.

⁷⁷ *Big M Drug Mart*, *supra* note 44 at 347. See also *Dignitatis Humanae*, *supra* note 73, at n. 5: "the unbeliever or atheist makes with equal right this claim to immunity from coercion in religious matters."

⁷⁸ Philip Wogaman, *Protestant Faith and Religious Liberty* (Nashville: Abingdon Press, 1967) at 185-86.

⁷⁹ First referred to in *C. v. U.K.* (1983), 37 D & R 142 at 147. See also Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford: Oxford University Press, 2001) at 72.

⁸⁰ As put in the Vatican II document, *Dignitatis Humanae*: "[o]f its very nature, the exercise of religion consists before all else in those *internal*, voluntary and free acts whereby man sets the course of his life directly toward God. No merely human power can either command or prohibit acts of this kind" (*supra* note 73 at 681) [emphasis added].

⁸¹ GA Res. 36/55, UN GAOR, 1981, Supp. No. 51, UN Doc. A/36/684,71 [*Declaration on the Elimination of Intolerance*]. Art. 18(2) of the ICCPR (*supra* note 70) is phrased in nearly identical terms.

⁸² *Church of the New Faith v. Commissioner of Pay-Roll Tax* (1883), 154 C.L.R. 120 at 150, Murphy J. (H.C.A.). As John Locke wrote: "No private person has any right in any manner to

be wrong, then, for the government to precondition housing, education, medical treatment, public office, and other benefits on the claimant professing a certain belief. Likewise, it would be wrong for government to subject people to special penalties on account of their religion.⁸³

Direct coercion of this type is relatively straightforward. More testing are claims by persons said to be subject to “indirect” or “subtle” coercion. If the government favours and promotes one religious perspective, does this constitute a form of coercion, intangible to be sure, but nonetheless still very “real” to those concerned?⁸⁴ Do those who neither subscribe to nor support the officially endorsed religion feel pressured into conforming? The terms commonly used to describe the psychological and social harms experienced by such persons are feelings of being “alienated”, “stigmatized”, or “ostracized”. Granted that such assertions are sincere, is this the sort of harm that merits prohibiting the religious practices, symbols, or institutions in question? We return to this challenging question later.

II. The Incompatibility Position

The view that establishment is starkly at odds with religious freedom is most closely associated and forcefully espoused by an impressive cadre of American scholars. The American understanding is traceable in large measure to the way the First Amendment was drafted: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...”⁸⁵ The two limbs or clauses of the article suggest that religious freedom itself could be envisaged as comprising two elements: non-establishment and free exercise. We agree with those who contend that the two clauses are not in opposition but are complementary, both tending toward the same end.⁸⁶ Justice Goldberg, for example, once observed: “[The] single end [of the clauses] ... is to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the

prejudice another person in his civil enjoyments, because he is of another church or religion ... If any man err from the right way, it is his own misfortune, not injury to thee: nor therefore art thou to punish him in the things of this life, because thou supposeth he will be miserable in that which is to come” (John Locke, *A Letter Concerning Toleration (Epistola de Tolerantia)* (1689) in John Horton & Susan Mendus, eds., *John Locke, A Letter Concerning Toleration: In Focus* (London: Routledge, 1991) at 23).

⁸³ To quote Locke, *ibid.* at 50: “The sum of all we drive at is, that every man enjoy the same rights that are granted to others.”

⁸⁴ See Oliver O’Donovan, *The Desire of Nations: Rediscovering the Roots of Political Theology* (Cambridge: Cambridge University Press, 1996) at 221.

⁸⁵ U.S. Const. amend. I, § 1.

⁸⁶ See e.g. Arlin M. Adams & Charles J. Emmerich, *A Nation Dedicated to Religious Liberty: The Constitutional Heritage of the Religion Clauses* (Philadelphia: University of Pennsylvania Press, 1990) at 37; Mary Ann Glendon & Raul F. Yanes, “Structural Free Exercise” (1991) 90 Mich. L. Rev. 477 at 492; Carl H. Esbeck, “A Restatement of the Supreme Court’s Law of Religious Freedom: Coherence, Conflict, or Chaos?” (1995) 70 Notre Dame L. Rev. 581 at 594.

best hope of attainment of that end.”⁸⁷ The two clauses, some argue, each have their own sphere of independent operation: “Neither clause is merely instrumental to the other’s role, nor is either subordinate to the other ...”⁸⁸ Rather, the religion clauses are “best envisioned as a draft team pulling together in the direction of full freedom for religion.”⁸⁹

While neither clause is ascendant, the non-establishment aspect has, in the opinion of many commentators, become so. Many consider that non-establishment or “separationism” has become the dominant goal, the US Supreme Court being more concerned with enforcing a rigid separation of church and state than with protecting the free exercise of religion.⁹⁰ Whether the critics are correct is an intriguing issue beyond the scope of this essay. Even if separation was the dominant motif, some suggest the trend is moving away from this.⁹¹

American scholars typically view religious freedom as being different from and superior to religious tolerance. A policy of tolerance is denigrated as a mere intermediate or “half-way step” in the development of liberal thought toward a true religious liberty premised on notions of equality and neutrality.⁹² Religious tolerance implies that religious exercise is a mere favour or privilege granted by the state: religion is something tolerated, but no more. Paul Kauper’s explanation is helpful:

[R]eligious freedom is deemed to be not a *concession* or grant by the state but an indefeasible *right* of the person, which the government must recognize, respect and protect. *Religious liberty is not to be confused with religious tolerance.* Tolerance as a legal concept is premised on the assumption that the state has ultimate control over religion and the churches, and that whether and to what extent religious freedom will be granted and protected is a matter of state policy. Tolerance of minority religious groups and of nonconformists was

⁸⁷ *Abington School District v. Schempp*, 374 U.S. 203 at 305 (1963).

⁸⁸ Esbeck, *supra* note 86 at 594. See also Derek H. Davis, “Editorial: Resolving Not to Resolve the Tension Between the Establishment and Free Exercise Clauses” (1996) 38 J.C.S. 245 at 258: “It is undisputed that the founders were not content to let religious liberty rest on the strength of either clause alone.”

⁸⁹ Esbeck, *ibid.*

⁹⁰ See e.g. Glendon & Yanes, *supra* note 86 at 492 and 535:

But the [Supreme] Court’s early resort to the simplistic “wall” metaphor enconced separationism as an end in itself, thereby driving a wedge between the free exercise and establishment provisions and creating the appearance of tension between them ... Over time, court majorities gave a narrow construction to free exercise, neglecting its associational and institutional aspects. These important dimensions of religious freedom further suffered from the Court’s broad constitution of the First Amendment’s establishment language. The effect was to regularly subordinate the free exercise of religion to the policy of enforcing a rigid separation of church and state. In case after case ... the First Amendment was thus turned on its head.

⁹¹ See Ira C. Lupu, “The Lingering Death of Separationism” (1994) 62 Geo. Wash. L. Rev. 230.

⁹² See Steven D. Smith, “The Restoration of Tolerance” (1990) 78 Calif. L. Rev. 305 at 308-12 [Smith, “Restoration”].

an important half-way step in the struggle for religious liberty ... But our constitutional system embodies the full-blown concept of religious freedom as a natural *right* which limits the government, rather than a *privilege* dispensed by governmental authority in pursuing a policy of benevolent toleration.⁹³

There has been a tendency by some scholars to simply equate separationism with religious liberty.⁹⁴ As we noted, it is easy to see why such an equation is made given the drafting of the First Amendment.⁹⁵ The danger is, however, that separation may become the pre-eminent goal—an end in itself. The better view, we submit, is that separation is an important instrumentalist means toward the larger end of protecting religious freedom. As Adams and Emmerich argue: “The separation concept ... is really a servant of an even greater goal; it is a means, along with concepts such as accommodation and neutrality, to achieve the ideal of religious liberty in a free society.”⁹⁶ As they point out, disestablishment alone does not guarantee religious freedom, as some of “the most disestablished societies in the twentieth century are those governed by totalitarian regimes.”⁹⁷ On the other hand, many countries with a religious establishment enjoy a *degree* of religious freedom. Americans largely believe, however, that the *full* realization of religious freedom requires non-establishment.⁹⁸ For them, establishment has both adverse consequences for society and is palpably wrong in principle. In terms of societal consequences, establishment can be deleterious both for religion and for the government. For the “Pietistic Separationists”, such as Roger Williams and William Penn, separation was necessary to protect the authenticity and purity of the faith. It was the church, not the state, that needed protection. By contrast, to the “Enlightenment Separationists”, the suspicion and hostility were the other way around.⁹⁹ Institutional religion had the very real potential to corrupt government and

⁹³ Paul G. Kauper, “Legal Aspects of Religious Liberty” in Cedric W. Tilberg, ed., *Religious Liberty* (New York: Lutheran Church in America, 1968) 25 at 25 [emphasis added]. See Scott C. Idleman, “The Sacred, the Profane, and the Instrumental: Valuing Religion in the Culture of Disbelief” (1994) 142 U. Pa. L. Rev. 1313 at 1369.

⁹⁴ See Leo Pfeffer, “Freedom and/or Separation: The Constitutional Dilemma of the First Amendment” (1980) 64 Minn. L. Rev. 561 at 564: “[S]eparation guarantees freedom and freedom requires separation. The draftsmen of the [first] amendment regarded freedom of religion and establishment as incompatible.”

⁹⁵ See Francesco Ruffini, *Religious Liberty* (New York: G.P. Putnam’s Sons, 1912) at 16:

[T]he principle of [religious] liberty was transplanted to North America ... and became imposed as a principle connected with that of separatism. It is easy, therefore, to understand why the American writers are unable to conceive the idea of true liberty apart from separatism. And thus it is that religious liberty and separatism have become in America two terms which, ideally, historically, and practically, are inseparable.

Ruffini uses the word “separatism” for what we refer to as “separationism”.

⁹⁶ Adams & Emmerich, *supra* note 86 at 37.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.* See also Leo Pfeffer, *Church, State, and Freedom*, rev. ed. (Boston: Beacon Press, 1967) at 70 [Pfeffer, *Church and Freedom*]: “Religious liberty is generally most secure where church and state are most completely separated.”

