PRIVATE CONSCIENCE AND THE PUBLIC PURSE: A COMPARISON AND EXPLANATION OF THE LAW RELATING TO STATE FUNDING OF RELIGIOUS SCHOOLS IN CANADA AND THE UNITED STATES

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I INTRODUCTION

In the United States, government provision of funding or other aid to private religious schools is a hugely controversial issue, and one which has spawned a voluminous and complex jurisprudence. In Canada, by contrast, the debate is much more muted and generally does not find its way into the courtroom. What exactly are the legal differences between the two countries when it comes to state aid for religious schools? And what accounts for these differences? This paper will be organized around these two questions. Part II compares and contrasts the legal doctrines relating to state aid for religious education on both sides of the 49th parallel. Part III provides an argument, drawing on historical, social and philosophical differences between the two countries, for why the American and Canadian law in this area differ so markedly. It is contended that the Canadian acceptance and the American rejection of direct state funding of religious schools can be explained with reference to differences that exist between the two countries along five dimensions: the countries' respective founding moments; demographic realities; perspectives on how best to achieve unity; fears of religious tyranny; and concerns over protecting religion from the state.

II THE LEGAL DIFFERENCES

A *United States*

In the United States, state funding of religious schools is governed by the Establishment Clause of the First Amendment, which states that 'Congress shall make no law respecting an establishment of religion'.[1] While the First Amendment on its face only applies to the federal government, the United States Supreme Court in *Everson v. Board of Education*[2] employed the incorporation doctrine and ruled that its protections apply also to the states through the Due Process Clause of the Fourteenth Amendment.[3] Making sense of the Establishment Clause jurisprudence relating to the public funding of religious schools since *Everson* is not an easy task. As one apparently exasperated legal scholar describes First Amendment cases, 'Few areas of law today are so riven with wild generalizations and hair-splitting distinctions, so given to grand statements of principle and petty applications of precept, so rife with selective

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1 *United States Constitution*, amendment I.

2 *Everson*, 330 U.S. 1 (1947).

3 The Court in *Everson* declared, that is, that the right to be free from governmental establishment of religion was a liberty protected from state infringement under the Fourteenth Amendment.

readings of history and inventive applications of precedent. Few areas of law hold such a massive jumble of juxtaposed doctrines and rules.'[4]

Amidst the complex and often contradictory case law, however, we can clearly see some distinct strands of thought in the courts' handling of Establishment Clause cases. Many of these strands are brought to light in the seminal case of *Everson*, which held that a New Jersey statute compensating students who rode public buses to their private, mainly Catholic, schools was constitutionally permissible. According to law and religion scholar John Witte Jr., the majority opinion of Justice Black in *Everson* can be read as highlighting four principles that animate the Establishment Clause: liberty of conscience, religious equality, religious pluralism, and separation of church and state.[5] However, the majority decision clearly focused on the last of these principles, the separation of church and state. For example, while the Court found that reimbursing the students for their transportation costs did not in fact aid religion, it concluded that any such aid would constitute an unconstitutional establishment of religion, and declared that the state cannot pass any laws 'which aid one religion, aid all religions, or prefer one religion over another'.[6] As Justice Black elaborated, 'No tax in any amount, large or small, can be levied to support any religious activities or institutions.'[7] The majority explicitly linked this 'no aid' interpretation to the Establishment Clause, finding that 'the clause against establishment of religion by law was intended to erect "a wall of separation between church and state"'.[8]

As Professor Witte notes, this emphasis on separation between the state and religion 'set the tone' for much of the Establishment Clause case law that followed, with the result that '[t]he other founding principles of disestablishment were increasingly lost in the Court's opinions for the next forty years'.[9] However, as the disjuncture between the majority's language in *Everson* and its actual holding in the case would indicate, 'no aid' didn't really mean no aid. Justice Black's decision explicitly acknowledges, for instance, that the state's provision of basic necessities such as police and fire services to religious institutions does not violate the Constitution.[10] However, it is clear that this approach still 'begs the question of where to draw the line between what aid is allowed and what is not'.[11] American courts have struggled mightily with this challenge.

One of the ways in which the Supreme Court has attempted to perform this exercise in line-drawing is by distinguishing between the religious and the secular missions of religious institutions. On this ground, for example, the Court has upheld the provision of secular textbooks to religious institutions,[12] but not the provision of other aid, such as money, that is easily diverted to furthering the religious mission of the institution.[13] Another important consideration in the Court's analysis has been the

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4 John Witte Jr., *Religion and the American Constitutional Experiment: Essential Rights and Liberties* (Westview Press, 2000) 182.

5 Ibid 164.

6 *Everson* above n 2, 15.

7 Ibid 16.

8 Ibid, quoting *Reynolds v. United States*, 98 U.S. 145 (1878).

9 Witte, above n 4, 165.

10 *Everson* 330 U.S. 1, 25–26.

11 John E. Ferguson Jr., 'Public Funds and Religious Schools: the Next Prayer Debate?' in David Odell-Scott (ed), *Democracy and Religion: Free Exercise and Diverse Visions* (2004) 48, 57.

12 *Board of Education v. Allen*, 392 U.S. 236 (1968).

13 See e.g. *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), which held that state grants linked to the maintenance of – and tuition paid to – sectarian schools violated the Establishment Clause because they advanced religion and/or fostered excessive entanglement.

route the aid takes to get to the religious school. Even amidst Justice Black's separationist language in *Everson*, for instance, the 'court seemed impressed with the argument that the aid… went not to the religious school but directly to the parent, thus benefiting the individual instead of the religious entity'.[14] In contrast, in *Committee for Public Education v. Nyquist*[15] the Court struck down aid programs for (predominantly Catholic) private schools that gave tuition reimbursements and tax relief for low income parents. The Court seemed little concerned with the path the aid took in reaching the parochial schools, or even whether it reached them at all:

> … if the grants are offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them, the Establishment Clause is violated whether or not the actual dollars given eventually find their way into the sectarian institutions.[16]

Another, and the most infamous, tool the court has employed to decide establishment cases is the *Lemon* test, so called because it was first articulated in the 1971 Supreme Court case of *Lemon v. Kurtzman*.[17] The test requires that in order to be constitutionally valid, an impugned law must: 1) have a secular purpose; 2) have a primary effect that neither hinders nor advances religion; and 3) not foster an excessive entanglement between church and state. Under the first prong of the test, 'what is relevant is the legislative *purpose* of the statute, not the possible religious *motivations* of the legislators who enacted the law'.[18] However, the purpose itself must be *bona fide*, as 'the Court is more than willing to review an action to make sure that it is not merely a cover for unconstitutional purposes'.[19]

In the end, however, little government action will fail to meet the hurdle set by the first branch of the test.[20] The real substance of the test is the second branch, under which most cases fall to be decided. It is usually at this stage in the analysis, for instance, that the Court addresses the issue of whether the aid flows directly to the religious institutions or is mediated by the choices of private individuals. The third prong, excessive entanglement, involves asking 'whether there is a discernible line of demarcation between government and religion'.[21] Deciding what counts as 'excessive' entanglement in any particular case is so contestable that adjudication of the matter may, to paraphrase Justice Scalia's language from a different establishment context,

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Of course, this whole approach is problematic given that, as Ferguson puts it, 'simple economics dictates that if funds are not needed in one place, then they can be used in another' (Ferguson, above n 11, 57).

14 Ferguson, above n 11, 58.

15 *Nyquist*, 413 U.S. 756 (1973).

16 Ibid 786.

17 *Lemon*, 403 U.S. 602 (1971).

18 Witte, above n 4, 181, quoting *Board of Education of the Westside Community Schools v. Mergens*, 496 U.S. 226 (1990), 249 (per O'Connor, J).

19 Ferguson, above n 11, 84 (n 143).

20 See *McCreary County v. ACLU*, 545 U.S. 844 (2005), 859: 'we have found government action motivated by an illegitimate purpose only four times since *Lemon*, and "the secular purpose requirement alone may rarely be determinative"…' (per Souter J, quoting from *Wallace v. Jaffree*, 472 U.S. 38 (1985), 75).

