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# ARTICLES

## ARE TWO CLAUSES REALLY BETTER THAN ONE? RETHINKING THE RELIGION CLAUSE(S)

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Donald L. Beschle*

## I. INTRODUCTION

The First Amendment begins with two references to the relationship between government and religion.[1] The prohibition on establishment of religion and the guarantee of free exercise of religion, despite their obvious interaction, are generally regarded as separate clauses, and analyzed under tests developed under one or the other.[2] The current state of Establishment Clause doctrine and Free Exercise doctrine is sharply contested and by no means clear.

Supreme Court justices will usually classify a religious freedom case as either presenting non-establishment or free exercise issues. Having done so, they will apply the test framed for that clause. But does that lead to the best and most defensible outcome? Might it be better to recognize that what we regard as separate clauses are, rather obviously, two aspects of a single right of religious freedom, and apply a single test that explicitly considers both values?

The Canadian Charter of Rights and Freedoms, the closest analog in the Canadian Constitution to the American Bill of Rights, makes no reference to a non-

* Professor, The John Marshall Law School.

[1] U.S. CONST. amend. I ("Congress shall make no law respecting the establishment of religion or the free exercise thereof[.]").

[2] *See infra* notes 101–18 and accompanying text.

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establishment principle.[3] Yet, in their application of the right to religious freedom, Canadian Courts have shown a sensitivity to non-establishment values that seems to equal, and occasionally exceed, that of the Supreme Court of the United States.[4] This Article will explore the possibility that abandoning the notion that a religious freedom case is either an Establishment Clause or a Free Exercise case; instead they are often, if not always, both, and applying a single test, might lead to better outcomes.

Part I will explore the recent Supreme Court case of *Trinity Lutheran v. Comer*[5] and the way many justices insist on privileging one clause over the other, even to the extent of dismissing the other as insignificant in the case. Part II will examine the Supreme Court's 2015 decision in *Town of Greece*[6] and contrast it with the contemporaneous Supreme Court of Canada decision in *City of Sanguenay*.[7] Each case presented a similar question of the permissibility of local government bodies opening their sessions with public prayer. The cases reach sharply different conclusions, with Canada weighing non-establishment values more strongly without an express Establishment Clause than the Supreme Court of the United States. Part III will give a very brief history of how each constitutional system developed its own approach to the relationship between government and religion. Finally, Part IV will suggest a single test for religious freedom cases, whether they initially seem to invoke one or both currently separate clauses. This test will largely track the proportionality test used by Canadian (and other western) courts in individual rights cases.

## II. *TRINITY LUTHERAN*: FREE EXERCISE OR NON-ESTABLISHMENT?

On June 26, 2017, the Supreme Court handed down its decision in *Trinity Lutheran Church v. Comer*.[8] The case, the most recent attempt by the Supreme Court to wrestle with the First Amendment Religion Clauses, grew out of a rather humble set of circumstances. Missouri's Department of Natural Resources offers a limited

[3] The Constitution Act, 1982, c. 11, sch. B (U.K.).

[4] *See infra* notes 101–18 and accompanying text.

[5] Trinity Lutheran Church, Inc. v. Comer, 137 S. Ct. 2012 (2017).

[6] Town of Greece v. Galloway, 134 S. Ct. 1811 (2014).

[7] Mouvement Laïque Québécois v. Saguenay, [2015] 2 S.C.R. 3 (Can.).

[8] *Trinity Lutheran*, 137 S. Ct. at 2012.

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number of financial grants to nonprofit organizations to cover the expense of resurfacing playgrounds using a surface made from recycled tires, thought to be safer than gravel or comparable surfaces.[9]

Trinity Lutheran operates a daycare center for preschool children ages two to five, on church property.[10] The Center admits children of any religion.[11] The Church's application for a grant under the recycled tire program scored quite high on several criteria unrelated to the religious nature of the Church, but Missouri denied the application based on a provision of the Missouri State Constitution.[12]

That provision, Article I, Section 7, is one of a number of state constitutional provisions, dating to the late nineteenth century[13] that are more specific than the Establishment Clause of the First Amendment in their prohibition of financial support from government to religious bodies:

> That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any favor of religious faith or worship.[14]

The Missouri provision, and those like it in other states, were a reaction to intense controversy in many states during the mid and late nineteenth century over the role of religion in schools, public and private.[15] In a legal world that had not yet incorporated the First Amendment into the Fourteenth Amendment Due Process Clause, states were free to consider their own responses to two questions: what role, if any, should religion play in public education, and what role, if any, should government play in support of religious alternatives to public education?

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[9] *Id.* at 2018.

[10] *Id.* at 2017.

[11] *Id.*

[12] *Id.* at 2018; MO. CONST. art. 1, § 7.

[13] See STEVEN K. GREEN, THE SECOND DISESTABLISHMENT: CHURCH AND STATE IN THE NINETEENTH-CENTURY AMERICA 290–311 (2010), for a discussion of these "Blaine Amendments."

[14] *Trinity Lutheran*, 137 S. Ct. at 2018; MO. CONST. art. 1, § 7.

[15] *See* GREEN, *supra* note 13.

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Congressman James Blaine, hoping to become the Republican nominee for president in 1876, introduced a proposed amendment to the U.S. Constitution that would address these questions.[16] The Blaine Amendment would clearly prohibit states from giving financial aid to religious schools, and would also require states to provide a system of public schools for all children.[17] Blaine seemed to lose interest in his proposal after he lost the nomination to Rutherford Hayes, and it never emerged from Congress.[18] A large number of states, however, including Missouri, enacted "Baby Blaine" amendments to their own constitutions, prohibiting state aid to religious schools in strong and specific language.[19]

In *Locke v. Davey*, the Supreme Court seemed to recognize the power of state constitutional provisions advancing non-establishment principles to a degree beyond the limits of the First Amendment Establishment Clause.[20] Washington, for example, administered a program of scholarship grants to high school graduates who met certain academic standards for use at public or private collages.[21] This program, would not, however, help fund a college-level program of study that prepared a student for ministry.[22] Davey, an otherwise qualified student, was denied a grant due to his desire to use it to help pay for such a program.[23] He brought suit claiming this constituted discrimination in violation of his free exercise rights.[24] A divided Court rejected his claim.[25] The Court held there was some "play in the joints" of establishment and free exercise principles allowing states to pursue non-establishment values in somewhat stronger terms than required by the First Amendment.[26]

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[16] *Id.* at 299.

[17] *Id.* at 294–95.

[18] *Id.* at 296–301.

[19] *Id.* at 302.

[20] Locke v. Davey, 540 U.S. 712, 725 (2004).

[21] *Id.* at 716.

[22] *Id.*

[23] *Id.* at 717–18.

[24] *Id.*

[25] *Id.* at 718.

[26] *Id.* at 719.

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Missouri relied on *Locke* in defending its exclusion of Trinity Lutheran from the scrap tire program.[27] The Court rejected the state's argument, however, in an opinion that left *Locke* itself, and the principle that states might weigh non-establishment principles more strongly than the Court would weigh such values under the Establishment Clause, in doubt. The majority opinion, noting that both sides agreed that under existing precedent, including Trinity Lutheran in the program would not violate the First Amendment Establishment Clause, went on to view the case as presenting a Free Exercise Clause claim.[28] Drawing on *Employment Division v. Smith*[29] and *City Hialeah v. Church of Lukumi*,[30] setting forth the parameters of the Free Exercise Clause, the Court found Missouri had engaged in unconstitutional discrimination against Trinity Lutheran.[31]

Is *Locke* still good law? Perhaps; the majority opinion did distinguish *Locke* as involving a program that did not distinguish on the grounds of who the recipient was, but rather on what the specific funds were to be used for.[32] It also dropped a short footnote, which was disavowed by two concurring Justices,[33] pointing out that the holding was limited to the specific facts of the case.[34] Four Justices, two concurring and two dissenting, would view the case as being, at least potentially, far more than a simple, fact-based decision about playground surfaces.[35]

To dissenting Justice Sotomayor, joined by Justice Ginsberg, the Court's decision was a serious blow to the principles behind the Establishment Clause.[36]

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[27] Trinity Lutheran Church, Inc. v. Comer, 137 S. Ct. 2012, 2016 (2017).