⁹⁹ See Adams & Emmerich, *supra* note 86 at 21-31.

destroy the liberties of the people. Hence the “wall of separation” was needed to keep the church at bay.¹⁰⁰

Perhaps the most recurrent and forceful objection is that a policy of orthodoxy coupled with tolerance is both offensive and alienating towards those who do not adhere to the established faith. Who wants to be merely tolerated? Does one need a constant, state-sanctioned reminder that one’s particular faith is officially disapproved, albeit not suppressed? Steven Smith summarizes this concern:

[T]olerance suggests *condescension*. Even if the regime never resorts to repression, the persistence of orthodoxy may still indicate the regime’s disapproval of those who dissent; dissenters’ beliefs or way of life, though legally protected, are nonetheless wrong from the orthodox perspective. The symbolic condescension and disapproval implicit in an attitude of tolerance might make dissenters feel that they are not fully accepted as citizens. This *symbolic ostracism* might inhibit the realization of an inclusive, harmoniously integrated political community.¹⁰¹

III. The Compatibility Position

A. Generally

The compatibility view is that religious freedom is consistent with establishment, at least establishment in its modern, diluted, symbolic form. Professor Ruffini reached this conclusion a century ago:

[T]rue and complete religious liberty can exist also apart from Separatism [i.e., Separationism]. When the State has assured full liberty of belief or disbelief to its own citizens, *without this implying the least prejudice in the enjoyment of their rights as citizens*; when the State has guaranteed to religious associations full liberty for the manifestation of their forms of worship, protecting them against any sort of attack, the State has done all that can be demanded of it in regard to religious liberty.¹⁰²

Fr. John Courtney Murray believed that it was “not at all incompatible” with religious freedom that there should exist an “orderly relationship” between the public

¹⁰⁰ See John Witte, Jr., “That Serpentine Wall of Separation” (2003) 101 Mich. L. Rev. 1869.

¹⁰¹ Smith, “Restoration”, *supra* note 92 at 310 [emphasis added, citations omitted]. Justice O’Connor has judicially expressed this concern in her so-called “endorsement test”, which we will analyze in-depth in Part IV.

¹⁰² Ruffini, *supra* note 95 at 521. The italicized words are important. It is the “weak”, symbolic form of establishment that is being considered here, not the “strong” form of establishment, or theocracy, which existed in medieval Europe and exists today in some Islamic states. “Strong” establishment accompanies state privilege for the favoured religion with distinct civil and legal disabilities for the nonadherents of the official religion. Religious tolerance of this kind (perpetuating lesser civil rights for dissident religions) is certainly an altogether different creature and there could be no argument that this is inferior to religious freedom. Hereafter, then, it is the “weak” form that is being referred to.

power and the Catholic Church.¹⁰³ Such a statement, to him, may be no more than “a statement of fact”, an acknowledgement of history.¹⁰⁴ The Irish Constitution, he argued, affirms Christianity, yet this is “not meant to insult or demean anyone; it is meant merely to express the most fundamental convictions of the vast majority of the people of Ireland.”¹⁰⁵

A similar point can be made about England. The criticism that establishment equates to religious discrimination¹⁰⁶ is plainly informed by modern notions of religious pluralism, but in fact echoes a much older debate. In a recent study, Avis argues that it has never been possible to identify fully nation and church in England in the way romanticized by the classical Anglican theorists, because the state has always had religious minorities, particularly Jews and Roman Catholics. In that sense the Church of England has never been a *state church*.¹⁰⁷ Similar considerations provoked anxious re-evaluation of the established church following the *Roman Catholic Relief Act*¹⁰⁸ and again when the first Parliament to be dominated by non-Anglicans was returned in 1909 with the Welsh nonconformist, David Lloyd George, as Prime Minister.¹⁰⁹

In practice, since the mid-nineteenth century, when any legal disabilities or penalties for nonattendance at worship were removed,¹¹⁰ the Church of England has shared with other religious bodies many of the characteristics of a voluntary body. The state’s legal provisions relating to individuals and concerning religion *impose* duties upon the church, rather than vice versa.¹¹¹ Hence, any argument that the establishment is discriminatory rests primarily on the symbolic effect of the link with state institutions.

¹⁰³ John Courtney Murray, *The Problem of Religious Freedom* (London: Geoffrey Chapman, 1965) at 96.

¹⁰⁴ *Ibid.*

¹⁰⁵ Michael J. Perry, “Religion, Politics and Human Rights” in Bernard Treacy & Gerry Whyte, eds., *Religion, Morality and Public Policy* (Dublin: Dominican Publications, 1995) 16 at 19.

¹⁰⁶ See *supra* note 1 and accompanying text.

¹⁰⁷ Avis, *supra* note 61 at 19.

¹⁰⁸ *Supra* note 49.

¹⁰⁹ See e.g. Samuel Taylor Coleridge, *On the Constitution of the Church and State* (London: J.M. Dent & Sons, 1972).

¹¹⁰ *Toleration Act 1688*, 1 Will. & Mar., c. 18, s. 16; *Roman Catholic Relief Act 1791*, (U.K.) 7 & 8 Vic., c. 102 (1844); *Religious Disabilities Act 1846*, (U.K.) 9 & 10 Vict., c. 59 (1846). Pearce notes, however, that aspects of the *Act of Uniformity*, (U.K.) 5 & 6 Edw. 6, c. 1 (1551) remained in force, although without penalties, until repealed by the *Statute Law (Repeals) Act 1969*, (U.K.) 1969, c. 52 (Pearce, *supra* note 20 at 461). See also St. John A. Robilliard, *Religion and the Law: Religious Liberty in Modern English Law* (Manchester: Manchester University Press, 1984) at 199-203.

¹¹¹ See generally *Wallbank*, as considered *supra* note 16. The sole exception is the position of the sovereign and the heir to the throne, but this is justifiable in view of the sovereign’s position as Supreme Governor of the Church of England. An heir to the throne who is unable in conscience to take the Accession and Coronation oaths always has the option of abdication.

The experience of other European nations also shows that it is simplistic to regard establishment as a zero-sum question where a special status for one religion necessarily implies a disadvantage for other faiths. In Italy, for example, the amended 1947 constitution specifically protects the separate sphere of the Catholic church, with which the state has detailed pacts, while guaranteeing equal legal rights for other religions.¹¹²

Finally we can consider the case of one state—Australia—whose constitution prohibits establishment and whose courts have clearly recognized that restrictions on religious liberty are a separate issue. The drafting of the relevant provision, section 116 of the constitution, makes this quite clear by dealing with them distinctly. It reads:

[T]he 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.¹¹³

In *Black v. The Commonwealth*, a majority of the High Court of Australia found that the provision of financial assistance to church schools by the state of Victoria did not amount to a law establishing religion. In doing so the court rejected the argument (derived from US First Amendment jurisprudence) that the establishment provision requires a strict separation of church and state.¹¹⁴ The court was quite explicit in rejecting the plaintiff's argument that a generous interpretation should be given to the words "shall not make any law for establishing any religion" in section 116. In the words of Stephen J.:

The very form of s. 116, consisting of four distinct and express restrictions upon legislative power, is also significant. It cannot readily be viewed as the repository of some broad statement of principle concerning the separation of church and state, from which may be distilled the detailed consequences of such separation. On the contrary, by fixing upon four specific restrictions of legislative power, the form of the section gives no encouragement to the undertaking of any such distillation.¹¹⁵

Gibbs J. stated that:

[T]he establishment clause imposes a fetter on legislative power, and unlike the words which forbid the making of any law prohibiting the free exercise of any religion, does not do so for the purpose of protecting a fundamental human right.¹¹⁶

¹¹² *Constitution, 1947* (Italy), arts. 7-8. This is also the case in Spain. See *Iglesia Bautista "El Salvador" and Ortega Moratilla v. Spain* (1992), 72 Eur. Comm. H.R.D.R. 256 [*Iglesia Bautista*]; *Alujer Fernandez and Caballero Garcia v. Spain* (2001), Application No. 53072/99 (Eur. Ct. H.R.), online: European Court of Human Rights <<http://www.echr.coe.int/Eng/Judgments.htm>> [*Fernandez*].

¹¹³ *Australian Constitution*, *supra* note 7.

¹¹⁴ *Black v. The Commonwealth*, *supra* note 8 at 602-603, Gibbs J., 609, Stephen J.

¹¹⁵ *Ibid.* at 609. See also *ibid.* at 616, Mason J., and 653, Wilson J.

¹¹⁶ *Ibid.* at 603.

The way in which the Australian provision has been approached by the court turns, of course, on its drafting. However, that fact alone demonstrates clearly that there is no reason to take the equally particular words of the US First Amendment, nor the way the courts have interpreted them, as embodying either necessary or universal truths about the nature of establishment.

From this comparative review, it is clear that state legal recognition of a religion does not always equate with positive disadvantages and inequalities for other (non-established) religions. These are often conflated, especially in contemporary discussion about the future of the Church of England, but they need not be.

B. International Stance

When one turns to international law there is an enigmatic and perhaps discreet silence on the establishment question. International treaties and covenants are worded in free exercise terms only. In 1956, the United Nations commissioned a Special Rapporteur, Arcot Krishnaswami, to report on religious discrimination. The result four years later was the Krishnaswami Report,¹¹⁷ “still regarded as a classic study.”¹¹⁸ The author, drawing upon the monographs of eighty-six countries, concluded that it was impossible to recommend a particular form of judicial relationship between the state and religion.¹¹⁹ As Brice Dickson noted more recently: “International law—not just UN law—at present contains no norms purporting to determine the nature of the relationship between a State and the church or churches within that State.”¹²⁰ John Witte, Jr. similarly detected the “conspicuous absen[ce]” in international norms of the more radical demands for separationism reified in the American “wall of separation” metaphor.¹²¹ He observed:

International law and many domestic laws regard the material and moral cooperation of the church and state as conducive, and sometimes essential, to the achievement of religious liberty ... Absolute separationists in this country have fewer allies abroad than is conventionally assumed.¹²²

The Krishnaswami Report concluded that there was no necessary correlation between legal or formal church-state relations and violations of freedom of religion.¹²³ Of course, whether the same conclusion would be reached today is perhaps debatable,

¹¹⁷ Arcot Krishnaswami, *Study of Discrimination in the Matter of Religious Rights and Practices* (New York: UN, 1980) [“Krishnaswami Report”].

¹¹⁸ Brice Dickson, “The United Nations and Freedom of Religion” (1995) 44 I.C.L.Q. 327 at 334.

¹¹⁹ *Ibid.* at 335.

¹²⁰ *Ibid.* at 351.

¹²¹ John Witte, Jr., “The Essential Rights and Liberties of Religion in the American Constitutional Experiment” (1996) 71 *Notre Dame L. Rev.* 371 at 439.

¹²² *Ibid.* at 440.

¹²³ “Krishnaswami Report”, *supra* note 117 at 64-5.

especially in the light of the systematic denial of religious rights largely sponsored or tolerated by many Islamic states.¹²⁴

There is no presumption against the existence of an established church under United Nations sponsored international human rights treaties.¹²⁵ The *ICCPR* refers to a person's right "to have or to adopt a religion or belief of his choice,"¹²⁶ and to be free from coercion in so choosing.¹²⁷ It does not, however, prohibit a state religion that acts noncoercively.