21 Ferguson, above n 11, 61.

make interior decorating look like a rock-hard science.[22] It can safely be said, however, that 'where government regulation or oversight is so extensive that the religious enterprise is subsumed into it, excessive entanglement has occurred'.[23]

Far from settling the law in the area of public funding for religious schools, the *Lemon* test has 'left ample room for interpretation', and can be interpreted as either allowing significant accommodation of religion, or as requiring strict separation.[24] However, the decision in *Lemon* itself infused the test with the logic of separation. *Lemon* held that a state policy of reimbursing (primarily Catholic) private schools for some of the costs of textbooks on secular subjects, and for portions of the salaries of teachers who taught only secular subjects, violated the Constitution by causing an excessive entanglement between state and church. Specifically, the Court was of the view that the level of bureaucratic surveillance required to ensure that the teachers at private religious schools for whom compensation was given would remain 'religiously neutral' in the classroom[25] was 'precisely the kind of excessive entanglement between church and state that the disestablishment clause outlaws'.[26] This interpretive approach emphasising separation 'guided most of the Court's disestablishment cases for the next 15 years'.[27]

Since it was first articulated, the *Lemon* test has been roundly criticized as ad hoc, amorphous, and even incoherent.[28] In 1984, in a concurring judgment in *Lynch v. Donnelly*,[29] Justice Sandra Day O'Connor sought to 'clarify'[30] the *Lemon* test. In so doing, she articulated what has come to be known as the 'endorsement test'. According to O'Connor J in *Lynch*, the Establishment Clause prohibits governmental action that is intended to endorse or disapprove of religion, as well as governmental action that has the effect of sending a message to a reasonable observer that the state endorses or disapproves of religion.[31] There has been a considerable lack of clarity in Establishment Clause jurisprudence as to the precise relationship between the endorsement test and the *Lemon* test. Generally, the endorsement test has been understood to be a further articulation of what the first and second prongs of the *Lemon* test forbid. According to O'Connor J, for instance, 'The purpose prong of

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

23 Ferguson, above n 11, 61. The *Lemon* test was modified somewhat by the Supreme Court in *Agostini v. Felton*, 521 U.S. 203 (1997). There the Court reduced the number of prongs in the *Lemon* test to two: purpose and effect. The question of excessive entanglement was said to be, rather than a separate prong of the test, a factor to be considered in determining whether the relevant government action has the effect of hindering or promoting religion.

24 Witte, above n 4, 157.

25 *Lemon*, above n 17, 619.

26 As quoted in Witte, above note 4, 158.

27 Ibid.

28 Jesse H. Choper, 'The Endorsement Test: Its Status and Desirability' (2002) 18 *Journal of Law and Policy* 499, 499–504.

29 *Lynch*, 465 U.S. 668 (1984).

30 'Focusing on institutional entanglement and on endorsement or disapproval of religion clarifies the *Lemon* test as an analytical device' (465 U.S. 668, 689 (O'Connor J)). See, however, Joel S. Jacobs, 'Endorsement as 'Adoptive Action:' A Suggested Definition of, and an Argument for, Justice O'Connor's Establishment Clause Test' (1994) 22 *Hastings Constitutional Law Quarterly* 29, 35: 'Yet if it were a clarification, it would simply be a more detailed explanation of the *Lemon* test and not alter the basic direction of *Lemon's* inquiry. Instead, the endorsement test replaces the foci of the *Lemon* test with foci of its own, thereby altering the test considerably; how state action affects religion is no longer important. Rather, the endorsement test focuses on how people perceive the relationship between the state and religion.'

31 *Lynch*, above n 29, 687–93.

the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval.'[32] The endorsement test is therefore often understood to be subsumed within the *Lemon* test in such a way that state endorsement of religion will be sufficient to show that the impugned action fails the *Lemon* test.[33]

A third test that has been employed by the Supreme Court in Establishment Clause cases is referred to as the 'coercion test'. This test emerges from the dissent of Justice Kennedy in *County of Allegheny v. ACLU*.[34] There, Justice Kennedy argued that whether state action amounts to an establishment of religion should turn on the question of whether the relevant action 'coerce[s] anyone to support or participate in any religion or its exercise'.[35] The coercion test has found favour in more recent years, particularly in cases involving 'passive' state action concerning religion, such as displays of religion on public property.[36] As for the relationship between the coercion test and the other tests for Establishment Clause violations, Justice Blackmum in *Lee*, in a concurring judgment which was joined by Justices Stevens and O'Connor, wrote that 'Although our precedents make clear that proof of government coercion is not necessary to prove an Establishment Clause violation, it is sufficient. Government pressure to participate in a religious activity is an obvious indication that the government is endorsing or promoting religion.'[37]

It is even possible, when looking at the jumble that is the Court's Establishment Clause jurisprudence, to identify a fourth approach that has been used.[38] In *Marsh v.*

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32 Ibid 691.

33 See e.g. *Doe v. Elmbrook School District*, 687 F.3d 840 (2012), 849–50 (per Flaum J). See also *DeStefano v. Emergency Housing Group, Inc.*, 247 F.3d 397 (2001), 410–11: 'In recent Supreme Court decisions, the 'endorsement' inquiry has been subsumed under the *Lemon-Agostini* framework such that analysis of the criteria for determining a practice's primary effect also resolves any endorsement challenge.'

34 *Allegheny*, 492 U.S. 573 (1989), 655: 'In keeping with the usual fashion of recent years, the majority applies the *Lemon* test to judge the constitutionality of the holiday displays here in question. I am content for present purposes to remain within the *Lemon* framework, but do not wish to be seen as advocating, let alone adopting, that test as our primary guide in this difficult area' (per Kennedy J).

35 Ibid 659.

36 See e.g. *Lee*, above n 22, *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), and the concurring opinions of Thomas and Scalia JJ in *Town of Greece v. Galloway*, 134 S.Ct. 1811 (2014).

37 Ibid 604. In *Elmbrook* (above n 33, 850) the Court of Appeals for the Seventh Circuit expressly noted its uncertainty as to 'Where the coercion test belongs in relation to the *Lemon* test', before quoting from the judgment of Blackmun J in *Lee* in support of the proposition that coercion is sufficient but not necessary to prove a violation of the Establishment Clause. (It is arguable, however, that Justice Kennedy's judgment in *Allegheny* 'appears to argue that a showing of either direct or indirect state coercion should be both necessary and sufficient to prove an Establishment Clause violation' (Cynthia V. Ward, 'Coercion and Choice Under the Establishment Clause' (2006) 39 *UC Davis Law Review* 1621, 1632, n 37).)

38 In addition to the three jurisprudential approaches discussed above, there is even case law to suggest that it is appropriate to apply all three of the *Lemon*, endorsement, and coercion tests to the facts of the alleged Establishment Clause violation. (See *Doe by Doe v. Beaumont Independent School District*, 173 F.3d 274 (1999).)

Chambers,[39] for instance, in which the Supreme Court held that paying a chaplain for religious services with taxpayer money did not violate the Constitution, the Court appears not to have employed any of the three established tests, focussing instead on the question of whether the impugned governmental action has been historically permitted.[40] This history-based approach was also followed in the 2015 Supreme Court case of *Town of Greece v. Galloway*,[41] which held that it was constitutionally permissible for the town of Greece, New York to open board meetings with a prayer led by volunteer chaplains. This historical approach appears to be combined at times with an application of the coercion test. According to Justice Kennedy in *Allegheny*, for example, 'Noncoercive government action within the realm of flexible accommodation or passive acknowledgment of existing symbols does not violate the Establishment Clause unless it benefits religion in a way more direct and more substantial than practices that are accepted in our national heritage.'[42]

On the whole, it can be said of this particularly muddled area of Constitutional jurisprudence that the law appears to be in a state of flux,[43] if not disarray.[44] The *Lemon* test survives, at least in the context of school funding cases, but only in modified form. Following *Lynch*, for instance, virtually all leading cases that purport to apply the *Lemon* test have asked not only whether the action was intended to, or has the effect of, 'advancing or inhibiting' religion, but also whether that action was intended to endorse or disapprove of, or has had the effect of endorsing or disapproving of, religion.