[28] *Id.* at 2019.

[29] Employment Division v. Smith, 484 U.S. 873 (1990) (the free exercise clause does not mandate exemption from generally applicable criminal statutes).

[30] Church of Lukumi Babalue Aye v. City of Hialeah, 508 U.S. 520 (1993) (the free exercise clause invalidates a statute specifically targeted at religious beliefs).

[31] *Trinity Lutheran*, 137 S. Ct. at 2020–21.

[32] *Id.* at 2023.

[33] *See id.* at 2025 (Thomas, J., concurring).

[34] *Id.* at 2024 n.3 (majority opinion).

[35] Justices Thomas and Gorsuch concur but would prefer a strong statement of free exercise protection against discrimination. *Id.* at 2025–26 (Thomas, J., concurring). Justice Sotomayor, joined by Justice Ginsburg, dissented, finding that this is an Establishment Clause violation. *Id.* at 2028 (Sotomayor, J., dissenting).

[36] *Id.* at 2027 (Sotomayor, J., dissenting).

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While earlier cases had permitted forms of indirect state aid to religious schools or other church-related programs, this was "the first time. . . [the Court held] that the Constitution requires the government to provide public funds directly to the church."[37] Justice Sotomayor chided the majority for simply accepting the parties' agreement that the First Amendment Establishment Clause was not at issue here, reminding her colleagues that the Court, not the parties, decide what issues are relevant.[38] In the dissenters' view, the case was primarily about non-establishment values, and a serious erosion of those values.[39]

In sharp contrast, the concurring opinions of Justice Thomas and Justice Gorsuch would prefer a stronger statement in favor of the Church's free exercise rights and dismissing any establishment concerns.[40] In particular, they specifically took issue with the majority's short footnote stressing the narrow scope of the Court's holding.[41]

Finally, Justice Breyer, in a short concurring opinion, stressed the general public benefits of the scrap tire program, and added his own assertion that the case should be limited to its facts, leaving "the application of the Free Exercise Clause to other public benefits for another day."[42] While joining the majority's Free Exercise analysis, he specifically analogizes this case to *Everson v. Board of Education*,[43] the seminal Establishment Clause case. Justice Breyer, perhaps the present Court's most frequent balancer,[44] is clearly aware of the significance of each clause, and unwilling to give one automatic preference over the other.

*Trinity Lutheran*, like *Locke*, presents a situation where the co-existence of free exercise and Establishment Clause values is obvious. But the history of Religion Clause jurisprudence is dominated by cases placed, by the Court and commentators,

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[37] *Id.*

[38] *Id.* at 2028 ("Constitutional questions are decided by this Court, not the parties' concessions.").

[39] *Id.* at 2027.

[40] *Id.* at 2025–26 (Gorsuch, J., concurring).

[41] *Id.*

[42] *Id.* at 2027 (Breyer, J., concurring).

[43] Everson v. Board of Education, 330 U.S. 1 (1947).

[44] To clarify Justice Breyer's fact-specific balancing, contrast *McCreary v. ACLU*, 545 U.S. 844 (2005), where he provides the fifth vote to invalidate a Ten Commandments display in a county courthouse, with *Van Orden v. Perry*, 545 U.S. 677 (2005), where he provides the fifth vote to permit a Ten Commandments monument to remain on the grounds of the Texas State Capital.

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within the purview of one or the other clause. Are the values sought to be protected by each clause really independent of each other, or are they always both present, whether acknowledged or not? How important is the presence of both clauses? Would it make a difference if there were no Establishment Clause? And what might that difference be? A pair of recent cases involving prayer at local legislative meetings, one case from the U.S. Supreme Court, the other from the Supreme Court of Canada, present an interesting contrast.

## III. LOCAL LEGISLATIVE PRAYER IN THE U.S. AND CANADA TOWN OF GREECE AND CITY OF SANGUENAY

Within about a year, the U.S. Supreme Court and the Supreme Court of Canada each considered the constitutionality of prayer at meetings of local legislative bodies. The U.S. case, *Town of Greece*, was analyzed under the First Amendment Establishment Clause.[45] The Canadian case, *City of Sanguenay*, was analyzed under the Canadian and Quebec Charter of Rights and Freedoms provisions protecting freedom of religion and conscience.[46] Neither of the Canadian documents has an express equivalent of the First Amendment Establishment Clause. Perhaps, then, the fact that cases came to different conclusions about local legislative prayer would not be surprising; but perhaps the way in which the courts disagreed might be.

### *A.* Town of Greece v. Galloway

The town board of Greece, New York held a monthly meeting to conduct business.[47] Citizens could attend and address the members.[48] Until 1999, the board opened its meetings with a moment of silence.[49] The newly-elected board supervisor, in 1999, decided to begin meetings with a recitation of the Pledge of Allegiance and a prayer delivered by a local clergyman designated "chaplain of the month."[50] From 1999 to 2007, every invited chaplain was Christian, and prayers ranged from generic theistic themes to specific Christian references.[51] Two local citizens brought suit,

[45] Town of Greece v. Galloway, 134 S. Ct. 1811 (2014).

[46] Mouvement Laïque Québécois v. Saguenay, [2015] 2 S.C.R. 3 (Can.); The Constitution Act, 1982, c. 11, sch. B (U.K.).

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

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*

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claiming the practice of prayer violated the First Amendment Establishment Clause; the plaintiffs did not ask for a complete ban on such prayer, but only that prayer be limited to "inclusive and ecumenical" prayer.[52]

As the case progressed, the town invited a Jewish layman and the chairman of a local Bahai temple to deliver an invocation and granted the application of a Wiccan priestess to do the same,[53] but the overwhelming majority of invocations were delivered by Christian clergy. The limited outreach seemed to make little difference to the Second Circuit Court of Appeals, which invalidated the practice, applying Justice O'Connor's "non-endorsement" approach to Establishment Clause cases,[54] and finding that a "steady drumbeat of Christian prayer" clearly sent a message of government endorsement of Christianity.[55]

The Court, in a majority opinion by Justice Kennedy, reversed, largely on the basis of *Marsh v. Chambers*, the 1983 case permitting the Nebraska legislature's practice of having a chaplain open sessions with an invocation.[56] *Marsh* itself relied not on any previously-articulated Establishment Clause test, but rather on the longstanding nature of the practice of legislative invocations, dating back to the First Congress.[57] Justice Kennedy, again relying on *Marsh* and history, rejected the contention that legislative prayer must be nonsectarian because only a "course or practice over time" of prayers that "denigrate nonbelievers or religious minorities, or preach conversion" might be problematic.[58]

Justice Kagan and her dissenting colleagues did not challenge *Marsh* itself, but distinguished it.[59] Local town board meetings include ordinary citizens as

[52] *Id.* at 1817.

[53] *Id.*

[54] Justice O'Connor puts forward as the key question "whether the government intends to convey a message of endorsement or disapproval of religion." Lynch v. Donnelly, 465 U.S. 668, 691 (1984) (O'Connor, J., concurring). Her test has been employed in subsequent cases. *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573 (1989).

[55] *Town of Greece*, 134 S. Ct. at 1818.

[56] Marsh v. Chambers, 463 U.S. 783 (1983).

[57] *Town of Greece*, 134 S. Ct. at 1818–19 (citing *Marsh*, 463 U.S. at 791–92).

[58] *Id.* at 1823.