In addition, there is the more specific 1981 *Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief*.¹²⁸ This, however, does not have the status of a binding international agreement.¹²⁹ The declaration provides in article 2(1) that "[n]o one shall be subject to discrimination by any State, institution, group of persons, or person on the grounds of religion or other belief."¹³⁰ By virtue of article 4, states are to take measures to enact protections against religious discrimination and to rescind discriminatory legislation.¹³¹ Adherence to the detailed list of the incidents of freedom of religion in article 6 would prevent the denial by a state of these entitlements to nonpreferred religions.¹³²

¹²⁴ See Paul Marshall, *Their Blood Cries Out: The Worldwide Tragedy of Modern Christians who are Dying for Their Faith* (Dallas: Word, 1997) (Marshall provides a well-documented, country-by-country analysis).

¹²⁵ See Dickson, *supra* note 118; Malcolm D. Evans, *Religious Liberty and International Law in Europe* (Cambridge: Cambridge University Press, 1997) c. 8-9.

¹²⁶ *ICCPR*, *supra* note 70, art. 18.

¹²⁷ *Ibid.*, art. 18(2).

¹²⁸ *Declaration on the Elimination of Intolerance, supra* note 81. See Evans, *supra* note 125, c. 9; Donna J. Sullivan, "Advancing the Freedom of Religion or Belief Through the UN Declaration on the Elimination of Religious Intolerance and Discrimination" (1988) 82 *Am. J. Int. L.* 487.

¹²⁹ See Sullivan, *ibid.* 488-89 (recommendations from two Special Rapporteurs that a convention of this kind be adopted have so far come to nothing).

¹³⁰ *Supra* note 81.

¹³¹ *Ibid.*

¹³² *Ibid.*:

[F]reedom of thought, conscience, religion or belief shall include, inter alia, the following freedoms:

- (a) To worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes;
- (b) To establish and maintain appropriate charitable or humanitarian institutions;
- (c) To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;
- (d) To write, issue and disseminate relevant publications in these areas;
- (e) To teach a religion or belief in places suitable for these purposes;
- (f) To solicit and receive voluntary financial and other contributions from individuals and institutions;

Nevertheless, Donna Sullivan concludes that the “protections offered in the Declaration are not premised upon the separation of church and state and are clearly distinguished in this regard from First Amendment rights under the United States Constitution.”¹³³ An earlier draft made this clearer; it contained a statement indicating that neither establishment of religion, nor formal separation of state and religion, would in themselves constitute religious intolerance or discrimination.¹³⁴

More general provisions prohibiting discrimination on religious grounds also appear in the *ICCPR*.¹³⁵ The Human Rights Committee has tended to run these together with religious liberty as such in an indiscriminate fashion.¹³⁶ Nevertheless, by cautioning against a state, official, traditional, or majority religion impairing the rights of others, the Human Rights Committee has acknowledged that arrangements that do not restrict religious liberty are possible. We can deduce their form from the features that are singled out for negative comment—measures that discriminate against adherents of other religions or nonbelievers by restricting access to government posts, conferring economic privileges on majority groups, or imposing special restrictions on minority religions.¹³⁷ Weak establishment of the type found in several contemporary European states does none of these.¹³⁸

(g) To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief;

(h) To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief;

(i) To establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.

¹³³ Sullivan, *supra* note 128 at 490.

¹³⁴ Art. I (d) Draft Convention. (Note by the Secretary-General: The Elimination of All Forms of Religious Intolerance, UN Doc. A/8730 (1972)). See Sullivan, *ibid*.

¹³⁵ *Supra* note 70. Notably, discrimination on religious grounds is prohibited under article 26 (non-discrimination and equality before the law) and under article 27 (group rights for religious minorities to profess and practice their own religion).

¹³⁶ See Evans, *supra* note 79 at 208-209.

¹³⁷ UN Human Rights Committee, “General Comments on Freedom of Thought, and on Minority Rights” (1994) 15 H.R.L.J. 233 at para. 9.

¹³⁸ The Human Rights Committee has, however, taken a mixed approach toward state preference for religious schools in a series of complaints from Canada. Provincial funding of Roman Catholic schools in Ontario has been found not to be discriminatory under article 26 of the *ICCPR* against complainants who, as parents of children at other (nonreligious) publicly funded schools, merely wished to see such funding removed: *Tadman v. Canada*, Communication No. 816/1998, U.N. Doc. CCPR/C/67/D/816/1998 (4 November 1999), online: Officer of the High Commissioner for Human Rights <<http://www.unhcr.ch>>. However, where a complaint was brought by a parent who bore the whole cost of sending his child to a private Jewish school the Committee found there had been discrimination: *Waldman v. Canada*, Communication No. 694/1996, U.N. Doc. CCPR/C/67/D/694/1996 (5 November 1999), online: Officer of the High Commissioner for Human Rights <<http://www.unhcr.ch>>. One member of the committee commented that the Covenant “does not require the separation of church and state,” but that countries that fail to do so “often encounter specific problems in securing compliance with articles 18, 26 and 27.” See T. Cloudhury,

C. *European Case Law under the European Convention on Human Rights*¹³⁹

Despite being a regional system for human rights protection, the *European Convention on Human Rights*¹⁴⁰ (“the Convention”) is of some importance to this discussion—it is the oldest and most developed international system for human rights protection; it applies to countries with a total population of some eight hundred million; and several of the paradigmatic examples of mild establishment fall under its supervision.

Although the *ECHR* forbids discrimination by member states in the enjoyment of Convention rights on various grounds, including religion or belief,¹⁴¹ the European Court of Human Rights has held that mild forms of state preference for one religion over another do not violate the Convention. Thus, in *Otto-Preminger Institute*, the European Court of Human Rights held that the Austrian authorities were permitted, when deciding to ban a film that was offensive to Roman Catholics, to take account of the clear Roman Catholic majority (estimated at eighty-seven per cent of the population) in the region concerned—the Tyrol.¹⁴² In considering the “margin of appreciation” to be granted to the authorities under article 10 of the *ECHR*, the court could not “disregard the fact that the Roman Catholic religion is the religion of the overwhelming majority of Tyroleans.”¹⁴³

Similarly, in *Choudhury*, the European Commission held that the failure of UK law to criminalize publications offending non-Christians did not of itself amount to a violation of freedom of religion. It thus followed that no issue of discrimination in the enjoyment of an article 14 Convention right arose where the law of blasphemy in England applied to Christianity only.¹⁴⁴

Article 9 of the *ECHR* protects freedom of thought, conscience, and religion. The state is permitted without infringing article 9 to make some variations in the legal treatment of different religious groups. For instance, in *Jewish Liturgical*

“Interpreting the Right to Equality under Article 26 of the International Covenant on Civil and Political Rights” [2003] Eur. H.R.L. Rev. 24 at 32-33.

¹³⁹ See Evans, *supra* note 79 at 80-87; Javier Martínez-Torrón, “Religious Liberty in European Jurisprudence” in Mark Hill, ed., *Religious Liberty and Human Rights* (Cardiff: University of Wales Press, 2002) 99 at 104-11.

¹⁴⁰ *ECHR*, *supra* note 2.

¹⁴¹ Article 14, *ibid.* See e.g. *Hoffman v. Austria* (1994), 17 E.H.R.R. 293, Application No. 00012845/87 (Eur. Ct. H.R.), online: European Court of Human Rights <<http://www.echr.coe.int/Eng/Judgments.htm>> (the European Court of Human Rights found that Austrian judges had discriminated in denying custody of a child to a mother because she was a Jehovah’s Witness).

¹⁴² *Otto-Preminger Institute v. Austria* (1994), 19 E.H.R.R. 34 at para. 52, 69 Eur. Comm. H.R.D.R. 173.

¹⁴³ *Ibid.* at para. 56.

¹⁴⁴ *Choudhury v. United Kingdom* (1991), 12 H.R.L.J. 172 at 173.

Association,¹⁴⁵ the French authorities had restricted the number of licences granted to orthodox Jewish groups for the ritual slaughter of animals. A minority, ultra-orthodox group that was unable to obtain meat that satisfied its religious dietary requirements from a licenced slaughterer in France nevertheless failed in its challenge under article 9. A majority of the European Court found that the group concerned was not impeded in practice from manifesting its religion since satisfactory meat could be easily imported from Belgium.¹⁴⁶

There are clear limits, however, to permissible state preference. Where the state denies legal recognition entirely to certain minority religious groups, the Convention organs have found there to be a breach of both article 9¹⁴⁷ and article 6 (the right to a fair trial), in conjunction with article 14.¹⁴⁸

The absence of a uniform European pattern for the treatment of religion by the state means that a variety of state-religion relationships between states and religion have been accepted by the Convention. There has been no attempt to impose uniformity, despite a recent tendency in the jurisprudence to refer to the state's duty of impartiality in religious matters.¹⁴⁹

The existence of a church established under national law has been held not to violate the Convention per se. In *Darby v. Sweden*, the Commission of Human Rights found that:

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 when the Convention was drafted and when they became parties to it. However, a State Church system must, in order to satisfy Article 9, include specific safeguards for the individual's freedom of religion.¹⁵⁰

The question at stake was the liability of a non-national to pay a tax that went in part to the Swedish Lutheran church to support its religious activities. The European Commission on Human Rights had found a violation of article 9, since the only way that the applicant could avoid paying the tax was to change nationality. The European Court of Human Rights approached the issue differently. It found that the tax

¹⁴⁵ *Cha'are Shalom Ve Tsedek v. France* (2000), Application No. 27417/95 (Eur. Ct. H.R.), online: European Court of Human Rights <<http://www.echr.coe.int/Eng/Judgments.htm>>.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Metropolitan Church of Bessarabia v. Moldova* (2002), 35 E.H.R.R. 306.

¹⁴⁸ *Canea Catholic Church v. Greece* (1999), 27 E.H.R.R. 521, Application No. 00025528/94 (Eur. Ct. H.R.) <<http://www.echr.coe.int/Eng/Judgements.htm>> (holding that denial of legal personality to some churches—prohibiting the capacity to litigate unless registered with the state—violates articles 6 and 14).

¹⁴⁹ *Refah Partisi (The Welfare Party) v. Turkey* (2003), 37 E.H.R.R. at paras. 90-92; Martínez-Torrón, *supra* note 139 at 106-107.

¹⁵⁰ (1991), 13 E.H.R.R. 774 at para. 45; 56 Eur. Comm. H.R.D.R. 166.

constituted discrimination in the enjoyment of property since Swedish nationals could opt out of supporting the Lutheran church while foreigners were denied this choice.¹⁵¹

The existence of an established church does not necessarily mean that it is to be treated as an arm of the state under the Convention system. Two (minor) Strasbourg cases involving human rights complaints against the Church of England have both resulted in findings that the complaints were inadmissible without reaching an authoritative determination of whether the UK is liable under the Convention for the actions of the church's institutions.¹⁵² Better guidance can be obtained from decisions of the European Court of Human Rights concerning other national churches.