The Supreme Court's decision in *Van Orden v. Perry*[45] not to apply an endorsement analysis, and to expressly declare that the *Lemon* test is not applicable in certain Establishment Clause contexts, might have seemed to presage the death of the Lemon and endorsement tests.[46] However, at present the weight of authority clearly suggests that American courts remain bound by the modified *Lemon test*.[47] As the

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39 *Marsh*, 463 U.S. 783 (1983).

40 Justice Brennan, joined in dissent by Marshall J, remarked: 'The Court makes no pretense of subjecting Nebraska's practice of legislative prayer to any of the formal 'tests' that have traditionally structured our inquiry under the Establishment Clause' (796).

41 Above n 36. Justice Scalia starkly declared that '*Town of Greece* abandoned the antiquated "endorsement test"'. (See *Elmbrook School District v. Doe*, 134 S. Ct. 2283 at 2284 (2014) (Scalia, J, dissenting from the denial of certiorari)).

42 Above n 34, 663.

43 This was the conclusion of Charles Warren in 2003 (Charles G. Warren, 'No Need to Stand on Ceremony: The Corruptive Influence of Ceremonial Deism and the Need for a Separationist Reconfiguration of the Supreme Court's Establishment Clause Jurisprudence' (2003) 54 *Mercer Law Review* 1669, 1670), and it would appear to remain an accurate description today.

44 *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), 861 (Thomas J, concurring): '[O]ur Establishment Clause jurisprudence is in hopeless disarray.'

45 *Van Orden*, 545 U.S. 677 (2005).

46 Rehnquist CJ, in his opinion for the majority in *Van Orden*, for example, wrote that 'Many of our recent cases simply have not applied the *Lemon* test' (686). He went on to add that 'Others have applied it only after concluding that the challenged practice was invalid under a different Establishment Clause test' (686). (Breyer J, concurring in the judgment, also clarified that 'in reaching the conclusion that the Texas display falls on the permissible side of the constitutional line, I rely less upon a literal application of any particular test than upon consideration of the basic purposes of the First Amendment's Religion Clauses themselves' (703–04).)

47 See e.g. *Elmbrook* above n 33; *Books v. City of Elkhart*, 235 F.3d 292 (2000); *Sherman ex rel. Sherman v. Koch*, 623 F.3d 501 (2010); *Milwaukee Deputy Sheriffs' Association v. Clarke*, 588 F.3d 523 (2009).

Court of Appeals for the Tenth Circuit wrote in *Weinbaum v. City of Las Cruces New Mexico*, 'the touchstone for Establishment Clause analysis remains the tripartite test set out in *Lemon*'.[48] This seems very likely to continue to be the case until such time as the *Lemon* test is specifically overruled.[49] In admitting that the rumours of the *Lemon* test's demise are exaggerated, Justice Scalia, who would himself be happy to see it put to rest,[50] describes the test as akin to 'some ghoul in a latenight horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried'.[51]

Despite the ongoing confusion over which test, if any, ought to be applied to Establishment Clause cases, it can safely be said that since the latter part of the 1980s the general trend in cases involving public aid for parochial schools appears to be a retreat from the strict separationist flavour given to the *Lemon* test at its inception, and an increasing willingness to allow some indirect aid to flow to religious schools.[52] In Witte's opinion, 'in this process of retreat, the Court has issued a number of blatantly contradictory opinions'.[53] However, a clear trend has emerged in which the Court will countenance the provision of public aid to private religious schools if its path to the institution is mediated by genuine individual choice. By way of illustration, in the important 2002 school voucher case of *Zelman v. Simon-Harris*,[54] the Court found that the relevant Ohio program was animated by the secular purpose of 'providing educational assistance to poor children in a demonstrably failing public school system.'[55] Further, since no surveillance of day-to-day operations such as that required in the *Lemon* context would be necessary, the program did not generate excessive entanglement. What is more, the Court held that because the vouchers could be used by parents to send their children to either public or private religious schools, the parents had a 'true private choice'[56] as to whether to use the voucher credit at a secular or religious school. As such, the Court found that the government was not violating the Establishment Clause by favouring religion; rather, it was acting in a neutral manner. Accordingly, as measured against the *Lemon* test, the primary effect of the program neither hindered nor advanced religion. Moreover, any '*incidental* advancement of a religious mission, or the perceived endorsement of a religious message, was reasonably

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48 *Weinbaum*, 541 F.3d 1017 (2008), 1030.

49 The Tenth Circuit Court of Appeals in *Weinbaum* declared that 'the *Lemon* test clings to life because the Supreme Court, in the series of splintered Establishment Clause cases since *Lemon*, has never explicitly overruled the case. … While the Supreme Court may be free to ignore *Lemon*, this court is not (1030 n 14).

50 *Lee*, above n 22, 644: 'The Court today demonstrates the irrelevance of *Lemon* by essentially ignoring it… and the interment of that case may be the one happy byproduct of the Court's otherwise lamentable decision.' See also Scalia J's concurring judgment in *Lamb's Chapel et al. v. Center Moriches Union Free School District et al.*, 508 U.S. 384 (1993), 399: 'For my part, I agree with the long list of constitutional scholars who have criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced.'

51 Ibid, 398.

52 See Witte, above n 4, 174.

53 Ibid 175.

54 *Zelman*, 536 U.S. 639 (2002).

55 Ibid, 649 (per Rehnquist J).

56 Ibid.

attributable *to the individual aid recipients*, *not the government*, whose role ends with the disbursement of benefits'.[57]

B *Canada*

In Canada, the legal landscape with regard to public funding of religious schools is markedly different. Section 2(a) of the *Charter of Rights and Freedoms* protects 'freedom of conscience and religion' in much the same way that the Free Exercise Clause, by proscribing any law prohibiting the free exercise of religion, protects religious freedom in America.[58] However, the Canadian Constitution has no equivalent of the Establishment Clause.[59] Indeed, not only is direct funding of religious schools by the Canadian provinces constitutionally permitted, s. 93(1) of the *Constitution Act, 1867* actually mandates provincial funding for denominational schools in order to preserve any 'right or privilege' accorded by law to any 'class of persons' in respect of such schools at the time the province joined Confederation.[60] This means, for example, that the provincial government of Ontario not only *may* provide funding to Roman Catholic schools, but is actually *required* to do so, since the failure to provide such funding would prejudicially affect the right to publicly funded separate Catholic schools that obtained in 1867. Moreover, section 29 of the *Charter* provides that none of the rights in the *Charter* – such as s. 2(a)'s guarantee of freedom of religion – can be used to 'abrogate or derogate' from any of the rights or privileges in respect of denominational schools guaranteed by s. 93(1).

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[57] Ibid, 652 (emphasis added). Whether the relevant governmental scheme involves genuine private choice was also held to be a crucial factor arguing in favour of the constitutionality of the program in the earlier Supreme Court case of *Mitchell v. Helms*, 530 U.S. 793 (2000), 795: 'If aid to schools, even 'direct aid,' is neutrally available and, before reaching or benefiting any religious school, first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any 'support of religion'' (per Thomas J), as well as the decision in *Locke v. Davey*, 540 U.S. 712 (2004), 719: 'Under our Establishment Clause precedent, the link between government funds and religious training is broken by the independent and private choice of recipients' (per Rehnquist J).

[58] For scholarship which notes the substantially similar jurisprudence created by religious freedom cases in both countries, see e.g. Robert Sedler, 'The Constitutional Protection of Freedom of Religion, Expression, and Association in Canada and the United States: A Comparative Analysis' (1988) 20:2 *Case Western Reserve Journal of International Law* 577; Christopher Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (2000); Donald Beschle, 'Does the Establishment Clause Really Matter? Non-Establishment Principles in the United States and Canada' (2002) 4:3 *University of Pennsylvania Journal of Constitutional Law* 451.

[59] For the suggestion that in spite of this Canada's freedom of religion case law suggests Canada possesses a 'hidden establishment clause', see Jeremy Patrick, 'Church, State, and Charter: Canada's Hidden Establishment Clause' (2006) 14:1 *Tulsa Journal of Comparative and International Law* 25.