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

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participants as well as observers.[60] The board itself, in dealing with citizen petitions and requests, is acting much as a court would act; surely a court session could not begin with sectarian prayer without making nonbelievers feel alienated from their government.[61] Thus, argued the dissent, local legislative prayer should be permissible not only where representatives of non-majority faiths have access to the "chaplain" role, but also where the prayers themselves are nonsectarian and inclusive.[62]

### *B.* Movement Laique Québécois v. Saguenay (City)

Only months after the U.S. Supreme Court decided *Town of Greece*, the Supreme Court of Canada considered a challenge to prayer at meetings of a local legislative council.[63] At the start of each public meeting of the Saguenay City Council, the mayor would deliver a prayer.[64] The short body of the prayer made no specific sectarian references, but the prayer began with the words (in French) "[i]n the name of the Father, the Son and the Holy Spirit," as the mayor made the sign of the cross.[65] An atheist resident of Sanguenay requested the mayor cease the practice, but the mayor refused.[66] The resident complained to the Quebec Human Rights Tribunal, which held the prayer practice was inconsistent with the Quebec Charter of Rights, in so far as it interfered with the resident's freedom of conscience and religion.[67]

The case made its way to the Supreme Court of Canada, which, in sharp contrast to the U.S. Supreme Court in *Town of Greece*, unanimously held that the prayer practice, by "consciously adhering to certain religious beliefs to the exclusion of others," violated "the state's duty of neutrality" in derogation of the freedom of conscience and religion provisions of the Quebec Charter and the Canadian Charter of Rights and Freedom.[68] In contrast to the U.S. Constitution, neither the Quebec nor

[60] *Id.* at 1844–45.

[61] *Id.*

[62] *Id.* at 1850.

[63] Mouvement Laïque Québécois v. Saguenay, [2015] 2 S.C.R. 3 (Can.).

[64] *Id.* ¶¶ 1–4.

[65] *Id.*

[66] *Id.*

[67] *Id.* ¶¶ 14–17.

[68] *Id.* ¶ 4.

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the Canadian Charters contain an express provision calling for government neutrality on religious matters analogous to the First Amendment Establishment Clause. However, Justice Gascon, writing for the Canadian Court, held that such a duty "results from an evolving interpretation of freedom of conscience and religion," which "requires that the state neither favour nor hinder any particular belief, and the same holds true for non-belief."[69]

The mayor and council members argued the prayers were protected as furthering their own rights of religious expression.[70] But Justice Gascon responded, "[w]hen the state adheres to a belief, it is not merely expressing an opinion on the subject. It is creating a hierarchy of beliefs and casting doubts on the values of those it does not share."[71] And encouragement or discouragement of religion violates Charter principles regardless of whether the practice is done "under the guise of cultural or historical reality or heritage."[72]

Sanguenay pointed to the practice of the Canadian House of Commons in opening its sessions with a prayer.[73] But unlike the U.S. Supreme Court in *Town of Greece*, the Canadian court found a substantial difference between the national legislative body and local councils. In language reminiscent of Justice Kagan's *Town of Greece* dissent, Justice Gascon noted that at the local level, citizens are at least potential, if not actual, participants, which makes the messages of non-inclusion sent by the legislative body more significant.[74]

*Town of Greece* and *City of Saguenay* presented remarkably similar factual situations to their respective courts. That different national high courts would reach sharply different conclusions is not, by itself, surprising. The contrast here stands out when we note that the constitutional documents suggest disagreement in the opposite direction.[75] How is it that the principle of non-establishment would receive stronger protection under the document that does not single out establishment as a particular concern? And these cases are not unique. Over the last three decades, Canadian

[69] *Id.* ¶¶ 14–17.

[70] *Id.* ¶ 73.

[71] *Id.*

[72] *Id.* ¶ 78.

[73] *Id.* ¶¶ 141–43.

[74] *See* Town of Greece v. Galloway, 134 S. Ct. 1811, 1844–45 (2014) (Kagan, J., dissenting).

[75] The Constitution Act, 1982, c. 11, § 2, sch. B (U.K.); *cf.* U.S. CONST. amend. I.

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courts have enforced the non-establishment principle at least as strongly the U.S. Supreme Court cases.[76]

How much does the constitutional text matter here? How might the text be molded by history or culture? Can the text (and even the punctuation) lead us down the wrong interpretive road? We might benefit from a brief look at the similarities and differences between United States and Canadian approaches to the proper interaction between religion and government.

## IV. ESTABLISHMENT AND NON-ESTABLISHMENT IN TWO NATIONS: SOME BACKGROUND

A brief discussion of the origins of the respective religion provisions of the First Amendment and of the Canadian Charter of Rights and Freedoms will help to inform one's understanding of the provisions themselves.

### *A. Non-Establishment in the United States: A New Thing?*

The principle that the U.S. Constitution calls for a separation of church and state, whatever the definition of separation might be, is so commonly acknowledged it is easy to overlook the degree to which that was a relatively new idea in the eighteenth century, and the degree to which the extent of separation was contested well into the twentieth century. European nations in the eighteenth century regarded it as a truism that a nation would benefit from, if not require, a nationally-recognized religion as a bulwark of national unity.[77] The degree to which dissenters would be tolerated might vary, but the basic principle remained. Incorporating the non-establishment principle into a constitutional document was, at best, a highly unusual thing.[78] The Vatican must have been quite surprised when its request to the Washington administration for advice on the appointment of an American bishop was rejected with the explanation that the new government had no role in religious matters.[79] It is hardly surprising, then, such a new idea would need explicit

[76] *See infra* notes 139–56 and accompanying text.

[77] *See* THOMAS HOBBES, LEVIATHAN 422 (1651) (writing approvingly of the proposition that "in every Christian Common-wealth, the Civil Sovereign is the Supreme Pastor . . . it is by his authority that all other Pastors are made, and have power to teach").

[78] *See, e.g.*, GREEN, *supra* note 13, at 24–31 (discussing the variations in the establishments in the American colonies during the seventeenth and eighteenth centuries).

[79] In 1789, the papal nuncio in Paris consulted Benjamin Franklin regarding the new government's views on an acceptable appointment of an American bishop. Franklin responded that the United States

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recognition in the Constitution. But to state a principle, especially a new one, is not to define it, or even to justify it.

The second important point to remember is that the First Amendment, and the balance of the Bill of Rights, was a limitation only on the federal government until the enactment of the Civil War Amendments.[80] The incorporation of the guarantee into the Fourteenth Amendment's prohibition on denial of due process by the states occurred later.[81] Federal jurisdiction over territorial law would lead to the late nineteenth century Mormon polygamy cases that would have a lasting impact on the Free Exercise clause.[82] There was no significant Supreme Court case dealing with the Establishment Clause until the mid-twentieth century.[83]

With the First Amendment prohibitions binding only the national government, even states such as Massachusetts and Connecticut, that maintained single-denomination established churches,[84] could agree with the Establishment Clause. If anything, it assured them no national church would displace their own state-supported denomination. But early in the nineteenth century, states began to move in the direction of general non-establishment. The 1820s saw the end of the single-denomination establishments in Connecticut and Massachusetts.[85] No state admitted after the original thirteen maintained such an establishment; to the contrary, state constitutions began to incorporate non-establishment provisions.[86] Still, the scope of such provisions would need to be fleshed out.

The earliest non-establishment issues at the state level involved state-subsidized financial support for clergy.[87] But with those issues fading into the background, or being decisively resolved against such support, nineteenth-century

government would take no role in such an appointment. *See* JAMES HENNESSEY, AMERICAN CATHOLICS: A HISTORY OF THE ROMAN CATHOLIC COMMUNITY IN THE UNITED STATES (1981).

[80] *See* Barron v. Baltimore, 32 U.S. 243 (1833); *see also* Permoli v. New Orleans, 44 U.S. 589 (1845).

[81] *See* Cantwell v. Connecticut, 310 U.S. 296 (1940).