In one case, the court upheld a claim against Greece for the forcible transfer to the state of land belonging to monasteries of the Greek Orthodox Church, finding that it violated the monasteries' right to peaceful enjoyment of its possessions under article 1 of the First Protocol to the Convention.¹⁵³ In reaching this conclusion, the court dismissed the Greek government's argument that because of the constitutional status of the Greek Orthodox Church, the monasteries were not entitled to complain as victims under the Convention since they did not qualify as "non-governmental" organizations under article 34.¹⁵⁴ The constitutional and legislative recognition of church institutions as public law entities ascribed with legal personality was found not to be determinative of the monasteries' status under the Convention.¹⁵⁵ The objectives of the monasteries (whether ecclesiastical, spiritual, social, or cultural) were not analogous to those of government organizations; their legal powers were confined to spiritual questions, and supervision was conducted by the local archbishop, not by the state.

Similarly, in an admissibility decision from Sweden, the Commission found that the status of the Church of Sweden and its parishes as public law corporations did not preclude an individual parish from being treated as a "non-governmental organization" for the purpose of making a Convention complaint. It also followed from the non-governmental status of the church, however, that the state could not be

¹⁵¹ *Ibid.* at paras. 28-34.

¹⁵² See *Tyler v. U.K.* (1994), 77A Eur. Comm. H.R.D.R. 81 (no violation of article 6(1) in consistory court and Court of Arches procedure and composition) and *Williamson v. UK*, Application No. 00027008/95, 17 May 1995 (challenge to Ordination of Women Measure for violating individual priest's rights under article 9 held inadmissible).

¹⁵³ *Holy Monasteries v. Greece* (1995), 20 E.H.R.R. 1, Application No. 0073092/87 (Eur. Ct. H.R.), online: European Court of Human Rights <<http://www.echr.coe.int/Eng/Judgments.htm>>.

¹⁵⁴ *Ibid.* at paras. 48-49.

¹⁵⁵ See article 3 of the Greek Constitution of 1975, discussed in *Kokkinakis v. Greece* (1993), 17 E.H.R.R. 397 at paras. 13-14, Application No. 00014307/88 (Eur. Ct. H.R.), online: European Court of Human Rights <<http://www.echr.coe.int/Eng/Judgments.htm>>.

liable for alleged violations of freedom of religion resulting from a decision of the Church Assembly about the form of liturgy to be used in the parish.¹⁵⁶

Recently, this approach was explicitly followed by several members of the House of Lords in *Wallbank*,¹⁵⁷ which arose under the *Human Rights Act 1998*¹⁵⁸ (incorporating the *ECHR* into United Kingdom law). Indeed, the House of Lords found that the Parochial Church Council of the Church of England was not acting as a “public authority” for the purpose of section 6 of the *Human Rights Act 1998* when enforcing liability for chancel repairs upon a landowner. As a consequence, and in line with the Strasbourg jurisprudence discussed above, the Convention right of peaceful enjoyment of property (Protocol 1, Article 1) could not be invoked against the Parochial Church Council.

It can be seen, then, that the European Convention draws a clear line between state institutions, which can be liable for human rights violations, and non-state actors, which cannot. The fact that established churches have been treated as being in the latter category further undercuts the argument that all forms of establishment involve restrictions on religious liberty.

IV. Answering the Objections

A. The Alienation Charge

Some, but by no means all, non-adherents of the established religion might complain that they feel excluded or alienated; that they are being relegated to the status of second-class citizens by the state’s favouring of a particular faith. Perhaps the most cited judicial articulation of this concern is Justice Sandra Day O’Connor’s so-called “endorsement test” for potential establishment clause violations under the First Amendment of the US Constitution. The actual context was a challenge to a city-sponsored and funded Christmas display in a privately owned park, which included a nativity scene featuring the birth of Christ. The government, said Justice O’Connor, ought to be wary of endorsing religion in these instances of public religious symbolism since

[e]ndorsement sends a message to non-adherents that they are *outsiders*, not full members of the political community, and an accompanying message to

¹⁵⁶ *Hautanemi v. Sweden* (1996), 22 E.H.R.R. CD155; Frank Cranmer, “The Church of Sweden and the Unravelling of Establishment” (2000) 5 Ecc. L.J. 417 (on establishment in Sweden).

¹⁵⁷ *Supra* note 16. See discussion of *Wallbank* in Ian Leigh, “Freedom of Religion: Public/Private, Rights/Wrongs” in Mark Hill, ed., *Religious Liberty and Human Rights* (Cardiff: University of Wales Press, 2002) 128 at 149-52.

¹⁵⁸ *Supra* note 17.

adherents that they are insiders, favoured members of the political community. Disapproval sends the opposite message.¹⁵⁹

Sachs J. of the South African Constitutional Court aptly described the harm involved here as a “negative radiating symbolic effect”.¹⁶⁰

The endorsement test has a certain facile attraction, but its flaws are well-documented.¹⁶¹ The majority in *Lynch* warned of the danger of “a stilted overreaction contrary to our history”¹⁶² in the course of ruling (by a bare majority of five to four) that there had been no violation of the establishment clause of the First Amendment.

Just what criteria ought to guide decision-makers in determining whether the test has been satisfied? This is a difficult question to answer. The predictable, albeit unhelpful answer is that each instance must be judged on its merits: “[T]he endorsement test depends on a sensitivity to the unique circumstances and context of a particular challenged practice.”¹⁶³ Admittedly, as Justice O’Connor noted, the endorsement test “may not always yield results with unanimous agreement at the margins. But that is true of many standards in constitutional law.”¹⁶⁴ In *County of Allegheny*—where, by contrast to *Lynch*, a crèche (on the grand staircase of the Allegheny County Courthouse) was held (again by a bare majority) to be unconstitutional—the minority expressed unease at the application of the endorsement test. The question of whether a “reasonable observer” might “fairly understand” a government action to send an alienating message to nonadherents was derided for being “flawed in its fundamentals and unworkable in practice”.¹⁶⁵ Indeed, the test was described as a “most unwelcome ... addition to our tangled Establishment Clause jurisprudence.”¹⁶⁶

¹⁵⁹ *Lynch v. Donnelly*, 465 U.S. 668 at 688 (1984) [*Lynch*, emphasis added]. The test has been applied in, for example, *County of Allegheny v. Greater Pittsburgh ACLU*, 492 U.S. 573 at 595, 625 (1989) [*County of Allegheny*] and *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000) at 309-10 and most recently by Justice O’Connor in *Elk Grove Unified School District v. Newdow*, 124 S. Ct. 2301 (2004) at 2321 [*Newdow* (Sup. Ct.)]. See generally Steven B. Epstein, “Rethinking the Constitutionality of Ceremonial Deism” (1996) 96 Colum. L. Rev. 2083.

¹⁶⁰ *Lawrence*, *supra* note 44 at para. 138. For discussion of this case and religious freedom in South Africa, see Lourens du Plessis, “Freedom of or Freedom from Religion?: An Overview of Issues Pertinent to the Constitutional Protection of Religious Rights and Freedom in ‘the New South Africa’” [2001] B.Y.U. L. Rev. 439.

¹⁶¹ See Steven D. Smith, “Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the ‘No Endorsement’ Test” (1987) 86 Mich. L. Rev. 266; Jesse H. Choper, *Securing Religious Liberty Principles for Judicial Interpretation of the Religion Clauses* (Chicago: University of Chicago Press, 1995) at 27-34.

¹⁶² *Lynch*, *supra* note 159.

¹⁶³ *County of Allegheny*, *supra* note 159 at 629.

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.* at 669.

¹⁶⁶ *Ibid.* at 668.

Similarly, Sachs J. in *Lawrence* noted that the all-encompassing breadth of the endorsement test was both its strength and its weakness: “It indicates the broad question to be asked, but not the specific criteria to be used for the answer. More especially, it does little to establish from whose standpoint the message by the State should be considered.”¹⁶⁷ Trifling and apparently innocuous matters to some sections of society (perhaps the majority) may be experienced as most hurtful and exclusionary to those possessing different beliefs. The majority in *County of Allegheny* held that this called for a double-barrelled approach, in which the court ascertains whether the practice in question would likely be perceived by adherents as endorsement, and by nonadherents as disapproval of their religion.¹⁶⁸ For Sachs J., the sensibilities and perspective of the reasonable Christian, Jew, Muslim, Hindu, or atheist were all inappropriate. The correct formulation was:

[T]he reasonable South African (of any faith or none) who is neither hypersensitive nor overly insensitive to the belief in question, but highly attuned to the requirements of the Constitution. In my opinion, such a reasonable South African is a person of common sense immersed in the cultural realities of our country and aware of the amplitude and nuanced nature of our Constitution. He or she neither attempts relentlessly to purge public life of even the faintest association with religion for fear of otherwise descending the slippery slope to theocracy, nor, at the other extreme, regards the religiously-based practices of the past to be as natural and non-sectarian as the air one breathes simply because of their widespread acceptance.¹⁶⁹

It is difficult to surpass this statement of the desirable, indeed ideal, attributes of the reasonable citizen when it comes to religious issues. The reasonable person is, of course, as Lord Radcliffe pointed out,¹⁷⁰ simply the anthropomorphic conception of justice. Here, just as the American Supreme Court had done, the Constitutional Court divided on the fulfillment of the test. On whether the designation of Sundays, Good Friday, and Christmas Day as “closed days” for the purposes of liquor sales by grocers was a breach of religious freedom guaranteed by section 14 of the Interim Constitution,¹⁷¹ four judges answered in the negative. There might be circumstances where state endorsement of religion would contravene section 14—where the endorsement has a coercive effect¹⁷²—but this was not one of them. The five other judges saw it differently. In their opinion, an “inescapable message” sent out by the legislation was that the state still showed special solicitude to Christians. The negative, symbolic harm was present; the implicit message communicated was that

¹⁶⁷ *Lawrence*, *supra* note 44 at para. 161.

¹⁶⁸ *County of Allegheny*, *supra* note 159 at 597, citing *School District of Grand Rapids v. Ball*, 473 U.S. 373 at 390 (1985).

¹⁶⁹ *Lawrence*, *supra* note 44 at para. 162.

¹⁷⁰ *Davis Contractors Ltd. v. Fareham Urban District Council*, [1956] A.C. 696 at 728 (H.L.).

¹⁷¹ Section 14 of the Interim Constitution (1993) retained its wording to become section 15 of the final *Constitution of the Republic of South Africa*, No. 108 of 1996 (see du Plessis, *supra* note 160 at 439-40).

¹⁷² *Lawrence*, *supra* note 44 at para. 104.