[60] Bruce Ryder, 'State Neutrality and Freedom of Conscience and Religion' (2005) 29 *Supreme Court Law Review* (2d) 169, 178–79. Section 93(1) of the *Constitution Act, 1867* reads as follows:

> In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:
>
> (1.) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union;

The Supreme Court of Canada, in *Re An Act to Amend the Education Act (Ontario),*[61] (hereafter *Reference re Bill 30*), has also made it clear that the provinces are free to use their 'plenary power' over education given by the opening words of s. 93 to extend funding to other religious schools, such as Jewish or Islamic institutions, provided this funding does not prejudicially affect the denominational school rights set out by s. 93(1).[62] In Canada such funding may be direct, and it may be total or partial; there is no *Lemon* test to be applied. Further, in obiter dicta that was later seized upon by a majority of the Canadian Supreme Court in the leading case of *Adler*,[63] Wilson J in *Reference re Bill 30* argued that as s. 93(3) specifically contemplates provincial legislative action to augment the denominational school rights protected by s. 93(1),[64] such legislative action would be immune from *Charter* review, notwithstanding that s. 29 would be inapplicable.[65] As Justice Wilson wrote for the majority:

> The Confederation compromise in relation to education is found in the whole of s. 93, not in its individual parts. The section 93(3) rights and privileges are not guaranteed in the sense that the s. 93(1) rights and privileges are guaranteed, i.e., in the sense that the legislature which gave them cannot later pass laws which prejudically [*sic*] affect them. But they are insulated from *Charter* attack as legislation enacted pursuant to the plenary power in relation to education granted to the provincial legislatures as part of the Confederation compromise. Their protection from *Charter* review lies not in the guaranteed nature of the rights and privileges conferred by the legislation but in the guaranteed nature of the province's plenary power to enact that legislation.[66]

What remained unclear after *Reference re Bill 30* was whether the provinces might be *required* to provide funding to private religious schools in light of the fact that public funding was provided to both the public school system and to the denominational (or 'separate') schools protected by s. 93. This question was answered in the negative in *Adler*. In that case, a group of parents who sent their children to private Jewish and Protestant schools in Ontario made two *Charter* arguments. Firstly, they claimed that s. 2(a) required the province to fund independent religious schools. The majority of the Court disposed of this claim by finding that s. 93 represents a '"comprehensive code" of denominational school rights'.[67] As such, while s. 93 guarantees the denominational rights enjoyed at the time of union, s. 2(a) 'cannot be

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61 *Re An Act to Amend the Education Act (Ontario)* (1987) 1 S.C.R. 1148 (*Reference re Bill 30*).

62 Ibid 1174 (per Wilson J); at 1202 (per Estey J). See also *Adler v. Ontario* (1996) 3 S.C.R. 609 (*Adler*), 648–49 (per Iacobucci J); at 636 (per Sopinka J).

63 *Adler*, above n 62.

64 Sub-section 93(3) reads: 'Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education.'

65 Section 29 is inapplicable in light of the fact that the additional rights or privileges created pursuant to s. 93(3), in contrast to the rights and privileges contemplated by s. 93(1), would not be, in the language of s. 29, 'rights or privileges *guaranteed* by or under the Constitution of Canada in respect of denominational, separate or dissentient schools' (emphasis added).

66 *Reference re Bill 30*, above n 61, 1198.

67 *Adler*, above n 62, 639.

used to enlarge this comprehensive code'.[68] Thus while a province could choose to extend denominational school rights to additional religious groups not covered by s. 93(1),[69] s. 2(a) does not compel it to do so.[70]

The Supreme Court based its conclusion on the finding that s. 93 was the 'product of an historical compromise' that 'provide[s] the province[s] with the jurisdiction to legislate in a prima facie selective and distinguishing manner'.[71] Consequently, the majority rejected the proposition that s. 2(a) required an extension of funding to additional religious groups, as such a finding would, in their opinion, amount to 'hold[ing] one section of the Constitution violative of another'.[72] In doing so, the majority expressly cautioned that although s. 93(1)'s conferring of a 'privileged status on those religious minorities which, at the time of Confederation, enjoyed legal rights with respect to denominational schools… may sit uncomfortably with the concept of equality embodied in the *Charter*'[73], it 'must nonetheless be respected'.[74]

The claimants' second argument in *Adler*, as characterized by the Supreme Court, was that 'by funding Roman Catholic separate schools and secular public schools at the same time as it denie[d] funding to independent religious schools, the province [was] discriminating against the appellants on the basis of religion contrary to [the equality guarantees of] s. 15(1) [of the *Charter*]'.[75] In response, the Court held that as the province's funding of Catholic schools was mandated by s. 93(1), s. 29 of the *Charter* 'explicitly exempts' such funding from *Charter* challenge.[76] In addition, the majority found that the public schools too were 'impliedly but nonetheless clearly within the terms of the regime set up by s. 93'.[77] It did this by examining the last piece of legislation relating to denominational schools pre-Confederation, which it found defined the rights of Ontario's Catholic schools with reference to those of the public schools.[78] This brought the public schools within the special purview of s. 93, rendering the public school system 'an integral part of the Confederation compromise', and one which, 'consequently, receives a protection against constitutional or *Charter* attack'.[79]

The veneration of the provinces' plenary power over education that occurred in *Reference re Bill 30* and *Adler* does not, however, mean that all legislation regarding public schooling is immune from *Charter* review. The majority in *Adler* was careful to make this clear:

> [I]t should be pointed out that all of this is not to say that no legislation in respect of public schools is subject to *Charter* scrutiny, just as this court's ruling in *Reference Re Bill 30* did not hold that no legislation in respect of separate schools was subject to

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68 Ibid 642 (per Iacobucci J).

69 Ibid 648–49 (per Iacobucci J); 636 (per Sopinka J).

70 As the majority emphasised: 'an ability to pass such legislation does not amount to an obligation to do so': *Adler*, above n 62, 648–49 (underlining in original).

71 Ibid 641–42 (per Iacobucci J) quoting with approval *Reference re Bill 30*, above n 61, 1206.

72 Ibid 642. As Wilson J wrote in *Reference re Bill 30* at 1197: 'It was never intended … that the *Charter* could be used to invalidate other provisions of the Constitution.'

73 Ibid 641–42.

74 Ibid.

75 Ibid 639.

76 All the justices in *Adler* took this position, even the four who rejected the majority's view that s. 93 is a complete code in respect of denominational schools that could not be enlarged by any part of the *Charter*.

77 Ibid 646.

78 Ibid 645.

79 Ibid 647–48.

> *Charter* scrutiny. Rather, it is merely the fact of their existence … that is immune from *Charter* challenge. Whenever the government decides to go beyond the confines of this special mandate, the *Charter* could be successfully invoked to strike down the legislation in question.[80]

To summarize, s. 93 of the *Constitution Act, 1867* requires provinces to fund denominational schools wherever a class of persons in the province enjoyed a legal right or privilege to such funding at the time the province joined Confederation. However, the rights and privileges relating to denominational schools at the time of union varied by province.[81] There was, as one commentator puts it, a 'patchwork quilt of standards for public funding' of education in Canada after 1867, as the number of Canadian provinces gradually expanded.[82] In four provinces – British Columbia, New Brunswick, Nova Scotia, and Prince Edward Island – there were no denominational school rights or privileges at the time of union. As a result, these provinces have never funded 'separate schools' of the kind given constitutional protection by s. 93.[83] Further, while denominational schools were provided for by law in Quebec and Newfoundland at their respective dates of union, neither province is currently bound to fund denominational schools under s. 93, since the application of that section to the two provinces has been ousted by constitutional amendment.[84] Consequently, there are presently only three provinces that are required under s. 93 to fund denominational schools: Ontario, Saskatchewan, and Alberta. In addition, five provinces have chosen to give at least partial funding to private religious schools of any faith,[85] while one – Alberta – also fully funds a number of previously independent religious schools, which it has folded into the public system. Four others – New Brunswick, Nova Scotia, Prince Edward Island, and Newfoundland – do not fund religious schools of any kind.[86] Ontario is in the remarkable position of providing full funding to Catholic separate schools but no funding of any kind to any other religious schools.[87]

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80 Ibid 649.