[82] *See, e.g.*, Reynolds v. United States, 98 U.S. 145 (1878); Davis v. Benson, 133 U.S. 333 (1890).

[83] Everson v. Bd. of Education, 330 U.S. 1 (1947).

[84] *See* GREEN, *supra* note 13, at 118–45.

[85] *Id.*

[86] *Id.* at 144 ("Formal establishments by the early antebellum era were already anachronisms."). *See id.* at 145, for a discussion of the end of the final formal establishments.

[87] *Id.*

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non-establishment debate focused overwhelmingly on schools.[88] Foreshadowing twentieth-century First Amendment cases, states wrestled with the presence of religion in public schools, and the legitimacy of state financial aid to religious schools.[89] This was likely inevitable in light of two important developments in the early to mid-century: the rise of the public school, that is, basic schooling provided by the state and open to all children, and the first great waves of immigration, most prominently in the same era, by Catholic Irish newcomers.[90] Whether a consequence of actual theological differences, a reaction to the Vatican's rejection of the principle of separation of church and state, or simple ethnic prejudice, the presence of Irish Catholics in large numbers would trigger significant conflict, largely political, and occasionally violent.[91]

Irish immigration coincided with the emergence and swift growth of the public "common" school, largely the work of Horace Mann.[92] Education had been the province of private entities, often associated with religious institutions, and sometimes benefiting from public financial support.[93] It was a nearly universal belief that some form of religious instruction would be a part of basic education.[94] While religious institutions provided basic education, this created no particular problem. But if all children were to be gathered together in a publicly-operated school, how would religion be incorporated, if at all?

The new public schools widely adopted Bible reading and other religious practices Catholic leaders saw as explicitly Protestant.[95] This led to demands that these practices be ended, or that public funds be made available to Catholic schools, which took root and grew as the century progressed.[96] Funding for Catholic or other religious private schools was rejected, with many states enacting the specific language of "Baby Blaine" amendments, similar to the amendment that had died in

[88] *Id.* at 251–325.

[89] *Id.*

[90] *See generally id.* at 253–71.

[91] *Id.* at 266–71.

[92] *Id.* at 251–66.

[93] *Id.* at 252 ("At the beginning of the century, public education was unapologetically religious in orientation.").

[94] *Id.* at 253–54.

[95] *Id.* at 266–71.

[96] *See generally id.* at 271–87.

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Congress.[97] With respect to religion in public schools, the most common early response was that as long as the Bible and other religious references were "nonsectarian," thought of as sort of a least common denominator Protestantism, no one could validly object.[98] Toward the end of the century, however, school districts began to take objections to the "nonsectarian" position seriously, and moved toward secularizing public schools.[99] But prayer and Bible reading would persist in many districts until the Supreme Court would find, in the 1960s, that these practices violated the Establishment Clause.[100]

Issues involving government aid to religious schools and the presence of prayer and Bible reading in public schools were central to the emergence of the Supreme Court Establishment Clause jurisprudence. Early 1960s cases finding that public school prayer[101] or devotional Bible reading[102] violated the First Amendment gave birth to a two-part test. Government would violate the Establishment Clause by a practice that either entirely lacked a secular purpose or had the principal effect of promoting religion.[103] The 1971 case of *Lemon v. Kurtzman*, shifting the focus to state aid to religious schools, adopted these two questions and added a third.[104] A government practice leading to "excessive entanglement" between churches and government would also violate the Clause.[105]

Strict application of the *Lemon* test led to successful Establishment Clause challenges in the ensuing decades, but the test had its detractors. By the 1980s, the Court was finding more acceptable instances of state support for religion, both financial and symbolic, either by refining or rejecting *Lemon*.[106] Led by Justice

[97] *See supra* note 13 and accompanying text.

[98] *See generally* GREEN, *supra* note 13, at 253–66.

[99] *Id.* at 289–325.

[100] Engle v. Vitale, 370 U.S. 421 (1962); Abington Twp. v. Schempp, 374 U.S. 203 (1963).

[101] *Engle*, 370 U.S. at 421.

[102] *Schempp*, 374 U.S. at 203.

[103] *Id.* at 222.

[104] Lemon v. Kurtzman, 403 U.S. 602 (1971).

[105] *Id.* at 612–14.

[106] *See, e.g.*, Mueller v. Allen, 463 U.S. 388 (1983) (holding that "indirect" aid to religious schools is constitutional); Lynch v. Donnelly, 465 U.S. 668 (1984) (holding that a nativity scene as a component of a government-sponsored Christmas holiday display is constitutional).

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Scalia, one group of Justices would hold that an Establishment Clause violation, at least in contexts outside of direct governmental financial support, would be found only where government coerced dissenters to conform to religious beliefs through concrete punishment.[107] A second group, led by Justice O'Connor, found that the central question to be asked in applying *Lemon* was whether the government practice sent a message of endorsement of religious belief and suggested that dissenters were disfavored members of the community.[108] While Justices regarded as strict separationists have not disappeared, recent cases such as *Trinity Lutheran* and *Town of Greece* show that enforcement of the Establishment Clause has clearly eroded in recent decades.

As the Court's Establishment Clause jurisprudence developed, the Free Exercise Clause led to a separate line of analysis. Prior to the 1960s, religious believers had been successful in a number of free speech cases,[109] but the Supreme Court had never affirmed a strong Free Exercise right to a religiously-based exemption from a generally applicable statute that pursued a secular legislative goal.

In 1963, the Court declared that an unemployment compensation applicant who was denied benefits was entitled to have her religiously-motivated refusal to accept Saturday work recognized as a Free Exercise-based exemption.[110] The Court held that an exemption claim based on a statute's substantial interference with religious duty required the state to justify denial of the exemption under the strict scrutiny standard.[111]

But the 1970s and 1980s saw the Free Exercise version of strict scrutiny applied in a manner that hardly resembled its near per se invalidity standard in other

[107] Lee v. Weisman, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting) ("The coercion that was a hallmark of historical establishments of religion has coercion of religious orthodoxy and financial support by force of law and threat of penalty.").

[108] *Lynch*, 465 U.S. at 687–88 (O'Connor, J., concurring).

[109] *See, e.g.*, W. Va. Bd. of Ed. v. Barnette, 319 U.S. 624 (1943) (holding that Jehovah's Witness children cannot be forced to recite the Pledge of Allegiance); Lovell v. City of Griffin, 303 U.S. 444 (1938) (invalidating an ordinance prohibiting distribution of literature).

[110] Sherbert v. Verner, 374 U.S. 398 (1963).

[111] *Id.* at 406–08.

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contexts.[112] In *Smith*, a sharply-divided Court,[113] declared that despite the 1963 case to the contrary, the Free Exercise Clause had never been and should not be recognized as demanding strict scrutiny in a case seeking an exemption from a generally applicable statutory duty.[114] Only a government statute or practice that singled out believers due to hostility to their beliefs rather than the secular consequences of their actions, would call for application of anything more than a rational basis justification.[115]

While *Smith* seemed to not only significantly reduce the scope of the Free Exercise Clause, but also to clarify the proper standard, subsequent events in the political branches of both the federal and state levels of government intervened to make the situation much murkier.[116] By statute, Congress created a strict scrutiny standard for a religiously-based claim of exemption from federal mandates; and a significant number of states, either by statute or court decision, affirmed strict scrutiny was the appropriate test when judging a claim to a free exercise exemption under state constitutional or statutory law.[117]

So, in recent decades, the Establishment Clause and Free Exercise Clauses of the First Amendment have led to the following situation: a once rather rigorous Establishment Clause has become significantly less restrictive on government activity that benefits religion. At the level of First Amendment doctrine, *Smith* has had a similar narrowing effect on the scope of the Free Exercise Clause. But subsequent events in Congress, and at the state level, have pushed back, and the actual scope of free exercise protection may not be much less than that afforded in pre-*Smith* times. There seems to be little question that states are free to give greater free exercise protection than that provided by the First Amendment. But *Trinity Lutheran* casts doubt on the extent to which states are also free to expand their

[112] *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503 (1983) (holding no exception from military uniform requirements to permit Orthodox Jewish army psychiatrist to wear a yarmulke); Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640 (1981) (holding no exemption for religious group from state fair regulation that sale or distribution of literature must be from fixed booths).