“Christians occupy central positions in the political kingdom, while non-Christians live on the periphery.”¹⁷³

Another objection to the endorsement test is its secularizing potential. Justice Kennedy in *County of Allegheny* noted that few traditional practices reflecting America’s religious roots could withstand scrutiny from this test.¹⁷⁴ Examples were, he noted, the Presidential Thanksgiving Proclamation, legislative prayers and chaplains, the national motto (“in God we trust”), and the Pledge of Allegiance’s reference to the United States being “one nation under God”.¹⁷⁵ Kennedy J. discerned that the minority or majority status of the religion would become critical in determining whether state recognition constituted a forbidden endorsement:

If there is such a person as the “reasonable observer,” I am quite certain that he or she will take away a salient message from our holding in these cases: the Supreme Court of the United States has concluded that the First Amendment creates classes of religions based on the relative numbers of their adherents. Those religions enjoying the largest following must be consigned to the status of least favored faiths so as to avoid any possible risk of offending members of minority religions.¹⁷⁶

In other words, under the endorsement test the followers of the majority faith must respect the sensibilities of others, and the US Supreme Court will ensure as much should the state venture to reinforce majority wishes. But the Court is not obliged to respect the majority’s sensibilities when it overturns existing state sponsored, public celebrations of the dominant religion. The Court is cast in the role of “censor” issuing national decrees as to what is orthodox, and “[w]hat is orthodox, in this context, means what is secular.”¹⁷⁷ Kennedy J. was adamant that the Court was “ill equipped to sit as a national theology board.”¹⁷⁸

Admittedly, there may be situations where state-favouring or endorsement of a particular religion *does* violate religious freedom; however, a carefully developed concept of coercion catches these. Chaskalson P. in *Lawrence* observed that state endorsements of religion would contravene the religious freedom guarantee

¹⁷³ *Lawrence, ibid.* at para. 164, Sachs J. (Mokgoro J. concurring). Three other justices, O’Regan, Goldstone, and Madala JJ. agreed that there had been an endorsement of religion sufficient to breach the constitution but, unlike Sachs and Mokgoro JJ., they concluded that the infringement was not justified “in an open and democratic society” according to s. 33.

¹⁷⁴ *Supra* note 159 at 670-74.

¹⁷⁵ *Ibid.* The last example was, of course, to prove eerily prophetic given the recent Ninth Circuit Court of Appeals decision impugning the constitutional propriety of those fateful words in the Pledge: *Newdow v. U.S. Congress*, 328 F.3d 466 (9th Cir. 2003) [*Newdow* (C.A.)]. An appeal to the Supreme Court was dismissed on procedural grounds: *Newdow* (Sup. Ct.), *supra* note 159. Three judges (Renquist C.J., O’Connor J., and Thomas J.) ruled, on the merits, that the Pledge did not violate the Establishment Clause.

¹⁷⁶ *County of Allegheny, supra* note 159 at 677.

¹⁷⁷ *Ibid.* at 678.

¹⁷⁸ *Ibid.*

if such endorsement has the effect of coercing persons to observe the practices of a particular religion, or of placing constraints on them in relation to the observance of their own different religion. The coercion may be direct or indirect, but it must be established to give rise to an infringement of the freedom of religion.¹⁷⁹

Kennedy J. in *County of Allegheny* correctly summarized, we believe, the true situation: “Absent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal.”¹⁸⁰

Coercion is a difficult concept to define, especially when one moves beyond “blatant” or “direct” instances of coercion (where the government expressly forbids or compels certain behaviour) to instances of “subtle” or “indirect” coercion (where government action merely makes non-compliance more difficult).¹⁸¹ John Locke drew a distinction between persuasion and force. He saw a limited role for the magistrate to make use of arguments to teach, instruct, and redress the “erroneous” by reason. For Locke, “it is one thing to persuade, another to command; one thing to press with arguments, another with penalties.”¹⁸² Like all dichotomies, the practical drawing of the line is often contentious. Jeremy Waldron observes:

It is notoriously difficult to draw a sensible line between conduct that counts as coercive and conduct that merely counts as persuasive. Knowing how to draw this line is not a matter of being familiar with a dictionary. It is a matter of knowing how and why coercion is thought to be a worry, and of working out how far and to what extent the grounds of that worry apply in a particular case.¹⁸³

Waldron then illustrates the point by echoing and updating Locke’s example: “Suppose a government makes no attempt to impose a Christian ethic with sanctions, but its most powerful orators constantly use broadcasting media to preach Christian values. Is this coercion or not?”¹⁸⁴

In Canada, indirect coercion has been found with regard to certain long-standing religious practices or observances. As we noted in Part II, the Supreme Court of Canada in *Big M Drug Mart* referred not only to “blatant” coercion, but to “indirect” or “subtle” forms of coercion as well. In that case, the Supreme Court held that a law whose avowed purpose was to prohibit Sunday trading worked “a form of coercion

¹⁷⁹ *Lawrence*, *supra* note 44 at para. 104.

¹⁸⁰ *County of Allegheny*, *supra* note 159 at 662.

¹⁸¹ See Michael W. McConnell, “Religious Freedom at a Crossroads” (1992) 59 U. Chicago L. Rev. 115 at 160. Thomas J. in *Newdow* criticized the adoption of a notion of coercion based on subtle psychological pressure. Instead, “[t]he kind of coercion implicated by the Religion Clauses is that accomplished ‘by force of law and threat of plurality’” (*supra* note 159 at 2330, citing *Lee v. Weisman*, 505 U.S. 577 (1992) at 640, Scalia J., dissenting).

¹⁸² Locke, *supra* note 82 at 18.

¹⁸³ Jeremy Waldron, “Legislation and Moral Neutrality” in Jeremy Waldron, ed., *Liberal Rights: Collected Papers: 1981-1991* (Cambridge: Cambridge University Press, 1993) 143 at 156.

¹⁸⁴ *Ibid.*

inimical to the spirit of the *Charter* and the dignity of all non-Christians.”¹⁸⁵ The Court held that non-Christians—whether Jews, agnostics, atheists, or Muslims—were not required or compelled to observe the Christian Sabbath in the sense that they were compelled to attend Church or pray that day. But they were required to “remember the Lord’s day of the Christians and to keep it holy” insofar as they were “prohibited for religious reasons from carrying out activities which are otherwise lawful, moral and normal.”¹⁸⁶ If one is precluded from doing an everyday secular activity (working, shopping, playing sport) to preserve the religious sensibilities of others, a form of coercion is arguably occurring. One is being indirectly forced to observe a religious practice, a practice not of one’s choosing and which may directly offend one’s own conscience. The “arm of the State”¹⁸⁷ ought not promote this effect.

Similarly, if a child is required to take positive steps to excuse herself or himself from religious instruction in the classroom, an embarrassment or “stigmatization” is likely to occur. For that reason, Canadian courts have ruled that religious exercises in public schools are not saved from infringing the *Charter*’s guarantee of religious freedom by allowing children the ability to opt out of such exercises.¹⁸⁸ Likewise, the ability of an adult citizen to opt out of the reciting of the Lord’s prayer at the opening of a town council meeting does not prevent *Charter* infringement.¹⁸⁹

Surely the outer limit of coercion was reached, if not breached, when the majority of the Ninth Circuit Court of Appeals in *Newdow* held that the Pledge of Allegiance was coercive. Even though the school pupil in that case was not obliged to recite the pledge, she was compelled to watch and listen to the ritual, and the court held: “[T]he mere presence in the classroom everyday as peers recite the statement ‘one nation under God’ has a coercive effect.”¹⁹⁰

Many of the Canadian instances are ones where state endorsement of a religious practice produces, in the Supreme Court’s view, tangible, adverse consequences for the non-adherent. A shopkeeper cannot sell on a certain day and, indeed, may suffer a further economic loss by having to also close on a holy day dictated by his or her own religion. But, to return to the central focus of our paper, what of the situation where the mere existence of an established church is said to be offensive? The US public nativity display cases provide a useful focus. As we have seen, some non-adherents may feel slighted and relegated to the position of outsiders by the mere presence of such a display; their dignity is, they contend, diminished by the very act of government favouritism.

¹⁸⁵ *Supra* note 44 at 354.

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

¹⁸⁸ See *Zylberberg*, *supra* note 35; *Canadian Civil Liberties v. Ontario (Education Minister)* (1990), 71 O.R. (2d) 341, 65 D.L.R. (4th) 1 (C.A.).

¹⁸⁹ *Freitag v. Penetanguishene (Town)* (1999), 47 O.R. (3d) 301, 179 D.L.R. (4th) 150 (C.A.).

¹⁹⁰ *Newdow* (C.A.), *supra* note 175 at 488.

We agree that it is no response to glibly argue that the aggrieved citizen should simply be less sensitive. Sachs J. in *Lawrence* explained that the functional impact of a law endorsing a religion may be “marginal, and its symbolic effect muted,”¹⁹¹ but the message it sends ought not to be disregarded out of hand. One must be most wary in applying the *de minimis non curat lex* maxim (the law does not concern itself with trifles) to these situations. The *de minimis* principle

should be used with extreme caution when it comes to deciding such sensitive and not easily measurable questions as freedom of conscience, religion and belief. One of the functions of the Constitution is precisely to protect the fundamental rights of non-majoritarian groups, who might well be tiny in number and hold beliefs considered bizarre by the ordinary faithful. In constitutional terms, the quality of a belief cannot be dependent on the number of its adherents nor on how widespread or reduced the acceptance of its ideas might be, nor, in principle, should it matter how slight the intrusion by the State is.¹⁹²

In principle, as Sachs J. contends, it should not matter how slight the offence is, but in practice there must be some limit: “trivial or insubstantial”¹⁹³ burdens upon religion are not candidates for constitutional infringement, nor should “every minuscule state-imposed cost associated with the practice of religion”¹⁹⁴ be prohibited. In *Newdow*, Fernandez J., dissenting, believed that it was “obvious” that the tendency of the Pledge’s “under God” phrase to interfere with the free exercise (or non-exercise) of religion was *de minimis*.¹⁹⁵ There was no coercion of anyone’s religious liberty “except in the fevered eye of persons who most fervently would like to drive all tincture of religion out of the public life of our polity.”¹⁹⁶

We agree that personal offence cannot lightly be ignored unless, it seems, the offended citizen is a member of the majority religion. Thick skin must be possessed by the adherents of the dominant (and in some nations, established) faith. Our point is that ostracism or alienation in this area can, and does, cut both ways. The angst experienced by those not adhering to the established faith must be set alongside the slight felt by religionists when their faith, often the dominant one in the nation, is ignored. As Fernandez J. in *Newdow* (C.A.) stated: “[S]ome people may not feel good about hearing the phrases recited in their presence, but, then, others might not feel good if they are omitted.”¹⁹⁷ It is easy to focus on alienation on one side only, yet

¹⁹¹ *Lawrence*, *supra* note 44 at para. 106.