81 As might be expected, given that the ten provinces did not join Confederation at the same time. Newfoundland, for instance, the last province to join, did not do so until 1949.

82 John Young, 'Religious Education in Canada' in Derek Davis and Elena Miroshnikova (eds), *The Routledge International Handbook of Religious Education* (2013), 71.

83 David Seljak, 'Education, Multiculturalism, and Religion' in Lori Beaman (ed), *Religion and Canadian Society: Contexts, Identities, and Strategies* (2012), 314.

84 In Quebec, this occurred in 1997; in Newfoundland, in 1998. In both cases the amendment required merely the consent of the legislative assembly of each province and the consent of the federal Parliament, pursuant to the amending formula laid out in s. 43 of the *Constitution Act, 1982*.

85 These Provinces are: British Columbia, Alberta, Saskatchewan, Manitoba And Quebec. They Provide Funding To Schools Of Any Religious Affiliation, provided they fulfil certain criteria, such as adhering to the provincial curriculum and hiring provincially certified teachers (see Gregory M. Dickinson and Nora M. Findlay, 'From 'Common Christianity' to 'Equal Concern and Respect' Working Out a New Understanding of Religion's Place in Canada's Schools' in Charles Russo (Ed), *International Perspectives on Education, Religion and Law* (2014) 111, 111–13).

86 Ibid 112.

87 In *Waldman v. Canada (Communication No. 694/1996)* the United Nations Human Rights Committee condemned Ontario's policy of funding only Catholic religious schools as

In sum, then, the differences between the American and Canadian law relating to state funding of religious schools can be reduced to two main points. First, while Canada has a parallel to the Free Exercise Clause in the form of s. 2(a) of the *Charter*, it lacks an equivalent to the Establishment Clause. Secondly, whereas the provision of state aid directly to religious schools for the purpose of furthering their religious mission is constitutionally prohibited in America, not only is such aid permissible in Canada, s. 93(1) *requires* Canadian provinces to fund minority religious schools where failing to do so would prejudicially affect rights to denominational schools that existed at Confederation.

III EXPLAINING THE DIFFERENCES

What explains the stark differences between the two countries when it comes to the constitutionality of public funding of religious schools? I will discuss five explanatory factors: divergent motivations behind the push for union, significantly different demographic realities, opposing perspectives on how best to achieve unity, Americans' more acute concerns over the risk of religious tyranny, and their greater fear that religion will be debased by a close affiliation with the state.

A *The founding moment*

Canada and the United States, and their constitutions, were born out of divergent circumstances. America became a republic after it went to war for its ideals and overthrew British colonial rule. Confederation, on the other hand, was through and through a pragmatic political decision. Focusing on the American context, it is crucial to note that the Revolutionary War 'was fought for religious liberty no less than political liberty'.[88] Indeed, from its colonial beginnings America was viewed as a refuge for the religiously persecuted. As one historian puts it, 'Many of the people who settled British North America in the seventeenth century came for religious reasons, for the opportunity to worship God in ways that were unacceptable in Europe.'[89] This was as true of the Puritan settlers who left England to escape what they viewed as the tainting of the Church of England by Roman Catholicism, as it was of later groups including Presbyterians, Mennonites, Catholics and Jews.

In contrast, the provision of asylum to the religiously persecuted was not, historically speaking, central to Canada's self-conception, despite the fact that the colonies of what is now Canada were also populated by their fair share of religious dissenters and misfits from Europe. Further, Canada, despite attempts by the Continental Congress to enlist its support, did not join in the Americans' revolution, with religious concerns playing an important role in keeping at least French Canada out of the fight. Catholicism, for example, was expressly protected by the *Quebec Act* of 1774,[90] and the Catholic francophone population had little hope of receiving

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discriminatory, and found that it violates the *International Covenant on Civil and Political Rights*.

88 Edwin S. Gaustad, *Church and State in America* (2nd ed, 2003) 31.

89 James H. Hutson, *Religion and the Founding of the American Republic* (1998) 3.

90 *An Act for making more effectual Provision for the Government of the Province of Quebec in North America,* 14 Geo. III, ch. 83 (1774) [*Quebec Act*].

comparable protections from the Americans, given their broad disinclination to support religion, and given their anti-Catholic sentiment more particularly.[91]

Further, whereas the inclusion of the First Amendment in the Bill of Rights was the result of a deep commitment among the American founders to the fundamental importance of liberty of conscience, the raw politics of religious compromise was a reality of the Canadian state from the very beginning. For the French in Upper (English-speaking) Canada, as well as for the minority (and predominantly Protestant) English in Lower Canada, it was unacceptable that the protection of their religion be left in the hands of the unsympathetic majority.[92]

Against this backdrop, then, it is not surprising that a political compromise over denominational schools was struck. As one of the fathers of Confederation, Charles Tupper, put it, 'without this guarantee for the rights of minorities being embodied in that new constitution, we should have been unable to obtain any confederation whatever'.[93] Justice Iacobucci, penning the majority decision in *Adler*, was of the same opinion, noting that s. 93 was 'a crucial step along the road leading to Confederation', which represented a 'solemn pact', a '"cardinal term" of Union', without which 'there would have been no Confederation'.[94] Interestingly, whereas for Thomas Jefferson and many of the other American founders, religious freedom 'was and would always be the foundation on which all other freedoms rested',[95] the Supreme Court of Canada in *Adler* found that the s. 93 'pact' 'is a child born of historical exigency,… [and] does not represent a guarantee of fundamental freedoms'.[96] We have in all of this, then, a clear answer to the question of why Canada does not have an Establishment Clause. Since a necessary ingredient in the birth of the country was constitutionally guaranteed government support for denominational schools, Canada could not very well have precluded any laws 'respecting an establishment of religion'.

Thus, whereas the Establishment Clause was drafted with the aim of preserving the fundamental value of religious freedom, the controlling constitutional provision in Canada in respect of religious schooling – s. 93 – was motivated by, as it were, more parochial concerns. Its purpose was not to ensure religious freedom. (The Supreme Court's decision in *Reference re Bill 30* conceded, for instance, that 'It is axiomatic … that if the Charter has any application to Bill 30, this Bill would be found discriminatory and in violation of s. 2(a) and s. 15 of the *Charter of Rights*.'[97]) Rather, its purpose was to sufficiently appease the two dominant religious groups such that a workable, enduring political union could be fashioned.

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91 See e.g. Vernon P. Creviston, 'No King Unless it be a Constitutional King: Rethinking the Place of the Quebec Act in the Coming of the American Revolution' (2011) 73:3 *The Historian* 463.

92 *Adler*, above n 62, 690–93 (per Sopinka, J).

93 As quoted in ibid 690.

94 Ibid 640.

95 As quoted in Gaustad, above n 88, 42.

96 *Adler*, above n 62, 640. Moreover, the concurring judgments of Sopinka and Major JJ and McLachlin J, and the dissenting opinion of L'Heureux-Dube J, all rejected the notion that freedom of religion requires funding for religious education. As Justice McLachlin (as she then was) wrote, borrowing from the lower court judgment of Dubin CJ, 'Never… has it been suggested that freedom of religion entitles one to state support for one's religion' (713).

97 *Reference re Bill 30*, above n 61, 1205–06.

B *Demographics*

We have seen that whereas Canadian Confederation would not have occurred but for a guarantee of continued support for minority religious schools, the American founders deliberately sought to create a republic committed to the ideal of religious freedom. However, this observation, on its own, does not have all that much explanatory power. We should go further, and ask *why* the section 93 compromise was a necessary condition of Confederation in Canada. Likewise, we should seek to understand why, in the name of religious freedom, the American founders chose to prohibit the establishment of any religion, as opposed to requiring instead that all government support for religion occur in an even-handed manner.

On the latter score, it is clear that the American founders were deeply hostile to the British establishment of the Anglican Church.[98] Based on this model, and on the adaptations of it employed in the American colonies themselves, the founders came to view the 'essential characteristic' of establishment as 'support for a preferred church through government coercion'.[99] However, while banning support for *any* religion would see that this evil was avoided, so too would requiring *even-handed* support for *all* religions. Moreover, the First Amendment itself can be read as neutral as to 'whether disestablishment of religion outlaws all government support for religion or only preferential support for some religions'.[100] As such, and given that there was no consensus among the founders on this issue,[101] why did the Supreme Court not adopt this latter non-preferentialist approach?