[113] Emp't Div. v. Smith, 494 U.S. 872 (1990).

[114] *Id.* at 878–79; Justice Scalia maintained that strict scrutiny had never actually been the standard applied by the Court. *Id.* at 878–88.

[115] *Id.* at 877–78.

[116] *See generally* Vikram David Amar, *State RFRAS and the Workplace*, 32 U.C. DAVIS L. REV. 513 (1999).

[117] *Id.*

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commitment to non-establishment values.[118] Has all of this left us with a legal regime that underenforces non-establishment values? And might the separate evolution of the two religion clauses have contributed to this?

### *B. Religious Freedom in Canadian Constitutional Law: Some Background*

Canadian law concerning church and state would develop from a starting point with significant differences from that of the United States. At the time of Confederation, Canada inherited the British doctrine of parliamentary supremacy, and it would be many decades before Canadian courts would be asked to invalidate legislation as interfering with religious freedom.[119] And neither the British nor French legacy would lead Canadians to regard government recognition and assistance to religion as unusual or very troubling.

If the North-South divide was the source of greatest tension in the forging of the U.S. Constitution, the British-French divide was the greatest threat to Canadian unity in the nineteenth century and continued to be a source of conflict thereafter.[120] In recent decades, the conflict has focused on language rights, but prior to the 1960s, the British-French divide was played out on religious grounds, as a Protestant-Catholic conflict.[121]

As the unrest that would engulf the American colonies in Revolution percolated, the British Parliament, in the Quebec Act of 1774, provided that the inhabitants of Quebec would "have the free Exercise of the Religion of the Church of Rome, subject to the king's supremacy," a concession credited with maintaining Quebec's loyalty during the American Revolution.[122] The 1851 Freedom of Worship Act sought to protect "the free exercise and enjoyment of Religious Profession and Worship without discrimination or preference," but discrimination against Catholics in pre-Confederation provinces outside Quebec continued.[123]

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[118] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017).

[119] *See generally* JEREMY WEBBER, THE CONSTITUTION OF CANADA: A CONTEXTUAL ANALYSIS 60–64 (2015).

[120] *Id.* at 14–20.

[121] *See generally* JANET EPP BUCKINGHAM, FIGHTING OVER GOD: A LEGAL AND POLITICAL HISTORY OF RELIGIOUS FREEDOM IN CANADA 11–19 (2014).

[122] *Id.* at 11–12.

[123] *Id.* at 12.

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The British North America Act of 1867, the document that served as the original constitution of a united Canada (consisting at the time of Ontario, Quebec, Nova Scotia and New Brunswick), dealt with the religious issue by dividing national and provincial powers.[124] Each province, for example, was allowed to determine the acceptable form of marriage, while the nation would maintain a single federal definition of marriage.[125] Of more lasting significance, each province was given exclusive control over education.[126] Prior to 1867, both Quebec and Ontario had established public schools that included instruction in the dominant provincial religion, but also provided public support for dissenters to have their own religiously-based schools (Protestant in Quebec and Catholic in Ontario).[127]

Article 93 of the 1867 Constitution preserved each province's right to continue the system in place at the time of confederation.[128] Statutes enacted in later decades would provide the same powers to provinces that joined the confederation after 1867.[129] In short, the constitutional system allowed provinces to choose to maintain publicly-funded schools for Catholic or Protestant minorities in a province where the dominant public school system was unacceptable to that group, as long as those schools were in place at the time the province joined the Confederation. In recent decades, provinces have moved away from this system of allowing public funds to confessional schools of Catholic or Protestant faiths (but not other minority religions), yet the authority of the provinces to provide funding for dissenting Protestant or Catholic schools remains.[130]

The tradition of Parliamentary Supremacy meant that until the 1982 constitutional reforms that gave birth to the Charter of Rights and Freedoms, religious freedom was entirely a matter for statutory, if any, protection.[131] But the Charter, in Section 2, provides constitutional protection of "freedom of conscience

[124] Constitution Act of 1867, 30 & 31 Vict. c. 3 (UK), *reprinted in* RSC 1985 App. II, No. 5.

[125] *See* BUCKINGHAM, *supra* note 121, at 156–64.

[126] *Id.* at 35–43.

[127] *Id.* at 35.

[128] *Id.*

[129] *Id.*

[130] *Id.* at 54–59.

[131] *See* WEBBER, *supra* note 119.

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and religion."[132] This provision, like other Charter rights, is subject "only to such reasonable limits proscribed by law as can be demonstrably justified in a free and democratic society."[133] Thus, Canadian courts have had nearly four decades to consider claims that government actions violated this Charter right. And these courts do so in the absence of any express Constitutional provision prohibiting the establishment of religion. But the absence of such a clause has not meant that government involvement with religion is unproblematic. In dealing with issues that American courts would label as Establishment Clause cases, Canadian courts have demonstrated the extent to which non-establishment values are inherent in freedom of religion clause.

## V. FREE EXERCISE AND NON-ESTABLISHMENT: TWO VALUES OR ONE?

In the previous section, we saw two nations with somewhat different histories and legal responses to the issue of religious freedom. In the United States, an early decision was made to reject the notion of an established church, at least at the national level.[134] This was reflected in the early inclusion of a non-establishment provision in its Constitution, and the prohibition would be extended decades later to action by state governments.[135] In Canada, certain elements of establishment were accepted in its original constitutional arrangement, and while current constitutional language expressly protects religious freedom, there is no express prohibition of establishment.[136] One would logically predict that the United States would take the non-establishment principle far more seriously than Canada. Yet, since the enactment of the Charter of Rights and Freedoms, Canadian courts have seemed to be at least as diligent in enforcement of the principle as their American counterparts.

In 1985, the Supreme Court of Canada, in *Big M Drug Mart*,[137] struck down a federal statute requiring businesses to close on Sunday.[138] The Court held that the

[132] *See id.* at 191–94.

[133] *Id.* at 186–89.

[134] *See supra* notes 74–85 and accompanying text.

[135] *Id.*

[136] *See supra* notes 119–23 and accompanying text.

[137] *See generally* R. v. Big M Drug Mart, [1985] 1 S.C.R. 295 (Can.).

[138] Lord's Day Act, R.S.C. 1970, c L-13 (the Act prohibited, with some exceptions, commercial activity on Sunday), *invalidated by Big M Drug Mart*, [1985] 1 S.C.R. at 301–02.

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79-year-old statute had clearly been adopted for the purpose of promoting religious practice, and that would be sufficient to invalidate it as violative of religious freedom.[139] Government support of religion, then, could violate religious freedom without the existence of an express non-establishment provision.[140] A year later, however, the Supreme Court of Canada upheld an Ontario Sunday closing law.[141] The statute, recently adopted and containing a number of exceptions not present in the 1906 federal statute, in the Court's opinion, satisfied the balancing test set forth in *R. v. Oakes*.[142]

Section 1 of the Charter of Rights and Freedoms provides that Charter rights can be limited by "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[143] In *Oakes*, the Supreme Court of Canada set out a proportionality test for the application of Section 1. In short, the test asks three things of the challenged statute: whether it is rationally related to a legitimate government objective, whether it impairs the right as little as possible, and whether the government interest is sufficiently important to justify the degree of interference with the right.[144] Under this test, the Court found the more narrowly-tailored Ontario statute was justified.[145]

These cases can be compared to the 1961 U.S. Supreme Court decision in *Braunfeld v. Brown*,[146] where the Court upheld a Sunday closing statute, accepting the state's justification that it had been adopted for the secular purpose of providing for a common day of rest and the choice of Sunday was merely in recognition of the preferences of most citizens.[147] The decision, which pre-dated the emergence of the *Lemon* test or its elements present in the school prayer cases, focused on the claim

[139] *Big M Drug Mart*, [1985] 1 S.C.R. at 331.