¹⁹² *Ibid.* at para. 160. O’Connor J. in *Newdow* (Sup. Ct.) similarly commented: “There are no *de minimis* violations of the Constitution—no constitutional harms so slight that the courts are obliged to ignore them” (*supra* note 159 at 2323).

¹⁹³ *Jones v. The Queen*, [1986] 2 S.C.R. 284 at 314, 31 D.L.R. (4th) 569, Wilson J. dissenting on other grounds.

¹⁹⁴ *Edwards Books and Art v. The Queen*, [1986] 2 S.C.R. 713 at 759, 35 D.L.R. (4th) 1, Dickson C.J.C.

¹⁹⁵ *Newdow* (C.A.), *supra* note 175 at 493.

¹⁹⁶ *Ibid.* at 492.

¹⁹⁷ *Ibid.*

believers or religionists may feel equally alienated by a secular political regime that extirpates religious symbolism and practice from the public square.¹⁹⁸

In a nation such as the United Kingdom where a recent census indicated that some 72 per cent of respondents identified themselves as Christian,¹⁹⁹ it seems plausible to believe that a significant portion of these would be offended should a thoroughgoing expunging of Christian religious symbols and practices be implemented.

There is, moreover, perhaps wider support for the rejection of the notion of a secular state (in which religion is legally privatized) than one might initially think. Writers from other religions, such as the British Muslim scholar Tariq Modood and the Chief Rabbi Jonathan Sacks, have defended establishment on the basis that it is a symbolic reminder of the spiritual sphere of life.²⁰⁰ Modood has recently rejected the plea for disestablishment of the Church of England and the creation of a thoroughly secular state. It is, he noted, "a brute fact" that not a single article or speech could be found by any non-Christian faith in favour of disestablishment. Rather, secular reformers have been using minorities by claiming the desire to accommodate them in order to justify courses of action that advance secular purposes. Modood charges that "proposals to dismantle establishment in the name of multi-faithism must be viewed as disingenuous,"²⁰¹ and castigates the attempt "to wrap a homogenising secular hegemony in the language of multi-culturalism and rights of minorities."²⁰² He supports an established religion (albeit in a weak form) on the basis that all religions stand and fall together.²⁰³ An inclusive and accommodating Church of England that

¹⁹⁸ Steven D. Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom* (New York: Oxford University Press, 1995) at 114 [Smith, *Foreordained Failure*]. See also Robert Bork, *Coercing Virtue: The Worldwide Rule of Judges* (Washington, D.C.: American Enterprise Institute, 2003) at 65-66: "Apparently those who do not like religion are exquisitely sensitive to the pain of being reminded of it, but the religious are assumed to have no right to such feelings about the banishment of religion from the public arena."

¹⁹⁹ U.K., National Statistics, "Religion in Britain", online: National Statistics Online <<http://www.statistics.gov.uk>> (The actual number was 42 million people answering to Christian (71.6 per cent) out of base of 58.7 million. Some 92 per cent of the people surveyed chose to answer this voluntary question.)

²⁰⁰ See Tariq Modood, "Establishment, Multiculturalism and British Citizenship" (1994) 65 Pol. Q. 53; Jonathan Sacks, *The Persistence of Faith: Religion, Morality & Society in a Secular Age* (London: Weidenfeld and Nicolson, 1991) at 97.

²⁰¹ Modood, *ibid.* at 61.

²⁰² *Ibid.* at 63.

²⁰³ Modood, ironically, cites Dr. Jonathan Sacks, Chief Rabbi of the United Hebrew Congregation and distills Sacks' argument as follows: (i) in the context of massive but incomplete secularization, the fate of all religions, minority and majority, hang together; (ii) moreover, diversity requires that there also be an overarching public culture; (iii) if this public culture is to have a religious dimension, it will be that of the premier religion, which for historical reasons is the Church of England, consequently all minorities ought to support it as a national institution (*ibid.* at 63-64).

retains its special privileges is preferable to a thoroughly secular public square where all reference to the sacred and transcendental is extirpated. Modood comments:

[T]he minimal nature of the Anglican establishment, its proven openness to other denominations and faiths seeking public space, and the fact that its very existence is an ongoing acknowledgement of the public character of religion, are all reasons why it may be far less intimidating to the minority faiths than a triumphal secularism.²⁰⁴

Support for establishment can thus be located squarely within an anti-secularist agenda and is not an exclusively Christian plea. The most vocal critics of establishment in the name of religious pluralism are, in fact, usually secularists, rather than the adherents of minority religions, whose views, Modood wryly notes, are rarely solicited.²⁰⁵ Religious liberty is similarly seized upon as a vehicle to secure greater economic liberty. In *Lawrence*, Sachs J. noted that the challenge to the ban of liquor sales based on an alleged violation of religious freedom did not come from believers whose religion was being threatened, but from grocers whose profits were being limited. The “result was an air of artificiality in relation to this aspect of the case.”²⁰⁶

B. The Inequality Charge

To single out and favour one religion is, the critics contend, unjust. “Religious freedom”, insisted Philip Kurland, “must mean that whatever special place one religion may have in the eyes of God, all religions are equal in the eyes of the law.”²⁰⁷ Spanish legal scholar Ívan Ibán maintains: “If religious equality does not exist (I refer to purely formal equality), then I do not believe we can say that full religious freedom exists.”²⁰⁸

The short answer to this argument is that religious freedom and religious equality are two different things.²⁰⁹ *Ex hypothesi*, establishment contravenes the ideal of formal religious equality. But the point is surely not to treat all religions equally in an abstract sense but to treat all religions with due concern and respect. Conceivably, an historic religion supported by a majority of citizens performing valuable social, educational,

²⁰⁴ *Ibid.* at 72-73.

²⁰⁵ Tariq Modood, “Introduction: Establishment, Reform and Multiculturalism” in Tariq Modood, ed., *Church, State and Religious Minorities* (London: Policy Studies Institute, 1997) 3 at 9 [Modood, “Introduction”].

²⁰⁶ *Lawrence*, *supra* note 44 at para. 140.

²⁰⁷ Philip B. Kurland, “The Religion Clauses and the Burger Court” (1984) 34 *Cath. U. L. Rev.* 1 at 3.

²⁰⁸ Ívan C. Ibán, “Religious Tolerance and Freedom in Continental Europe” (1997) 10 *Ratio Juris* 90 at 97.

²⁰⁹ See e.g. Mason J. in *Black v. The Commonwealth*, *supra* note 8 at 617.

and cultural functions might well be more “deserving”, in a broad sense, of state assistance than a recent, tiny, insular religious community.²¹⁰

Sir Isaiah Berlin once warned of the danger of “confounding liberty with her sisters, equality and fraternity.”²¹¹ It may well be that freedom by itself, shorn of the conditions necessary to effectively exercise it, is a hollow thing. This simply indicates that there are other values or goals—equality, justice, and so on—besides liberty. Berlin urged: “But nothing is gained by a *confusion of terms* ... Everything is what it is: liberty is liberty, not equality nor fairness or justice or culture, or human happiness or a quiet conscience.”²¹²

Admittedly, claims of infringement of religious freedom and unequal, discriminatory treatment on the basis of religion can sometimes be difficult to distinguish. Sopinka J. of the Supreme Court of Canada in *Adler v. Ontario* noted this difficulty and the overlap between claims based on subsection 2(a) (religious liberty) and section 15 (equality and religious nondiscrimination) of the Canadian Charter.²¹³ Nonetheless, the claims are conceptually distinct. In *Adler*, parents who, for religious reasons, sent their children to independent, private religious schools challenged the absence of public funding for such schools as a violation of their rights to religious freedom and equality under the Charter. The Supreme Court held that there was no infringement of the appellants’ freedom of religion. The situation here did not involve the prohibition of a religious practice, but rather the absence of state funding for one. This, noted L’Heureux-Dubé J., “has not historically been considered a violation of the freedom of religion.”²¹⁴ McLachlin J. similarly commented: “Absence of state funding for private religious practices, as distinct from prohibitions on such practices, has never been seen as religious persecution.”²¹⁵ “Never”, continued McLachlin J., “has it been suggested that freedom of religion entitles one to state support for one’s religion.”²¹⁶ A failure to render state-assistance to all religious communities and to

²¹⁰ See Ruffini, *supra* note 95 at 520: “A perfect equality of legal treatment must presuppose an equality in the actual conditions.” Yet in many European nations this equality of conditions was plainly lacking (in Ruffini’s native Italy, a huge Catholic majority existed alongside a tiny non-Catholic minority). Thus,

in order to realise a perfect parity or equality it would be necessary that the State, in homage to pure abstractions and theories, should ignore the concrete reality of facts—which the State cannot possibly do, since it is an entity which lives and works exclusively in the world of reality. And from another point of view, an equality of legal treatment, in actual conditions so monstrously dissimilar, would not constitute practical justice, but merely abstract justice (*ibid.* at 520).

²¹¹ Isaiah Berlin, “Two Concepts of Liberty” in *Four Essays on Liberty* (London: Oxford University Press, 1969) 118 at 154.

²¹² *Ibid.* at 125 [emphasis added].

²¹³ *Adler v. Ontario*, [1996] 3 S.C.R. 609 at para. 166, 140 D.L.R. (4th) 385 [*Adler*].

²¹⁴ *Ibid.* at 410

²¹⁵ *Ibid.* at 454.

²¹⁶ *Ibid.*

treat them all with strict equality was not a violation of religious freedom. Cases such as *Adler* thus bear out Richard Moon's recent assessment that "the Canadian courts have been hesitant to state clearly that freedom of religion does not simply prohibit coercion in spiritual matters (protects spiritual autonomy), but also prohibits something more, the unequal treatment of different religions."²¹⁷ Interestingly, L'Heureux-Dubé J. in *Adler* pointed out that the potential for greater redress under section 15 may not be realized: "The protections afforded in s. 15 may thus be of greater scope than those in s. 2(a), as our concern moves from the coercive aspect of the state action to its impact on the individual's and group's sense of dignity and worth in the socio-economic context of the day."²¹⁸ Under section 15, a minority of the Court held that there had indeed been a breach of the Charter.²¹⁹

If we return to our definition of religious freedom in Part II, it seems clear that establishment per se does not infringe religious freedom. Positive religious liberty remains similarly unimpaired. Regarding negative religious liberty, establishment (in the weak form) ipso facto does not produce any direct or indirect coercion or compulsion in religious matters.