Demographics provide much of the answer to these questions. On the issue of why the United States chose to adopt a 'support none' as opposed to a 'support all' model, it is instructive to note that the even-handed approach is most feasible where the number of groups receiving state support is few. This was the case in Canada, where there existed two main religious groups, Catholics and Protestants, with the latter a relatively cohesive community. In the United States, by contrast, 'While it is true that the vast majority of denominations were Christian, the sense of difference among them was profound.'[102] Thus in the 18th century and well after the founding of the American republic:

> There were Anglicans, Congregationalists, Methodists, Deists, Dutch Reformed, Baptists, Presbyterians, Quakers, and Catholics, as well as Jews. Protestants, taken as a whole, extended a strong influence, but the category, 'Protestant,' hides a wide array of religious beliefs and institutions – none of which ever held sole power over all of the colonies or states.[103]

In addition to the large number of discrete Protestant sects in America, the proportion of the total population belonging to a Protestant denomination also goes a long way to explaining why the United States opted against a non-preferentialist model of state support for religion. Specifically, not only were Protestants a significantly

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98 See e.g. William W. Sweet, 'The Role of the Anglicans in the American Revolution' (1947) 11:1 *Huntington Library Quarterly* 51, 69–70.

99 Arlin M. Adams and Charles J. Emmerich, *A Nation Dedicated to Religious Liberty: The Constitutional Heritage of the Religion Clauses* (1990) 55.

100 Witte, above n 4, 53.

101 Ibid.

102 Marci Hamilton, 'The Religious Origins of Disestablishment Principles' (2006) 81:5 *Notre Dame Law Review* 755, 755.

103 Ibid.

higher proportion of the population of the American republic in 1776 compared to their numbers within the population of Canada in 1867, the individualist ethos that prevailed across Protestant creeds inclined early Americans against giving government an active role in supporting religion. As Samuel Huntington observed:

> The Protestant emphasis on the individual conscience and the responsibility of individuals to learn God's truths directly from the Bible promoted the American commitment to individualism, equality, and the rights to freedom of religion and opinion. …With its congregational forms of church organization, Protestantism fostered opposition to hierarchy and the assumption that similar democratic forms should be employed in government.[104]

Relatedly, as Huntington also notes, 'Protestantism stressed the work ethic and the responsibility of the individual for his own success or failure in life.'[105] Such a viewpoint links up with the Millian conviction, historically much in vogue in America, that if left to her own devices the truth will win out. This strand of thought clearly pervades American free speech jurisprudence, for instance, and sets it in sharp relief from the Canadian law in this area, which is informed by a much more pessimistic view of the ability of truth to conquer falsity.[106] As it relates to religion, the American sentiment is best summed up by Thomas Jefferson in the preamble to his Virginia Statute of Religious Freedom. For Jefferson, religious liberty was crucially about letting various religious doctrines compete, on an equal footing, for the individual's intellectual assent. Consequently, he prefaced his guarantee of religious freedom by declaring unequivocally that 'truth is great and will prevail if left to herself', and that 'she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict, unless by human interposition disarmed of her natural weapons, free argument and debate; errors ceasing to be dangerous when it is permitted freely to contradict them'.[107] As such, if a particular religious sect were unable to survive or thrive under conditions of religious freedom, this would be suggestive merely of some defect in dogma.

In Canada, by contrast, Catholic minorities in Upper Canada (now Ontario) and Protestant minorities in Lower Canada (now Quebec) entertained real fears that their communities would not survive without governmental protection.[108] Added to a strongly held belief that a religious education was crucial to the moral upbringing of children, these early Canadians were keenly aware of the assimilative pressures they would have to endure in the absence of government support for parochial schools. They took little comfort in the notion that the truth of their creed might guarantee the continued survival of the faith. Likewise, those in Lower Canada were not nearly as

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104 Samuel Huntington, *Who Are We?: The Challenges to America's National Identity* (2004) 68.

105 Ibid.

106 Compare especially the contrasting free speech cases of *R. v. Keegstra* (1990) 3 S.C.R. 697 and *Collin v. Smith*, 439 U.S. 916 (1978).

107 *Act for Establishing Religious Freedom* (Laws of Va., 1 Rev. Code, 1819, p. 77) (*Virginia Statute for Religious Freedom*, January 16, 1786).

108 As Justice Wilson noted in *Reference re Bill 30* (1987) 1 S.C.R. 1148, 1173 '[t]he protection of minority religious rights was a major preoccupation during the negotiations leading to Confederation because of the perceived danger of leaving the religious minorities in both Canada East [Lower Canada] and Canada West [Upper Canada] at the mercy of overwhelming majorities'.

taken with Protestant anti-hierarchical ideals of the sort that held sway in America; instead, they were comfortably familiar with the corporatism of the Catholic Church.

Indeed, Catholics in Lower Canada had gotten rather used to state support for their religion by the time of Confederation. For example, in the wake of the English victory over New France at the Plains of Abraham in 1759, the British government initially planned to 'establish the Anglican Church and to apply, in Canada, the anti-Catholic measures that were in force in Great Britain and in other British colonies'.[109] However, given the growing American uprising in the years that followed, 'the British government was rapidly impelled to guarantee freedom of worship to its new Catholic subjects in order to ensure their loyalty and dissuade them from joining the American colonists in their anti-British activities'.[110] This it did via the Royal Proclamation of 1763. Further, the *Quebec Act* of 1774 'confirmed this conciliatory policy by authorizing the Catholic Church to collect tithes'.[111] French Catholics were more than content to continue with such arrangements in place. The alternative of embracing high-flown commitments to religious liberty like those prevailing in the American colonies, and fighting against linguistic and religious assimilation in an environment of total disestablishment, was decidedly unappealing.

In addition, the demographic reality that Catholics made up a huge proportion of the Canadian population but a very small proportion of the American population was sustained by migration patterns in the late 18th century. Both before and after the American Revolution, for example, tens of thousands of United Empire Loyalists from America migrated to what is now Canada.[112] Another significant trend was the migration to Quebec of French priests, many of them fleeing France in the wake of the French Revolution and its anti-clerical elements.[113] In sum, the large numbers, territorial concentration, and enormous political clout wielded by the Catholic French-speaking population of Lower Canada made them unique compared to any religious minority group in the American colonies.[114] The Catholic demand for a constitutional guarantee of denominational school rights, therefore, was not one that predominately Protestant English Canada could ignore.

Demographics also explain a lot when it comes to the further question of why public funding for religious schools varies across the Canadian provinces. Since 1867, Canada has of course become a much more multicultural country. Its provinces are home to vastly greater numbers of non-Christians than was true at the time of

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109 Rosalie Jukier and José Woehrling, 'Religion and the Secular State in Canada', in Javier Martinez-Torron and W. Cole Durham (eds), *National Reports* (2010) 155, 159.

110 Ibid.

111 Ibid.

112 Maya Jasanoff, 'The Other Side of Revolution: Loyalists in the British Empire' (2008) 65:2 *William and Mary Quarterly* 205, 208.

113 See e.g. Michel Tetu, 'Quebec and the French Revolution' (1989) 12:3 *Canadian Parliamentary Review* 1, 5: '51 carefully chosen French priests … came to Quebec between 1792 and 1815. ... They settled around Lac St-Pierre, near Trois-Rivières; in fact, the area would even be called 'La Petite France'. At the time there were only 140 priests in all of Quebec, so the arrival of 51 more marked the second foundation of the Church in Canada.' See also Robert Choquette, *Canada's Religions: An Historical Introduction* (2004) 198.

114 Indeed, the term 'religious minority': is somewhat inapt in the early American context, as in most colonies and later states, as well as federally, there was no one religious sect that was a 'majority', in the sense of representing over 50% of the population. (This largely remains the case in the United States to this day.)