[140] *Id.*

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

[142] *Id.* at 768 (citing R. v. Oakes, [1986] 1 S.C.R. 103, 105–06 (Can.)).

[143] The Constitution Act, 1982, c. 11, § 1, sch. B (U.K.).

[144] *Oakes*, [1986] 1 S.C.R. at 139.

[145] *Edwards Books*, [1986] 2 S.C.R. at 741–44.

[146] *See generally* Braunfeld v. Brown, 366 U.S. 599 (1961).

[147] *Id.* at 607–08.

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of the plaintiff that the mandatory closing law interfered with his rights to the free exercise of his Jewish beliefs.[148]

Establishment Clause jurisprudence in the United States was largely formed by the cases invaliding prayer and devotional Bible reading in public schools, and the two-part purpose and effect test that would be expanded to the three-part *Lemon* test.[149] But the absence of an express non-establishment principle in Canada did not prevent several provincial courts from striking down similar practices in post-Charter public schools.

As discussed above, the 1867 Constitution included Article 93, which protected minority religious education insofar as it existed at the time of Confederation (or, by statute, at the time new provinces joined), but it did not speak to the question of religion in the majority schools.[150] The presence of religion in the public schools, Protestant in most provinces, Catholic in Quebec, was unchallenged for decades.[151] Starting in the 1960s, however, sentiment in several provinces in favor of secularization of public schools grew, and in the aftermath of the adoption of the Charter provision guaranteeing freedom of religion, challenges were brought to the practice of prayer in public schools.[152]

In *Zylberberg v. Sudbury Board of Education*,[153] the Ontario Court of Appeal invalidated the mandatory recitation of the Lord's Prayer in Sudbury public schools.[154] Even if exemptions were allowed for particular students, the Court held, this infringed the religious freedom of religious minorities.[155] The British Columbia Supreme Court and the Manitoba Court of Appeal would, within a few years of *Zylberberg*, rely on similar reasoning to prohibit mandatory religious exercises in those provinces.[156]

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[148] *Id.* at 608–09.

[149] *See supra* notes 101–05 and accompanying text.

[150] *See supra* notes 127–30 and accompanying text.

[151] *See generally* BUCKINGHAM, *supra* note 121, at 35–51.

[152] *Id.* at 51–61.

[153] Zylberberg v. Sudbury Bd. of Educ., [1988] 65 O.R. (2d) 641 (Can. Ont. C.A.).

[154] *Id.* at 662–63.

[155] *Id.* at 663.

[156] *See* BUCKINGHAM, *supra* note 121, at 57–58.

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These cases, along with *City of Saguenay*, discussed *supra*, show that an express non-establishment provision within a constitution is not necessary for a court to recognize and enforce the values underlying non-establishment principles.[157] Canadian courts, under the banner of freedom of religion, have come to conclusions in cases that would be recognized as Establishment Clause cases in the United States that are similar, and in some cases, more diligent in their protection of non-establishment principles.[158] A separate Establishment Clause might, in a subtle way, be not only unnecessary to protect non-establishment values, but might actually hinder the enforcement of these values, by masking their connection to free exercise.

## VI. A SINGLE PROPORTIONALITY TEST FOR THE RELIGION CLAUSES?

In an eighteenth-century world where government favoritism toward a particular religion was common, the framers of the First Amendment would see the need for specific non-establishment language. Standing alone, a free exercise guarantee might promise no more than mere tolerance of dissenters. Even today, and even in Western democracies, the demand that government be absolutely neutral in religious matters is not universal. Post-World War II international covenants on human rights typically protect freedom of religion and conscience, but do not contain provisions prohibiting government support of favored religions.[159] National constitutions range from those proclaiming the nation to be secular, to those recognizing a special place in the history and culture of the nation for one religion, to those maintaining, at least symbolically, a national church.[160]

The Canadian cases illustrate that the absence of an explicit non-establishment provision does not preclude courts from recognizing non-establishment principles as inherent in a guarantee of religious freedom. The question, of course, will not be

[157] *See* S.L. v. Commission Scholaire des Chemes, 2012 SCC 7, 2012 1 S.C.R. 235. Justice Deschamps notes "Religious neutrality is now seen by many western states as a legitimate means of creating a free state in which citizens of various beliefs can exercise their individual rights." *Id.* ¶ 10. She illustrates the connection between neutrality and religious freedom in cases beginning with *Big M Drug Mart*. *Id.* ¶¶ 121–25.

[158] *Id.*

[159] *See generally* Natan Lerner, *Religious Human Rights Under the United Nations*, *in* 3 RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE 79–84 (Johan D. van der Vyver & John Witte eds., 1996).

[160] *Compare, e.g.*, Constitution of Ireland 1937 art. 44, http://www.irishstatutebook.ie/eli/cons/en/html (declaring the separation of church and state), *with* 1975 SYNTAGMA [SYN.] [CONSTITUTION] 3 (Greece) (establishing the Eastern Orthodox Church).

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whether respect for the principle is present or absent, but rather how strongly it weighs in the balance. One might assume the presence of a non-establishment provision would ensure the most rigorous enforcement of the principle. Yet the level of Establishment Clause enforcement in the United States has noticeably declined.[161] However counterintuitive it might seem, could the impulse to regard non-establishment and free exercise as separate principles, even though related, be in part responsible for underenforcement?

The treatment of the Establishment and Free Exercise Clauses as separate things has led to the development of separate analytical tests for each. And within each clause, debate continues about the proper test. Establishment Clause cases pit advocates of non-coercion, non-endorsement, and strict *Lemon* separation against each other.[162] Free Exercise cases see advocates of strict scrutiny contend with supporters of only minimal scrutiny in most cases.[163] And all of this usually means that when confronted with a church-state case, the first thing one is led to do is to choose which box to place it in: Free Exercise or Establishment?

Of course, separate analytical tracks have not prevented judges from recognizing connections. In *United States v. Welsh*, a statutory interpretation rather than a constitutional case,[164] Justice Harlan concurred in an opinion defining the term "religious" in a statute allowing conscientious objectors to avoid the military draft in an extremely broad way, because he thought a narrow, traditional definition would cause some Establishment Clause problems.[165] And the Establishment Clause cases dealing with school prayer are argued with the impact on the students' own religious rights obvious in the background.[166] Nevertheless, the choice of how to classify a case, and what test follows from that decision, can skew the process. The Establishment Clause tests focus on whether government has overstepped its bounds

[161] *See supra* notes 106–08 and accompanying text.

[162] *Id.*

[163] *See supra* notes 106–16 and accompanying text.

[164] Welsh v. United States, 398 U.S. 333 (1979).

[165] *Id.* at 356–61 (Harlan, J., concurring).

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

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but pushes the harm to the religious freedom of dissenters into the background.[167] Conversely, the Free Exercise Clause bring the individual into the foreground but pushes the duty of government to maintain neutrality on religious questions into the background.[168]

If the separate analytical approaches to cases labelled as either Establishment Clause or Free Exercise Clause cases can lead to less than optimal outcomes, what can be done to improve the situation? If both clauses were rethought as simply aspects of a single clause protecting freedom of religion, what alternative analytical framework might be appropriate? The Canadian approach offers a possible answer.[169]

The *Oakes* test for balancing Charter rights claims under the Section 1 provision asks when the limitation of the right is consistent with "reasonable limits . . . demonstrably justified in a free and democratic society."[170] The *Oakes* test is a version of the "proportionality" test adopted by a number of Western democracies to consider limitations of recognized individual rights.[171] While subtle differences exist in the application of this proportionality test among nations that adhere to it, the basic steps are the same. And while the U.S. Supreme Court has largely resisted the use of proportionality in individual rights cases, an examination of the test will show it brings together a number of analytical steps quite familiar to American lawyers.