Empirically speaking, one can point to examples of nations with established churches whose citizens enjoy religious liberty. As Carillo de Alborno suggested in his 1963 study: "It seems obvious ... that countries which officially protect a particular religion *may have* a correct conception of religious liberty. We think, for instance, that the British understanding of religious freedom in the modern times is a perfect one, in spite of having an established Church."²²⁰ The description of the British church-state structure as "perfect" despite establishment is hardly an assessment with which American scholars would concur. Staunch separationists retort: "It is of course true there is a *large measure* of religious liberty in England; whether there is *complete* religious liberty depends largely on one's viewpoint."²²¹ However, aside from the symbolic alienation some non-Christians may experience, it is difficult to pinpoint precisely how religious freedom is less than complete. If there is an "absolute and indissoluble nexus" between non-establishment (separationism) and religious freedom, then many European nations such as England and Italy "should resign themselves to remaining forever excluded from a regime of full and true religious liberty."²²² This is a view that would find little favour outside of the US.

²¹⁷ Richard Moon, "Liberty, Neutrality, and Inclusion: Religious Freedom under the Canadian Charter of Rights and Freedoms" (2003) 41 *Brandeis L.J.* 563 at 565.

²¹⁸ *Supra* note 213 at 414.

²¹⁹ McLachlin J. and L'Heureux-Dubé J. held that section 15's equality guarantee had been breached, although McLachlin J. found that the infringement was justified under section 1 of the Charter (*Adler, ibid.*).

²²⁰ A.F. Carrillo de Alborno, *The Basis of Religious Liberty* (London: SCM, 1963) at 51 [emphasis in original].

²²¹ Pfeffer, *Church and Freedom*, *supra* note 98 at 52 [emphasis added].

²²² Ruffini, *supra* note 95 at 521.

To vigorously pursue separationism and dismantle the established church would, in some countries, cause much offence. To dismantle state churches in pursuit of some abstract or idealized conception of equality would do violence to history and the actual exigencies of religious life in certain nations.

There is, we concede, the strongly held view that religious equality or evenhandedness *is* an intrinsic part of religious freedom. For example, five judges of the South African Constitutional Court in *Lawrence* were adamant that this was so. For them, to refrain from state coercion with respect to citizens' religious choices did not go far enough. O'Regan J. insisted:

[T]he requirements of the Constitution require more of the Legislature than that it refrain from coercion. It requires in addition that the Legislature refrain from favouring one religion over others. Fairness and evenhandedness in relation to diverse religions is a necessary component of freedom of religion.²²³

In the South African context, any state endorsement of Christianity would not only "disturb the general principle of impartiality in relation to matters of belief and opinion," but might also serve to activate memories of past discrimination since religious marginalization had "in the past coincided strongly ... with racial discrimination, social exclusion and political disempowerment."²²⁴

Chaskalson P. (along with three other concurring judges) saw no need, however, to overlay section 14, the religious freedom guarantee, with American-style establishment interpretations that mandate strict religious equality and a secular public sphere. As a matter of drafting, section 14 of the Interim Constitution did not contain an establishment clause and he saw no need to read one into the section. Another section of the Interim Constitution (section 8, now section 9 of the Final Constitution) dealt with unequal treatment and religious discrimination. More importantly, to read anti-establishment principles into the religious freedom guarantee would have "far-reaching implications".²²⁵ Chaskalson P. proceeded to give a short litany of practices that would be vulnerable: public holidays at Christmas and Good Friday, the broadcasting of church services by the state broadcaster, state subsidies to denominational schools, and so on.²²⁶

It may be that the unequal treatment accusation is another way of levelling the charge of unjustified discrimination. But, as we discussed in Part II, there may be objective reasons why the established church is given certain advantages vis-à-vis other faiths. The "benefits" it receives from the state are a quid pro quo for the national pastoral tasks it undertakes for society at large.

²²³ *Lawrence*, *supra* note 44 at para. 128.

²²⁴ *Ibid.* at para. 152, Sachs J.

²²⁵ *Ibid.* at para. 101.

²²⁶ *Ibid.*

To suggest that an established church is given “advantages” over other religions can, in any event, be somewhat misleading, certainly in the case of “mild” establishment. In Britain, for example, it is often claimed that the position of the twenty-six senior bishops in the House of Lords constitutes preferential treatment for the church.²²⁷ This is at best a simplification, as any “advantage” is purely formal. The Anglican bishops do not sit in the House of Lords to defend the interests of the Church of England, either in theory or in practice. The justification (itself controversial) is that they add to the range of views in the legislative process by contributing a religious or moral perspective.²²⁸ Far from benefitting the church (since the bishops hardly ever speak as Anglicans), if this practice has any benefit, it is to add richness to the legislative process. Objectors can, and still do, argue that other religious and nonreligious groups do not enjoy this privileged access.²²⁹ In reality, however, the bishops’ influence is negligible—they constitute a small percentage of the membership of House of Lords, it is rare for more than two of them to speak or vote in any debate, and the last significant occasion on which their votes changed the outcome was nearly a century ago (in passing the *Parliament Act, 1911*).²³⁰ Although (mysteriously) the Church of England has fought to retain its place in a reformed Upper House, if they were to be removed, the main casualty would be critics of the current arrangements who would then be deprived of a superficially plausible but thoroughly misleading argument.

Equally, it is easy to misunderstand another aspect of the English arrangements—the connection between the Crown and the Church of England. To portray this relationship as conveying undue privilege is to suggest that the Church benefits from the arrangement. Arguably, however, it is the monarchy which has been the net beneficiary. Spiritual underpinning for what Bagehot described as the “magic” of monarchy,²³¹ for a long time distracted attention from the otherwise anomalous nature

²²⁷ See e.g. Edge, “Religious Remnants”, *supra* note 1 at 454-55.

²²⁸ U.K., Royal Commission on the Reform of the House of Lords, *A House for the Future* (London: The Stationary Office, 2000) c. 15 at paras. 4-5 (Chairman: The Rt. Hon. Lord Wakeham DL); U.K., Parliament, “The House of Lords: Completing the Reform”, Cmd 5291, para. 83, online: Department for Constitutional Affairs <<http://www.dca.gov.uk/constitution/holref/holreform.htm>>.

²²⁹ See e.g. U.K., H.C., “Public Administration—Fifth Report: The Second Chamber: Continuing the Reform”, Cm 494 in *Sessional Papers, 2001-2002*, at para. 158, online: The United Kingdom Parliament <<http://www.parliament.the-stationary-office.co.uk/pa/cm200102/cmselect/cmpubadm/494/49402.htm>>.

²³⁰ See Francis Brown, “Influencing the House of Lords: the Role of the Lords Spiritual 1979-1987” (1994) 42 Pol. Stud. 105; Gavin Drewry & Jenny Brock, “Prelates in Parliament” (1970-1971) 24 Parliamentary Aff. 222. For an analysis of recent voting figures, see U.K., Joint Committee on House of Lords Reform, *House of Lords Reform: First Report* (London: The Stationary Office, 2002) at para. 38, online: The United Kingdom Parliament <<http://www.parliament.the-stationary-office.co.uk/pa/jt200203/jtselect/jtholref/17/17.pdf>>.

²³¹ Paul Smith, ed., *Bagehot: The English Constitution* (Cambridge: Cambridge University Press, 2001), 43-44, 54. See generally Bradley, *supra* note 10; Leigh, “By Law Established?”, *supra* note 23.

of hereditary succession to the throne. That there is now serious discussion of cutting the connection between the sovereign and the Church is, in large part, the result of reformers perceiving a benefit to the monarchy in presenting a more religiously inclusive face.²³²

What the Church of England *gains* from the role of the monarch as Supreme Governor is the dubious privilege of a degree of state interference in senior ecclesiastical appointments (in practice through the Prime Minister, rather than the sovereign herself)²³³ and in church legislation (which is subject to Royal Assent). It is far from clear that this constitutes preferential treatment.

These examples demonstrate the importance of evaluating any supposed privileges that an established religion receives in the context of and with regard to corresponding duties. Formal equality (requiring complete parity of treatment of all religion) is too blunt a measure of difference, unless one starts from the position that any distinction in treatment is unjustifiable. To do so would be to give absolute priority to formal equality. The better measure, we submit, is a notion of substantive equality—only if differences in treatment are excessive or disproportionate to the distinctive roles and responsibilities of the established church should they be suspect. It should be noted that the case law on both section 15 of the Canadian Charter and article 14 of the *ECHR* follows a similar approach to the equality guarantee. Under the Charter, provisions that offend section 15 may nevertheless be justified under section 1.²³⁴ Under article 14 of the *ECHR*, the case law treats discrimination as suspect only if there is “no reasonable and objective justification.”²³⁵ This does not mean that a court is required to defer uncritically to all existing differences; rather, it promotes a discriminating approach to testing the legitimacy of different treatment.²³⁶

Two decisions under article 14 of the *ECHR* hold that the preferential tax treatment of the Catholic Church in Spain over that of Protestant churches is justified, referring to the former’s responsibilities to provide public access to its monuments and artefacts under a concordat with the state.²³⁷ These decisions are of some

²³² See *Fabian Society*, *supra* note 23 at 72: “A continuing close and formal relationship between the Head of State and one faith—or indeed with organised religion of any kind—is no longer appropriate for modern Britain.”

²³³ See *Palmer*, *supra* note 12.

²³⁴ See *Andrews v. Law Society of B.C.*, [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1. See also Peter W. Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1997) at 1252-53 (suggesting that this is a preferable approach to reading reasonable limitations into section 15).

²³⁵ *Belgian Linguistics Case No. 2* (1968), 1 E.H.R.R. 252 at 284.

²³⁶ Moreover, in one striking case the European Court of Human Rights has held that article 14 imposes an obligation to treat different cases differently: *Thlimmenos v. Greece*, (2001) 31 E.H.R.R. 411 at para. 44 (in the application of subsequent civil penalties, failure to distinguish between those who refuse to comply with a law for religious reasons and other law-breakers amounted to unequal treatment).

²³⁷ *Iglesia Bautista*, *supra* note 112; *Fernandez*, *supra* note 112.

significance in justifying preferential treatment in other countries.²³⁸ In some contexts, then, the apparently privileged position of an established church can be justified despite differences in treatment that appear to violate formal equality.

C. The Neutrality Mirage

The liberal state's claim to religious neutrality is decidedly shaky if not wholly repudiated. There is, we contend, always an establishment or state orthodoxy. This is, of course, a large and contentious claim deserving of expansive argument.²³⁹ In what is already a lengthy essay, we will confine ourselves to a brief explanation.