Confederation.[115] In light of this, it is quite clear that had the fathers of Confederation not included the s. 93 compromise, no province today would adopt a similar scheme guaranteeing public funding to only Catholic and Protestant minority groups.[116] As noted above, even the Supreme Court, in upholding the preferential treatment guaranteed under s. 93, conceded that it 'sits uncomfortably with the concept of equality embodied in the *Charter*'.[117]

The fact that Canada has become a much more pluralistic nation, and has enshrined equality rights in the *Charter*, thus provides an explanation for why Quebec[118] and Newfoundland chose to oust the application of s. 93 to their education legislation via constitutional amendment.[119] Why then, we might ask, have Alberta, Saskatchewan, and, most notably, Ontario not done likewise? Here again we must take note of the demographic realities, as well as the political realities that tend to flow on from them. For instance, the demographic situation in all three provinces is such that Catholics today represent the largest unified religious group.[120] While there are more Protestants overall than Catholics in each of these provinces, no individual Protestant sect is anywhere near the size of the Catholic 'minority'. Indeed, the fact that Catholics are no longer a true minority in any of these provinces 'is seen by some as straining the characterization of s. 93 guarantees as a form of minority protection'.[121] With regard to Ontario in particular, '[t]he fact that Quebec has turned its back on s. 93 has also brought into question its continued existence in Ontario, given the original purpose of the provision as a compromise between these two provinces'.[122] The sheer number of Catholic Ontarians today – they are only marginally smaller than the total Protestant

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115 *Canada's Changing Religious Landscape* (June 27, 2013) Pew Research Centre <http://www.pewforum.org/2013/06/27/canadas-changing-religious-landscape> at 6 November 2015.

116 As one editorial in a leading Ontario newspaper noted in 2007, 'public funding for Roman Catholic schools is bizarre'. It then went on to ask, very much rhetorically, 'If such a system did not exist, would we invent it now?' (G. Gardner, 'A tough sell for the premier', *Ottawa Citizen* (Ottawa, Canada) (July 28, 2007)). For a likeminded analysis of how 'odd' this arrangement would 'appear to someone steeped in the modern U.S. constitutional tradition', see Christopher L. Eisgruber and Mariah Zeisberg, 'Religious Freedom in Canada and the United States' (2006) 4:2 *International Journal of Constitutional Law* 244, 256.

117 *Reference re Bill 30*, above n 61, 1198 (per Wilson J).

118 In the case of Quebec, the vastly greater social salience of *linguistic*, as opposed to religious, difference in the modern-day life of that province – itself, of course, the result of a demographic change – is also a huge part of the story.

119 These demographic changes probably also go some way to explaining why five provinces currently fund religious schools without discrimination on the basis of creed. However, the same sort of multiculturalist argument that can be made against privileging Catholic and Protestant schools is often invoked to defend the claim that the provinces should fund only the secular public schools. The rationale here is that restricting funding to the public schools will encourage children from all religious traditions to learn together, rather than be siloed in private religious schools.

120 Statistics Canada, *Population by religion, by province and territory (2001 Census)*, <http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/demo30a-eng.htm> at 6 November 2015.

121 Zoe Oxaal, 'Second-Guessing the Bishop: Section 93, the Charter, and the Religious Government Actor in the Gay Prom Date Case' (2003) 66:2 *Saskatchewan Law Review* 455, 484.

122 Ibid.

population[123] – thus makes the guarantee of Catholic school rights in that province appear particularly anachronistic. But it also explains why altering the status quo has proved so contentious.[124] Those benefitting from the funding of Catholic schools in Ontario have a vested interest in seeing that the arrangement endures. Further, 'Catholic education in Ontario is supported by a strong infrastructure of organizations'[125] whose combined political power means that reforming the status quo on education funding would risk 'a great backlash'.[126]

C *Response to the fear of internal division*

Another important difference between Canada and the United States that goes some way to explaining the doctrinal differences we have canvassed derives from a fear, common in fact among both nations, that religious differences could lead to conflict and divisiveness. In 1771, for example, Virginia politician Richard Bland, drawing on the recent history of Europe, stated that 'a religious dispute is the most fierce and destructive of all others to the peace and happiness of government'.[127] Canada's fathers of Confederation would not likely have quarrelled with this characterization. Where the two countries parted company dramatically, however, was in the solutions they proposed to the problem of religious strife.

For the American founders, the real cause of religious conflict within states was the state itself establishing one religion as the true path and hindering the free pursuit of other creeds. It was this practice that had lit the flame of the religious wars that had engulfed Europe, and it was this that the British government wished to continue in America. A firm separation between church and state, however, would ensure the unity and peace of the community. As Justice Frankfurter put it one year after *Everson*, 'the great American principle of eternal separation… is one of the vital reliances of our Constitutional system for assuring unities among our people stronger than our diversities'.[128] Justice Frankfurter's emphasis on unification deserves special attention, since it draws out another important difference between Canada and the United States. In America, for instance, the founders appear to have been much more enthralled with the Enlightenment notion that all people are fundamentally equal. This view finds a privileged place, for example, within the Declaration of Independence, which declares that 'all men are created equal'. This idea has led American courts to be sceptical about the constitutional validity of government action that seeks to categorize individuals on

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123 Something that cannot be said, for instance, of Alberta and Saskatchewan—where, in any event, public funding flows not only to Catholic schools as demanded by s. 93(1), but to religious schools of all faiths.

124 See e.g. 'Funding for Faith-based Schools Defines Ontario Election', CBC Digital Archives <http://www.cbc.ca/player/play/2129427378> at 6 November 2015.

125 Andrew Chung, 'Newfoundland offers religious school lessons', *Toronto Star* (Toronto, Canada), 16 September 2007 <http://www.thestar.com/news/2007/09/16/newfoundland_offers_religious_school_lessons.htm> at 6 November 2015. (This infrastructure 'includes the Institute for Catholic Education, the Ontario Conference of Catholic Bishops, Catholic parents groups, Catholic teachers unions, and the Catholic trustees association').

126 Ibid. See also *Policy on Public Financing of Religious Schools* (2009) Canadian Secular Alliance 2 <http://secularalliance.ca/wp-content/uploads/2009/10/csa-policy-on-public-financing-of-religious-schools.pdf> at 6 November 2015.

127 As quoted in Gaustad, above n 88, 33.

128 *McCollum v. Board of Education*, 333 U.S. 203 (1948). As quoted in Witte, above n 4, 167.

the basis of personal characteristics.[129] In the minds of many Americans – and in much of the U.S. Supreme Court's Equal Protection jurisprudence – such action, even when it is designed to redress the historical disadvantages faced by particular groups, is inherently distasteful since it emphasizes what separates Americans, as opposed to what unites them. Further, there is a deep concern that this type of redress does not truly respect individuals *qua* individuals, but rather treats them merely as members of a particular class.[130]

In Canada the situation is very different. Canada has historically been much more willing to embrace, and even give governmental protection to, difference. Whereas Canada by 1867 had an established history of allowing the French minority to seek to preserve its language by insularizing itself, Americans actively sought to ensure that children from all backgrounds entered the melting pot that was the public school system. Thus Canadians – who have always lived with the fact of a large linguistic (and, historically, religious) minority in its midst, and since 1971 have lived with an official multiculturalism policy that is given constitutional protection through s. 27 of the *Charter* – have long been considerably less likely than Americans to view the protection of such differences as manifesting a lack of regard for the individual, or as *per se* divisive. Canadian courts, for example, have embraced the notion that governmental recognition of difference may be *necessary* in order to treat individuals equally.[131] Section 15(2) of the *Charter*, for example, in stark contrast (and indeed in direct response)[132] to the American equal protection jurisprudence, explicitly sanctions government actions that make distinctions on the basis of select personal characteristics where these actions are designed to ameliorate the conditions faced by disadvantaged groups.