The initial step will be to determine whether there is a plausible claim of a rights violation at the outset, before any type of balancing or enunciation of the state's interest is considered.[172] Here, Canadian courts tend to be generous, ruling out only

[167] *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2031 (2017) (Sotomayor, J., dissenting) (criticizing the majority opinion for focusing only on the Church's Free Exercise claim to the exclusion of the question of whether including the Church in the program would violate the Establishment Clause).

[168] *See id.*

[169] The Constitution Act, 1982, c. 11, § 1, sch. B (U.K.).

[170] *See generally* AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (2012).

[171] *See, e.g.*, Irwin Toy, Ltd. v. Quebec, [1989] 1 S.C.R. 927, at 967–71 (analyzing the *Oakes* test).

[172] The right of free speech has been broadly defined. *See, e.g.*, *Irwin Toy*, 1 S.C.R at 969 ("if the activity conveys or attempts to convey a meaning, it has expressive content and prima facie falls within the scope of the guarantee").

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claims that are almost indisputably outside Charter protection.[173] Since this is merely a threshold question, not clearly leading to strong or weak protection, the consequences of clarifying a belief system as "religion" or not becomes less crucial. Of course, Canadian Charter language speaking in terms of religion and conscience lends itself to broad interpretation, but the absence of the term "conscience" from the First Amendment does not by any means limit American courts to a narrow definition of the belief systems protected.[174] In a system recognizing a single freedom of religion right, the plausible violation here may be twofold.[175] The government action may have implications for both non-establishment and free exercise values, and both may be necessary to consider regardless of the particular objections to government activity put forward by the particular plaintiff.[176]

The next step in proportionality analysis is to identify the government interest in the action that is challenged.[177] The *Oakes* court held that the interest must be "pressing and substantial," and while this certainly sounds like a level of heightened, if not strict, scrutiny, courts can be reluctant to end the analysis here if the government interest is not clearly illegitimate or trivial.[178] The strength or weakness of the government interest will return as a factor in the final step of analysis.

With the state interest in its regulation established, the next step is to ask whether there is a rational connection between the regulation and the objective.[179] Similar to the rational basis test in American constitutional law, this part of the test will usually be satisfied and will exclude only actions entirely unrelated to legitimate government goals.[180] In the context of religious freedom, it would end the inquiry in favor of the rights claimant only where the legitimate interest put forward by the state seems entirely pretextual, and invoked to justify either naked hostility or favoritism to religion.[181]

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[173] The Constitution Act, 1982, c. 11, § 2, sch. B (U.K.).

[174] *See generally* BARAK, *supra* note 170, at 245–302.

[175] *Id.*

[176] *Id.*

[177] *See Irwin Toy*, [1989] 1 S.C.R. at 971–72.

[178] *See generally* BARAK, *supra* note 170, at 303–16; *Irwin Toy*, [1989] 1 S.C.R at 986–96.

[179] *See generally* BARAK, *supra* note 170, at 317–39.

[180] *Id.*

[181] *Id.*

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The next step is to ask whether the state action impairs the right as little as possible, or in terms more familiar to American lawyers, whether there is an alternative which would satisfy the state interest while imposing less of a burden on the right.[182] While this step sounds like the strict scrutiny test, in systems employing proportionality it will not be interpreted as rigorously. In order for the inquiry to end here, it must be shown an alternative exists that is obvious and practical, and that will allow the government objective to be satisfied to the full extent that it is satisfied by the challenged practice.[183] At this stage of the analysis, the state need not accept an alternative that would be less effective or costlier. But such matters will be appropriate to consider in the final step of the proportionality analysis.

The final step of proportionality analysis is to weigh whether "all things considered, the objective is sufficiently important to justify the extent of the infringement."[184] This is the step where proportionality truly becomes a balancing test. And, like all balancing tests, it is open to the criticism that it is hopelessly indeterminate, and merely a matter of subjective weighing of value by the decisionmaker. In the arena of religious freedom, do we value non-establishment more or less than free exercise? Aharon Barak, in his survey of proportionality across a number of legal systems, insists that a more precise balancing inquiry can at least minimize the subjectivity problem.[185] Instead of balancing at the level of the right or

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> [T]he necessity test does not require the use of means whose limitation is the smallest, or even of a lesser extent as the means chosen by the law, if the means cannot achieve the proper purpose to the same extent as the means chosen by the law. This necessity test does not require a minimal limitation of this constitutional right; it only requires the smallest limitation required to achieve the law's purpose.

*Id.* at 321.

183 *See id.* at 350–62.

184 *Irwin Toy*, [1989] 1 S.C.R at 994.

185

> [T]he issue is not the comparison of the general social importance of the purpose (security, public safety, etc.) on the one hand and the general social importance of preventing harm to the constitutional right (equality, freedom of expression, etc.) on the other. Rather, the issue is much more limited. It refers to the comparison between the state of the purpose prior to the law's enactment, compared with that state afterwards, and the state of the constitutional right prior to the law's enactment compared with its state after enactment. Accordingly, we are comparing the marginal social importance of the benefit gained by the limiting law and the marginal social importance of

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interest involved in the abstract, the proper question is whether the marginal benefits of the state regulation in question outweigh the marginal infringement on the right.[186] This will, of course, require an assessment of the importance of the right and the countervailing interest at the abstract level, but will not always lead to a conclusion in favor of one or the other. Some will object to a balancing test that allows an interest to ever prevail against a right. But in the context of religious freedom, if non-establishment and free exercise are seen as dual aspects of the right the balance will not, at least entirely, involve a right-interest conflict, but a balance between potentially conflicting aspects of a single right.

How would the application of this analysis look in practice? Would it necessarily lead to sharp changes in outcomes? Would it perhaps lead to more convincing reasoning in support of outcomes? As an example, we might return to *Trinity Lutheran* and examine it under the proportionality framework.

The threshold question is easily resolved. The Church's complaint that the exclusion of their application from consideration obviously presents a plausible freedom of religion issue.[187] The state then must come forward with an acceptable objective. While the objective of the grant program is to promote safety of playgrounds and the children who use them, the Church's objection is not to the program, but to the exclusion of their application. The state interest here will be itself an argument in favor of religious freedom under the non-establishment principle.[188]

Given the long history of religious conflict associated with the issue of state financial support of churches, the state should have no trouble establishing a rational relation between its decision and its significant interest. There does not seem to be an alternative that would address the Church's claim yet fully satisfy the state's

> preventing the harm to the constitutional right caused by the limiting law. The question is whether the right of the marginal social importance of the benefits is heavier than the weight of the marginal social importance of preventing the harm.

BARAK, *supra* note 170, at 351.

[186] *See supra* notes 8–12 and accompanying text.

[187] *See supra* notes 13–14 and accompanying text.

[188] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2020–24 (2017).

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interest; the only available courses of action are to allow or deny the Church the opportunity to participate in the program.[189]

With the preliminary questions addressed, and none of them leading to a quick resolution, we come to the core of proportionality, the balancing process. Unlike many balancing tests, this one is more "apples-to-apples" than measuring two distinct interests.[190] Both the state and the Church are pursuing their own view of religious freedom. Is the marginal harm to the religious freedom of the Church to be free of discrimination greater or less than the marginal harm to the non-establishment principle that would arise from breaching the "no direct financial aid" rule?

Clearly, there will be disagreement on the proper resolution of the balancing test. But this indeterminacy is hardly different than the current state of religion clause jurisprudence. In fact, it is not far from the points raised by the Court's majority opinion in *Trinity Lutheran*.[191] While dismissing the Establishment Clause as not at issue, the opinion takes pains to stress it is limited to the facts presented, and also to point out that it does not overrule, but distinguishes *Locke*.[192] In other words, in a situation presenting roughly similar issues, *Locke* and *Trinity Lutheran* come out differently when the perceived burden on the non-establishment principle varies.