Liberal democracies may *aim* to be neutral as between competing values, interests, and conceptions of individuals belonging to different faiths. They may assert that "there is no orthodoxy on religious matters in the secular state," as Blackmun J. did in *County of Allegheny*.²⁴⁰ But in practice there is always an orthodoxy, and not all ways of life can be treated the same. Neutrality of consequences or outcomes—the notion that the institutions of public policy must take care to ensure that the effects of state policies upon different religious communities are even-handed (neither increasing the chance of one way of life flourishing nor another diminishing)—is unsustainable in the opinion of many theorists. John Rawls comments: "[I]t is surely impossible for the basic structure of a just constitutional regime not to have important effects and influences as to which comprehensive doctrines endure and gain adherents over time; and it is futile to counteract these effects and influences."²⁴¹ Some liberal theorists have been prepared to abandon the claim to neutrality entirely.²⁴² William Galston, for example, concedes that liberalism "cannot, as many contemporary

²³⁸ For example, in the United Kingdom with regard to the arrangements reached under the *Education Act, 1944* for state funding of denominational schools operated in premises owned by church authorities, and the exemption of Church buildings from secular planning control. Neither applies solely to the Church of England but in each case that church benefits substantially more than minority religions.

²³⁹ See generally Rex J. Ahdar, *Worlds Colliding: Conservative Christians and the Law* (Aldershot, U.K.: Ashgate, 2001) c. 3-4; Iain T. Benson, "Notes Towards a (Re)definition of the 'Secular'" (2000) 33 U.B.C. L. Rev. 519; Samuel Gregg, *Morality, Law and Public Policy* (Sydney: St. Thomas More Society, 2001) c. 2; Phillip E. Johnson, *Reason in the Balance: The Case Against Naturalism in Science, Law & Education* (Downers Grove, Ill.: InterVarsity, 1995) c. 2; David N. Cinotti, "The Incoherence of Neutrality: A Case for Eliminating Neutrality from Religion Clause Jurisprudence" (2003) 45 J. Church & St. 499.

²⁴⁰ *Supra* note 159 at 611. See also *ibid.* at 610: "A secular state, it must be remembered, is not the same as an atheistic or antireligious state. A secular state establishes neither atheism nor religion as its official creed."

²⁴¹ John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993) at 193. "The principles of any reasonable political conception must impose restrictions on permissible comprehensive views, and the basic institutions those principles require inevitably encourage some ways of life and discourage others, or even exclude them altogether" (*ibid.* at 195).

²⁴² See e.g. Stephen Macedo, "The Politics of Justification" (1990) 18 Pol. Theory 280 at 298: "The liberal must, in the end, defend his partisanship and not evade it."

theorists suppose, be understood as broadly neutral concerning the human good. It is rather committed to a distinctive conception of the human good, a conception that undergirds the liberal conception of social justice.²⁴³

A secular baseline is commonly admired by many liberals as a neutral, impartial one, but that depends entirely upon one's viewpoint. Few religious people believe that secularism, in the guise of a strict separation between organized religion and public institutions, is really neutral. As Tariq Modood observes: "There may be a neutrality between religions, but there is less of an even-handed division of spoils between those who believe religion is a matter of private faith, that the transcendental relates only to the nonpolitical dimensions of the human condition, and those who deny this."²⁴⁴ Secular constitutions "seem to be the political expression of a particular philosophy about religion and life."²⁴⁵ Robert George concurs, noting that, increasingly, many religionists

[q]uite reasonably reject secularism's claim to constitute nothing more than a neutral playing field on which other worldviews may fairly and civilly compete for the allegiance of the people ... [S]ecularism is itself one of the competing worldviews. We should credit its claims to neutrality no more than we would accept the claims of a baseball pitcher who in the course of a game declares himself to be the umpire and begins calling his own balls and strikes ... [S]ecularism itself is a sectarian doctrine with its own metaphysical and moral presuppositions and foundations, with its own myths, and, one might even argue, its own rituals.²⁴⁶

As we have seen, critics of religious establishment point to the symbolic ostracism or alienation experienced by those not adhering to the established faith. Yet, to reiterate, it is easy to focus on alienation on one side only—believers may feel equally alienated by a secular, political regime that extirpates religious symbolism and practice from the public square.²⁴⁷ This kind of secularism is experienced as "a competing partisan position".²⁴⁸ Far from being neutral or inclusive, it resonates as an ordering of life in accordance with the nonreligious values of some of the community at the expense of the spiritual values of others. Kennedy J. in *Allegheny* captures this concern: "[E]nforced recognition of only the secular aspect would signify the callous indifference toward religious faith that our cases and traditions do not require."²⁴⁹

²⁴³ William A. Galston, *Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State* (Cambridge: Cambridge University Press, 1991) at 18; See also William Galston, *Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice* (Cambridge: Cambridge University Press, 2002) at 23, 26.

²⁴⁴ Modood, "Introduction", *supra* note 205 at 13.

²⁴⁵ *Ibid.*

²⁴⁶ Robert P. George, "A Clash of Orthodoxies" (August-September 1999) 95 *First Things* 33 at 34-35.

²⁴⁷ Smith, *Foreordained Failure*, *supra* note 198 at 114.

²⁴⁸ Moon, *supra* note 217 at 571.

²⁴⁹ *Supra* note 159 at 663-64.

For a modern state to remain entirely impartial is, we submit, an impossible feat. The idea of a purely neutral state in which there is no official endorsement of the true and “good”, of a political community that eschews the notion that it acts on the basis of substantive values, is a mirage. As Lesslie Newbigin points out: “No state can be completely secular in the sense that those who exercise power have no beliefs about what is true and no commitments to what they believe to be right.”²⁵⁰ Paul Rishworth similarly contends:

The reality, of course, is that states must inevitably pursue or affirm ideologies upon which opinions may reasonably differ amongst its citizens. A government’s position on matters such as free trade, universal access to public health and pensions, employment law, the way it should treat its citizens, and so on will all reflect some underlying vision and values.²⁵¹

Once a state becomes more than a minimalist policeman and adopts a more pervasive, cultural-formation role, it cannot help but advantage and disadvantage particular world views.

Once government shakes off its limited role and concerns itself with the general welfare of the people, including their cultural and intellectual lives, it has leapt the “Wall” and entered the traditional sphere of religion. In contrast to many of our Founders, [Edmund] Burke had a more modern conception of the jurisdiction of the State, which did not permit him the easy answer of a “Wall of Separation.” If the government is “a partnership in all science; a partnership in all art; a partnership in every virtue and in all perfection,” then it necessarily will be conveying a collective teaching on science, art, virtue and perfection (whether we label the teaching a “religion” or not). *It follows not that an establishment is desirable, but that it is inescapable.*²⁵²

In a society where the role of the state is minimal, where the state is merely concerned with, say, defence and maintaining civil order, a commitment to secularism arguably does not present great difficulties. But “in Western countries, as the role of the state expands to cover health, education, employment and society security, the space left to those of any religious convictions to mould their lives according to their faith is correspondingly reduced.”²⁵³

The state’s position and resultant public policies will reflect its conception of the good, its official world view. McConnell describes this as no less than

²⁵⁰ Lesslie Newbigin, *Foolishness to the Greeks: The Gospel and Western Culture* (Grand Rapids: Eerdmans, 1986) at 132.

²⁵¹ Paul Rishworth, “Liberty, Equality and the New Establishment” in Grant Huscroft & Paul Rishworth, eds., *Litigating Rights: Perspectives from Domestic and International Law* (Oxford: Hart, 2002) 91 at 93.

²⁵² Michael W. McConnell, “Establishment and Toleration in Edmund Burke’s ‘Constitution of Freedom’” [1995] Sup. Ct. Rev. 393 at 444 [emphasis added].

²⁵³ Rivers, *supra* note 4 at 3.

“establishmentarianism”.²⁵⁴ While establishmentarianism is ordinarily associated with a religious orthodoxy, the orthodoxy may come in secular as well as religious forms.²⁵⁵ The established position will inevitably exclude the world views of some citizens. Take the state’s view on marriage. A choice must be made on the nature of marriage: is it to be a lifelong commitment? Between persons of the opposite sex? Confined to two persons only? The ultimate choice will be repugnant to those whose religious beliefs and world view are different from the state’s value judgment. Is the public school system to be strictly secular? If so, a pupil is likely to learn the lesson that religion is of little relevance to the subject matter taught. This is, as McConnell points out, a lesson about religion and is not neutral: “Studious silence on a subject that parents may say touches all of life is an eloquent refutation.”²⁵⁶ Issues of life and death, such as abortion and euthanasia, will turn on fundamental moral and metaphysical understandings “of whether bodily life is intrinsically good, as Judaism and Christianity teach, or merely instrumentally good, as orthodox secularists believe.”²⁵⁷

Conclusion

Is a mild or weak form of establishment, where the state does not coerce or compel religious practice or observance, compatible with religious freedom? We have argued that it is. Weak establishment does not inhibit the religious beliefs or practices of others. The US First Amendment caselaw and doctrine have produced a distorting influence. Our survey of other countries, of international law, and in particular, of the *ECHR* cases demonstrates that establishment is not generally judged as limiting religious liberty. Nor are the arguments based on the alleged alienation of other religions compelling. A state in which “religion” is disestablished cannot bask in self-congratulation at having maximized religious liberty through its supposed neutrality on religious matters.

To avoid the negative and distorting connotations of the word “establishment”, it might be better to adopt a label such as “acknowledgement” for the sort of mild state endorsement of religion we defend in this article. Some dicta in the US Supreme Court have used this term in an effort to separate the chaff and the wheat in terms of permissible state support for religion. O’Connor J. distinguished between government endorsements versus mere “acknowledgements” of religion.²⁵⁸ “Intuition tells us”, explained Brennan J., “that some official ‘acknowledgement’ is inevitable in a religious society if government is not to adopt a stilted indifference to the religious

²⁵⁴ Michael W. McConnell, “The New Establishmentarianism” (2000) 75 *Chicago-Kent L. Rev.* 453 at 453.

²⁵⁵ *Ibid.*

²⁵⁶ Michael W. McConnell, “Neutrality Under the Religion Clauses” (1986) 81 *Nw. U. L. Rev.* 146 at 162.

²⁵⁷ George, *supra* note 246 at 35.

²⁵⁸ Lynch, *supra* note 159 at 692-93.

life of the people.”²⁵⁹ Kennedy J. urged that “[r]ather than requiring government to avoid any action that acknowledges or aids religion, the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society.”²⁶⁰

There is no need to eradicate historic religious institutions and practices in the name of religious freedom. Unless the notion of religious freedom is to be stretched or, more accurately, distorted to embrace religious equality, noncoercive state endorsement of religion is consistent with freedom of religion. It may be that a particular governmental endorsement of religion is vulnerable to a constitutional challenge on other grounds (for example, constitutional protection concerned with equality), but that is another matter.

²⁵⁹ *Lynch, ibid.* at 714. Brennan J. was quick to add, however, that “overly broad acknowledgments” of religion that might “imply governmental favoritism” toward one religion would not pass constitutional muster (*ibid.*).

²⁶⁰ *County of Allegheny, supra* note 159 at 657.