Further, conventional wisdom in Canada has it that treating all groups in an identical fashion will tend to undermine, rather than promote, national unity.[133] The universalist impulse, which is at the heart of the American melting pot ideal, is in tension with the mosaic model of Canadian multiculturalism. It is axiomatic in Canadian politics, for example, that due to the unique cultural circumstances of Quebec, it would never have joined Confederation had it not been able, through a federal division of powers, to administer its own unique civil code relating to property and civil rights. Similarly, as we have seen, the unification of Quebec with the three other founding provinces would not have occurred but for the special recognition afforded to the Catholic minority schools in Ontario by s. 93.[134] Thus while constitutional protection for denominational schools set apart the religious minorities

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129 See e.g. Cass R. Sunstein, 'Public Values, Private Interests, and the Equal Protection Clause' (1982) *Supreme Court Review*, 127–166 (explaining the degrees of scrutiny applied in American jurisprudence to cases arising under the Equal Protection Clause of the 14th Amendment).

130 See e.g. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

131 See e.g. *R. v. Kapp*, 2008 SCC 41; *Lovelace v. Ontario* (2000) 1 S.C.R. 950.

132 Jena McGill, 'Section 15(2), Ameliorative Programs and Proportionality Review' (2013) *Supreme Court Law Review* 521, 524–525.

133 See e.g. Will Kymlicka, *Multicultural Citizenship* (Oxford University Press, 1995) 173–192.

134 Lest there be any doubt that special recognition is indeed what s. 93 provides, we see the majority judgment of the Supreme Court in *Reference re Bill 30* quote with approval from the previous decision of the Ontario Court of Appeal: 'These educational rights, granted specifically to the Protestants in Quebec and the Roman Catholics in Ontario, make it impossible to treat all Canadians equally. The country was founded upon the recognition of special or unequal educational rights for specific religious groups in Ontario and Quebec' (above n 61, 1198).

in Ontario and Quebec, it helped to bring the solitudes together as well, as it assured Catholic Francophones that their views and their faith would be given voice and protection within the new Canada.

From the forgoing it should be evident that in America the central concern was to avoid religious tensions by way of a separation of church and state that would unite the populace together as one people. In Canada, by contrast, unity meant something a little different. The political compromise in s. 93 was aimed at the formation not of a unified, culturally cohesive people, but rather a governable whole that would protect the religious (and linguistic) differences of its constituent parts. The Confederation compromise around religious schools was a means to this more modest end.

D *Fear of religious tyranny*

Not only were the American founding fathers, as we have seen, more enamoured with the ideal of religious liberty than were their Canadian counterparts, they also harboured considerably greater concerns over the possibility of a descent into religious tyranny. Compulsory public funding of religious institutions in particular was seen to be the thin edge of the wedge. As John Adams put it with reference to the government in London, 'if Parliament could tax us, they could establish the Church of England with all its creeds, articles, tests, ceremonies, and tithes'.[135] James Madison, too, shared the fear that the merest establishment could lead to religious tyranny. 'Who does not see', Madison asked his compatriots rhetorically, 'that the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever'.[136]

Why has America been so taken by this slippery slope argument in favour of separating church and state, whereas Canada seems to have been little bothered by it? The answer again lies in the divergent histories and political cultures of the two nations. Specifically, the American state, at its founding and ever since, has nursed a fundamental suspicion of governmental power.[137] This distrust is more or less absent in the Canadian context. As Wilson J explained in dissent in *McKinney v. University of Guelph*:

> Unhappy with the injustices the Americans perceived were perpetrated against them by the British, the American people were left with a deep distrust of powerful states. The United States Constitution enshrines the belief of the American people that unless the state is strictly controlled it poses a great danger to individual liberty. Its primary focus, articulated in the bulk of its provisions, is against 'state action'. *Canada does not share this history*.[138]

Further, as one expert in comparative Canadian and American constitutional law puts the point:

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[135] As quoted in Gaustad, above n 88, 33.

[136] Ibid 69.

[137] This quintessentially American fear of centralized authority explains much of the founders' preoccupation with creating a strongly federal union in which the states could act as a check on the federal government.

[138] *McKinney v. University of Guelph* (1990) 3 S.C.R. 229, 343. (Emphasis added).

> [T]he decision by Canadian colonists not to join the American revolution, coupled by the mass migration of United Empire Loyalists from the American colonies, meant that the Province of Canada, from its inception, had as its core value a trust of the very government from which Americans rebelled.[139]

E *Fear of degrading religion*

The fifth and final factor to mention by way of explaining the differences in American and Canadian law relating to the funding religious schools involves the concern that without a clear separation of church and state, religion will suffer. We have seen above that the founders feared, and the U.S. Supreme Court continues to fear, that religious tyranny may follow on from religious establishment. The concern, as one commentator characterizes it, is that 'Religion is… too powerful… and too greedy to permit its unhindered pervasion of a civil magistracy'.[140] However, prevailing views in the United States on the greed and menace of the *state* (such as those canvassed in the previous section) also explain why America has long been preoccupied with keeping government's hands off *religion*. This concern for protecting not the state from religion but rather religion from the state is evident in the writings of such 17th century American figures as Roger Williams and William Penn. Williams, for example, created the 'wall of separation' metaphor, 150 years before Jefferson co-opted the phrase, to describe what was necessary to protect the purity of religious belief.[141] This concern to protect religion from the state continues to inform the U.S. Supreme Court's interpretation of the Establishment Clause, especially in the case of those justices who cling to a strict separationist approach.[142] The words of Justice Black in *Engel v. Vitale* succinctly present the dual dangers the Establishment Clause protects against: 'a union of government and religion tends to destroy government and degrade religion.'[143] In contrast, and as we have seen, Canadians' historical faith in government and relative distrust of majorities has long made them more willing to abide a connection between religion and the state. From this vantage, the American concern that any such connection would undermine the broadly liberal nature of the state or the purity of religion (or both) seems exaggerated.[144]

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139 Stephen Ross, *Comparative Constitutional Law (U.S./Canada/Australia) 2009*, 8–20.

140 Witte, above n 4, 145 (paraphrasing the judgment of Black J in *Engel v. Vitale*, 370 U.S. 421 (1962), 430–32.

141 Adams and Emmerich, above n 99, 5.

142 See especially the dissenting opinion of Justice Souter (joined by Stevens J and Ginsburg J) in *Mitchell v. Helms*, 530 U.S. 793 (2000), 871–72

143 *Engel v. Vitale*, above n 140, 431.

144 This is not to say, of course, that one cannot find this type of argument in Canada today. The Canadian Secular Alliance, for instance, makes an argument of this sort when it claims that 'Refusing financial subsidy from the state may actually be in the best interests of private religious schools, since they will inevitably come under public pressure to change any anti-liberal-democratic practices as a pre-condition of receiving public money. Declining public funding would eliminate this source of leverage and free religious groups to practice their beliefs without interference by the government or the courts' (Canadian Secular Alliance, above n 126).

IV CONCLUSION

The American and Canadian freedom of religion jurisprudence is broadly similar. There are, however, important and marked differences when it comes to the law in the two countries surrounding the public funding of religious schools. Specifically, Canada has no constitutional bar on the establishment of religion, as is found in the U.S. Establishment Clause. Moreover, whereas direct state funding of religious schools is constitutionally impermissible in the United States, it is not only permissible in Canada but even, in certain provinces, constitutionally required.

In order to understand why these legal differences exist, this paper explored five notable contrasts between the American and Canadian experiences. Firstly, whereas a commitment to the ideal of religious freedom was central to the founding of the American republic, Canadian Confederation was through and through a pragmatic political compromise. Secondly, whereas demographically Canada was composed of a large and powerful Catholic minority, the United States was overwhelmingly Protestant, but historically comprised Protestant sects who saw themselves as being as different from one another as they were from Catholics. Thirdly, whereas the United States responded to the fear that religious difference could lead to internal division by attempting to forge a common identity in conditions of religious disestablishment, the Canadian state addressed the same concern by specifically recognising and protecting its religious minority communities. Fourthly, whereas the United States, in keeping with its historical distrust of governmental authority, has long harboured a deep-seated fear of religious tyranny, Canadians have been much less troubled by this concern. Lastly, whereas the fear that a close relationship between church and state would degrade religion was, and remains, a common concern in the United States, it has never been as worrying for Canadians. Together, this combination of historical, social, and philosophical differences help explain why the law relating to state funding of religious schools is the way it is on either side of the border.