One significant question does remain concerning the future of *Locke*. And it will need to be resolved whether or not the religion clauses are considered as separate inquiries. *Locke* clearly indicated that states were free, to some extent, to strike the non-establishment/free exercise balance more strongly in favor of non-establishment, under their state constitutions, than the Supreme Court would do under the First Amendment.[193] *Trinity Lutheran* did not clearly address this point. The Court distinguished *Locke* on its facts,[194] but did not explain why the Missouri State constitutional prohibition on state financial aid to churches did not protect the

[189] The position that a right will always outweigh a general social interest is most closely identified with Ronald Dworkin. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 90–94 (1978).

[190] Justice Scalia is perhaps the foremost critic of balancing, contending that the attempt to balance incommensurate interests is "like judging whether a particular line is longer than a particular rock is heavy." Bendix Automotive Corp. v. Midwest Enterprises, Inc., 486 U.S. 888, 897 (1988) (Scalia, J., dissenting).

[191] *Trinity Lutheran*, 137 S. Ct. at 2022.

[192] *Id.* at 2023–24; Locke v. Davey, 540 U.S. 712, 718–19 (2004).

[193] *Trinity Lutheran*, 137 S. Ct. at 2023.

[194] *See supra* notes 45–52 and accompanying text.

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state, regardless of whether the exclusion of the church from the program ran afoul of the First Amendment.

While the use of proportionality may not lead to a different outcome in *Trinity Lutheran*, we have already seen the way in which it leads to a different outcome in cases involving local government prayer. *Town of Greece*, decided under the Establishment Clause, minimized if not completely ignored, the perspective of the dissenting town residents.[195] Instead, the focus was on whether the town crossed a line by its actions, with no need to balance against the harm to individuals.[196] Once precedent could be invoked to support the conclusion that the prayer was acceptable, the inquiry was over. The proportionality analysis of *City of Saguenay*, in contrast took the perspective of the dissident townspeople as its starting point.[197] This perspective (also taken by Justice Kagan and the other dissenters in *Town of Greece*),[198] highlights the extent to which dissenters are made to feel less than full members of the community. This point is evident in a number of Establishment Clause cases in recent decades, most notably in Justice O'Connor's "non-endorsement" test.[199] However, it has had only sporadic success.

The proportionality test provides sufficient reasons to find fault with *Town of Greece* even before considering the final balancing element of the test. The town must initially come forward with a legitimate reason for the prayer, and presumably that reason must be secular. Lending an air of seriousness to the proceedings might qualify. When we reach the question of whether an obvious alternative exists that would fully satisfy the interest while not impairing the right of religious freedom, the town's defense fails. Surely the Pledge of Allegiance, National Anthem, or even of moment of silence would suffice.[200]

The precise scope of *Town of Greece* has yet to be settled. Writing for the Court, Justice Kennedy rejected the position that either the prayers themselves, or the process of selecting those who deliver the invocations, must be inclusive or

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[195] Town of Greece v. Galloway, 134 S. Ct. 1811 (2014).

[196] *See supra* notes 63–74 and accompanying text.

[197] *See supra* notes 59–62 and accompanying text.

[198] *See supra* note 54.

[199] Prior to 1999, the town's board meetings were opened with a moment of silence. Town of Greece v. Galloway, 134 S. Ct. 1811, 1816 (2014).

[200] *Id.* at 1820.

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ecumenical.[201] He did, however, warn that there might be a limit on government prayer if it crossed the line into either proselytizing or prayer that degrades or insults non-believers.[202] The Fourth Circuit Court of Appeals recently faced an issue of how seriously that restriction should be taken, and whether it was crossed by the Rowan County, North Carolina Board of Commissioners.[203]

In July 2017, the Fourth Circuit issued its opinions in the *en banc* rehearing of *Lund v. Rowan County*.[204] Writing for the majority, Judge Wilkinson summarized the case as follows:

> For years on end, the elected members of the county's Board of Commissioners composed and delivered pointedly sectarian invocations. They rotated the prayer opportunity amongst themselves; no one else was permitted to offer an invocation. The prayers referenced one and only one faith and veered from time to time into overt proselytization. Before each invocation, attendees were requested to rise and often asked to pray with the commissioners. The prayers served to open meetings of our most basic unit of government and directly preceded the business session of the meeting.[205]

Citing a number of rather over-the-top invocations[206] proclaiming the superiority of Christianity and its specific doctrines, Judge Wilkins wrote:

> We conclude that the Constitution does not allow what happened in Rowan County. The prayer practice served to identify the government with Christianity and risked conveying to citizens of minority faiths a message of exclusion. And because the commissioners were the exclusive prayer-givers, Rowan County's invocation practice falls well outside the more inclusive, minister-oriented practice of legislative prayer described in *Town of Greece*. Indeed, if elected representatives invite their constituents to participate in prayers invoking a single

[201] *Id.* at 1823–24.

[202] *Id.* at 1824.

[203] Lund v. Rowan County, 863 F.3d 268 (4th Cir. 2017) (*en banc*).

[204] *Id.* at 271–72.

[205] *Id.* at 272; *see id.* at 281–82.

[206] *Id.* at 272.

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> faith for meeting upon meeting, year after year, it is difficult to imagine constitutional limits to sectarian prayer practice.[207]

Still, several judges dissented, claiming Judge Wilkerson was simply cherry-picking individual invocations to support his conclusion.[208] If the Rowan County situation is not problematic, does that mean that *Town of Greece* will essentially be read to mean legislative prayer is simply per se valid? And can that possibly be correct within a constitutional system that specifically warns against the establishment of religion?

## VII. CONCLUSION: NON-ESTABLISHMENT AND FREE EXERCISE: EITHER/OR OR NOT ONLY/BUT ALSO?

Religion clause law is in a state of flux; perhaps even in something of a state of disarray.[209] Several approaches to the Establishment Clause contend for acceptance. While *Smith* seemed to simplify Free Exercise law, the legislative pushback (and developments at the state level) have revived the *Sherbert* test.[210] The separate opinions in *Trinity Lutheran* illustrate the continued tension between the current approaches to the two clauses.[211]

Perhaps much of the confusion stems from the perceived need to initially classify a case as either a free exercise or a non-establishment problem. Having done so, a judge may have tipped the scales in a way that ignores the extent to which the other value is implicit in each. Canadian cases, working under a Charter of Rights and Freedoms that does not explicitly ban establishment, illustrate the implicit presence of each value in what American law would recognize as presenting one or the other value.

Recognizing a single right of religious freedom, one that incorporates both non-establishment and free exercise values, may allow for a more careful analysis of these cases. A single proportionality test that recognizes that the claim of a free exercise exemption or grant of aid inevitably calls for consideration of non-establishment values, and that an Establishment Clause claim may impinge on free exercise, may or may not change many outcomes, but will honestly confront the dual issues. Even if American courts continue to resolve the balance as they currently do, the application of a single test to a single right of religious freedom serves to explain the

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[207] *Id.*

[208] *See generally id.* at 296–300 (Niemeyer, J., dissenting); *id.* at 301–10 (Agee, J., dissenting).

[209] *See supra* notes 77–120 and accompanying text.

[210] *See supra* notes 110–15 and accompanying text.

[211] *See supra* notes 35–48 and accompanying text.

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paradox of Canadian court recognition of non-establishment values, despite the absence of explicit non-establishment language in the Charter, even in some cases where the U.S. Supreme Court would see no problem.

In short, religious freedom claims should not be seen as an "either/or" choice between non-establishment and free exercise values. Regardless of how the balance is ultimately struck, each case presents a "not only/but also" relation between the two aspects of what is actually a single right of religious freedom.

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